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Preliminary Imprimaturs: Prevailing Party Status Based on Preliminary Injunctions

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Preliminary Imprimaturs: Prevailing Party Status Based on Preliminary Injunctions

Bart Forsyth *

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I. Introduction

Numerous federal statutes authorize attorney's fees for a prevailing party.¹ Prior to 2001, every federal circuit except the Fourth followed the catalyst theory, which grants prevailing party status when a party's ends are accomplished as a result of its lawsuit.² Under the catalyst theory courts determined whether a party prevailed by focusing on whether the party obtained its desired result, regardless of whether the party obtained a favorable ruling. In *Buckhannon Board and Care Home, Inc. v. West Virginia Department of Health and Human Resources*,³ the Supreme Court, in a 5-4 decision,

1. See *Marek v. Chesny*, 473 U.S. 1, 44-51 (1985) (Brennan, J., dissenting) (listing over 100 federal statutes authorizing fee shifting). Not all fee-shifting statutes authorize attorney's fees for prevailing parties; some statutes authorize attorney's fees "whenever appropriate." See, e.g., Endangered Species Act of 1973, 16 U.S.C. § 1540(g)(4) (2000) (authorizing attorney's fees "whenever the court determines such award is appropriate"); Clean Air Act, 42 U.S.C. § 7607(f) (2000) (same); Outer Continental Shelf Lands Act, 43 U.S.C. § 1349(a)(5) (2000) (same). To date, courts considering "whenever appropriate" statutes have held that the catalyst theory remains applicable. See *Loggerhead Turtle v. County Council*, 307 F.3d 1318, 1325 (11th Cir. 2002) (finding *Buckhannon* inapplicable to "whenever appropriate" statutes); *Ctr. for Bio. Diversity v. Norton*, 262 F.3d 1077, 1080 (10th Cir. 2001) (same); *Southwest Ctr. for Bio. Diversity v. Carroll*, 182 F. Supp. 2d 944, 947 (C.D. Cal. 2001) (same). "Whenever appropriate" statutes do not require prevailing party status and are therefore outside the scope of this Note.

2. See *Associated Builders & Contractors v. Orleans Parish Sch. Bd.*, 919 F.2d 374, 377-78 (5th Cir. 1990) (discussing the catalyst theory).

3. *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Human Res.*, 532 U.S. 598, 605 (2001). In *Buckhannon*, the Supreme Court considered whether a party could be a prevailing party in the absence of a formal judicial ruling. *Id.* at 600. The plaintiffs in *Buckhannon* operated care homes that provided assisted living to their residents. *Id.* The homes failed to meet a West Virginia statute that required all residents to be able to exit the premises without assistance in the event of a fire. *Id.* Pursuant to the statute, the West Virginia Department of Health and Human Resources issued orders requiring the closure of the homes. *Id.* The plaintiffs brought suit alleging that the state's statutory provisions violated the federal Americans with Disabilities Act (ADA) and the Fair Housing Amendments Act (FHAA). *Id.* at

overturned the dominant standard for determining prevailing party status and ruled that a party cannot prevail without first prevailing in court.⁴ After *Buckhannon*, obtaining the desired result is insufficient to gain prevailing party status.⁵ A party must also obtain the "necessary judicial imprimatur."⁶

The Court did not expressly define the required "judicial imprimatur."⁷ In *Buckhannon*, the Supreme Court analyzed its precedent and concluded that the High Court has only *held*⁸ that court-ordered consent decrees and final judgments on the merits suffice for prevailing party status.⁹ Clearly, these forms of relief can constitute sufficient judicial approval for prevailing party status. Courts interpreting *Buckhannon* agree that the Supreme Court's examples are not exclusive,¹⁰ but find it difficult to agree on what other forms of judicial action constitute the necessary judicial imprimatur.¹¹ The circuits particularly struggle with preliminary injunctions.¹²

601. During discovery, the West Virginia legislature eliminated the challenged statutory requirement. *Id.* The defendants moved to have the case dismissed as moot, and the district court granted the motion. *Id.* The Supreme Court ruled that a party could not prevail without obtaining court-ordered relief. *Id.* at 604. In so doing, the Court emphasized that the legislative history and public policy concerns were insufficient to overcome what the Court considered the clear-meaning of the statutory term, "prevailing party." *Id.* at 607–08.

4. *See id.* at 605 (requiring a judicial imprimatur before a party can be considered a prevailing party).

5. *See id.* (overruling the catalyst theory).

6. *See id.* (requiring a judicial imprimatur for prevailing party status). Webster's Dictionary defines imprimatur as "sanction or approval." MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 626 (11th ed. 2003).

7. *See* *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Human Res.*, 532 U.S. 598, 605 (2001) (requiring a judicial imprimatur for prevailing party status).

8. *See id.* (distinguishing the Supreme Court's *holdings* from *dicta* that supported the catalyst theory).

9. *See id.* at 604 (analyzing Supreme Court precedent for prevailing party status).

10. *See* *John T. v. Del. County Intermediate Unit*, 318 F.3d 545, 558 (3d Cir. 2003) (noting that *Buckhannon* allows prevailing party status in broader circumstances than after a final judgment on the merits or a court-ordered consent decree); *Watson v. County of Riverside*, 300 F.3d 1092, 1096 (9th Cir. 2002) (granting prevailing party status for a party that won a preliminary injunction), *cert. denied*, 123 S. Ct. 1574 (2003); *Truesdell v. Phila. Hous. Auth.*, 290 F.3d 159, 165 (3d Cir. 2002) (granting prevailing party status based on a stipulated settlement); *Barrios v. Cal. Interscholastic Fed'n*, 277 F.3d 1128, 1134 & n.5 (9th Cir. 2002) (granting prevailing party status for a party that obtained its desired result through a legally enforceable settlement agreement), *cert. denied*, 537 U.S. 820 (2002).

11. *Compare* *Smyth v. Rivero*, 282 F.3d 268, 277 (4th Cir. 2002) (finding the grant of a preliminary injunction insufficient to confer prevailing party status), *cert. denied*, 537 U.S. 825 (2002) with *Watson*, 300 F.3d at 1095 (finding a preliminary injunction sufficient to confer prevailing party status).

12. *See* *Smyth*, 282 F.3d at 277 (finding a preliminary injunction to be an insufficient judicial imprimatur); *John T.*, 318 F.3d at 558 (same). *But see* *Watson*, 300 F.3d at 1095

Buckhannon engenders this difficulty by relying on two different approaches for determining prevailing party status.¹³ In recognizing a prevailing party after a final judgment on the merits, the Court expressed concern that the catalyst theory allowed plaintiffs to obtain attorney's fees without demonstrating a meritorious claim.¹⁴ In allowing prevailing party status after a court-ordered consent decree, however, the Court was concerned, not that the plaintiff obtain a decision on the merits, but that the desired result stem from a court order.¹⁵

Analysis of prevailing party status thus divides into two approaches. The first is a means-based approach that allows prevailing party status when a party obtains its desired result by means of a court order, as in the Court's example of a court-ordered consent decree.¹⁶ The second is a merit-based approach that allows prevailing party status when there has been sufficient judicial recognition on the merits of the plaintiff's claim, as with a final judgment on the merits.¹⁷

Since *Buckhannon*, the federal circuits have relied on both approaches. The Ninth Circuit relies on a means-based approach and has granted prevailing party status, not only for a party that obtained a preliminary injunction,¹⁸ but also for parties that obtained court-approved settlements.¹⁹ The Fourth Circuit, by contrast, relies on a merit-based approach and has refused prevailing party status for a party that won a preliminary injunction.²⁰ Finally, the Third Circuit recently used a merit-based approach to deny prevailing party status to a party

(finding a preliminary injunction to be a sufficient judicial imprimatur).

13. See *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Human Res.*, 532 U.S. 598, 603 (2001) (analyzing prevailing party status in terms of judicial recognition on the merits and the origin of the desired result).

14. See *id.* at 605 (finding that the catalyst theory allows prevailing party status without a meritorious claim).

15. See *id.* at 604 (recognizing court-ordered consent decrees as a basis for prevailing party status).

16. See *id.* (discussing court-ordered consent decrees).

17. See *id.* at 603-04 (discussing judgments on the merits).

18. See *Watson v. County of Riverside*, 300 F.3d 1092, 1096 (9th Cir. 2002) (finding a preliminary injunction sufficient to confer prevailing party status), *cert. denied*, 123 S. Ct. 1574 (2003).

19. See *Richard S. v. Dep't of Developmental Servs.*, 317 F.3d 1080, 1086 (9th Cir. 2003) (granting prevailing party status based on a court-approved settlement); *Barrios v. Cal. Interscholastic Fed'n*, 277 F.3d 1128, 1134 (9th Cir. 2002) (same), *cert. denied*, 537 U.S. 820 (2002).

20. See *Smyth v. Rivero*, 282 F.3d 268, 277 (4th Cir. 2002) (finding the grant of a preliminary injunction an insufficient judicial imprimatur to confer prevailing party status), *cert. denied*, 537 U.S. 825 (2002).

that won a preliminary injunction.²¹ Unlike the Fourth Circuit, which absolutely barred prevailing party status based on a preliminary injunction,²² the Third Circuit expressly declined to hold that a preliminary injunction was always insufficient for prevailing party status.²³ In the Third Circuit, a party can obtain prevailing party status based on a preliminary injunction if the injunction involved sufficient recognition on the merits.²⁴

As the disparate treatment indicates, preliminary injunctions pose difficult questions when they are presented as a basis for prevailing party status. One source of difficulty is that preliminary injunctions are interim—not final—relief, but frequently represent the final disposition of a case; many cases are resolved by, or soon after, a preliminary injunction.²⁵ Further, while every circuit requires a showing on the merits before granting a preliminary injunction, the required showing varies greatly between circuits and can even vary with the circumstances of an individual case.²⁶ Finally, any judicial recognition on the merits in a preliminary injunction is necessarily speculative because the recognition occurs without the benefit of a full trial on the merits.²⁷

This Note argues that prevailing party status should be available, in specified circumstances, for a party that obtains its desired result through a preliminary injunction. Further, this Note analyzes the merit- and means-based approaches for determining prevailing party status. Part II traces the history of the term "prevailing party" beginning with a discussion of the catalyst theory

21. See *John T. v. Del. County Intermediate Unit*, 318 F.3d 545, 558–59 (3d Cir. 2003) (denying prevailing party status for a party that won a preliminary injunction because the injunction was not granted on the merits of the claim).

22. See *Smyth*, 282 F.3d at 277 n.8 (finding that preliminary injunctions involve an insufficient inquiry into the merits for prevailing party status).

23. See *John T.*, 318 F.3d at 558 (declining to adopt the district court conclusion that prevailing party status was only warranted after final judgments on the merits or court-ordered consent decrees).

24. See *id.* at 555–58 (analyzing *Buckhannon* and merit-based relief as a prerequisite for prevailing party status).

25. See, e.g., *Watson v. County of Riverside*, 300 F.3d 1092, 1095–96 (9th Cir. 2002) (analyzing prevailing party status when an action was mooted after a preliminary injunction), *cert. denied*, 123 S. Ct. 1574 (2003); *Smyth*, 282 F.3d at 274–77 (same); *Dakota Indus., Inc. v. Ever Best Ltd.*, 944 F.2d 438, 440 (8th Cir. 1991) (recognizing that a preliminary injunction functions like a permanent injunction in trademark litigation); *Calvin Klein Cosmetics Corp. v. Lenox Labs., Inc.*, 815 F.2d 500, 503 (8th Cir. 1987) (same).

26. See *Thomas R. Lee, Preliminary Injunctions and the Status Quo*, 58 WASH. & LEE L. REV. 109, 111–23 (2001) (discussing the varying standards for preliminary injunctions).

27. See *Smyth v. Rivero*, 282 F.3d 268, 270–77 (4th Cir. 2002) (denying prevailing party status for a party that won a preliminary injunction because the injunction did not represent sufficient judicial recognition of the merits of the plaintiff's claim), *cert. denied*, 537 U.S. 825 (2002).

and the circuit split that predated *Buckhannon*, then considering *Buckhannon*'s attempted resolution of the split, and finally describing some ramifications of *Buckhannon*. Part III examines the circuit split that developed in the wake of *Buckhannon* regarding whether a preliminary injunction can suffice for prevailing party status. Part IV compares the merit- and means-based approaches and concludes that the means-based approach is more equitable and more consistent with *Buckhannon*. Notwithstanding this conclusion, this Note recognizes one situation in which courts should rely on a merit-based approach.

II. Background

A. The Catalyst Theory

Prior to 1994, every federal circuit court of appeals (except the Federal Circuit, which never addressed the issue) concluded that the catalyst theory was an appropriate test for determining whether a party prevailed.²⁸ The catalyst theory posits that a party is a prevailing party if the party's lawsuit was a catalyst for the desired change.²⁹ Thus, under the catalyst theory, a plaintiff prevails if the plaintiff's lawsuit causes the desired result, even if the plaintiff achieves that result without court intervention.³⁰ For example, imagine that a worker filed an employment discrimination suit against Widget Inc. seeking injunctive relief to require a change in Widget Inc.'s hiring procedures. If, faced with overwhelming evidence and certain defeat at trial, Widget Inc. voluntarily changed its hiring procedure, the lawsuit would become moot. Under the catalyst theory, the worker would be entitled to attorney's fees because the lawsuit engendered the desired result.³¹

28. See *Grano v. Barry*, 783 F.2d 1104, 1108-09 (D.C. Cir. 1986) (adopting the catalyst theory); *J & J Anderson, Inc. v. Town of Erie*, 767 F.2d 1469, 1474-75 (10th Cir. 1985) (same), *abrogated by* *Dennis v. Higgins*, 498 U.S. 439 (1991); *Institutionalized Juveniles v. Sec'y of Pub. Welfare*, 758 F.2d 897, 910-11 (3d Cir. 1985) (same); *Gerena-Valentin v. Koch*, 739 F.2d 755, 758-59 (2d Cir. 1984) (same); *Doe v. Busbee*, 684 F.2d 1375, 1379-80 (11th Cir. 1982) (same); *Stewart v. Hannon*, 675 F.2d 846, 851 (7th Cir. 1982) (same); *Robinson v. Kimbrough*, 652 F.2d 458, 465 (5th Cir. 1981) (same); *Am. Const'al Party v. Munro*, 650 F.2d 184, 187-88 (9th Cir. 1981) (same); *Williams v. Miller*, 620 F.2d 199, 202 (8th Cir. 1980) (*per curiam*) (same); *Bonnes v. Long*, 599 F.2d 1316, 1319 (4th Cir. 1979) (same), *overruled by* *S-1 & S-2 v. State Bd. of Educ.*, 21 F.3d 49 (4th Cir. 1994) (*en banc*); *Nadeau v. Helgemoe*, 581 F.2d 275, 279 (1st Cir. 1978) (same), *called into doubt by* *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Human Res.*, 532 U.S. 598 (2001).

29. See *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Human Res.*, 532 U.S. 598, 625-28 (2001) (Ginsburg, J., dissenting) (arguing to retain the catalyst theory).

30. See *id.* at 605 (describing and overruling the catalyst theory).

31. See, e.g., *Grano v. Barry*, 783 F.2d 1104, 1108-09 (D.C. Cir. 1986) (applying the

In 1994 the Fourth Circuit ruled that the catalyst theory was no longer viable.³² The basis of the court's ruling was dictum from the Supreme Court's decision in *Farrar v. Hobby*.³³ Even though *Farrar* did not involve a catalytic effect, the Supreme Court stated in dictum that attorney's fees are only appropriate when predicated on an enforceable judgment.³⁴ Notwithstanding *Farrar* and the Fourth Circuit's ruling, nine courts of appeals affirmed their definitions of prevailing party status and retained the catalyst theory.³⁵ A clear

catalyst theory to determine prevailing party status); *Gerena-Valentin v. Koch*, 739 F.2d 755, 758–59 (2d Cir. 1984) (same); *Doe v. Busbee*, 684 F.2d 1375, 1379–82 (11th Cir. 1982) (same); *Stewart v. Hannon*, 675 F.2d 846, 851 (7th Cir. 1982) (same); *Robinson v. Kimbrough*, 652 F.2d 458, 465 (5th Cir. 1981) (same); *Williams v. Miller*, 620 F.2d 199, 202 (8th Cir. 1980) (per curiam) (same).

32. See *S-1 and S-2 v. State Bd. of Educ.*, 21 F.3d 49, 51 (4th Cir. 1994) (en banc) (finding the catalyst theory to be an inappropriate basis for prevailing party status).

33. *Farrar v. Hobby*, 506 U.S. 103, 113–15 (1992) (holding that a plaintiff awarded nominal damages is a prevailing party but is not automatically entitled to attorney's fees). In *Farrar*, the Court considered whether a plaintiff who received nominal damages was a prevailing party entitled to attorney's fees under 42 U.S.C. § 1988. *Id.* at 105. The plaintiff sued for a civil rights violation, seeking \$17 million in damages. *Id.* at 106. A jury found that the defendant behaved unconstitutionally, but the Fifth Circuit awarded only nominal damages. *Id.* at 106–07. The Fifth Circuit further ruled that the plaintiff was not entitled to attorney's fees. *Id.* at 107. Upon review, the Supreme Court reasoned that the plaintiff was a prevailing party because a judgment for damages, whether nominal or compensatory, modifies the relationship between the parties by forcing the defendant to pay money it would not otherwise have to pay. *Id.* at 112–13. Nonetheless, the Court found that "the degree of the plaintiff's overall success goes to the reasonableness of a fee award . . ." *Id.* at 114 (quoting *Tex. State Teachers Ass'n v. Garland Ind. Sch. Dist.*, 489 U.S. 782, 793 (1989)). Thus, the Court held that a plaintiff that received nominal damages was a prevailing party, but was not entitled to an award of attorney's fees. *Id.* at 113–15. It is important to note that *Farrar* did not involve the catalyst theory because the plaintiff had obtained a judgment on the merits. *Id.* at 111.

34. See *id.* at 111–12 (synthesizing Supreme Court precedent on prevailing party status).

35. See *Stanton v. S. Berkshire Reg'l Sch. Dist.*, 197 F.3d 574, 577 n.2 (1st Cir. 1999) (retaining the catalyst theory), called into doubt by *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Human Res.*, 532 U.S. 598 (2001); *Morris v. City of West Palm Beach*, 194 F.3d 1203, 1207 (11th Cir. 1999) (same), called into doubt by *Buckhannon*, 532 U.S. 598 (2001); *Payne v. Bd. of Educ.*, 88 F.3d 392, 397 (6th Cir. 1996) (same), called into doubt by *Buckhannon*, 532 U.S. 598 (2001); *Marbley v. Bane*, 57 F.3d 224, 234 (2d Cir. 1995) (same), called into doubt by *Buckhannon*, 532 U.S. 598 (2001); *Kilgour v. City of Pasadena*, 53 F.3d 1007, 1010 (9th Cir. 1995) (same), called into doubt by *Buckhannon*, 532 U.S. 598 (2001); *Baumgartner v. Harrisburg Hous. Auth.*, 21 F.3d 541, 550 (3d Cir. 1994) (same), called into doubt by *Buckhannon*, 532 U.S. 598 (2001); *Zinn v. Shalala*, 35 F.3d 273, 276 (7th Cir. 1994) (same), called into doubt by *Buckhannon*, 532 U.S. 598 (2001); *Beard v. Teska*, 31 F.3d 942, 951 (10th Cir. 1994) (same), called into doubt by *Buckhannon*, 532 U.S. 598 (2001); *Little Rock Sch. Dist. v. Pulaski County Special Sch. Dist.*, #1, 17 F.3d 260, 263 n.2 (8th Cir. 1994) (same), called into doubt by *Buckhannon*, 532 U.S. 598 (2001).

majority of circuits agreed that "[v]ictory can be achieved well short of a final judgment."³⁶

B. Attorney's Fees and Preliminary Injunctions Prior to *Buckhannon*

Prior to *Buckhannon*, prevailing party status did not turn directly on whether a party won a preliminary injunction. The determinative question was whether the party obtained its desired result.³⁷ If a party won a preliminary injunction but ultimately lost at trial, the party was not a prevailing party.³⁸ However, if the preliminary injunction induced the desired result, prevailing party status was appropriate.³⁹ Thus, a court that awarded attorney's fees to a party that won a preliminary injunction was not necessarily relying on the catalyst theory. Often the party obtained relief not because its lawsuit was a catalyst for the change, but because the order for a preliminary injunction granted the desired result.⁴⁰

36. *Marbley v. Bane*, 57 F.3d 224, 234 (2d Cir. 1995), called into doubt by *Buckhannon*, 532 U.S. 598 (2001).

37. See *McCafferty v. Local 254, Serv. Employees Int'l Union*, 186 F.3d 52, 63 n.7 (1st Cir. 1999) (denying attorney's fees to a party that won a preliminary injunction because of the disparity between what plaintiff sought and what plaintiff received); *Haley v. Pataki*, 106 F.3d 478, 483 (2d Cir. 1997) (basing prevailing party status for a party that won a preliminary injunction on whether the injunction resulted from a determination on the merits).

38. See *LaRouche v. Kezer*, 20 F.3d 68, 69 (2d Cir. 1994) (ruling that a party that lost an appeal on the merits could not be a prevailing party based on the grant of a preliminary injunction); *Christopher P. v. Marcus*, 915 F.2d 794, 805 (2d Cir. 1990) (ruling that a plaintiff who won a temporary restraining order to maintain status quo was not a prevailing party when the plaintiff lost an appeal on the merits).

39. See, e.g., *Owner-Operator Indep. Drivers Ass'n v. Bissell*, 210 F.3d 595, 598–99 (6th Cir. 2000) (allowing attorney's fees after party won a preliminary injunction and obtained the desired result through a declaratory judgment); *Nat'l Black Police Ass'n v. D.C. Bd. of Elections and Ethics*, 168 F.3d 525, 529 (D.C. Cir. 1999) (granting prevailing party status to a party that won a preliminary injunction and obtained its desired result despite the mootness of the underlying action); *Coalition for Basic Human Needs v. King*, 691 F.2d 597, 601 (1st Cir. 1982) (awarding attorney fees for a plaintiff that won a preliminary injunction even though the underlying action was dismissed as moot).

40. See *Watson v. Riverside County*, 300 F.3d 1092, 1096 (9th Cir. 2002) (recognizing that a preliminary injunction granted plaintiff's desired relief, *cert. denied*, 123 S. Ct. 1574 (2003)). The catalyst theory could be necessary for attorney's fees even after a party wins a preliminary injunction. If a plaintiff wins a preliminary injunction and the preliminary injunction persuades the defendant to settle, then the plaintiff obtained its desired result because the suit was a catalyst for change. See *Bissell*, 210 F.3d at 605 n.3 (relying on the catalyst theory to uphold a district court's grant of attorney's fees after party won a preliminary injunction and a declaratory judgment). For further discussion of the catalyst theory after a plaintiff wins a preliminary injunction, see *infra* notes 221–36 and accompanying text (discussing the means-based approach for prevailing party status).

C. Buckhannon

In *Buckhannon*, the Supreme Court addressed the viability of the catalyst theory.⁴¹ The Court considered whether a party could be a prevailing party in the absence of a formal judicial ruling.⁴² The plaintiffs in *Buckhannon* operated care homes that provided assisted living to their residents.⁴³ The homes failed to meet a West Virginia statutory requirement that all residents be able to exit the premises without assistance in the event of a fire.⁴⁴ Pursuant to the statute, the West Virginia Department of Health and Human Resources issued orders requiring the closure of the homes.⁴⁵ The plaintiffs brought suit alleging that the state's statutory provisions violated the federal Americans with Disabilities Act (ADA) and the Fair Housing Amendments Act (FHAA).⁴⁶ The defendants agreed to stay enforcement of the order pending resolution of the litigation.⁴⁷ During discovery, the West Virginia Legislature eliminated the challenged statutory requirement.⁴⁸ The defendants moved to dismiss the case as moot.⁴⁹ The district court granted the motion.⁵⁰

Under the catalyst theory, the plaintiffs would likely have been entitled to attorney's fees because the suit served as a catalyst for the legislative change.⁵¹ Having abandoned the catalyst theory,⁵² however, the Fourth Circuit ruled that the plaintiffs were not prevailing parties.⁵³ Upon review, the Supreme Court affirmed the Fourth Circuit's decision, overruled every other circuit that had

41. See *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Human Res.*, 532 U.S. 598, 600 (2001) (analyzing the catalyst theory).

42. See *id.* at 600 (stating the issue).

43. *Id.*

44. *Id.*

45. *Id.*

46. *Id.* at 600-01.

47. *Id.* at 601.

48. *Id.*

49. *Id.*

50. *Id.*

51. Cf. *Marbley v. Bane*, 57 F.3d 224, 235 (2d Cir. 1995) (allowing attorney's fees under the catalyst theory when the state rescinded the policy that engendered the lawsuit), *called into doubt* by *Buckhannon Bd. of Care Home, Inc. v. W. Va. Dep't of Health & Human Res.*, 532 U.S. 598 (2001).

52. See *S-1 & S-2 v. State Bd. of Educ.*, 21 F.3d 49, 51 (4th Cir. 1994) (en banc) (overruling the catalyst theory as a method for determining prevailing party status).

53. See *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Human Res.*, No. 99-1424, 2000 WL 42250 (4th Cir. Jan. 20, 2000) (per curiam) (finding that plaintiffs were not prevailing parties), *aff'd*, 532 U.S. 598 (2001).

addressed the issue, and ruled that the catalyst theory is not an appropriate method for determining whether a plaintiff is a prevailing party.⁵⁴

In overruling the catalyst theory, the Court considered three factors: (1) the plain meaning of "prevailing party,"⁵⁵ (2) the legislative history of fee-shifting statutes,⁵⁶ and (3) policy issues for and against the catalyst theory.⁵⁷ The Court first found that by its "plain meaning" the term prevailing party required judicial action.⁵⁸ The Court reached this conclusion by combining the definition of prevailing party in *Black's Law Dictionary* with Supreme Court precedent.⁵⁹ *Black's* defined a prevailing party as "[a] party in whose favor a judgment is rendered, regardless of the amount of damages awarded."⁶⁰ The Court then considered its precedent and concluded that, despite dicta suggesting the contrary, the Court's cases had only held that plaintiffs were entitled to attorney's fees after a judgment on the merits or a court-ordered consent decree.⁶¹ Combining these sources, the Court determined that a party becomes a prevailing party if "a material alteration of the legal relationship of the parties" results from the "necessary judicial imprimatur."⁶²

After defining prevailing party, the Court examined the legislative history of fee-shifting statutes.⁶³ Despite strong language in the House and Senate Reports to 42 U.S.C. § 1988,⁶⁴ the majority concluded that the legislative history was "at best ambiguous."⁶⁵ In so doing, the Court relied on "the American Rule that attorney's fees will not be awarded absent explicit statutory

54. See *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Human Res.*, 532 U.S. 598, 610 (2001) (concluding that the catalyst theory is not a permissible basis for awarding attorney's fees).

55. See *id.* at 603 (formulating the definition of prevailing party).

56. See *id.* at 607–08 (discussing the legislative history of fee-shifting statutes).

57. See *id.* at 608–10 (discussing policy arguments).

58. See *id.* at 603–04 (defining prevailing party in terms of judicial action).

59. See *id.* (citing BLACK'S LAW DICTIONARY and discussing Supreme Court precedent).

60. BLACK'S LAW DICTIONARY 1145 (7th ed. 1999).

61. See *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Human Res.*, 532 U.S. 598, 603–06 (2001) (analyzing relevant caselaw).

62. *Id.* at 604–05.

63. See *id.* at 607–08 (considering the legislative history under 42 U.S.C. § 1988).

64. The House Report to § 1988 explains that "[t]he phrase 'prevailing party' is not intended to be limited to the victor only after entry of a final judgment following a full trial on the merits." H.R. REP. NO. 94-1558, at 7 (1976). The Senate Report adds that "parties may be considered to have prevailed when they vindicate rights through a consent judgment or without formally obtaining relief." S. REP. NO. 94-1011, at 5 (1976), reprinted in 1976 U.S.C.C.A.N. 5908, 5912.

65. See *Buckhannon*, 532 U.S. at 608 (analyzing the legislative history of 42 U.S.C. § 1988).

authority"⁶⁶ and on what the majority considered the "clear meaning" of prevailing party.⁶⁷

Finally, the Court weighed policies for and against the catalyst theory.⁶⁸ The Court refused to decide how the policies balanced because policy could not overcome what the majority considered "clear legislative language."⁶⁹ Based on this language, the Court ruled that "the catalyst theory is not a permissible basis for the award of attorney's fees under the FHAA . . . and ADA."⁷⁰

D. Reactions to *Buckhannon*

The Supreme Court's decision in *Buckhannon* substantially affected civil rights litigation. Business owners applauded the decision, arguing that the catalyst theory turned "frivolous . . . lawsuits into a cottage industry."⁷¹ An attorney for the Alliance of Automobile Manufacturers added, "the extortion by plaintiff's attorneys who seek fees without winning the very case they started is over."⁷²

Public interest groups have been less enthusiastic. By allowing attorney's fees for prevailing parties, Congress established a "private attorney general."⁷³ Congress intended to encourage private litigants to enforce civil rights laws.⁷⁴

66. *Id.* at 607–08 (comparing the legislative history to the "clear meaning" of the term prevailing party).

67. *Id.* at 607 (analyzing the legislative history).

68. *See id.* at 608–10 (considering policy arguments).

69. *See id.* at 610 (declining to weigh policy arguments for and against the catalyst theory).

70. *Id.* (internal quotations omitted). While *Buckhannon* only specifically applies to the FHAA and ADA, courts have extended *Buckhannon* to other prevailing party statutes; *see, e.g.*, *John T. v. Del. County Intermediate Unit*, 318 F.3d 545, 556 (3d Cir. 2003) (finding that *Buckhannon* applies broadly to fee-shifting statutes that use prevailing party terminology); *Cody v. Hillard*, 304 F.3d 767, 773 n.3 (8th Cir. 2002) (same); *Richardson v. Miller*, 279 F.3d 1, 4 (1st Cir. 2002) (extending *Buckhannon* to Attorney's Fee Awards Act of 1976); *J.C. v. Reg'l Sch. Dist. 10, Bd. of Educ.*, 278 F.3d 119, 123 (2d Cir. 2002) (extending *Buckhannon* to attorney's fees awarded under the Individuals with Disabilities Education Act).

71. *See* Jack Hayes, *U.S. Supreme Court Denies ADA Legal Fees*, NATION'S RESTAURANT NEWS, June 25, 2001, at 1, WL 6/25/01 NATNRSTNWS 1 (defending *Buckhannon*).

72. Tony Mauro, *Supreme Court: No Fee Award Without a Ruling*, FULTON COUNTY DAILY REPORT, May 31, 2001, at 1 (quoting Charles Newman of St. Louis office of Bryan Cave) (discussing *Buckhannon*).

73. *See* Charles R. Haywood, Comment, *The Power of Bankruptcy Courts to Shift Fees Under the Equal Access to Justice Act*, 61 U. CHI. L. REV. 985, 987–89 (1994) (describing the purposes of fee-shifting statutes).

74. *See id.* at 989 (describing the purposes of fee-shifting statutes).

Civil rights litigants fear that *Buckhannon's* narrow definition of a prevailing party and elimination of the catalyst theory eviscerates the "private attorney general" model and threatens the ability of public interest groups to bring suits that are complex and expensive.⁷⁵ Furthermore, attorneys argue that *Buckhannon* affects trial strategies by creating an incentive for plaintiffs to seek damages in addition to injunctive relief so that a defendant cannot unilaterally moot an action.⁷⁶ An attorney for the American Civil Liberties Union noted that *Buckhannon* "will produce . . . two results: more litigation on collateral issues involving attorney fees and a decrease in the amount of litigation we are able to undertake."⁷⁷

On balance, *Buckhannon's* overall effect may be negative because *Buckhannon* is unlikely to prevent meritless lawsuits and may create adverse effects for defendants in civil rights actions. The catalyst theory did not encourage meritless claims because a meritless lawsuit is unlikely to produce the plaintiff's desired result.⁷⁸ To be sure, a defendant may settle a lawsuit simply to avoid the cost of contesting the suit, but the catalyst theory is often irrelevant to this scenario because such settlements usually include an agreement for attorney's fees.⁷⁹ The availability of attorney's fees may allow plaintiffs to bring non-frivolous suits they could not otherwise afford to bring, but this is the precise purpose of fee-shifting statutes: to encourage private litigants to enforce civil rights laws.⁸⁰

Not only is *Buckhannon* unlikely to prevent meritless suits, but *Buckhannon* may also have an adverse effect on defendants in civil rights litigation. The plaintiffs most affected by *Buckhannon* are plaintiffs that are

75. See Martin A. Schwartz, *The 2000–2001 Supreme Court Term: Section 1983 Cases*, 18 *TOURO L. REV.* 57, 74 (2001) (criticizing *Buckhannon* as contrary to public policy).

76. See Christopher Dunn, *Recovering Attorney's Fees under "Catalyst Theory"*, N.Y.L.J., March 29, 2002, at 1 (describing strategies to circumnavigate *Buckhannon*).

77. Marcia Coyle, *Fee Change is a Sea-Change But Some Seek Way to Skirt Justices' Limit on Catalyst Theory Fees*, NAT'L L.J., June 11, 2001, at A1 (discussing *Buckhannon* (quoting Steven Shapiro, National Legal Director of ACLU)).

78. See, e.g., *Nadeau v. Helgemoe*, 581 F.2d 275, 279–81 (1st Cir. 1978) (discussing the catalyst theory), *abrogation recognized by Richardson v. Miller*, 279 F.3d 1 (1st Cir. 2002); see also *supra* Part II.B (explaining the catalyst theory).

79. See *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Human Res.*, 532 U.S. 598, 609 (2001) (discussing defendant's incentive to enter a settlement that includes attorney's fees and costs); cf. *Marek v. Chesny*, 473 U.S. 1, 7 (1985) (same).

80. See Haywood, *supra* note 73, at 989 (discussing The Civil Rights Attorneys' Fees Award Act of 1976 and Congress's intent to encourage fee shifting statutes for the public benefit); see also *Buckhannon*, 532 U.S. at 622 (Ginsburg, J., dissenting) (criticizing the majority opinion).

primarily seeking injunctive relief.⁸¹ In such suits, settlement (which would allow the plaintiff to negotiate attorney's fees) is often unnecessary because the defendant can moot the action voluntarily by altering the offensive conduct.⁸² In such situations, plaintiffs cannot obtain attorney's fees without the catalyst theory.⁸³ As a result, plaintiffs have an increased incentive to seek damages in addition to injunctive relief to prevent defendants from voluntarily mooting the action.⁸⁴ Thus, *Buckhannon* potentially subjects defendants to more claims for damages and prolongs litigation that parties could otherwise resolve without trial.⁸⁵

III. Circuit Courts' Treatment of Prevailing Party Status Based on Preliminary Injunctions after *Buckhannon*

After *Buckhannon*, the Fourth and Ninth Circuits considered whether a preliminary injunction is a sufficient judicial imprimatur to warrant prevailing party status. In *Smyth v. Rivero*,⁸⁶ the Fourth Circuit ruled that a preliminary injunction was insufficient to warrant prevailing party status.⁸⁷ Subsequently, the Ninth Circuit reached the opposite conclusion in *Watson v. County of Riverside*.⁸⁸

A. Fourth Circuit

In *Smyth*, the plaintiffs were seven recipients of aid under the Aid to Families with Dependent Children program.⁸⁹ The plaintiffs brought suit alleging that a new paternity identification policy violated the Social Security Act and the Supremacy and Equal Protection Clauses of the United States

81. See *Dunn*, *supra* note 76, at 1 (recognizing *Buckhannon*'s effect on plaintiffs seeking injunctive relief).

82. See *id.* (discussing the effects of *Buckhannon*).

83. See *supra* Part II.B (explaining the catalyst theory).

84. See *Dunn*, *supra* note 76, at 1 (describing strategies to circumnavigate *Buckhannon*).

85. See *id.* (discussing methods to prevent defendants from voluntarily mooting actions).

86. *Smyth v. Rivero*, 282 F.3d 268 (4th Cir. 2002), *cert. denied*, 537 U.S. 825 (2002). For a detailed discussion of *Smyth*, see *infra* Part III.A (discussing *Smyth*).

87. See *id.* at 277 (finding a preliminary injunction insufficient to warrant prevailing party status).

88. See *Watson v. County of Riverside*, 300 F.3d 1092, 1093 (9th Cir. 2002) (awarding prevailing party status to a plaintiff who won a preliminary injunction), *cert. denied*, 123 S. Ct. 1574 (2003). For a detailed discussion of *Watson*, see *infra* Part III.B (discussing *Watson*).

89. See *Smyth*, 282 F.3d at 277 (describing facts).

Constitution.⁹⁰ The policy required that an applicant for aid either identify the father of the child or provide the first and last names of all potential fathers.⁹¹ The plaintiffs alleged that they were unable to identify the fathers of their children as required and that the Virginia Department of Social Services (VDSS) reduced or eliminated their benefits as a result.⁹²

The district court entered a preliminary injunction barring enforcement of the policy against the mothers and children involved in the lawsuit.⁹³ In granting the injunction, the district court reasoned that the balance of harms favored the plaintiffs and that the plaintiffs were likely to succeed on the merits.⁹⁴ Subsequently, the Commissioner of VDSS (Commissioner) obtained a waiver from the Department of Health and Human Services (HHS) that authorized the paternity identification policy that the Commissioner relied upon.⁹⁵ The Commissioner then modified the identification policy so that it applied prospectively from the time of the waiver.⁹⁶ The modified identification policy no longer applied to the plaintiffs, and the court dismissed the case as moot.⁹⁷ The district court granted the plaintiffs' motion for attorney's fees because the plaintiffs received a "'judgment against the defendant [the preliminary injunction]' and a 'partial settlement, which materially altered the legal relationship between the parties by modifying the defendant's behavior in a way that directly benefited the plaintiff.'"⁹⁸

After the district court's decision, but before the Fourth Circuit's appellate review, the Supreme Court decided *Buckhannon*.⁹⁹ In deciding *Smyth*, the Fourth Circuit emphasized that the *Buckhannon* Court cited success on the merits as a prerequisite to prevailing party status and that the Court stressed that preliminary successes did not equate to legal victories.¹⁰⁰ The Fourth Circuit determined that the grant of a preliminary injunction was equivalent to the

90. *Id.* at 271.

91. *Id.*

92. *Id.*

93. *Id.* at 272.

94. *Id.*

95. *Id.*

96. *Id.* at 273–74 (quoting the district court).

97. *Id.*

98. *Id.* at 274.

99. *Id.*

100. *See id.* at 275–76 (analyzing *Buckhannon*); *see also* *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Human Res.*, 532 U.S. 598, 603–05 (2001) (considering the character of judicial relief necessary for prevailing party status).

preliminary successes deemed insufficient in *Buckhannon*.¹⁰¹ The court acknowledged that granting a preliminary injunction required consideration of the merits.¹⁰² However, the court reasoned that the consideration was necessarily abbreviated because a party seeking a preliminary injunction must show only a strong or substantial likelihood of success by clear and convincing evidence.¹⁰³ The district court's consideration of the merits was not a final determination, but merely a prediction of an uncertain outcome.¹⁰⁴

Moreover, courts—in every circuit—consider factors other than the likelihood of success on the merits when granting a preliminary injunction.¹⁰⁵ For instance, in the Fourth Circuit, a high likelihood of substantial harm justifies the grant of a preliminary injunction with a lesser showing on the merits.¹⁰⁶ Thus, the showing of a likelihood of success on the merits can vary with the balance of harms.¹⁰⁷ The Fourth Circuit reasoned that the consideration of the balance of harms makes the preliminary injunction an unreliable indicator of success on the merits, and therefore an inappropriate basis for prevailing party status.¹⁰⁸

In reaching its conclusion, the Fourth Circuit emphasized that the *Smyth* decision did not turn on the Fourth Circuit's own standard for preliminary

101. See *Smyth v. Rivero*, 282 F.3d 268, 277 (4th Cir. 2002) (finding preliminary injunctions to be an insufficient basis for prevailing party status after *Buckhannon*), *cert. denied*, 537 U.S. 825 (2002).

102. See *id.* (discussing whether winning a preliminary injunction can be sufficient to warrant prevailing party status (citing *Blackwelder Furniture Co. of Statesville v. Seilig Mfg. Co.*, 550 F.2d 189, 196 (4th Cir. 1977))).

103. See *id.* (considering the standard for a preliminary injunction (citing *MicroStrategy, Inc. v. Motorola, Inc.*, 245 F.3d 335, 339 (4th Cir. 2001))).

104. See *id.* (comparing the inquiry into the merits for a grant of a preliminary injunction to the inquiry necessary for prevailing party status under *Buckhannon*).

105. See *id.* (analyzing whether winning a preliminary injunction can warrant prevailing party status (citing *Safety-Kleen, Inc. (Pinewood) v. Wyche*, 274 F.3d 846, 858–59 (4th Cir. 2001))). For a survey of the different standards for preliminary injunctions across the federal circuits, see *infra* Part IV.B (surveying the standards for preliminary injunctions across the federal circuits).

106. See *Safety-Kleen, Inc. (Pinewood) v. Wyche*, 274 F.3d 846, 858–59 (4th Cir. 2001) (listing the likelihood of irreparable harm as the first factor considered for a preliminary injunction).

107. See *Ciena Corp. v. Jarrard*, 203 F.3d 312, 323 (4th Cir. 2000) (analyzing the relationship between considerations of the likelihood of success and the balance of harms in a preliminary injunction inquiry).

108. See *Smyth v. Rivero*, 282 F.3d 268, 276–77 (4th Cir. 2002) (distinguishing the inquiry for a preliminary injunction from the inquiry involved with a final judgment on the merits), *cert. denied*, 537 U.S. 825 (2002).

injunctions nor on the circumstances of the injunction at issue.¹⁰⁹ Regarding the former, the court noted that "[t]he preliminary injunction inquiry, because of the preliminary, incomplete examination of the merits involved and the incorporation (if not the predominance) of equitable factors, is ill-suited to guide the prevailing party determination regardless of how it is formulated."¹¹⁰ The Fourth Circuit also rejected the plaintiffs' argument that some preliminary injunctions justify an award of attorney's fees even if others do not.¹¹¹

B. Ninth Circuit

In *Watson*, the Ninth Circuit ruled that—despite *Buckhannon*—a party who won a preliminary injunction was a prevailing party.¹¹² The plaintiff in *Watson* was a former Riverside County deputy sheriff suspected of using excessive force during a highly publicized arrest.¹¹³ After the arrest, officers at the station ordered Watson to prepare a report of the incident.¹¹⁴ The police department ultimately terminated Watson for his conduct during the arrest.¹¹⁵

Watson alleged that various state officers violated his constitutional rights by detaining him, forcing him to write the report, and refusing to allow him to speak to an attorney or representative of his employee organization prior to writing the report.¹¹⁶ Watson sought money damages and an injunction enjoining the police department from using the report in an administrative hearing to appeal Watson's termination.¹¹⁷ After finding that Watson had some likelihood of success on the merits, the trial judge granted Watson a preliminary injunction enjoining the use of the report at the administrative hearing.¹¹⁸ Two years after the trial judge granted the injunction, the district

109. See *id.* at 277 nn. 8-9 (noting that the insufficiency of a preliminary injunction for prevailing party status is not dependent on the Fourth Circuit test for a preliminary injunction or on the circumstances of the present injunction).

110. *Id.* at 277 n.8.

111. See *id.* at 277-78 (refusing to distinguish plaintiff's injunction from a situation where plaintiff wins a preliminary injunction but ultimately loses on the merits).

112. See *Watson v. County of Riverside*, 300 F.3d 1092, 1093 (9th Cir. 2002) (affording prevailing party status to a plaintiff who won a preliminary injunction but lost the suit), *cert. denied*, 123 S. Ct. 1574 (2003).

113. *Id.*

114. *Id.* at 1094.

115. *Id.*

116. *Id.*

117. *Id.*

118. *Id.*

court granted the police department's motion for summary judgment regarding all of Watson's claims except his claim of a due process violation in obtaining the report.¹¹⁹ However, because the parties had already concluded the administrative appeal and excluded the incident report per the preliminary injunction, both parties agreed that the underlying permanent injunction was moot.¹²⁰ Thus, the only claim remaining was Watson's claim for attorney's fees.¹²¹ The district court granted the claim.¹²²

The Ninth Circuit upheld the trial court's award of attorney's fees.¹²³ In so doing, the court emphasized that Watson's lawsuit did not seek Watson's reinstatement, but sought to exclude the incident report from the administrative hearing.¹²⁴ Thus, by winning the preliminary injunction, Watson obtained the precise result that he sought.¹²⁵ The court then distinguished *Buckhannon* because Watson's case did not involve the catalyst theory.¹²⁶ The police department did not exclude the incident report voluntarily; they excluded it because the trial court ordered them to do so.¹²⁷ Finally, the Ninth Circuit ruled that a preliminary injunction was a sufficient judicial imprimatur to justify an award of attorney's fees.¹²⁸ The court determined that the Supreme Court's requirements of a final judgment on the merits or a court-ordered consent decree were examples of sufficient judicial oversight and were not an exhaustive list of the judicial orders that would suffice.¹²⁹

IV. Discussion

A. *Buckhannon's Dual Approach: Recognition on the Merits or Court-Ordered Relief*

As *Watson* and *Smyth* demonstrate, it is unclear from *Buckhannon* whether a party that wins a preliminary injunction may obtain prevailing party

119. *Id.*

120. *Id.*

121. *Id.*

122. *Id.*

123. *Id.*

124. *Id.* at 1095.

125. *Id.*

126. *Id.* at 1096.

127. *Id.*

128. *Id.*

129. *Id.*

status.¹³⁰ The circuit split created by *Watson* and *Smyth* results from different interpretations of *Buckhannon*. In *Watson*, the Ninth Circuit relied on a means-based approach and granted prevailing party status for a party that won a preliminary injunction because the party's relief stemmed from the preliminary injunction.¹³¹ In *Smyth*, the Fourth Circuit relied on a merit-based approach and denied prevailing party status because the preliminary injunction did not constitute sufficient judicial recognition on the merits.¹³² Thus, *Watson* focused on how the plaintiff obtained its desired result and *Smyth* focused on whether the desired result was accompanied by significant judicial recognition on the merits.¹³³

Whether courts should apply a merit- or means-based approach depends on the definition of the judicial imprimatur required by *Buckhannon*.¹³⁴ The Fourth Circuit considered the imprimatur to be a court order based on the merits of the plaintiff's claim.¹³⁵ The Ninth Circuit, on the other hand, considered the imprimatur to be a court order that granted the plaintiff's desired relief.¹³⁶ The distinction between these approaches illustrates the distinction between a means-based and a merit-based approach. Under the Fourth Circuit's merit-based approach, prevailing party status is justified if a plaintiff obtains a court order that involves sufficient judicial consideration of the merits of its claim.¹³⁷ By contrast, under the Ninth Circuit's means-based approach,

130. Compare *Smyth v. Rivero*, 282 F.3d 268, 277 (4th Cir. 2002) (relying on *Buckhannon* to rule that prevailing party status is not justified based on a preliminary injunction), *cert. denied*, 537 U.S. 825 (2002) with *Watson v. County of Riverside*, 300 F.3d 1092, 1096 (9th Cir. 2002) (distinguishing *Buckhannon* to allow prevailing party status based on a preliminary injunction), *cert. denied*, 123 S. Ct. 1574 (2003).

131. See *Watson*, 300 F.3d at 1096 (granting prevailing party status based on a preliminary injunction because the preliminary injunction granted plaintiff's desired result).

132. See *Smyth*, 282 F.3d at 276 (ruling that a preliminary injunction is too preliminary in nature to justify award of attorney's fees).

133. Compare *Watson*, 300 F.3d at 1096 (granting prevailing party status based on a preliminary injunction) with *Smyth*, 282 F.3d at 277 (denying prevailing party status based on a preliminary injunction).

134. See *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Human Res.*, 532 U.S. 598, 605 (2001) (requiring a judicial imprimatur for prevailing party status).

135. Cf. *Smyth*, 282 F.3d at 277 (denying prevailing party status to a party that won a preliminary injunction because preliminary injunctions do not constitute sufficient judicial recognition on the merits of plaintiff's claim).

136. See *Watson v. County of Riverside*, 300 F.3d 1092, 1096 (9th Cir. 2002) (granting prevailing party status to a plaintiff that obtained its desired result directly from a preliminary injunction), *cert. denied*, 123 S. Ct. 1574 (2003).

137. See *John T. v. Del. County Intermediate Unit*, 318 F.3d 545, 558–59 (3d Cir. 2003) (denying prevailing party status to a plaintiff that won a preliminary injunction because the preliminary injunction was not based on the merits of the claim); cf. *Smyth*, 282 F.3d at 276

prevailing party status is justified if the party obtains its desired result from a court order.¹³⁸

Despite language in *Buckhannon* that endorses a merit-based approach, close analysis of *Buckhannon* supports the Ninth Circuit's means-based approach. In overruling the catalyst theory, the Court wrote, "[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."¹³⁹ The Court further noted that surviving a motion to dismiss for failure to state a claim or lack of jurisdiction was likewise insufficient.¹⁴⁰ In so holding, the Court implied that, in such cases, a plaintiff fails to obtain judicial recognition on the merits of its claim.¹⁴¹ The Court wrote: "[the catalyst theory] allows an award where there is no judicially sanctioned change in the legal relationship of the parties [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."¹⁴² Thus, in overruling the catalyst theory, the Supreme Court emphasized that the theory allowed plaintiffs to recover attorney's fees without demonstrating that their complaint had sufficient merit.¹⁴³ Moreover,

(considering the requirements for prevailing party status after *Buckhannon*). An obvious problem with the merit-based approach is determining what degree of recognition on the merits of a plaintiff's suit is sufficient. For a detailed discussion of this problem, see *infra* Part IV.C (discussing the problems with the merit-based approach).

138. See *Watson*, 300 F.3d at 1096 (analyzing the requirements for prevailing party status after *Buckhannon*). A means-based approach grants prevailing party status when a party obtains its desired result. The approach does not, however, address the underlying question of whether the court-ordered relief the plaintiff obtained constituted the desired result. The Supreme Court prescribed a two-step process for calculating attorney's fees in case of partial or limited success. See *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983) (discussing the appropriateness of attorney's fees for a party that obtained limited success). A court must consider (1) whether "the plaintiff fail[ed] to prevail on claims that were unrelated to the claims on which he succeeded," and (2) whether "the plaintiff achiev[ed] a level of success that makes the hours reasonably expended a satisfactory basis for making a fee award." *Id.* at 434. Further, the district court, can, within its discretion, make deductions based on limited success. See *Sorenson v. Mink*, 239 F.3d 1140, 1147 (9th Cir. 2001) (discussing the availability of attorney's fees for plaintiffs that obtained limited success). Issues of partial or limited success are inherent in all prevailing party analysis and are not addressed by the means-based approach. As such, they are outside the scope of this Note.

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

140. See *id.* (finding prevailing party status inappropriate for surviving a motion to dismiss for failure to state a claim for lack of jurisdiction).

141. See *id.* (discussing the inappropriateness of catalyst theory as a basis for prevailing party status).

142. *Id.* (emphasis added) (quoting Brief for United States Amicus Curiae at 27).

143. See *id.* (overruling the catalyst theory).

Buckhannon can be read to imply that the Supreme Court did not intend to allow prevailing party status based on a preliminary injunction.¹⁴⁴ The Court defined the requisite judicial imprimatur by citing court-ordered consent decrees and final judgments on the merits.¹⁴⁵ By exclusion, a preliminary injunction would not apply.

The Third and Fourth Circuits relied on this interpretation of *Buckhannon* and applied a merit-based analysis to deny prevailing party status to parties that obtained their desired result from preliminary injunctions.¹⁴⁶ In *Smyth*, the Fourth Circuit concluded that prevailing party status is inappropriate based on a preliminary injunction because courts grant preliminary injunctions based on considerations such as a balance of harms favoring the plaintiff or public policy and need not consider the underlying merits.¹⁴⁷ Similarly, the Third Circuit, in *John T. v. Delaware County Intermediate Unit*,¹⁴⁸ recently concluded that prevailing party status was inappropriate for a party that won a preliminary injunction when the preliminary injunction was not based on the merits of the claim.¹⁴⁹

144. See *id.* at 603–04 (analyzing Supreme Court precedent to determine when prevailing party status is appropriate).

145. See *id.* (recognizing past justifications for prevailing party status).

146. See *John T. v. Del. County Intermediate Unit*, 318 F.3d 545, 558–59 (3d Cir. 2003) (finding that preliminary injunctions lack sufficient inquiry into the merits to justify prevailing party status); *Smyth v. Rivero*, 282 F.3d 268, 277 (4th Cir. 2002) (same), *cert denied*, 537 U.S. 825 (2002).

147. See *Smyth*, 282 F.3d at 277 (finding preliminary injunction inquiries into the balance of harms and the merits of plaintiff's claims insufficient to justify prevailing party status). For a survey of the federal circuit courts' standards for preliminary injunctions, see *infra* Part IV.B (surveying the standards for preliminary injunctions across federal circuits).

148. *John T. v. Del. County Intermediate Unit*, 318 F.3d 545 (3d Cir. 2003). In *John T.*, plaintiff, a twelve-year-old child with Downs Syndrome, brought suit under the Individuals with Disabilities Education Act (IDEA) against the Delaware County Intermediate Unit (DCIU), a Pennsylvania state agency charged that provides special education services to children with disabilities in Delaware County. *Id.* at 548–49. The plaintiff alleged that while the agency offered to provide services at a public school it refused to provide them at the private school that the plaintiff attended. *Id.* at 549. The plaintiff sought (1) compensation for costs of services and programs paid for by plaintiff, (2) payment of future costs of services and programs, and (3) a due process hearing as required by the IDEA. *Id.* After a hearing, the district court granted a preliminary injunction, which ordered DCIU to "provide John T. [the plaintiff] with speech therapy, occupational therapy, a teacher's aide, and an itinerant teacher." *Id.* The plaintiff then moved for, and was denied, attorney's fees. On appeal, the Third Circuit confirmed the denial of attorney's fees. *Id.* at 558. The Third Circuit reasoned that *Buckhannon* applies to the IDEA, and further, that the preliminary injunction received by the plaintiff did not amount to relief on the merits of the plaintiff's claim and was therefore an inappropriate basis for attorney's fees after *Buckhannon*. *Id.* at 556–59.

149. See *id.* at 558–59 (refusing prevailing party status for a party that won a preliminary injunction where the preliminary injunction was not based on the merits of the claim).

Such a conclusion, however, does not square with the Supreme Court's recognition that a court-ordered consent decree is an appropriate basis for prevailing party status.¹⁵⁰ The Court noted, "[a]lthough a consent decree does not always include an admission of liability by the defendant, it nonetheless is a *court-ordered change* in the legal relationship between the plaintiff and the defendant."¹⁵¹ Further, the Court added, "never have we awarded attorney's fees for a *nonjudicial alteration* of actual circumstances."¹⁵² Thus, a consent decree is an appropriate basis for prevailing party status, not because it involves judicial recognition on the merits of the plaintiff's claim, but because the desired result is granted by a court order.¹⁵³

The Supreme Court's specific reference to final judgments on the merits and court-ordered consent decrees is insufficient to preclude prevailing party status based on a preliminary injunction.¹⁵⁴ Lower courts can interpret the Court's references to final judgments on the merits and court-ordered consent decrees as examples rather than as requirements; the Court stops short of stating that prevailing party status is unobtainable based on other forms of court-ordered relief.¹⁵⁵ Furthermore, in contrast to a final judgment, a court-ordered consent decree does not involve an inquiry into the merits.¹⁵⁶ Both a final

150. See *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Human Res.*, 532 U.S. 598, 604 (2001) (discussing the appropriate basis for prevailing party status).

151. *Id.* (emphasis added) (quoting *Tex. State Teachers Ass'n v. Garland Indep. Sch. Dist.*, 489 U.S. 782, 792 (1989)).

152. *Id.* at 606 (emphasis added) (quoting Justice Ginsburg's dissent).

153. *Cf.* *Tex. State Teachers Ass'n v. Garland Indep. Sch. Dist.*, 489 U.S. 782, 792 (1989) (allowing prevailing party status because the desired result stemmed from a court order); *Maher v. Gagne*, 448 U.S. 122, 129 (1980) (same); *Watson v. County of Riverside*, 300 F.3d 1092, 1096 (9th Cir. 2002) (same), *cert. denied*, 123 S. Ct. 1574 (2003).

154. See *Buckhannon*, 532 U.S. at 603–04 (recognizing final judgments on the merits and court-ordered consent decrees as appropriate bases for prevailing party status); see also *John T. v. Del. County Intermediate Unit*, 318 F.3d 545, 558 (3d Cir. 2003) (declining to accept the district court suggestion that *Buckhannon* only allows prevailing party status for a party that obtains a final judgment on merits or a court-ordered consent decree); *Watson*, 300 F.3d at 1096 (granting prevailing party status for a party that won a preliminary injunction); *Barrios v. Cal. Interscholastic Fed'n*, 277 F.3d 1128, 1134 (9th Cir. 2002) (granting prevailing party status for a party that obtained its desired result through a court-approved settlement), *cert. denied*, 537 U.S. 820 (2002); *Truesdell v. Phila. Hous. Auth.*, 290 F.3d 159, 165 (3d Cir. 2002) (granting prevailing party status based on a stipulated settlement).

155. See *Buckhannon*, 532 U.S. at 603 (citing examples of relief that are appropriate for prevailing party status).

156. See *United States v. Oregon*, 913 F.2d 576, 580 (9th Cir. 1990) (explaining that a consent decree is "not a decision on the merits . . . but [is] the product of negotiation and compromise" (citing *United States v. Armour & Co.*, 402 U.S. 673, 681–82 (1971))); see also Thomas M. Mengler, *Consent Decree Paradigms: Models Without Meaning*, 29 B.C. L. REV. 291, 322 (1988) (explaining that the "district court, in approving a consent decree, is not

judgment and a court-ordered consent decree, however, involve relief that stems from a court order.¹⁵⁷ Thus, it is logical to extend the examples to other forms of relief that enforce the plaintiff's desired result, like preliminary injunctions. Finally, the examples of consent decrees and final judgments on the merits are unpersuasive as exclusive requirements because they are dicta.¹⁵⁸

In *Buckhannon*, Justice Scalia apologized to the circuits for dicta from Supreme Court opinions that induced reliance on the catalyst theory.¹⁵⁹ Scalia's apology suggests that the circuits should not be compelled by further dicta. Appropriately, the circuits that considered *Buckhannon* found final judgments and court-ordered consent decrees to be examples of acceptable relief and not the only appropriate forms.¹⁶⁰

Taken in full, *Buckhannon* does not require judicial recognition on the merits, but that the desired result stems from a court order.¹⁶¹ Consent decrees and final judgments on the merits do not involve similar degrees of recognition on the merits.¹⁶² They do, however, both involve judicial oversight and judicial enforcement of a court order.¹⁶³ Thus, the judicial imprimatur required by

remedying a wrong. Except in rare instances, neither party has admitted liability.").

157. See *supra* notes 134–38 and accompanying text (comparing the merit-and means-based approaches for determining prevailing party status).

158. See *Barrios v. Cal. Interscholastic Fed'n*, 277 F.3d 1128, 1134 n.5 (9th Cir. 2002) (labeling *Buckhannon*'s reference to court-ordered consent decrees and final judgments on the merits as dicta), *cert. denied*, 537 U.S. 820 (2002).

159. See *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Human Res.*, 532 U.S. 598, 621 (2001) (Scalia, J., concurring) (apologizing for dicta in past decisions that confirmed the viability of the catalyst theory).

160. See *John T. v. Del. County Intermediate Unit*, 318 F.3d 545, 556 (3d Cir. 2003) (noting that *Buckhannon* allows prevailing party status in broader circumstances than after a final judgment on the merits or a court-ordered consent decree); *Watson v. County of Riverside*, 300 F.3d 1092, 1096 (9th Cir. 2002) (granting prevailing party status for a party that won a preliminary injunction and stating that "[j]udgments and consent decrees are examples of [judicial imprimaturs], but . . . not the only examples"), *cert. denied*, 123 S. Ct. 1574 (2003); *Barrios*, 277 F.3d at 1134 (granting prevailing party status for a party that obtained its desired result through a court-ordered consent decree), *cert. denied*, 537 U.S. 820 (2002); *Truesdell v. Phila. Hous. Auth.*, 290 F.3d 159, 165 (3d Cir. 2002) (granting prevailing party status based on a stipulated settlement).

161. See *Buckhannon*, 532 U.S. at 603–05 (discussing the requirements for prevailing party status); see also *supra* notes 134–38 and accompanying text (describing the merit- and means-based tests for prevailing party status).

162. See *United States v. Oregon*, 913 F.2d 576, 580 (9th Cir. 1990) (explaining that a consent decree is "not a decision on the merits . . . but the product of negotiation and compromise" (citing *United States v. Armour & Co.*, 402 U.S. 673, 681–82 (1971))); see also *Mengler*, *supra* note 156, at 322 (explaining that the "district court, in approving a consent decree, is not remedying a wrong. Except in rare instances, neither party has admitted liability.").

163. See *Buckhannon*, 532 U.S. at 604 (finding that enforceable judgments on the merits

Buckhannon is satisfied, not by recognition of the merits, but by obtaining relief through an enforceable judgment from a court. Preliminary injunctions, like final judgments or court-ordered consent decrees, are enforceable judgments.¹⁶⁴ As such, a preliminary injunction can be a proper basis for attorney's fees after *Buckhannon*.¹⁶⁵

B. Differing Standards for a Preliminary Injunction and a Merit-Based Analysis

If courts adopt a merit-based approach to prevailing party status, courts will have to determine how strong a showing on the merits a party must make.¹⁶⁶ One possibility is to require a final judgment on the merits. This requirement, however, is draconian and would create an inefficient incentive for plaintiffs to force judicial proceedings to a final conclusion.¹⁶⁷ Furthermore, the majority of lawsuits settle or become moot before reaching a final judgment on the merits.¹⁶⁸ If courts refuse to allow attorney's fees in all such cases, they will thwart the legislative intention of allowing private litigants to enforce civil rights laws.¹⁶⁹ Finally, requiring a final judgment on the merits is inconsistent

and consent decrees materially alter the legal relationships of the parties); *United States v. Oregon*, 913 F.2d at 580 (discussing court-ordered consent decrees).

164. See *Watson*, 300 F.3d at 1096 (discussing preliminary injunctions). Frequently, a preliminary injunction only constitutes interim relief. Prevailing party status is only justified under a means-based approach when the injunction is not dissolved or supplanted by a later ruling. For a discussion of these issues, see *supra* Part IV.E (discussing the means-based approach as applied to interim relief).

165. See *Watson*, 300 F.3d at 1096 (allowing prevailing party status based on a preliminary injunction); see also *infra* notes 219–22 and accompanying text (discussing the means-based approach for granting prevailing party status).

166. Cf. *Smyth v. Rivero*, 282 F.3d 268, 277 (4th Cir. 2002) (finding that preliminary injunctions involve an insufficient showing on the merits to justify prevailing party status), *cert. denied*, 537 U.S. 825 (2002).

167. See *Dunn*, *supra* note 76, at 1 (discussing plaintiffs' strategies after the loss of the catalyst theory).

168. See STEPHEN C. YEAZELL, *CIVIL PROCEDURE* 311 (5th ed. 2000) (noting that most civil lawsuits are resolved before trial); see also Table C-5, U.S. District Courts—Time Intervals from Filing to Disposition of Civil Cases Terminated, by District and Method of Disposition, During the Twelve-Month Period Ending September 30, 1998, <http://www.uscourts.gov/dirrpt98/c05sep98.pdf> (indicating that over 90% of lawsuits are resolved without trial) (on file with Washington and Lee Law Review).

169. See *Haywood*, *supra* note 73, at 987–89 (discussing Congress's rationale for the private attorney general model in fee-shifting statutes).

with *Buckhannon's* recognition that consent decrees are sufficient for prevailing party status.¹⁷⁰

In lieu of requiring a final judgment on the merits, courts could insist on a lesser showing on the merits. Such an approach would be particularly problematic in the context of a preliminary injunction because the standards for granting a preliminary injunction vary across circuits.¹⁷¹ Rule 65 of the Federal Rules of Civil Procedure addresses preliminary injunctions, but does not specify standards to guide a court in deciding when to grant a preliminary injunction.¹⁷² Likewise, the Supreme Court has never specified a clear standard.¹⁷³ In general, the circuits agree that the relevant factors include: (1) likelihood of success on the merits; (2) irreparable harm to the moving party if the injunction is denied; (3) irreparable harm to the non-moving party if the injunction is granted; and (4) the public interest.¹⁷⁴ Despite recognizing similar standards, the weight and the method of analyzing each factor varies significantly between circuits.¹⁷⁵

170. See *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Human Res.*, 532 U.S. 598, 604 (2001) (recognizing consent decrees as an appropriate basis for prevailing party status).

171. See, e.g., *Al-Fayed v. CIA*, 254 F.3d 300, 303 (D.C. Cir. 2001) (detailing the standards for granting a preliminary injunction in the D.C. Circuit); *Zervos v. Verizon N.Y., Inc.*, 252 F.3d 163, 172 (2d Cir. 2001) (same for the Second Circuit); *Ty, Inc. v. Jones Group, Inc.*, 237 F.3d 891, 895-96 (7th Cir. 2001) (same for the Seventh Circuit); *Adams v. Freedom Forge Corp.*, 204 F.3d 475, 484 (3d Cir. 2000) (same for the Third Circuit); cf. Morton Denlow, *Preliminary Injunctions: Look before You Leap*, LITIGATION, Summer 2002, at 8, 9-10 (discussing the effect of various standards for preliminary injunctions across the circuits on plaintiffs' decisions on whether to seek a preliminary injunction).

172. See FED. R. CIV. P. 65 (stating the federal rules for preliminary injunctions).

173. See Denlow, *supra* note 171, at 9 (discussing the lack of clear standards for granting a preliminary injunction).

174. See, e.g., *Ciena Corp. v. Jarrard*, 203 F.3d 312, 322 (4th Cir. 2000) (indicating that trial courts must consider: (1) the likelihood of success on the merits; (2) irreparable harm to the movant; (3) irreparable harm to the non-movant; and (4) the public interest); *Pitt News v. Fisher*, 215 F.3d 354, 365-66 (3d Cir. 2000) (same); *Entergy, Ark., Inc. v. Nebraska*, 210 F.3d 887, 898 (8th Cir. 2000) (same); *United States v. Power Eng'g Co.*, 191 F.3d 1224, 1230 (10th Cir. 1999) (same); *Tefel v. Reno*, 180 F.3d 1286, 1295 (11th Cir. 1999) (same); *Connection Distrib. Co. v. Reno*, 154 F.3d 281, 288 (6th Cir. 1998) (same); *Platinum Home Mortgage Co. v. Platinum Fin. Group, Inc.*, 149 F.3d 722, 726 (7th Cir. 1998) (same); *Ross-Simons of Warwick, Inc. v. Baccarat, Inc.*, 102 F.3d 12, 15 (1st Cir. 1996) (same); *Tom Doherty Assocs. v. Saban Entm't, Inc.*, 60 F.3d 27, 33 (2d Cir. 1995) (same); *Doe v. Duncanville Indep. Sch. Dist.*, 994 F.2d 160, 163 (5th Cir. 1993) (per curiam) (same); *United States v. Nutri-Cology, Inc.*, 982 F.2d 394, 397 (9th Cir. 1992) (same).

175. See, e.g., *Al-Fayed v. CIA*, 254 F.3d 300, 303 (D.C. Cir. 2001) (applying a four-part test for granting a preliminary injunction); *Zervos v. Verizon N.Y., Inc.*, 252 F.3d 163, 172 (2d Cir. 2001) (applying a two-part test); *Ty, Inc. v. Jones Group, Inc.*, 237 F.3d 891, 895 (7th Cir. 2001) (applying a sliding-scale approach for granting a preliminary injunction); *Adams v. Freedom Forge Corp.*, 204 F.3d 475, 484 (3d Cir. 2000) (applying a two-part test that allows for the consideration of other relevant factors).

Every circuit considers a party's likelihood of success on the merits before granting a preliminary injunction, but the amount of weight given the factor varies substantially.¹⁷⁶ The weight varies from a substantial likelihood of success on the merits,¹⁷⁷ to reasonable certainty of success,¹⁷⁸ to a probability of success,¹⁷⁹ to substantial questions going to the merits,¹⁸⁰ to a fair question going to the merits,¹⁸¹ to a negligible showing on the merits.¹⁸² A summary of the different standards used to grant a preliminary injunction in federal courts follows.

1. D.C. Circuit—Traditional Four-Part Test

The D.C. Circuit uses a traditional four-part test.¹⁸³ Before granting a preliminary injunction, the D.C. Circuit requires that the moving party show (1) a substantial likelihood of success on the merits; (2) irreparable injury if the injunction is not granted; (3) that the injunction will not substantially injure other interested parties; and (4) that the injunction will further the public's interests.¹⁸⁴

2. Second Circuit—Two-Part Test

To obtain a preliminary injunction in the Second Circuit, a plaintiff must show (a) irreparable harm in the absence of an injunction and (b) either (i) a likelihood of success on the merits, or (ii) sufficiently serious questions going

176. See Lee, *supra* note 26, at 111–23 (discussing the varying standards for preliminary injunctions).

177. See *Al-Fayed*, 254 F.3d at 303 (requiring a substantial likelihood of success on the merits before granting a preliminary injunction).

178. See *Robinswood Cmty. Club v. Volpe*, 506 F.2d 1366, 1368 (9th Cir. 1974) (requiring a strong likelihood or reasonable certainty of success on the merits).

179. See *Adams*, 204 F.3d at 484 (3d Cir. 2000) (requiring a reasonable likelihood of success on the merits).

180. See *Zervos*, 252 F.3d at 172 (requiring sufficiently serious questions on the merits to make them fair grounds for litigation or a likelihood of success on merits).

181. See *Brandeis Mach. & Supply Corp. v. Barber-Greene Co.*, 503 F.2d 503, 505 (6th Cir. 1974) (*per curiam*) (requiring a fair question going to the merits for grant of a preliminary injunction).

182. See *Ty, Inc. v. Jones Group, Inc.*, 237 F.3d 891, 895–96 (7th Cir. 2001) (requiring some likelihood of success on the merits).

183. See *Al-Fayed v. CIA*, 254 F.3d 300, 303 (D.C. Cir. 2001) (laying out the D.C. Circuit's test for preliminary injunctions).

184. See *id.* (listing the factors for a preliminary injunction).

to the merits to make them a fair ground for litigation and a balance of hardships tipping decidedly toward the plaintiff.¹⁸⁵

3. Third Circuit

In the Third Circuit, a party must show both a likelihood of success on the merits and a probability of immediate and irreparable harm if the injunction is denied.¹⁸⁶ If relevant, the district court should also examine the likelihood of irreparable harm to the non-moving party and whether the injunction serves the public interest.¹⁸⁷

4. Fourth Circuit—Balance of Hardship Test

In the Fourth Circuit, the trial court must first determine whether the plaintiff has made a strong showing of irreparable harm if the injunction is denied.¹⁸⁸ If the plaintiff makes the showing, the court must balance the likelihood of harm to the plaintiff if the injunction is denied against the likelihood of harm to the defendant if the injunction is granted.¹⁸⁹ If the balance of harms tips decidedly in the plaintiff's favor, then typically it will "be enough that the plaintiff has raised questions going to the merits so serious, substantial, difficult and doubtful, as to make them fair ground for litigation and thus for more deliberate investigation."¹⁹⁰ If the balance of hardships is substantially equal between the plaintiff and defendant, then "the probability of success begins to assume real significance, and interim relief is more likely to require a clear showing of a likelihood of success."¹⁹¹ Thus, the importance of

185. See *Zervos v. Verizon N.Y., Inc.*, 252 F.3d 163, 172 (2d Cir. 2001) (listing factors for a preliminary injunction).

186. See *Adams v. Freedom Forge Corp.*, 204 F.3d 475, 484 (3d Cir. 2000) (describing the Third Circuit's test for granting a preliminary injunction).

187. See *id.* (discussing the standard for granting a preliminary injunction).

188. See *Scotts Co. v. United Indus. Corp.*, 315 F.3d 264, 271 (4th Cir. 2002) (stating the Fourth Circuit's standard for a preliminary injunction); *Blackwelder Furniture Co. of Statesville, Inc. v. Selig Mfg. Co.* 550 F.2d 189, 195 (4th Cir. 1977) (same).

189. See *Scotts Co.*, 315 F.3d at 271 (discussing the standard for preliminary injunction); *Safety-Kleen, Inc. (Pinewood) v. Wyche*, 274 F.3d 846, 858–59 (4th Cir. 2001) (same); *Blackwelder*, 550 F.2d at 195 (same).

190. *Scotts Co.*, 315 F.3d at 271 (quoting *Blackwelder*, 550 F.2d at 195).

191. *Id.* (quoting *Direx Israel, Ltd. v. Breakthrough Med. Corp.*, 952 F.2d 802, 808 (4th Cir. 1991)).

the probability of success on the merits increases as the probability of irreparable harm decreases.¹⁹²

5. Seventh Circuit—The Sliding Scale Approach

In the Seventh Circuit a party moving for a preliminary injunction must demonstrate that (1) the case has some likelihood of success on the merits; (2) no adequate remedy at law exists; and (3) the movant will suffer irreparable harm if the injunction is denied.¹⁹³ If the plaintiff satisfies these three factors, then the court also considers the possibility of irreparable harm to the non-moving party if preliminary relief is granted.¹⁹⁴ Finally, the court considers public factors involved in granting or denying the injunction.¹⁹⁵ The court then balances the factors using a sliding scale approach.¹⁹⁶ The more likely the movant is to succeed on the merits, the less the balance of irreparable harms needs to favor the movant's position.¹⁹⁷ By contrast, if the balance of irreparable harms clearly favors the movant, then the court requires a lesser showing on the merits.¹⁹⁸ Under this approach, a movant may need to demonstrate only a "better than negligible chance of success on the merits."¹⁹⁹

6. Ninth Circuit

In the Ninth Circuit, a plaintiff seeking a preliminary injunction must meet one of two tests.²⁰⁰ Under the first test, a trial court may issue a preliminary injunction if the court finds that: (1) the plaintiff will suffer irreparable injury if the injunction is not granted; (2) the plaintiff will probably prevail on the merits; (3) the balance of harms favors the plaintiff; and (4) granting the

192. See *Blackwelder*, 550 F.2d at 195 (discussing the standard for a preliminary injunction).

193. See *Ty, Inc. v. Jones Group, Inc.*, 237 F.3d 891, 895–96 (7th Cir. 2001) (listing the factors for granting a preliminary injunction).

194. *Id.* at 895

195. *Id.*

196. *Id.*

197. *Id.*

198. *Id.* at 895–96.

199. *Id.* at 896 (quoting the magistrate judge's findings).

200. See *Stanley v. Univ. of S. Cal.*, 13 F.3d 1313, 1319 (9th Cir. 1994) (stating the Ninth Circuit's standard for granting a preliminary injunction); *Martin v. Int'l Olympic Comm.*, 740 F.2d 670, 674–75 (9th Cir. 1984) (same).

injunction is in the public interest.²⁰¹ Under the second test, a trial court may issue an injunction if the plaintiff demonstrates either a combination of probable success on the merits and the possibility of irreparable injury, or that serious questions on the merits are raised and the balance of hardships tips sharply in the plaintiff's favor.²⁰² Finally, the Ninth Circuit discourages preliminary relief that goes beyond maintaining the status quo.²⁰³

C. Problems with the Merit-Based Approach When a Party Wins a Preliminary Injunction

As the above summary indicates, a preliminary injunction may involve varying degrees of recognition on the merits.²⁰⁴ If courts require a showing on the merits for prevailing party status and make the threshold showing lower than a full trial on the merits, courts will have difficulty determining when the varying standard for obtaining a preliminary injunction satisfies the threshold for prevailing party status. Courts can remedy this problem with several possible solutions, but each is problematic.

One solution is to rule, as the Fourth Circuit did in *Smyth*, that winning a preliminary injunction is never sufficient for prevailing party status.²⁰⁵ Such a ruling, however, prevents a plaintiff from recovering attorney's fees even when the plaintiff wins a preliminary injunction, demonstrates a meritorious claim, and obtains its desired result.²⁰⁶ Many preliminary injunctions, particularly in trademark cases or in cases where the court consolidates the injunction and the trial on the merits, are the end of litigation.²⁰⁷ An absolute bar against awarding attorney's fees based on preliminary injunctions punishes plaintiffs with strong suits simply because further litigation was unnecessary.

201. See *Stanley*, 13 F.3d at 1319 (stating the Ninth Circuit's standard for granting a preliminary injunction).

202. See *id.* (stating the standard for a preliminary injunction).

203. See *id.* (stating the standard for a preliminary injunction); see also *Lee*, *supra* note 26, at 115 (discussing the Ninth Circuit's heightened standard for preliminary injunctions when the movant seeks to upset the status quo).

204. See *supra* Part IV.B (describing the standards across the circuits for preliminary injunctions).

205. See *Smyth v. Rivero*, 282 F.3d 268, 277 (4th Cir. 2002) (finding that a preliminary injunction does not involve enough recognition on the merits to warrant prevailing party status), *cert. denied*, 537 U.S. 825 (2002); see also *supra* Part III.A (discussing *Smyth*).

206. See *Smyth*, 282 F.3d at 277 (denying prevailing party status to a party that won a preliminary injunction and obtained its desired result).

207. See FED. R. CIV. P. 65(2) (discussing consolidation of a preliminary injunction hearing with a trial on the merits); see also *Denlow*, *supra* note 171, at 9–10 (discussing the considerations involved in deciding to pursue a preliminary injunction).

An alternative to the absolute bar is to require the trial court to make a specific finding on the likelihood of success on the merits when a plaintiff seeks a preliminary injunction and attorney's fees. Under such an approach, prevailing party status would be available to a plaintiff that obtained its desired result by virtue of a preliminary injunction and received a district court's finding that the plaintiff demonstrated the requisite likelihood of success on the merits (for example, a substantial likelihood of success on the merits).²⁰⁸ In jurisdictions that require a substantial likelihood of success on the merits to win a preliminary injunction, no additional finding would be necessary; obtaining a preliminary injunction would necessarily demonstrate the requisite showing on the merits.²⁰⁹ By contrast, a jurisdiction that grants preliminary injunctions with a showing on the merits below the requisite showing could grant a preliminary injunction but deny prevailing party status because the plaintiff made an insufficient showing on the merits.²¹⁰

To illustrate this last point, imagine that the requisite showing on the merits for prevailing party status is deemed to be a substantial likelihood of success on the merits.²¹¹ Imagine further that a plaintiff seeks a preliminary injunction in the Seventh Circuit, where a preliminary injunction can be granted with a showing of "some likelihood of success on the merits."²¹² If a trial court in the Seventh Circuit finds that the plaintiff demonstrates some likelihood of success on the merits, but fails to demonstrate a substantial likelihood of success on the merits, the court would be justified in granting the preliminary injunction and refusing prevailing party status.²¹³

208. *Cf. Smyth*, 282 F.3d at 277 (finding that preliminary injunctions do not constitute enough judicial recognition on the merits for prevailing party status).

209. *Cf. Al-Fayed v. CIA*, 254 F.3d 300, 303 (D.C. Cir. 2001) (requiring a substantial likelihood of success on the merits for a preliminary injunction in the D.C. Circuit).

210. *Cf. Zervos v. Verizon N.Y., Inc.*, 252 F.3d 163, 172 (2d Cir. 2001) (requiring sufficiently serious questions on the merits); *Ty, Inc. v. Jones Group, Inc.*, 237 F.3d 891, 895 (7th Cir. 2001) (requiring better than negligible chance of success on the merits); *Adams v. Freedom Forge Corp.*, 204 F.3d 475, 484 (3d Cir. 2000) (requiring a likelihood of success on the merits); *Brandeis Mach. and Supply Co. v. Barber-Greene Co.*, 503 F.2d 503, 505 (6th Cir. 1974) (*per curiam*) (requiring a fair question going to the merits for grant of a preliminary injunction); *Robinswood Comm. Club v. Volpe*, 506 F.2d 1366, 1368 (9th Cir. 1974) (requiring a strong likelihood or a reasonable certainty of success on the merits to make them sufficient grounds for litigation or a likelihood of success on the merits).

211. I selected "a substantial likelihood of success" simply for the purpose of illustration. The arbitrariness of this selection highlights a major drawback of the merit-based approach for determining prevailing party status. *See infra* notes 214–18 and accompanying text (discussing the drawbacks of the merit-based approach).

212. *See Ty, Inc. v. Jones Group, Inc.*, 237 F.3d 891, 895 (7th Cir. 2001) (listing the factors for granting a preliminary injunction).

213. *See supra* notes 193–99 and accompanying text (describing the Seventh Circuit's

Requiring the trial court to make a specific finding on the merits is problematic for several reasons. First, asking trial courts to make an additional finding will inevitably require more time because a specific finding on the merits requires a more thorough inquiry into the merits. In addition to consuming judicial resources, the inquiry could delay the ultimate grant of the preliminary injunction, which may cause additional injury to the movant, a party that is likely faced with exigent circumstances.²¹⁴ Furthermore, regardless of any additional inquiry the trial court makes, any findings on the merits will be necessarily speculative.²¹⁵ A likelihood of success on the merits is simply not the same as success on the merits.²¹⁶ A trial judge cannot always know the strength of a plaintiff's case without the benefit of a trial.²¹⁷ Finally, any threshold requirement is arbitrary; nothing in the prevailing party statutes suggests what the threshold should be, and no particular threshold is more logical than another.²¹⁸

D. Means-Based Analysis: Obtaining Relief from a Court Order

As demonstrated above, the merit-based approach is problematic as applied to preliminary injunctions.²¹⁹ Rather than outright denying attorney's

standard for granting preliminary injunctions).

214. See, e.g., *Leary v. Daeschner*, 228 F.3d 729, 736 (6th Cir. 2000) (recognizing exigent circumstances for plaintiff seeking a preliminary injunction); *Reynolds v. Int'l Amateur Athletic Fed'n*, No. 92-3596, 1992 WL 157545, at *1 (6th Cir. Jul. 19, 1992) (unpublished table decision) (same); *Am. Greetings Corp. v. Dan-Dee Imps., Inc.*, 807 F.2d 1136, 1147 (1986) (recognizing that preliminary injunctions frequently involve exigent circumstances); *Ideal Toy Corp. v. Plawner Toy Mfg. Corp.*, 685 F.2d 78, 84 (3d Cir. 1982) (same).

215. See *Smyth v. Rivero*, 282 F.3d 268, 277 (4th Cir. 2002) (deeming preliminary injunctions an insufficient basis for prevailing party status because any recognition on the merits is speculative), *cert. denied*, 537 U.S. 825 (2002); *MicroStrategy, Inc. v. Motorola, Inc.*, 245 F.3d 335, 339 (4th Cir. 2001) (noting that preliminary injunctions involve speculative consideration of the merits).

216. See *Smyth*, 282 F.3d at 276 (finding a preliminary injunction to be an abbreviated discussion of the merits); *MicroStrategy*, 245 F.3d at 339 (same).

217. See *Smyth*, 282 F.3d at 276 (describing preliminary injunctions as an abbreviated discussion of the merits); *MicroStrategy*, 245 F.3d at 339 (same); cf. 11A CHARLES ALAN WRIGHT ET AL., *FED. PRAC. & PROC.: CIVIL 2D* § 2948.3 (1995) ("All courts agree that plaintiff must present a prima facie case but need not show that he is certain to win.").

218. See, e.g., *The Civil Rights Attorney's Fees Award Act of 1976*, 42 U.S.C. § 1988(b) (2000) (allowing attorney's fees for a prevailing party); *Multiemployer Pension Plan Amendments Act of 1980*, 29 U.S.C. § 1451(e) (2000) (same); *Fair Housing Act*, 42 U.S.C. § 3613(c)(2) (2000) (same).

219. See *Smyth*, 282 F.3d at 277 (refusing prevailing party status based on a preliminary injunction).

fees for preliminary injunctions, trial courts should analyze prevailing party status based on the means by which a plaintiff obtains its desired result.²²⁰ A means-based approach grants prevailing party status when a party obtains a court order and the court order directly grants the party's desired result.²²¹ Such an approach is consistent with *Buckhannon*, is easily administrable, and reconciles the circuit split created by *Smyth* and *Watson*.

Consistent with *Buckhannon*, courts can grant prevailing party status based on a preliminary injunction by focusing on the means by which the party obtained its desired result.²²² As discussed above, *Buckhannon* overruled the catalyst theory but did not expressly prohibit attorney's fees for a party that obtained its desired result through a preliminary injunction.²²³ In *Buckhannon*, the plaintiffs argued that they were entitled to attorney's fees because their lawsuit brought about their desired result.²²⁴ The plaintiffs did not obtain the result by court order, but instead obtained their desired result because their lawsuit was a catalyst for a legislative response.²²⁵ Thus, the plaintiffs relied upon the catalyst theory.²²⁶

A party that claims to be a prevailing party based on a preliminary injunction is not always relying on the catalyst theory.²²⁷ If a plaintiff wins a

220. See *Watson v. County of Riverside*, 300 F.3d 1092, 1096 (9th Cir. 2002) (granting prevailing party status because the court order granted the desired relief), *cert. denied*, 123 S. Ct. 1574 (2003).

221. Whether accepting or denying the catalyst theory, courts have always required that a prevailing party obtain its desired result. See, e.g., *G.M. v. New Britain Bd. of Educ.*, 173 F.3d 77, 81–83 (2d Cir. 1999) (granting prevailing party status to plaintiff that obtained its desired result); *Ruocchhio v. United Transp. Union, Local 60*, 181 F.3d 376, 388 (3d Cir. 1999) (same); *Metro. Pittsburgh Crusade for Voters v. City of Pittsburgh*, 964 F.2d 244, 250 (3d Cir. 1992) (same); *Shepard v. Sullivan*, 898 F.2d 1267, 1271 (7th Cir. 1990) (same). When a plaintiff relies on an interim order, it may be difficult for courts to determine when a party has obtained its desired result because an interim order can be supplanted by a later ruling. For a discussion of these difficulties, see *infra* Part IV.E (discussing special concerns under means-based analysis when a party obtains its desired result by an interim order).

222. See *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Human Res.*, 532 U.S. 598, 604 (2001) (discussing court-ordered consent decrees and the requirements for prevailing party status).

223. See *id.* at 605 (overruling the catalyst theory).

224. See *id.* at 601 (explaining the procedural history).

225. See *id.* (discussing the background facts).

226. See *id.* at 601 (explaining plaintiff's argument); see also *Institutionalized Juveniles v. Sec'y of Pub. Welfare*, 758 F.2d 897, 910–11 (3d Cir. 1985) (awarding attorney's fees based on the catalyst theory); *Gerena-Valentin v. Koch*, 739 F.2d 755, 758–59 (2d Cir. 1984) (same); *Robinson v. Kimbrough*, 652 F.2d 458, 465–66 (5th Cir. 1981) (acknowledging that attorney's fees can be awarded based on the catalyst theory).

227. See *Watson v. County of Riverside*, 300 F.3d 1092, 1096 (9th Cir. 2002) (noting that the award of attorney's fees for a party that wins a preliminary injunction does not depend on

preliminary injunction, and because of the defendant's compliance with the injunction the plaintiff obtains its desired result, the case does not implicate the catalyst theory.²²⁸ The plaintiff obtained its desired result, not because its lawsuit was a catalyst for the change in conduct, but because of a court order.²²⁹ By contrast, if a plaintiff wins a preliminary injunction and, subsequently, the defendant voluntarily changes its conduct, reaches a settlement agreement, or some third party (like a legislature) forces the desired change, the plaintiff must depend on the catalyst theory despite having won a preliminary injunction.²³⁰ The plaintiff won a preliminary injunction, and the lawsuit engendered the desired result, but the court did not grant it.²³¹

Smyth and *Watson* illustrate the above distinction. In *Smyth*, the plaintiffs relied on the catalyst theory, and in *Watson* they did not.²³² In *Watson*, the police department did not voluntarily exclude evidence of the police report at the administrative hearing; the police department excluded the evidence because the preliminary injunction required them to do so.²³³ By contrast, in *Smyth*, the action became moot not because the preliminary injunction granted plaintiffs the full relief they sought, but because their lawsuit led the commissioner to obtain a waiver from HHS and redefine the paternity policy, thereby exempting the plaintiffs.²³⁴ Thus, in *Smyth*, the plaintiffs won a

the catalyst theory), *cert. denied*, 123 S. Ct. 1574 (2003).

228. *See id.* (noting that plaintiff's recovery of attorney's fees did not depend on the catalyst theory).

229. *See id.* ("In this case, the County was prohibited from introducing Watson's report at the termination hearing for one reason and for one reason only: because Judge Timlin said so.").

230. *See Smyth v. Rivero*, 282 F.3d 268, 277 (4th Cir. 2002) (denying prevailing party status based on a preliminary injunction mooted by defendant's actions), *cert. denied*, 537 U.S. 825 (2002); *Taylor v. City of Fort Lauderdale*, 810 F.2d 1551, 1555-58 (11th Cir. 1987) (awarding attorney's fees for obtaining a preliminary injunction that became moot after a change in a local ordinance); *Rose v. Nebraska*, 748 F.2d 1258, 1264 (8th Cir. 1984) (awarding attorney's fees for obtaining a preliminary injunction that became moot after the legislature amended the state statute); *Williams v. Alioto*, 625 F.2d 845, 847-48 (9th Cir. 1980) (*per curiam*) (awarding attorney's fees after a preliminary injunction became moot because the police abandoned the controversial policy).

231. *See Smyth*, 282 F.3d at 273 (considering a preliminary injunction that became moot); *Taylor*, 810 F.2d at 1555 (same); *Rose*, 748 F.2d at 1260 (same); *Williams*, 625 F.2d at 847 (same).

232. *Compare Smyth*, 282 F.3d at 277 (refusing to grant prevailing party status to a party that won a preliminary injunction) *with Watson*, 300 F.3d at 1096 (granting prevailing party status to a party that won a preliminary injunction).

233. *See Watson v. County of Riverside*, 300 F.3d 1092, 1096 (9th Cir. 2002) (finding that plaintiff's relief stemmed from a court order), *cert. denied*, 123 S. Ct. 1574 (2003).

234. *See Smyth*, 282 F.3d at 273 (describing the background of the litigation).

preliminary injunction but obtained their desired result, not by court order, but because their lawsuit was a catalyst for the desired change.²³⁵

A means-based analysis for determining prevailing party status is consistent with *Buckhannon* because it denies attorney's fees to parties that rely on the catalyst theory.²³⁶ The preliminary injunction serves as *Buckhannon's* requisite judicial imprimatur, and the party that obtained its desired result has, as *Buckhannon* requires, obtained a "material alteration of the legal relationship of the parties necessary to permit an award of attorney's fees."²³⁷ If, however, a party wins a preliminary injunction but ultimately obtains its desired result by some external circumstance, i.e. through the catalyst theory, then the party has not obtained the requisite judicial imprimatur. Therefore, a means-based approach makes prevailing party status inappropriate when external circumstances, rather than a court order, engender the desired result.²³⁸

For similar reasons, a means-based approach reconciles *Smyth* and *Watson*. Under a means-based approach, the *Watson* court correctly granted prevailing party status, and the *Smyth* court correctly denied it. In *Watson*, the plaintiff's desired result flowed directly from the preliminary injunction; the plaintiff sought to keep evidence out of the administrative hearing, and the preliminary injunction barred the evidence from the administrative hearing.²³⁹ Thus, the plaintiff won a preliminary injunction and the preliminary injunction directly caused the plaintiff's desired result.²⁴⁰ Under a means-based approach, prevailing party status was appropriate. In *Smyth*, however, the plaintiffs' suit was a catalyst for the desired relief; the plaintiffs won a preliminary injunction

235. See *id.* (describing the facts).

236. See *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Human Res.*, 532 U.S. 598, 605 (2001) (overruling the catalyst theory); see also *supra* notes 227–35 and accompanying text (distinguishing parties that win preliminary injunctions and rely on the catalyst theory from parties that win preliminary injunctions and do not rely on the catalyst theory). A means-based analysis for granting prevailing party status is also consistent with *Buckhannon's* recognition that court-ordered consent decrees are sufficient for prevailing party status. For a discussion of *Buckhannon's* recognition of court-ordered consent decrees, see *supra* Part IV.A (comparing means- and merit-based methods of analyzing prevailing party status).

237. *Buckhannon*, 532 U.S. at 604 (citing *Tex. State Teachers Ass'n v. Garland Indep. Sch. Dist.*, 489 U.S. 782 (1989)); see also *Tex. State Teachers Ass'n v. Garland Indep. Sch. Dist.*, 489 U.S. 782, 792 (1989) (recognizing consent decrees as a valid basis for prevailing party status).

238. See *supra* notes 227–35 and accompanying text (distinguishing preliminary injunctions that rely on the catalyst theory from preliminary injunctions that do not). For a discussion of the catalyst theory, see *supra* Part II.A (discussing the catalyst theory).

239. See *Watson v. County of Riverside*, 300 F.3d 1092, 1096 (finding that the preliminary injunction caused the exclusion of the written report), *cert. denied*, 123 S. Ct. 1574 (2003).

240. See *supra* Part IV.D (describing the means-based test for prevailing party status).

but obtained their relief from a private settlement with the Commissioner.²⁴¹ Thus, the *Smyth* plaintiffs fail under a means-based test.

Finally, a means-based approach is consistent with the definition of prevailing party in *Black's Law Dictionary*. *Black's* defines prevailing party as "[a] party in whose favor a judgment is rendered, regardless of the amount of damages awarded."²⁴² In deciding *Buckhannon*, the Supreme Court relied on the above definition and noted that the catalyst theory was inconsistent with *Black's* definition of a prevailing party because the catalyst theory does not require that a plaintiff obtain a favorable judgment.²⁴³ The means-based approach requires that a party's relief stem from a court order and thus necessitates, consistent with *Black's Law Dictionary*, a favorable judgment from a court.

E. Interim Relief and a Means-Based Approach

As *Smyth* demonstrates, winning a preliminary injunction will not necessarily warrant prevailing party status under a means-based approach because the preliminary injunction might not be a direct cause of the desired result.²⁴⁴ A further difficulty for plaintiffs relying on a preliminary injunction for prevailing party status is demonstrating when such plaintiffs obtained their desired result. Frequently, a preliminary injunction constitutes only interim relief.²⁴⁵ If a party wins a preliminary injunction and subsequently wins a permanent injunction, the court should grant attorney's fees based on the permanent, not the preliminary, injunction.²⁴⁶ Furthermore, if a party wins a

241. See *Smyth v. Rivero*, 282 F.3d 268, 273 (4th Cir. 2002) (stating the facts), *cert. denied*, 537 U.S. 825 (2002).

242. BLACK'S LAW DICTIONARY 1145 (7th ed. 1999).

243. See *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Human Res.*, 532 U.S. 598, 605 (2001) (finding the catalyst theory inconsistent with the definition of "prevailing party" in *Black's Law Dictionary*).

244. See *McCafferty v. Local 254, Serv. Employees Int'l. Union*, 186 F.3d 52, 63 n.7 (1st Cir. 1999) (denying attorney fees to party that won a preliminary injunction because of the disparity between what plaintiff sought and what plaintiff received); see also *supra* notes 227–35 and accompanying text (distinguishing preliminary injunctions that provide the desired result from preliminary injunctions that do not).

245. See *Planned Parenthood of S. Ariz. v. Lawall*, 307 F.3d 783, 784–85 (9th Cir. 2002) (granting a preliminary injunction but denying a permanent injunction); *Idaho Watersheds Project v. Hahn*, 307 F.3d 815, 816 (9th Cir. 2002) (denying a preliminary injunction but granting a permanent injunction); *Reynolds v. Roberts*, 207 F.3d 1288, 1292 (11th Cir. 2000) (granting a preliminary injunction but denying a permanent injunction).

246. See *Patsy's Brand, Inc. v. I.O.B. Realty, Inc.*, 317 F.3d 209, 221 (2d Cir. 2003) (basing prevailing party status on a permanent injunction when plaintiff had previously won a

preliminary injunction, and the court ultimately denies the permanent injunction, then the party did not obtain its desired result, did not prevail, and should not receive attorney's fees.²⁴⁷ A preliminary injunction is not a suitable basis for prevailing party status when a later decision or dissolution will supplant the preliminary injunction.²⁴⁸ Thus, a court should base prevailing party status on a preliminary injunction only when the court determines that the underlying action is moot and that a further ruling in the same case will not jeopardize the outcome.²⁴⁹

F. The Defendant's Ability to Voluntarily Moot the Action

Perhaps the biggest drawback of a means-based approach is that the approach does not prevent defendants from voluntarily mooting an action to avoid paying the plaintiff's attorney's fees.²⁵⁰ Defendants could lose a preliminary injunction, reason their odds of losing a permanent injunction are high, and elect to desist in their offensive conduct, thereby mooting the action and avoiding a judgment for attorney's fees.²⁵¹ In such situations, attorney's fees would be inappropriate under a means-based approach because the desired result will have stemmed from the defendant's voluntary change in conduct and not from the preliminary injunction.²⁵²

preliminary injunction); *Tamko Roofing Prods., Inc. v. Ideal Roofing Co.*, 282 F.3d 23, 30 (1st Cir. 2002) (same).

247. See *LaRouche v. Kezer*, 20 F.3d 68, 69 (2d Cir. 1994) (denying prevailing party status to a party that won a preliminary injunction but lost an appeal on the merits); *Christopher P. v. Marcus*, 915 F.2d 794, 804–05 (2d Cir. 1990) (ruling that plaintiff who won a preliminary injunction to maintain the status quo was not a prevailing party when plaintiff lost its appeal on the merits).

248. See, e.g., *Patsy's Brand*, 317 F.3d at 221 (basing prevailing party status on a permanent injunction when plaintiff had previously won a preliminary injunction); *Tamko Roofing Prods.*, 282 F.3d at 30–31 (same); *LaRouche*, 20 F.3d at 69 (denying prevailing party status to a party that won a preliminary injunction but lost an appeal on the merits); *Christopher P.*, 915 F.2d at 804–05 (ruling that a plaintiff who won a preliminary injunction to maintain the status quo was not a prevailing party when plaintiff ultimately lost on the merits).

249. The basic test for mootness is whether the relief sought would, if decided in the plaintiff's favor, make a difference to the legal interest of the parties. See *Markva v. Haveman*, 317 F.3d 547, 557 (6th Cir. 2003) (defining the test for mootness); *Green v. Nevers*, 196 F.3d 627, 632 (6th Cir. 1999) (same); *Garcia v. Lawn*, 805 F.2d 1400, 1402 (9th Cir. 1986) (same).

250. See *supra* Part II.D (discussing criticisms of *Buckhannon*).

251. See *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Human Res.*, 532 U.S. 598, 622–23 (2001) (Ginsburg, J., dissenting) (criticizing the majority opinion).

252. See *supra* Part IV.D (discussing the means-based approach to prevailing party status).

The defendant's ability to voluntarily moot an action is one of the most common criticisms of *Buckhannon*.²⁵³ This ability can lead to a denial of attorney's fees for plaintiffs, not because the plaintiffs' cases lack merit, but simply because the defendant mooted the action before the court could make a final ruling.²⁵⁴ Furthermore, the ability creates an incentive for plaintiffs to add a claim for damages simply to prevent the defendant from voluntarily mooting the action.²⁵⁵ Relying on a means-based analysis does not obviate these concerns.

The Supreme Court could prevent defendants from voluntarily mooting an action by overruling *Buckhannon* and reinstating the catalyst theory. Under the catalyst theory, a plaintiff would recover attorney's fees if the defendant voluntarily changed its conduct, provided the change in conduct was induced by the lawsuit.²⁵⁶ Overruling *Buckhannon* would, however, reinstate the drawbacks that led the Supreme Court to overrule the catalyst theory. Most notably, plaintiffs would be able to recover attorney's fees without any judicial consideration of their claim.²⁵⁷

Courts could more effectively prevent defendants from voluntarily mooting actions by refining the means-based approach with a limited version of the merit-based approach. In general, prevailing party status would be appropriate only under the means-based approach. Courts could, however, allow attorney's fees to a party when (1) the party wins a preliminary injunction, (2) the defendant voluntarily moots the action, and (3) the trial judge determines that the plaintiff made a sufficient showing on the merits. This approach addresses the Supreme Court's concerns in *Buckhannon*—a party could not be a prevailing party without a judicial ruling and a judicial finding that the suit had sufficient merit—and limits the defendant's ability to block attorney's fees by voluntarily changing its conduct.

253. See *Dunn*, *supra* note 76, at 1 (describing strategies to circumnavigate *Buckhannon*).

254. See *Buckhannon*, 532 U.S. at 622–23 (Ginsburg, J., dissenting) (criticizing the effect of a majority decision).

255. See *Dunn*, *supra* note 76, at 1 (describing strategies to circumnavigate *Buckhannon*).

256. See, e.g., *Institutionalized Juveniles v. Sec'y of Pub. Welfare*, 758 F.2d 897, 910–11 (3d Cir. 1985) (applying the catalyst theory); *Gerena-Valentin v. Koch*, 739 F.2d 755, 758–59 (2d Cir. 1984) (same); *Robinson v. Kimbrough*, 652 F.2d 458, 465 (5th Cir. 1981) (same); *Bonnes v. Long*, 599 F.2d 1316, 1319 (4th Cir. 1979) (same), *overruled by S-1 and S-2 v. State Bd. of Educ.*, 21 F.3d 49 (4th Cir. 1994) (en banc); *Nadeau v. Helgemoe*, 581 F.2d 275, 279–80 (1st Cir. 1978) (same), *called into doubt by Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Human Res.*, 532 U.S. 598 (2001); see also *supra* Part II.A (discussing the catalyst theory).

257. See *Buckhannon Bd. & Care Home, Inc., v. W. Va. Dep't of Health & Human Res.*, 532 U.S. 598, 605 (2001) (overruling the catalyst theory).

However, reliance—even on a limited merit-based approach—does involve the drawbacks discussed above regarding the merit-based approach.²⁵⁸ The judicial finding on the merits would be speculative because the judge would not have the benefit of a full trial, judges would have to make additional findings, and any threshold established for whether the party demonstrated sufficient merits would necessarily be arbitrary.²⁵⁹ These concerns, however, are less troublesome if courts follow the merit-based approach only when a defendant voluntarily changes its conduct after the plaintiff wins a preliminary injunction and demonstrates sufficient merits. In such a situation, the need to prevent the defendant from voluntarily mooting an action outweighs the difficulties inherent in a merit-based approach.

V. Conclusion

Buckhannon overruled the catalyst theory and required a judicial imprimatur for prevailing party status.²⁶⁰ It is unclear from *Buckhannon* whether the imprimatur is satisfied by judicial recognition on the *merits* of the plaintiff's claim, or whether the imprimatur is satisfied when the plaintiff obtains its desired result by *means* of a court order. A close reading of *Buckhannon* and various policy considerations favor the means-based approach.²⁶¹ Under a means-based approach, courts should grant prevailing party status when a party obtains a court order and the court order grants the party's desired relief.²⁶² If the relief is in the form of a preliminary injunction, the court must also be convinced that the action is moot and the relief will not be supplanted or dissolved by subsequent judicial action.²⁶³

Despite its advantages over a merit-based approach, the means-based approach does not prevent defendants from voluntarily mooting an action to avoid paying the plaintiff's attorney's fees.²⁶⁴ A court can negate this power by awarding attorney's fees under a merit-based approach when a plaintiff (1) wins a preliminary injunction, in so doing, (2) demonstrates a sufficient likelihood of success on the merits, and (3) the defendant moots the lawsuit by

258. See *supra* Part IV.C (discussing the drawbacks to the merit-based approach).

259. See *supra* Part IV.C (discussing the drawbacks to the merit-based approach).

260. See *Buckhannon*, 532 U.S. at 605 (overruling the catalyst theory).

261. See *supra* Part IV (comparing the means and merit-based approaches for granting prevailing party status).

262. See *supra* Part IV.D (analyzing the means-based approach).

263. See *supra* Part IV.E (discussing the interim nature of preliminary injunctions).

264. See *supra* Part IV.F (addressing defendant's ability to voluntarily moot an action).

voluntarily changing its conduct.²⁶⁵ Thus, a plaintiff receives the "necessary judicial imprimatur" when the plaintiff obtains its desired result by a court order, or in limited circumstances, when the plaintiff obtains a court order that involves sufficient recognition on the merits of the plaintiff's claim.

265. See *supra* Part IV.F (discussing defendant's ability to voluntarily moot an action).