

Is the “Catalyst Theory” of Attorney Fees Still Alive?

BY ROY SIMON

My high school Chemistry teacher, Mr. Carmichael, used to post a “mehcmaxe” on the board every day. (“Mehcmaxe” is “chem exam” spelled backwards.) One day the mehcmaxe was, “What is a bovine directory?” The answer was: “a catalyst.” In chemistry, a “catalyst” is defined as a substance that increases the rate of a chemical reaction but is itself unchanged by the reaction. In law, a catalyst could be defined as a lawsuit that persuades the defendant to end an illegal practice without resolving the lawsuit.

That raises a question: When a defendant responds to a civil rights suit, an environmental suit, or some other public interest lawsuit by changing its behavior voluntarily (*i.e.*, without a court order or a court-ordered consent decree), is the plaintiff entitled to statutory attorney fees? Many courts have answered variations on the question, but they have given many different answers. This article attempts to organize the threads into a coherent fabric.

Background: The Rise and Fall of the “Catalyst Theory”

Under the well established “American Rule,” each party to a lawsuit typically bears its own attorney fees absent a contract to the contrary, a common law exception for a “common fund,” or statutory authority for a court to award attorney fees to a party. To overcome the American Rule, Congress and state legislatures have enacted scores of statutes authorizing the award of attorney fees to the “prevailing party” in litigation. *See, e.g.*, the Civil Rights Act of 1964, 42 U.S.C. §2000e5 (k); the Voting Rights Act Amendments of 1975, 42 U.S.C. §19731 (e); and the Civil Rights Attorney’s Fees Awards Act of 1976, 42 U.S.C. §1988. The key to unlocking an award of attorney fees, therefore, is for the plaintiff to establish that she is a “prevailing party” within the meaning of the fee shifting statutes.

Obviously, a plaintiff can become a prevailing party by obtaining a judgment in her favor. Less obvious, but equally well established, is that a plaintiff may qualify as a prevailing party by obtaining significant relief through a court ordered consent decree. But what if a defendant ceases improper behavior voluntarily in response to a plaintiff’s lawsuit, without awaiting a judgment or a consent decree? Is the plaintiff a “prevailing party” for purposes of attorney fees if her lawsuit was the catalyst for the defendant to change its behavior, even if the lawsuit ended before the plaintiff obtained a favorable judgment or a consent decree?

For nearly two decades, the answer in the Second Circuit was “yes.” An early “catalyst” case was *Gerena-Valentin v. Koch*, 739 F.2d 755 (2d Cir. 1984). The Second Circuit held that the plaintiff in a civil rights case was a “prevailing party” entitled to attorney fees if “the lawsuit was a ‘significant catalyst’ in bringing about the relief sought.” Eleven years later, in *Marbley v. Bane*, 57 F.3d 224 (2d Cir. 1995), the Second Circuit again endorsed the catalyst theory, stating that “a plaintiff whose lawsuit has been the catalyst in bringing about a goal sought in litigation, by threat of victory (and not by dint of nuisance and threat of expense), has prevailed for purposes of an attorney’s fee claim, even though the result has not been

reduced to a judgment, consent decree, or settlement.” The Second Circuit was thus in step with a long parade of courts that endorsed the catalyst theory. Indeed, almost every other United States Court of Appeals that considered the issue – the First, Third, Sixth, Seventh, Eighth, Ninth, Tenth, and Eleventh Circuits – endorsed the catalyst theory.

The only circuit that rejected the catalyst theory was the Fourth Circuit. In *S1 and S2 v. State Bd. of Ed. of N. C.*, 21 F.3d 49 (4th Cir. 1994) (en banc), the Fourth Circuit held that a person “may not be a ‘prevailing party’ ... except by virtue of having obtained an enforceable judgment, consent decree, or settlement giving some of the legal relief sought.”

In *Buckhannon Board and Care Home, Inc. v. West Virginia Department of Healthy and Human Resources*, 203 F.3d 819 (4th Cir. 2000) (en banc), the Fourth Circuit considered the catalyst theory again. If ever a case was tailor made for applying the catalyst theory, it was *Buckhannon*. A West Virginia state law required that residents in group homes be capable of “self preservation” in case of a fire. The state fire marshal inspected a series of assisted living residences operated by Buckhannon Board and Care Home, Inc. and ordered Buckhannon to close because the residents, many of whom were elderly or disabled, were not capable of saving themselves in the event of a fire. The corporation sued for a declaratory judgment that the “self preservation” requirement violated the Fair Housing Amendments Act and the Americans with Disabilities Act. Both of those statutes provide for an award of reasonable attorney fees to a “prevailing party.”

The West Virginia state legislature apparently thought that *Buckhannon’s* complaint had merit, so during the lawsuit the legislature voted to eliminate the “self preservation” requirement. The district court then dismissed the lawsuit as moot, but the plaintiff corporation claimed to be a “prevailing party” within the meaning of the applicable fee award statutes and petitioned for an award of attorney fees based on the catalyst theory. The district court denied the petition based on the Fourth Circuit’s earlier rejection of the catalyst theory, and the Fourth Circuit, sitting en banc, affirmed by a slender 76 margin. The plaintiff petitioned for certiorari, and the Supreme Court granted the petition.

Even though every other federal Court of Appeals that had considered the catalyst theory had approved it, the United States Supreme Court voted 54 to affirm the Fourth Circuit’s rejection of the catalyst theory. Writing for the majority, Justice Rehnquist relied in part on BLACK’S LAW DICTIONARY 1145 (7th ed.1999), which defines a “prevailing party” as “[a] party in whose favor a judgment is rendered” The catalyst theory, in contrast, “allows an award where there is no judicially sanctioned change in the legal relationship of the parties.” The *Buckhannon* majority rejected that definition of a prevailing party, stating:

A defendant’s voluntary change in conduct, although perhaps accomplishing what the plaintiff sought to achieve by the lawsuit, lacks the necessary judicial imprimatur on the change. Our precedents thus counsel against holding that the term ‘prevailing party’ authorizes an award of attorney’s fees without a corresponding alteration in the legal relationship of the parties. [Emphasis by the Court.]

The catalyst theory appeared dead. Was it?

After Buckhannon

It is elementary that when the United States Supreme Court construes a federal statute, the Supreme Court's construction is final and binding on both state and federal courts applying the same statute unless and until Congress amends the statute. In the case of *Buckhannon*, the binding effect is even broader than usual because dozens of federal fee shifting statutes use the identical "prevailing party" language interpreted in *Buckhannon*.

But the story is not so simple, and the catalyst theory remains alive after *Buckhannon*. It remains alive for two reasons.

First, Congress and the states have enacted literally hundreds of fee shifting laws, and many of them do not use the "prevailing party" formula. Several courts have already determined that the rationale of *Buckhannon* does not necessarily apply to statutes that use different language.

Second, even when state legislatures have used the phrase "prevailing party" or similar terms as the litmus test for a litigant's eligibility for a fee award, state courts are not bound to accept the reasoning of *Buckhannon* when they construe state statutes rather than federal ones. Thus far, state high courts have split on whether to follow *Buckhannon* or not.

Federal Environmental Lawsuits

Most of the Congressional fee shifting statutes in the environmental area do not use the term "prevailing party." A good example is *Loggerhead Turtle v. County Council of Volusia County, Fla.*, 307 F.3d 1318 (11th Cir. 2002). A group of citizens alleged that Volusia County was violating the federal Endangered Species Act because there was not enough light on the beaches at night during sea turtle nesting season. Without waiting for a determination on the merits, the County voluntarily adopted more stringent beachfront lighting regulations. When the plaintiffs moved for an award of attorney fees, the County argued that *Buckhannon* "eliminates the catalyst test ... as a basis to award attorney's fees" Distinguishing *Buckhannon*, the district court noted that the fee award provision of the Endangered Species Act, 16 U.S.C. § 1540(g), does not use the "prevailing party" language at issue in *Buckhannon*, but rather authorizes courts to award attorney fees and costs "to any party, whenever the court determines such award is appropriate." The court then determined that it was "appropriate" to award fees.

Volusia County appealed, but the Eleventh Circuit affirmed. When Congress used the phrase "whenever ... appropriate," the court said, it intended that plaintiffs should recover attorney fees if their lawsuit furthered the goals of the statute. Here, the legislative history of the Endangered Species Act stated that citizens bringing legitimate suits under the Act were performing a public service and should receive litigation costs if the lawsuit ended the challenged behavior, even without a verdict. Moreover, the *Buckhannon* opinion discussed only "prevailing party" statutes. It did not address fee shifting statutes that permit a fee award "whenever ... appropriate." Thus, the catalyst theory remained viable under statutes that permitted fee awards "whenever appropriate."

The District of Columbia Circuit reached the same result in a Clean Air Act case, *Sierra Club v. Environmental Protection Agency*, 322 F.3d 718 (D.C. Cir. 2003). In that case, the Sierra Club and other environmental groups challenged an EPA rule that gave more than thirty states a blanket extension of the

EPA's interim approvals of their programs for issuing air pollution source operating permits. The plaintiffs asserted that the blanket extension violated 42 U.S.C. §7661a(g), which limits interim approvals to two years and bars any renewal.

Before any judgment was entered, the parties reached a settlement in which the EPA agreed not to grant any further interim approval extensions and to remove language in 40 C.F.R. §70.4(d)(2) on which the EPA had based its authority to extend interim approvals beyond two years. The plaintiffs then petitioned the D.C. Circuit for an award of attorney fees under 42 U.S.C. §7607(f), which permits a court to award the "costs of litigation (including reasonable attorney and expert witness fees) whenever it determines that such award is appropriate."

The EPA opposed the award because the settlement lacked the judicial imprimatur held crucial in *Buckhannon*, but the D.C. Circuit held that Clean Air Act cases were governed by *Ruckelshaus v. Sierra Club*, 463 U.S. 680 (1983), which had expressly held that the phrase "whenever appropriate" expands the class of parties eligible for fee awards "from prevailing parties to *partially prevailing parties*—parties achieving some success, even if not major success." The D.C. Circuit then found that the plaintiffs had satisfied the so called "three thresholds test" for applying the catalyst theory: (1) they had obtained at least "some of the benefit sought"; (2) their claim "was obviously colorable"; and (3) their suit "quite clearly caused the EPA to accept the settlement's terms."

The Ninth Circuit joined the same chorus in *Association of California Water Agencies v. Evans*, (9th Cir. 2004), another Endangered Species Act case. The court agreed that *Buckhannon* precluded reliance on the catalyst theory in suits brought under "prevailing party" statutes, but – citing *Loggerhead Turtle* and *Ruckelshaus v. Sierra Club* – held that *Buckhannon* "does not preclude use of the catalyst theory for suits brought under statutes which provide for fee shifting "whenever ... appropriate." However, the Ninth Circuit pointed out that the catalyst theory applies only if plaintiffs can demonstrate a "clear, *causal relationship* between the litigation brought and the practical outcome realized." (Emphasis in original.)

Thus, the catalyst theory remains viable in suits brought under the Endangered Species Act, the Clean Air Act, the Clean Water Act, and about ten other federal environmental statutes permitting an award of attorney fees "whenever appropriate."

But the Second Circuit will not use the catalyst theory under the Freedom of Information Act, which permits fee awards only to parties that have "substantially prevailed" in the litigation. In *Union of Needletrades, Industrial and Textile Employees v. Immigration and Naturalization Service*, 336 F.3d 200 (2d Cir. 2003), which relied on *Buckhannon*, the Second Circuit held that a party has not "substantially prevailed" within the meaning of the FOIA unless it has secured either a judgment on the merits or a court ordered consent decree. *Accord – Oil, Chemical & Atomic Workers International Union v. Department of Energy*, 288 F.3d 452 (D.C. Cir. 2002).

Nor will the Second Circuit allow fee awards under the catalyst theory in cases brought under the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988 – see *New York State Federation of Taxi Drivers v. Westchester County Taxi & Limousine Commission*, 272 F.3d 154 (2d Cir.2001) – or under the Individuals with Disabilities in Education Act (IDEA), 20 U.S.C. §§ 1400 et seq. – see *J.C. v. Regional School District 10, Board of Education*, 278 F.3d 119 (2d Cir.2002).

Split Decisions in the States

State courts are another story, because *Buckhannon* does not govern state fee shifting statutes using the “prevailing party” formula. So far, the Oklahoma Supreme Court has agreed with *Buckhannon* but the California Supreme Court and has not, and the New York state courts remain up in the air.

The Oklahoma Supreme Court addressed the catalyst theory in *Tibbetts v. Sight ‘n Sound Appliance Centers Inc.*, Okla., No. 96079, 9/16/03. A group of consumers sought nearly \$1 million dollars in damages in a class action alleging that Sight ‘n Sound Appliance Centers had violated the state Consumer Protection Act by engaging in unlawful bait and switch schemes. The jury returned a verdict in favor of the plaintiffs, but awarded no actual or punitive damages. The trial court denied attorney fees but the intermediate court of appeals held that the plaintiffs were entitled to fees and remanded for a determination of the fee amount. When the trial court awarded the plaintiffs \$375,000 as a reasonable fee, the defendant appealed. The Oklahoma Supreme Court agreed with the reasoning in *Buckhannon*, holding that “without some judgment or judicial decree that has changed the relationship between the parties so that defendant is judicially required to do something, i.e., some enforceable judgment, plaintiffs cannot be said to be the successful or prevailing parties entitled to an award of attorney fees.”

The California Supreme Court, construing different language, reached a different result. In *Graham v. DaimlerChrysler Corp.*, 34 Cal.4th 553 (2004), the plaintiffs filed a class action alleging that DaimlerChrysler had falsely claimed that Dakota R/T pickup trucks could safely tow 6,400 pounds when actually they could safely tow only 2,000 pounds. Before the lawsuit was filed, DaimlerChrysler had offered only to pay for a \$300 trailer hitch that would correct the problem, or to repurchase or replace Dakota R/T trucks on a casebycase basis, but only to customers who demanded that remedy. After the suit was filed, DaimlerChrysler sent a letter offering to repurchase or replace all of the Dakota R/T trucks, and more than 2,500 buyers nationwide chose that remedy. Plaintiffs then petitioned for attorney fees under § 1021.5 of the California Code of Civil Procedure, which authorizes an award of attorneys’ fees to a

successful party ... in any action which has resulted in the enforcement of an important right affecting the public interest if: (a) a significant benefit, whether pecuniary or nonpecuniary, has been conferred on the general public or a large class of persons, (b) the necessity and financial burden of private enforcement ...are such as to make the award appropriate, and (c) such fees should not in the interest of justice be paid out of the recovery, if any....

DaimlerChrysler, citing *Buckhannon*, argued that the plaintiffs were not eligible for a fee award. By the narrow vote of 43, the California Supreme Court disagreed, stating that it would look to the “the impact of the action, not the manner of its resolution.” The court had endorsed the catalyst theory more than two decades earlier in *Westside Community for Independent Living Inc. v. Obledo*, 657 P.2d 365 (Cal. 1983), and the reasoning in *Buckhannon* did not persuade the court to retreat from that position now, either as a matter of statutory construction or as a matter of policy. Regarding statutory construction, the majority agreed with Justice Ginsburg’s dissent in *Buckhannon* that “if a party reaches the ‘sought after destination,’ then the party ‘prevails’ regardless of the ‘route taken.’” In other words: “When a creditor sues a debtor to collect a debt, and the debtor pays the debt before a judgment is entered against it, the creditor has been a ‘successful party’ by any conventional understanding of that term.” Regarding policy, the catalyst theory is consistent with the purpose of the fee award statute (§ 1021.5): “to financially reward attorneys who successfully prosecute cases in the public interest, and thereby ‘prevent worthy

claimants from being silenced or stifled because of a lack of legal resources.” Attorneys would be deterred from accepting public interest litigation if they faced the prospect that they would be deprived of statutory fees after successful litigation.

But the court imposed several limits on the catalyst theory. First, the court adopted a suggestion by the Attorney General that a plaintiff seeking attorney fees under a catalyst theory must first reasonably attempt to settle the matter short of litigation. “Lengthy prelitigation negotiations are not required,” the court said, “nor is it necessary that the settlement demand be made by counsel, but a plaintiff must at least notify the defendant of its grievances and proposed remedies and give the defendant the opportunity to meet its demands within a reasonable time.” Second, if the defendant did not change its conduct until after the lawsuit was filed, the plaintiff must show a “causal connection between the lawsuit and the relief obtained.” Third, the suit must not be “frivolous, unreasonable, or groundless.” In a companion case, *Tipton Whittingham v. Los Angeles*, 34 Cal.4th 604 (2004), the California Supreme Court added one more limitation to the catalyst theory: “Attorney fees may not be obtained, generally speaking, by merely causing the acceleration of the issuance of government regulations or remedial measures, when the process of issuing those regulations or undertaking those measures was ongoing at the time the litigation was filed.” Thus, if the government is already developing appropriate regulations or planning remedial measures at the time suit is filed, a plaintiff will not ordinarily be entitled to attorney fees under the catalyst theory.

What About New York?

In New York, the fate of the catalyst theory is not yet resolved. Relying on *Buckhannon*, the First Department held in a suit based on New York’s Equal Access to Justice Act (CPLR Article 86) that the catalyst theory is “no longer a viable basis for an award of attorney’s fees.” But when the plaintiff appealed (supported by a raft of powerful amici), the New York Court of Appeals affirmed the decision on other grounds, expressly stating that in light of its holding it “need not reach the ‘catalyst’ issue.” *Wittlinger v. Wing*, 99 N.Y.2d 425 (2003), *aff’g* 289 A.D.2d 171 (1st Dep’t 2001).

More recently, in a suit brought under the New York City Human Rights Law, the United States Court of Appeals for the Second Circuit observed that New York’s courts have not yet considered whether *Buckhannon*’s focus on the judgments and orders entered in a case “is relevant not only to determining a plaintiff’s status as a prevailing party but also to measuring the degree of success achieved.” The Second Circuit certified this question (and three related questions) to the New York Court of Appeals. The resulting opinion did not mention *Buckhannon* and did not reach the catalyst theory. See *McGrath v. Toys ‘R’ Us*, 3 N.Y.3d 421 (2004). But the Court of Appeals did give a hint as to how it might rule if the catalyst theory were squarely presented to it. The court noted that the underlying fee award statute was “indistinguishable from provisions in comparable federal civil rights statutes.” Then the court noted: “Where our state and local civil rights statutes are substantively and textually similar to their federal counterparts, our Court has generally interpreted them consistently with federal precedent.” As Bob Dylan might say, “You don’t need a weatherman to know which way the wind blows.”

Conclusion: Let a Hundred Flowers Bloom

We can now accurately summarize the effects of *Buckhannon* on federal and state fee award statutes.

First, it is clear that the catalyst theory is no longer viable in suits brought under federal statutes that authorize attorney fees only to a “prevailing” party. This article has not attempted to map all of the boundaries of the phrase “prevailing party,” but after *Buckhannon* the phrase clearly does not encompass plaintiffs who rely only on the catalyst theory.

Second, it is equally clear that the catalyst theory remains alive and well in suits brought under the Endangered Species Act, the Clean Air Act, the Clean Water Act, and about ten other federal environmental statutes that permit a court to award attorney fees “whenever appropriate.” Case law regarding fee awards under those statutes is essentially unaffected by *Buckhannon*.

Third, the effect of *Buckhannon* on state fee shifting statutes is still up for grabs. If state statutes use the phrase “prevailing party,” then courts are likely to follow *Buckhannon* but are not bound to do so. If state statutes use phrases that do not include “prevailing” or “prevailed,” then courts are less likely to follow *Buckhannon*. When federal courts construe state fee shifting statutes when exercising diversity jurisdiction or supplemental jurisdiction, the Erie Doctrine will command federal courts to decide the catalyst theory issue as state courts would decide it.

In sum: The post *Buckhannon* pattern regarding federal fee shifting statutes is already well established, but the pattern regarding state statutes is still developing, and we should not expect a quick resolution in the states. We need to keep in mind that (a) states use many different linguistic formulas in their fee shifting statutes; (b) *Buckhannon* itself was decided by a razor thin 54 margin, so it lacks the persuasive value of a unanimous Supreme Court opinion; and (c) *Buckhannon* is not binding on state or federal courts when construing state statutes. Thus, litigants on both sides of the catalyst theory debate have plenty of room to argue about whether courts construing state fee shifting laws should follow *Buckhannon*. For the foreseeable future regarding state fee shifting statutes, therefore, the words of Mao TseTung are apt: “Let a hundred flowers bloom, let a hundred schools of thought contend.”

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