

## COMMENT

### The Tarnished Golden Rule: The Corrosive Effect of Federal Prevailing-Party Standards on State Reciprocal-Fee Statutes

#### INTRODUCTION

It may have been with slight confusion that Asdrubal Alfaro read the foreclosure complaint filed against him in July 2012. An entity completely separate from the one to which he sent his monthly mortgage payments filed this case. So Mr. Alfaro called a longtime friend and attorney to help him save his home. With the representation of his friend, Mr. Alfaro mounted a successful defense. Mr. Alfaro's attorney had noticed that the plaintiff bank, which years ago claimed to have purchased the debt from the original mortgagee, did not have the paperwork necessary to prove that it owned the relevant debt. On the very day that Mr. Alfaro's attorney pressed this standing argument in objection to summary judgment, the plaintiff withdrew its summary judgment motion. Mere days later, the plaintiff withdrew the entire foreclosure action.<sup>1</sup> Having successfully

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1. In addition to *Alfaro*, many of the examples in this Comment come from mortgage foreclosure cases, for several reasons. First, the authors are recent alumni of the Mortgage Foreclosure Litigation Clinic, part of the Jerome N. Frank Legal Services Organization at Yale Law School. Our experience in mortgage foreclosure cases informs our understanding of this issue. Second, foreclosures are particularly high-stakes, with large amounts of money at issue. This makes fee award methods particularly important in these cases. Third, because the amount of money at issue in these cases tends to be particularly large, lawyers are especially likely to be involved. Paula Hannaford-Agor et al., *Civil Justice Initiative: The Landscape of Civil Litigation in State Courts*, NAT'L CTR. ST. CTS. v-vi (2015), <http://www.ncsc.org/~media/Files/PDF/Research/CivilJusticeReport-2015.ashx> [<http://perma.cc/L2VZ-LEUG>] (noting that defendants are less likely to be represented in small claims court because of the modest amount of money at issue). The greater involvement of counsel leads to more developed case law on

kept Mr. Alfaro in his home without giving anything in return, his lawyer moved for attorney’s fees. Based on a narrow reading of Connecticut’s reciprocal-fee statute,<sup>2</sup> the trial and appellate courts denied Mr. Alfaro’s motion. Days before this Comment went to press, however, the Connecticut Supreme Court reversed. It held that when a defendant seeks attorney’s fees in a consumer case, “after a termination of proceedings that in some way favors the defendant, there exists a rebuttable presumption that the defendant is entitled to such fees.”<sup>3</sup> Unfortunately, many consumer-defendants do not achieve a similar result; instead, they carry the burden of their attorney’s fees, despite being the victor in court.

America’s state trial courts have been deluged with a flood of shoddy consumer debt actions. Although swelling consumer debt explains some of this overflow,<sup>4</sup> another major factor is the rising tide of debt buyers, who purchase unpaid debts from consumers’ original creditors at a significant discount and then bring debt-collection litigation to compel repayment.<sup>5</sup> Unlike the original creditor, who is imagined to have “sufficient economic and legal incentives to good behavior”<sup>6</sup> in light of its reputation as a debt originator, debt buyers and their attorneys are intent on one goal: forcing consumers to cough up. In their single-minded zeal to collect, debt buyers regularly seek to collect debts that consumers may have no legal obligation to pay, a task for which debt buyers receive

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the attorney’s fee issue. *Cf. id.* at vi (predicting that the lack of counsel will reduce the number of common-law precedents).

2. CONN. GEN. STAT. ANN. § 42-150bb (West 2012).
3. Conn. Hous. Fin. Auth. v. Alfaro, No. SC 19720, 2018 WL 576698, at \*8 (Conn. Jan. 26, 2018).
4. *See Consumer Debt - Are Credit Cards Bankrupting Americans: Hearing Before the Subcomm. on Commercial & Admin. Law of the H. Comm. on the Judiciary*, 111th Cong. 3 (2009) (statement of Adam J. Levitin, Associate Professor of Law, Georgetown University Law Center), <http://scholarship.law.georgetown.edu/cgi/viewcontent.cgi?article=1049&context=cong> [<http://perma.cc/AH8A-LC7W>] (arguing that skyrocketing consumer debt primarily reflects “the deeper economic problems of American families” as “basic costs of living have increased dramatically in recent decades, while incomes have remained stagnant”); *infra* notes 22-23 and accompanying text.
5. *See Repairing a Broken System: Protecting Consumers in Debt Collection Litigation and Arbitration*, FED. TRADE COMMISSION 5 (July 2010) [hereinafter *Repairing a Broken System*], <http://www.ftc.gov/sites/default/files/documents/reports/federal-trade-commission-bureau-consumer-protection-staff-report-repairing-broken-system-protecting/debtcollectionreport.pdf> [<http://perma.cc/T8UR-CGQP>] (“[T]he debt-buying industry has resulted in increases in collection lawsuits because entities that purchase delinquent debt often use collection law firms as their primary tool for recovery.”) (quoting U.S. GOV’T ACCOUNTABILITY OFF., GAO-09-748, CREDIT CARDS: FAIR DEBT COLLECTION PRACTICES ACT COULD BETTER REFLECT THE EVOLVING DEBT COLLECTION MARKETPLACE AND USE OF TECHNOLOGY 41 (2009), <http://www.gao.gov/new.items/do9748.pdf> [<http://perma.cc/CZJ2-VXPM>]).
6. *Henson v. Santander Consumer USA, Inc.*, 137 S. Ct. 1718, 1724 (2017).

a healthy discount.<sup>7</sup> As a result, whereas original creditors may have worked with defaulting consumers on a repayment plan, debt buyers often bring mass-produced lawsuits that are more likely to lead to collection through intimidation and harassment than to produce favorable judgments.<sup>8</sup> Consumer-defendants are often unable to check these debt collectors' abuses because they are unable to find a publicly funded legal agency with the capacity to take on their case or afford a private attorney to defend them.<sup>9</sup> To ensure that legal protections are observed in this brave new world of debt collection, American consumers should enjoy the same access to legal representation as the plaintiffs that they face.

Some states have pursued this goal through statutes that reciprocate otherwise-unilateral attorney's fee clauses in consumer contracts. Without reciprocal fee-shifting statutes, these clauses would allow only creditors to recover attorney's fees when they prevail. "Reciprocal-fee" statutes motivate attorneys to represent consumers when promising defenses and counterclaims exist.<sup>10</sup> By making attorney's fees available to consumers whenever they successfully prosecute or defend an action, these reciprocal-fee statutes make it easier for consumers to find willing legal representation. Connecticut has one such statute, and the authors saw it in action while representing Mr. Alfaro.

This Comment examines how Connecticut and other states with reciprocal-fee statutes have defined the threshold that consumer-defendants must pass to be considered a prevailing party entitled to attorney's fees. Our survey of state law reveals three major definitions of what is "successful" or "prevailing" in awarding attorney's fees. All represent deviations from the American Rule, which requires each party to bear its own litigation costs, regardless of who prevails.<sup>11</sup>

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7. See *The Structure and Practices of the Debt Buying Industry*, FED. TRADE COMMISSION 23-24 (Jan. 2013), <http://www.ftc.gov/sites/default/files/documents/reports/structure-and-practices-debt-buying-industry/debtbuyingreport.pdf> [<http://perma.cc/TRG4-LK4Y>] (noting that debt buyers paid on average four cents for each dollar of debt, with less collectible debt being less expensive).
  8. See *infra* note 33 and accompanying text. Debt collection can have a profoundly adverse effect on consumers' physical and mental health. See, e.g., Megan Wachspress et al., Comment, *In Defense of "Free Houses,"* 125 YALE L.J. 1115, 1125-26 & nn.45-46 (2016) (discussing the health consequences of foreclosure actions on community members).
  9. See *infra* notes 37-41 and accompanying text.
  10. See Jeffrey C. Bright, *Unilateral Attorney's Fees Clauses: A Proposal To Shift to the Golden Rule*, 61 DRAKE L. REV. 85, 118 (2012).
  11. The Supreme Court has said that "[t]he American Rule has roots in our common law reaching back to at least the 18th century." *Baker Botts LLP v. ASARCO LLC*, 135 S. Ct. 2158, 2164 (2015) (discussing *Arcambel v. Wiseman*, 3 U.S. (3 Dall.) 306 (1796)). The Court's historical inquiry was less than rigorous—*Arcambel* was a cursory opinion that Justice Story rejected for not stating the correct rule. See Bruce A. Markell, *Loser's Lament: Caulkett and ASARCO*, 35

The first approach is the rigid stance outlined in *Buckhannon Board & Care Home, Inc. v. West Virginia Department of Health and Human Resources*<sup>12</sup>: to prevail, a plaintiff or defendant must secure a judicially sanctioned change in the parties' relationship.<sup>13</sup> The second is the "catalyst theory," which authorizes fees whenever one party's litigation posture causes the other party to pursue the desired change.<sup>14</sup> The third, which we will refer to as the "golden rule," is the most balanced. It recognizes that if the plaintiff does not succeed in its litigation, then the defendant has de facto prevailed and should receive fees.

Of these approaches, the golden rule is the most consistent with the consumer-protection purposes of reciprocal-fee statutes. The Connecticut Supreme Court recognized this when it ruled for Mr. Alfaro.<sup>15</sup> Ultimately, then, advocates should push—and, more importantly, judges should adopt—this Comment's definition of "prevailing party." Part I of this Comment outlines the need for greater consumer representation in the millions of consumer-contract cases filed each year. Part II explains why existing state reciprocal-fee statutes have failed to increase the supply of attorneys engaged in consumer-defense work. In particular, it shows that federal jurisprudence has narrowed the application of fee-shifting statutes generally, and that states have begun to import this restricted interpretation into their reciprocal-fee statutes. Part II corresponds to our findings in the Appendix, which comprehensively account for how states have used federal precedent to interpret their reciprocal-fee statutes. Part III presents a prescrip-

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BANKR. L. LETTER NL 1, 1 (2015). Still, though perhaps not the hoary principle the Court claims, the American Rule is today the default rule nationwide. See John Leubsdorf, *Toward a History of the American Rule on Attorney Fee Recovery*, 47 LAW & CONTEMP. PROBS. 9, 9-10 (1984) (sketching the nonlinear history of the American Rule).

12. 532 U.S. 598 (2001).
13. See *infra* notes 63-73 and accompanying text (discussing the formalist approach adopted by the Supreme Court in *Buckhannon*, and extended by *CRST Van Expedited, Inc. v. EEOC*, 136 S. Ct. 1642 (2016)).
14. See *infra* notes 66-69 and accompanying text (discussing the position of the *Buckhannon* plaintiffs and lower federal courts whose catalyst approach *Buckhannon* rejected).
15. It reasoned that, if its interpretation of the reciprocal-fee statute were too strict, "a commercial party that becomes aware . . . of problems in successfully prosecuting its action[] could simply withdraw the action to avoid paying the attorneys' fees that it has required the consumer to incur. . . . [This] would be wholly inconsistent with the recognized legislative purpose behind [the reciprocal-fee statute]." Conn. Hous. Fin. Auth. v. Alfaro, No. SC 19720, 2018 WL 576698, at \*6 (Conn. Jan. 26, 2018). Instead of endorsing a pure "golden rule" standard, *Alfaro* adopted a rebuttable presumption that a creditor-plaintiff's voluntary withdrawal without obtaining material relief makes the consumer-defendant successful. *Id.* at \*8. The court recognized but declined to address Mr. Alfaro's argument for a pure "golden rule" standard. *Id.* at \*3 n.8.

tion for separating state reciprocal-fee statutes from restrictive federal interpretations, which will aid states that seek to increase legal representation in consumer cases by providing an effective incentive for attorneys to take on defensive cases. We conclude with a brief discussion of how to maximize our prescription's impact.

## I. THE RISING FLOOD OF DEBT-COLLECTION ABUSES AND THE SHRINKING SUPPLY OF CONSUMER ADVOCATES

The need for reciprocal-fee statutes stems from asymmetric access to quality legal representation: creditors, unlike consumers, are no strangers to the courts and do not struggle to find attorneys to represent them.<sup>16</sup> In 2014, for instance, a debt collector was the most litigious civil plaintiff in New York.<sup>17</sup> Industry and consumer groups estimate that debt collection suits filed nationwide number in the millions annually.<sup>18</sup> In seventy-six percent of civil actions, at least one party is self-represented.<sup>19</sup> Almost always, the self-represented party in civil cases is

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16. A recent study estimated that approximately sixty-four percent of the approximately seventeen million civil actions filed in state courts are contract cases, the majority of which concern traditionally consumer-law issues of debt collection, landlord-tenant disputes, or foreclosures. Hannaford-Agor et al., *supra* note 1, at 6 n.36, 18 tbl.3, 19 fig.7. This Comment considers these actions to be consumer contract actions because they affect goods, debts, and services acquired for personal, family, or household use. See, e.g., 15 U.S.C. § 1692a(5) (2012) (defining debt, for purposes of the Fair Debt Collection Practices Act, as debt acquired “primarily for personal, family, or household purposes”); CONN. GEN. STAT. § 42-150bb (2012) (defining consumer contracts as “contracts or leases in which the money, property or service which is the subject of the transaction is primarily for personal, family or household purposes”).
  17. Brian Stauffer, *Rubber Stamp Justice: US Courts, Debt Buying Corporations, and the Poor*, HUM. RTS. WATCH (Jan. 20, 2016), <http://www.hrw.org/report/2016/01/20/rubber-stamp-justice/us-courts-debt-buying-corporations-and-poor> [<http://perma.cc/BYL4-ZDK4>] (defining litigiousness in terms of the number of lawsuits filed).
  18. Maria Aspen, *Courthouse “Rocket Dockets” Give Debt Collectors Edge over Debtors*, AM. BANKER (Feb. 11, 2014, 2:11 PM), <http://www.americanbanker.com/news/courthouse-rocket-dockets-give-debt-collectors-edge-over-debtors> [<http://perma.cc/5VLS-73NA>]; see also Peter A. Holland, *Junk Justice: A Statistical Analysis of 4,400 Lawsuits Filed by Debt Buyers*, 26 LOY. CONSUMER L. REV. 179, 182 (2014) (describing “lawsuits against millions of consumers”); Mary Spector, *Debts, Defaults and Details: Exploring the Impact of Debt Collection Litigation on Consumers and Courts*, 6 VA. L. & BUS. REV. 257, 265 (2011) (“In some jurisdictions, the increase [in debt-collection cases filed] has been explosive: in one jurisdiction a judge reportedly limited one law firm’s filings to no more than 500 new debt-collection cases every two weeks.” (footnote omitted)).
  19. Hannaford-Agor et al., *supra* note 1, at iv. In debt-collection cases, those numbers are often higher. For example, in 2013, ninety-seven percent of debt-collection defendants in New Jersey’s Special Civil Part were unrepresented. Paul Kiel, *So Sue Them: What We’ve Learned About*

the defendant,<sup>20</sup> especially when larger sums of money are on the line. Thus, in millions of state-court actions every year—actions that can mean the difference between financial stability and homelessness<sup>21</sup>—consumers are forced to forgo representation and, likely, any valid defenses they may have.

Meanwhile, the amount of debt held by U.S. consumers has continued to rise, reaching a new peak of \$12.84 trillion in 2017.<sup>22</sup> With debt burdens increasing as wages stagnate, millions of Americans live in negative net worth, where household debt exceeds assets.<sup>23</sup> This rising debt burden is not spread evenly: minority households are more likely to be financially insecure and face adverse judgments in debt-collection lawsuits.<sup>24</sup> Additionally, low-income consumers

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*the Debt Collection Lawsuit Machine*, PROPUBLICA (May 5, 2016, 7:57 AM EDT), <http://www.propublica.org/article/so-sue-them-what-weve-learned-about-the-debt-collection-lawsuit-machine> [<http://perma.cc/9G8F-QD3F>].

20. Hannaford-Agor et al., *supra* note 1, at 32 tbl.11 (finding that plaintiffs are represented by attorneys in ninety-two percent of civil cases, while defendants are only represented in twenty-six percent of civil cases).
21. *Foreclosure to Homelessness 2009: The Forgotten Victims of the Subprime Crisis*, NAT'L COALITION FOR HOMELESS ET AL. 5 (2009), <http://www.nationalhomeless.org/advocacy/Foreclosures-to-Homelessness0609.pdf> [<http://perma.cc/2RK5-MCE2>] (reporting, based on survey responses from attorneys, that a median of ten percent and mean of nineteen percent of respondents' clients became homeless following foreclosure within the last twelve months).
22. Research & Statistics Grp., *Quarterly Report on Household Debt and Credit*, FED. RES. BANK OF N.Y. 1 (Aug. 2017), [http://www.newyorkfed.org/medialibrary/interactives/householdcredit/data/pdf/HHDC\\_2017Q2.pdf](http://www.newyorkfed.org/medialibrary/interactives/householdcredit/data/pdf/HHDC_2017Q2.pdf) [<http://perma.cc/HJ23-JL5E>]. Much of this debt (sixty-eight percent) is connected to Americans' housing. *Id.* at 3. In 2014, seventy-seven million Americans were in debt or had owed money at some point. Caroline Ratcliffe et al., *Delinquent Debt in America*, URBAN INST. 7 (July 30, 2014), <http://www.urban.org/sites/default/files/alfresco/publication-pdfs/413191-Delinquent-Debt-in-America.PDF> [<http://perma.cc/JR63-MMSW>].
23. David Bergeron et al., *The Middle-Class Squeeze: A Picture of Stagnant Incomes, Rising Costs, and What We Can Do To Strengthen America's Middle Class*, CTR. AM. PROGRESS 6 (Sept. 2014), <http://cdn.americanprogress.org/wp-content/uploads/2014/09/MiddleClassSqueeze.pdf> [<http://perma.cc/MU2H-XDPP>].
24. See Dedrick Asante-Muhammad et al., *The Road to Zero Wealth: How the Racial Wealth Divide Is Hollowing out America's Middle Class*, PROSPERITY NOW 8 (Sept. 2017), [http://inequality.org/wp-content/uploads/2017/09/The-Road-to-Zero-Wealth\\_FINAL.pdf](http://inequality.org/wp-content/uploads/2017/09/The-Road-to-Zero-Wealth_FINAL.pdf) [<http://perma.cc/8XD7-PW3V>]; Debbie Gruenstein Bocian et al., *Foreclosures by Race and Ethnicity: The Demographics of a Crisis*, CTR. FOR RESPONSIBLE LENDING 1 (June 18, 2010), <http://www.responsiblelending.org/mortgage-lending/research-analysis/foreclosures-by-race-and-ethnicity.pdf> [<http://perma.cc/H377-STDP>] (“Between 2009 and 2012, the updated estimate for [property depreciation in communities of color related to foreclosures for] African Americans is \$194 billion, versus \$193 billion, and the estimate for Latino communities changed from \$180 billion to \$177 billion.”); Ben Henry et al., *Wasted Wealth: How the Wall Street Crash Continues To Stall Economic Recovery and Deepen Racial Inequity in America*, ALLIANCE FOR A JUST SOC'Y 8-9 (May 2013), <http://allianceforajustsociety.org>

are less likely to perceive their financial problems as legal, and less likely to seek professional help due to asymmetrical informational barriers, cost concerns, and time constraints.<sup>25</sup>

As a result, low-income Americans seek professional legal help for only eighteen percent of civil legal issues related to consumer finance.<sup>26</sup> Although consumer finance issues are the second most commonly experienced civil legal problem among low-income Americans, the rate at which legal assistance for these problems is sought remains one of the lowest across practice areas.<sup>27</sup> Compounding this problem is the prevalence of predatory lenders who target vulnerable populations with loans designed to fail.<sup>28</sup> Together, rising debt burdens and predatory lending have made debt collection an increasingly lucrative industry, recovering over thirteen billion dollars in revenue in 2016 against largely unrepresented consumers.<sup>29</sup>

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/wp-content/uploads/2013/05/Wasted.Wealth\_NATIONAL.pdf [http://perma.cc/WGG9-P5YA]; Paul Kiel & Annie Waldman, *The Burden of Debt on Black America*, ATLANTIC (Oct. 9, 2015), <http://www.theatlantic.com/business/archive/2015/10/debt-black-families/409756> [http://perma.cc/UQC8-LHPQ] (finding that the rate of debt-collection judgments was twice as high in mostly black neighborhoods as it was in mostly white neighborhoods, even after controlling for income).

25. *The Justice Gap: Measuring the Unmet Civil Legal Needs of Low-Income Americans*, LEGAL SERVS. CORP. 33-34 (June 2017), <http://www.lsc.gov/sites/default/files/images/TheJusticeGap-FullReport.pdf> [http://perma.cc/XMH9-JV5G].
26. *Id.* at 30.
27. *Id.* at 7, 30 (reporting that consumer finance is the second-most commonly experienced civil legal problem area but the rate at which legal assistance is sought for these problems is the second-lowest).
28. See, e.g., *Bank of Am. Corp. v. City of Miami*, 137 S. Ct. 1296, 1301-02 (2017) (recognizing the discriminatory impact of predatory lending); *Bank of Am., N.A. v. Aubut*, 143 A.3d 638, 658-59 (Conn. App. Ct. 2016) (recognizing a “predatory lending” defense against foreclosure when the loan was “destined to fail from [its] inception,” reasoning that the defense sounds in both fraud and unconscionability). The authors, through their clinical work, are familiar with the widespread predatory lending that led to the wave of foreclosures that precipitated (and has continued since) the 2008 financial crisis. An expert report prepared for the authors’ clients, in a case that settled days before trial, concluded that the clients’ mortgage was made to generate “as much profit as possible before the loan failed, without regard to investors, the [clients’] family or their home. This is the very definition of Predatory Lending and exactly the types of behavior that led to the financial crash of 2006-2007.” Jack Baker, Review, Explanation and Opinion of the Mehmedi Loan for Case No. UWY-CV-09-6001723-S *Bank United, FSB v. Mehmedi, Lirije et al.*, at 16 (Aug. 19, 2016) (on file with the authors).
29. *Midland Funding, LLC v. Johnson*, 137 S. Ct. 1407, 1416 (2017) (Sotomayor, J., dissenting) (citing CONSUMER FIN. PROT. BUREAU, FAIR DEBT COLLECTION PRACTICES ACT: ANNUAL REPORT 8 (2016)).

Perhaps unsurprisingly, this post-recession flood of debt-collection actions has brought a raft of complaints against debt collectors.<sup>30</sup> Between July 2011 and December 2016, the Consumer Financial Protection Bureau (CFPB) processed approximately 285,000 debt-collection complaints, and the Federal Trade Commission processed nearly 900,000 in 2015 alone.<sup>31</sup> A common allegation in these complaints is an attempt to collect “zombie debt,” or debt that consumers are no longer legally required to repay.<sup>32</sup> Zombie debt collectors rely on informational asymmetries and the likelihood that resource-poor consumers cannot afford legal counsel to contest collection of sums to which the collectors have no legal entitlement. Because over ninety percent of consumers fail to appear in small-claims debt-collection actions, many debt buyers’ business models rest on “filing suit and betting that consumers will lack the resources to respond,” resulting in default judgments.<sup>33</sup> Naturally, “most consumers do not know or understand their legal rights with respect to the collection of time-barred debt,” making legal representation all the more crucial.<sup>34</sup>

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30. Brief for Nat’l Ass’n of Consumer Advocates as Amici Curiae Supporting Appellant at 6-10, *Bushnell v. Portfolio Recovery Assocs.*, No. 2D17-0429 (Fla. Dist. Ct. App. Oct. 2, 2017) [hereinafter *Bushnell* Amicus] (reporting the range of abuses perpetrated by debt buyers in debt-collection actions).
31. *Monthly Complaint Report*, CONSUMER FIN. PROT. BUREAU 11 (Dec. 2016), [http://files.consumerfinance.gov/f/documents/201612\\_cfpb\\_MonthlyComplaintReport.pdf](http://files.consumerfinance.gov/f/documents/201612_cfpb_MonthlyComplaintReport.pdf) [<http://perma.cc/Q3YM-PWGU>]; *Consumer Sentinel Network Data Book for January-December 2015*, FED. TRADE COMM’N 6 (Feb. 2016), <http://www.ftc.gov/system/files/documents/reports/consumer-sentinel-network-data-book-january-december-2015/160229csn-2015databook.pdf> [<http://perma.cc/B995-ZY6P>] (reporting 897,655 consumer complaints regarding debt collection); see also *Osorio v. State Farm Bank*, F.S.B., 746 F.3d 1242, 1248 (11th Cir. 2014) (documenting 327 autodialed calls made to a consumer’s cell phone over the course of six months, attempting to collect on a debt that person did not owe); *King v. Time Warner Cable*, 113 F. Supp. 3d 718, 722 (S.D.N.Y. 2015) (documenting 163 debt collection calls made to an individual, attempting to collect a debt from an unrelated customer).
32. See Spector, *supra* note 18, at 266-67. Government enforcement actions have recently targeted debt collectors seeking to recover zombie debt. *Midland Funding*, 137 S. Ct. at 1417 (Sotomayor, J., dissenting).
33. *Id.* That close to ninety percent of judgments in consumer debt collection lawsuits are default judgments indicates that creditor-plaintiffs’ positions are rarely tested before they are awarded judgment (and attorney’s fees). *Repairing a Broken System*, *supra* note 5 at 7 n.18. Although plaintiffs continue to bear the burden of proof when seeking a default judgment, because collection lawsuits almost always seek a certain sum, default judgments are often summarily awarded. See FED. R. CIV. P. 55(b)(1); Richard M. Alderman, *Default Judgments and Postjudgment Remedies Meet the Constitution: Effectuating Sniadach and Its Progeny*, 65 GEO. L.J. 1, 4 (1976) (noting that when a default judgment is entered, “the debtor may be deprived of his property without a court ever hearing the merits of the creditor’s claim or the debtor’s possible defenses thereto”).
34. *Repairing a Broken System*, *supra* note 5, at 26.



Given these abuses, consumers would benefit from legal representation.<sup>35</sup> A fair consumer civil litigation system not only needs attorneys skilled in consumer issues, but also attorneys who are motivated and willing to conduct consumer outreach and know-your-rights trainings. Defense lawyers in debt-collection actions not only advocate for their consumer-clients, but also ensure that statutory and common-law protections for consumers are observed and that judicial resources are not wasted on unenforceable debt. Without lawyers on consumers' side, many unlawful industry practices go unchecked.<sup>36</sup> If consumers are systematically unrepresented, the massive debt-collection industry's predatory habits become increasingly entrenched and nearly impossible to break.

The problem, of course, is that it has become extremely difficult for consumer-defendants to obtain legal assistance. To practice law, lawyers need funding.<sup>37</sup> To practice law effectively, they also need expertise.<sup>38</sup> Given fiscal constraints, lawyers are incentivized to develop expertise in practice areas where funding is secure – fields with financial backers, or where solo practitioners can hope to sustain an economically fruitful practice.<sup>39</sup> Unfortunately, consumer-defense work is not one of those fields,<sup>40</sup> meaning that the quality and quantity of effective lawyers available to represent consumer-defendants is low. Legal services organizations can meet some of the demand, but the need is far outpacing

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35. *Bushnell* Amicus, *supra* note 30, at 13-15 (“Legal aid and consumer rights attorneys across several states told Human Rights Watch that they win the overwhelming majority of the cases they defend against debt buyers.”) (quoting Stauffer, *supra* note 17, at 60).
  36. See Melanca Clark & Maggie Barron, *Foreclosures: A Crisis in Legal Representation*, BRENNAN CTR. JUST. 17-26 (2009), <http://www.brennancenter.org/page/-/Justice/Foreclosure%20Report/ForeclosuresReport.pdf> [<http://perma.cc/YR32-DE3F>].
  37. *Bushnell* Amicus, *supra* note 30, at 10-13 (“Studies show that the vast majority of debt collection lawsuits are filed against poor and struggling households . . . [for whom] paying out of pocket for legal representation is a virtual impossibility.”).
  38. See MODEL RULES OF PROF'L CONDUCT r. 1.1 (AM. BAR ASS'N 2017); Clark & Barron, *supra* note 36, at 14 (“[M]ost lawyers without expertise in foreclosures would have trouble in these cases, let alone lay persons.”).
  39. See DAVID DAYEN, CHAIN OF TITLE: HOW THREE ORDINARY AMERICANS UNCOVERED WALL STREET'S GREATEST FORECLOSURE FRAUD 120 (2016) (describing foreclosure defense as the “subsistence farming of the legal profession”).
  40. Anecdotal evidence suggests that lawyers will avoid consumer defense work because they believe it to be economically unsustainable, technically complex, and devoid of valid legal defenses. See, e.g., Tim Padgett, *Where Are All the Foreclosure Lawyers?*, TIME (Oct. 24, 2009), <http://content.time.com/time/nation/article/0,8599,1932075,00.html> [<http://perma.cc/7YSR-H7FD>]; Mike Stuckey, *The Home You Save Could Be Your Own: In Foreclosure Crisis, More Americans Representing Themselves in Court*, NBC NEWS (Jan. 28, 2009, 12:28 PM ET), <http://www.nbcnews.com/id/28877173> [<http://perma.cc/7S2G-3BTF>].

the availability of publicly funded lawyers in consumer law.<sup>41</sup> However, if attorney's fees were readily available to lawyers from a source other than the financially burdened consumer, lawyers would be more likely to enter the field and develop the expertise needed to represent consumer-defendants and keep debt collectors in check.<sup>42</sup>

At the same time that consumers struggle to obtain legal representation, creditors can finance an aggressive, nationwide litigation strategy through attorney's fees recovered as a result of "ubiquitous" unilateral fee-shifting clauses.<sup>43</sup> Unilateral fee-shifting provisions are one-sided clauses that allow lenders, but not consumers, to recoup attorney's fees in a broad range of consumer contracts.<sup>44</sup> In other words, the same consumers unable to afford their own attorneys find themselves obligated to pay for their creditors' lawyers. Moreover, the high rate at which consumers are unrepresented makes them even more likely to be found liable for their debt—and thus for their adversaries' attorney's fees.

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41. See Clark & Barron, *supra* note 36, at 28-30. As funding for Legal Services Corporation grantees has largely stagnated over the past few decades and been subject to various restrictions, the traditional engines for providing consumer-defense services to low-income consumers have been strained. Matt Ford, *What Will Happen to Americans Who Can't Afford an Attorney?*, ATLANTIC (Mar. 19, 2017), <http://www.theatlantic.com/politics/archive/2017/03/legal-services-corporation/520083> [<http://perma.cc/CQ55-HNP5>]; see also Clark & Barron, *supra* note 36, at 27 ("Only a small number of the families unable to afford a private attorney are able to obtain legal assistance.").
42. See Brief for the Connecticut Fair Housing Center et al. as Amici Curiae Supporting Defendant-Appellant at 10, *Conn. Hous. Fin. Auth. v. Alfaro*, No. SC 19720 (Conn. Dec. 5, 2016) [hereinafter Brief of the *Alfaro* Amici] ("The availability of [reciprocal] attorney's fees encourages the private bar to represent homeowners and tenants with meritorious defenses who would otherwise be unable to afford to retain an attorney, and helps support the efforts of non-profit organizations like the *amici* that are often the only counsel available to low-income consumers."); DAYEN, *supra* note 39, at 120 (reporting the powerful incentive reciprocal-fee statutes offered to an attorney to become involved in foreclosure defense in Florida); Robert V. Percival & Geoffrey P. Miller, *The Role of Attorney Fee Shifting in Public Interest Litigation*, 47 LAW & CONTEMP. PROBS. 233, 237 (1984) (describing fee-shifting statutes as a tool "to encourage public interest litigation").
43. Bright, *supra* note 10, at 88-89, 88 n.8, 89 n.11. For an example of how ubiquitous these clauses have become, the Federal National Mortgage Association (a government-sponsored enterprise more commonly known as Fannie Mae) includes in paragraph 6(E) of its model multi-state fixed-rate note a unilateral attorney's fee clause: "If the Note Holder has required me to pay immediately in full . . . the Note Holder will have the right to be paid back by me for all of its costs and expenses in enforcing this Note to the extent not prohibited by applicable law. Those expenses include, for example, reasonable attorneys' fees." *Multistate Fixed Rate Note: Single Family*, FANNIE MAE ¶ 6(E), [http://www.fanniemae.com/content/legal\\_form/3200.pdf](http://www.fanniemae.com/content/legal_form/3200.pdf) [<http://perma.cc/S3DV-HTU6>].
44. See Bright, *supra* note 10, at 88-89.

These clauses are not the product of a negotiation on equal footing,<sup>45</sup> but rather arise from the exploitation of consumers' systemically inferior bargaining position through adhesive contracts and lack of meaningful choice. Although some states have attempted to make such one-sided clauses reciprocal,<sup>46</sup> corporate lenders' greater access to expert legal advice and political clout have allowed them to avoid or weaken these reciprocal-fee statutes by advocating for narrow judicial interpretations. Nonetheless, reciprocal-fee statutes promise a more level playing field in consumer-contract litigation by providing consumers with equal access to attorney's fees.

The rise in consumer debt, decrease in consumer bargaining power, and lack of meaningful contractual choice make it more important than ever to encourage attorneys to take defensive consumer cases. Reciprocal-fee statutes, if properly structured and enforced, can be an elegant, efficient way to do so. But divergence in the way statutes define when consumers may receive attorney's fees and how courts actually interpret them to authorize fee awards makes a substantial difference in how effective these statutes are in expanding access to legal representation for consumers. Today's limited supply of reciprocal-fee statutes, as presently drafted and interpreted, too frequently leaves consumers without a means of paying a qualified attorney.

## II. THE RESTRICTIVE FEDERAL INTERPRETATION OF "PREVAILING PARTY" AND ITS EROSION OF THE ORIGINAL UNDERSTANDING OF STATE RECIPROCAL-FEE STATUTES

As the Appendix explores in detail, eleven states' statutes currently provide for reciprocal attorney's fees in contracts with unilateral-fee clauses. Other states have enacted nonreciprocal fee-shifting schemes that can similarly entitle a successful consumer to attorney's fees.<sup>47</sup> In theory, then, the prevailing consumer or prevailing debtholder should receive attorney's fees, even if the contract itself only provides fees to the creditor. These statutes are generally based on the same policy justifications:

- to provide equal access to attorney's fees, despite consumers' overall inferior bargaining position;<sup>48</sup>

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45. See *AT&T Mobility, LLC v. Concepcion*, 563 U.S. 333, 346-47 (2011) ("[T]he times in which consumer contracts were anything other than adhesive are long since past.").

46. See *infra* Appendix.

47. See *infra* note 150.

48. See *Bushnell Amicus*, *supra* note 30, at 4-5; *supra* text accompanying notes 45-46.

- to make the successful party whole after bearing the economic burden of litigation;<sup>49</sup>
- to discourage wasteful, frivolous, or inadequately prepared litigation;<sup>50</sup>
- to encourage consumers with meritorious claims to seek legal assistance;<sup>51</sup> and
- to facilitate fairer, more efficient settlement of disputes.<sup>52</sup>

Despite these acknowledged benefits, the lack of reciprocal-fee statutes in most states has allowed millions of dollars in legal fees to flow to creditors in consumer actions.<sup>53</sup>

Universal adoption of reciprocal-fee statutes would be a positive step.<sup>54</sup> However, even if reciprocal-fee statutes were universal, there would remain a

49. See Bright, *supra* note 10, at 109.

50. See, e.g., *Bank of N.Y. v. Bell*, 23 A.3d 121, 126 (Conn. Super. Ct. 2011) (“Not only will [Connecticut’s reciprocal-fee statute] discourage frivolous suits, but it will place the burden where it belongs – on the party with the poorly thought out complaint or hastily conceived writ. It will also discourage vexatious litigation and the use of pretrial discovery and depositions to harass defendants.” (quoting *Fraser v. ETA Ass’n, Inc.*, 580 A.2d 94, 96 (Conn. Super. Ct. 1990))).

51. See, e.g., Brief of the *Alfaro Amici*, *supra* note 42, at 9 (“Reciprocal attorney’s fees . . . are a critical element of access to justice for low-income consumers, particularly in areas of law, such as foreclosures, evictions and consumer debt collection, where low-income consumer parties are overwhelmingly self-represented.”); see also *Bushnell Amicus*, *supra* note 30, at 5-6.

52. See *Benavides v. Benavides*, 526 A.2d 536, 538 (Conn. App. Ct. 1987) (“[A] realization that the opposing party, although poor, has access to an attorney and that an attorney’s fee may be awarded deters noncompliance with the law and encourages settlements.”); Bright, *supra* note 10, at 110.

53. For a federally sanctioned list of attorney’s fees awardable in individual residential-mortgage foreclosure cases – just one type of consumer-contract action of which hundreds of thousands are initiated every year – see *Schedule of Standard Attorney Fees Approved by HUD & Investors*, NAT’L CONSUMER L. CTR. (2006), [http://www.nclc.org/images/pdf/foreclosure\\_mortgage\\_counseling\\_resources/practice\\_aids/pa\\_schedule\\_of\\_attorney\\_fees.pdf](http://www.nclc.org/images/pdf/foreclosure_mortgage_counseling_resources/practice_aids/pa_schedule_of_attorney_fees.pdf) [<http://perma.cc/BRG4-KX8G>]. When reciprocal-fee statutes exist, these attorney’s fees can also flow in the other direction: in Florida, for instance, where the reciprocal-fee statute is construed more broadly, consumer-defense attorneys have won attorney’s fees in at least twenty cases over the past four years. See *Bushnell Amicus*, *supra* note 30, at 15-16 & n.1.

54. See Bright, *supra* note 10, at 126 (calling for widespread adoption of reciprocal fee statutes). Additionally, states and localities that already have reciprocal-fee statutes are contemplating or have enacted more systemic reform to increase consumers’ access to justice. See *Housing & Buildings, N.Y.C., N.Y., ADMIN. CODE § 26-1302* (2017) (guaranteeing tenants in eviction proceedings access to counsel); Judiciary Comm., *Report of the Task Force To Improve Access to Legal Counsel in Civil Matters* CONN. GEN. ASSEMBLY 19, 21 (Dec. 15, 2016), [http://www.rc.com/upload/O-Hanlan-Final-Report-of-CT-Leg-Task-Force-12\\_2016.pdf](http://www.rc.com/upload/O-Hanlan-Final-Report-of-CT-Leg-Task-Force-12_2016.pdf) [<http://perma.cc/FD5W-MRX8>] (recommending that Connecticut guarantee civil attorneys in certain civil cases and that it expand its reciprocal-fee statute).

significant risk that judges would define “prevailing” or “successful” consumer-defendants narrowly—as courts in several states have already done.<sup>55</sup> By only awarding attorney’s fees in rare instances when consumers manage to prevail in affirmative suits,<sup>56</sup> or when consumers are determined to have actually caused the action’s favorable termination,<sup>57</sup> judges undermine these statutes’ ability to achieve true reciprocity.<sup>58</sup> Therefore, universal adoption of the existing reciprocal-fee statute framework would not achieve the goals of fee-shifting provisions:

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55. See *infra* note 78.

56. See, e.g., David A. Super, *The Rise and Fall of the Implied Warranty of Habitability*, 99 CALIF. L. REV. 389, 405 (2011) (noting that most tenants “in bad housing lack the legal or economic resources to sue affirmatively”).

57. Because corporate lenders are more likely to be “sophisticated” businesses represented by “skilled” lawyers, Peter A. Holland, *The One Hundred Billion Dollar Problem in Small Claims Court: Robo-Signing and Lack of Proof in Debt Buyer Cases*, 6 J. BUS. & TECH. L. 259, 262 (2011), they can avoid potentially successful defenses and even still receive fees through settlement, voluntary withdrawal, or extrajudicial leverage. In several recent cases, creditors have withdrawn collection actions shortly after being confronted with a defense and (mostly successfully) attempted to avoid paying consumer-defendants’ attorney’s fees. See, e.g., *Deutsche Bank Nat’l Tr. Co. v. Hughes*, No. 1–14–2295, 2015 WL 3557194, at \*7 (Ill. App. Ct. June 5, 2015) (“We agree with the defendants’ contention that the voluntary dismissal was clearly sought [by the mortgagee] to avoid the impending disposition of this case on the motion for summary judgment.”); *Bank of N.Y. Mellon v. Maslowski*, No. 2–13–0373, 2013 WL 6843577, at \*10 (Ill. App. Ct. Dec. 23, 2013); *Bank of Am., N.A. v. Destino*, 29 N.Y.S.3d 56, 57 (N.Y. App. Div. 2016); *DKR Mortg. Asset Tr. 1 v. Rivera*, 14 N.Y.S.3d 414, 415 (N.Y. App. Div. 2015); *Epps v. Fowler*, 351 S.W.3d 862, 870 (Tex. 2011) (noting the judicial system’s “disfavor” of “nonsuits that are filed to circumvent unfavorable legal restrictions or rulings”). Additionally, some debt buyers have framed debt-collection lawsuits as “account stated” claims, rather than contractual claims, in order to avoid the obligation to produce the underlying contractual agreement and payment history, as well as to avoid the potential for reciprocal attorney’s fees. See *Bushnell Amicus, supra* note 30, at 17–18 (citing Emanwel J. Turnbull, *Account Stated Resurrected: The Fiction of Implied Assent in Consumer Debt Collection*, 38 VT. L. REV. 339, 340 (2013)).

58. For an example of how broadly unilateral-fee clauses permit attorney’s fees, see Jim Puzanghera, *Some Banks Require Customers To Pay All Costs in Legal Disputes*, L.A. TIMES (June 21, 2012), <http://articles.latimes.com/2012/jun/21/business/la-fi-banking-liability-20120621> [<http://perma.cc/XN9C-4TXQ>], which reports that unilateral attorney’s fees clauses at major banks “make the customer liable for the bank’s . . . attorney’s fees . . . from any dispute over the account, regardless of who wins.” Additionally, mortgagee-plaintiffs are routinely awarded attorney’s fees in mortgage modification agreements without receiving a favorable final judgment on a mortgage with a unilateral-fee clause. Post-2008 federal programs designed to facilitate mortgage modifications allow mortgagees to capitalize “bona fide foreclosure-related costs” into the mortgage’s new principal balance. As a result, even when mortgage-defendants succeed in negotiating a mortgage modification to avoid foreclosure, they are still required to pay opposing counsel’s fees (and interest thereon), in addition to their own attorney’s bill. See Reply Brief of Defendant-Appellant at 15, *Conn. Hous. Fin. Auth. v. Alfaro*, 2018 WL 576698 (Conn. Jan. 24, 2017) (No. SC 19720) (“[M]ortgage modifications,

it would not compensate consumers who hire counsel; force lenders to bear the burden of unsuccessful collection actions; or end the glut of baseless, mass-produced, and oppressive collection actions that have choked state courts.<sup>59</sup> The narrowing federal definition of “prevailing party” has influenced state reciprocal-fee statutes, undermining consumers’ access to attorney’s fees in millions of consumer-contract cases.<sup>60</sup>

#### A. *The Increasingly Restrictive Federal Definition of “Prevailing Party”*

The narrow federal definition of prevailing party has contributed to consumers’ shrinking access to attorney’s fees. Despite the American Rule default, there are multiple federal fee-shifting statutes that provide attorney’s fees to prevailing parties in the civil rights context.<sup>61</sup> As the federal interpretations of “prevailing party” for these statutes have become more restrictive, so too have states’ constructions of reciprocal-fee statutes in the consumer context.<sup>62</sup> By examining

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like most other forms of curing a default, require the *consumer-defendant* to pay fees that the *commercial plaintiff* incurred during the foreclosure case . . .”); Joseph Rebella, *The HAMP & GSE Waterfall Worksheet: A User’s Guide*, MFY LEGAL SERVS., INC. 14 (Dec. 10, 2015), <http://mobilizationforjustice.org/wp-content/uploads/HAMP-GSE-Standard-Modification-Waterfall-Worksheet-Guide.pdf> [<http://perma.cc/2G5S-XZVJ>].

59. Jessica Silver-Greenberg, *Boom in Debt Buying Fuels Another Boom—in Lawsuits*, WALL ST. J. (Nov. 28, 2010, 12:01 AM), <http://www.wsj.com/articles/SB10001424052702304510704575562212919179410> [<http://perma.cc/NNP5-VY7R>]; see also Peter A. Holland, *Defending Junk-Debt-Buyer Lawsuits*, J. POVERTY L. & POL’Y, May-June 2012, at 12, 12 (“Consumer advocates are well aware of the rise in bogus lawsuits filed by junk-debt buyers. The sheer volume of these cases is astronomical.” (footnote omitted)); Bill Smith, *Debt Collectors Flex Muscle in People’s Court, System Not Much Help to People Who Owe*, NEWS-PRESS (Aug. 8, 2017, 4:49 PM), <http://www.news-press.com/story/news/2017/08/04/sxdx/484768001> [<http://perma.cc/A9NS-EGA3>] (reporting that more than forty-five percent of small-claims cases in a Florida county were consumer debt-collection actions brought by debt buyers).
60. See Hannaford-Agor et al., *supra* note 1, at 17-18 (estimating the number of state-court contract cases).
61. *Marek v. Chesny*, 473 U.S. 1, 44-51 (1985) (Brennan, J., dissenting) (listing 119 federal fee-shifting statutes).
62. See Roy Simon, *Is “Catalyst Theory” of Attorney Fees Still Alive?*, N.Y. LEGAL ETHICS REP. (June 1, 2005), <http://www.newyorklegalethics.com/is-catalyst-theory-of-attorney-fees-still-alive> [<http://perma.cc/NU4S-8ZLM>] (noting that states are “split” on whether to follow Supreme Court case law narrowing federal fee-shifting statutes); see also *Bank of N.Y. v. Bell*, 23 A.3d 121, 126 (Conn. Super. Ct. 2011) (“Not only will [Connecticut’s reciprocal-fee statute] discourage frivolous suits, but it will place the burden where it belongs – on the party with the poorly thought out complaint or hastily conceived writ.” (quoting *Fraser v. ETA Ass’n, Inc.*, 580 A.2d 94, 96 (Conn. Super. Ct. 1990))).

why this narrow federal conception of fee-shifting should not apply to the consumer context, this Comment contends that state courts need not adopt these federal interpretations when reading their own reciprocal-fee statutes.

The federal trend towards restricting the definition of “prevailing party” was cemented in 2001, in *Buckhannon Board & Care Home, Inc. v. West Virginia Department of Health & Human Resources*.<sup>63</sup> The plaintiffs in *Buckhannon* sought declaratory and injunctive relief against state rules that allegedly discriminated against disabled residents of assisted-living facilities.<sup>64</sup> Several months after the plaintiffs filed suit, the state legislature and relevant state commission repealed the challenged provisions, mooted plaintiffs’ civil rights challenge.<sup>65</sup> The plaintiffs moved for attorney’s fees on the basis of the catalyst theory, which awards attorney’s fees whenever one party’s litigation posture prompts the other party to pursue the desired change, regardless of whether the first party obtained a favorable final judgment.<sup>66</sup> The plaintiffs asserted that because the “voluntary change in the defendant[s]’ conduct” brought about their “desired result,” they should be deemed the prevailing party.<sup>67</sup> The Court disagreed, narrowing its previously “generous” construction of federal fee-shifting statutes<sup>68</sup> to reject the catalyst theory that had been adopted by all but one circuit to have addressed the question.<sup>69</sup>

Relying on *Black’s Law Dictionary* to define the phrase “prevailing party,” which the Court considered to be a “legal term of art,”<sup>70</sup> the *Buckhannon* majority

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63. 532 U.S. 598 (2001).

64. *Id.* at 600-01.

65. Brief for Petitioners at 8, *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep’t of Health & Human Res.*, 532 U.S. 598 (2001) (No. 99-1848), 2000 WL 1724963, at \*7-8.

66. See, e.g., Joel H. Trotter, *The Catalyst Theory of Civil Rights Fee Shifting After Farrar v. Hobby*, 80 VA. L. REV. 1429, 1433-37 (1994). The “three thresholds” catalyst-theory test that *Buckhannon* rejected would have inquired (1) “whether the claim was colorable rather than groundless”; (2) “whether the lawsuit was a substantial rather than an insubstantial cause of the defendant’s change in conduct”; and (3) “whether the defendant’s change in conduct was motivated by the plaintiff’s threat of victory rather than threat of expense.” *Buckhannon*, 532 U.S. at 610.

67. *Buckhannon*, 532 U.S. at 601.

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

69. *Buckhannon*, 532 U.S. at 625-27 (Ginsburg, J., dissenting).

70. *Buckhannon*, 532 U.S. at 603 (quoting BLACK’S LAW DICTIONARY (7th ed. 1999)); see also *id.* at 610-11 (Scalia, J., concurring) (tracing the origins of the term “prevailing party”). The Court appeared to reject legislative history recommending a broader reading of “prevailing party,” in which the Senate expressed its intent that a litigant should be considered a “prevailing party” even “without formally obtaining relief.” *Id.* at 607-08 (discussing House and Senate reports associated with 42 U.S.C. § 1988 (2012)). The Court also did not reconcile its intensely

stated that a civil rights plaintiff must obtain a favorable final judgment in order to prevail and be entitled to attorney's fees.<sup>71</sup> Because the *Buckhannon* plaintiffs' success was the result of legislative action, they did not receive a favorable final judgment from the court, and thus were left holding the bill for their attorney's fees. By preventing fee awards in the large range of cases where one party's litigation posture prompts the other to change its conduct voluntarily and without consideration,<sup>72</sup> *Buckhannon* "severely limited" civil rights plaintiffs' access to attorney's fees.<sup>73</sup>

*Buckhannon* technically only concerned the fee-shifting provisions of the Fair Housing Amendments Act of 1988 and the Americans with Disability Act.<sup>74</sup> However, the Court's commitment to interpreting the broad universe of federal fee-shifting statutes "consistently"<sup>75</sup>—despite variations in statutory language<sup>76</sup> and distinctions in the legislative history and context—meant that *Buckhannon*'s standard was quickly applied to other federal fee-shifting statutes.<sup>77</sup> Furthermore, while not bound by *Buckhannon* in construing reciprocal-fee statutes, many state legislatures and judges have also adopted *Buckhannon*'s logic.<sup>78</sup>

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textual approach with the reality that federal fee-shifting statutes use a wide variety of language. See *supra* notes 11-12 and accompanying text; see also *Buckhannon*, 532 U.S. at 628-29 (Ginsburg, J., dissenting) (arguing that statutes should be read contextually and *Black's Law Dictionary* should not be considered "preclusively definitive").

71. *Buckhannon*, 532 U.S. at 603. The Court recently extended *Buckhannon*'s restrictive interpretation of "prevailing party" to civil rights defendants. *CRST Van Expedited, Inc. v. EEOC*, 136 S. Ct. 1642, 1651-52 (2016).
72. See Robin Stanley, *Buckhannon Board & Care Home, Inc. v. West Virginia Department of Health & Human Resources: To the Prevailing Party Goes the Spoils . . . and the Attorney's Fees!*, 36 AKRON L. REV. 363, 391-92 (2003).
73. Macon Dandridge Miller, *Catalysts as Prevailing Parties Under the Equal Access to Justice Act*, 69 U. CHI. L. REV. 1347, 1347 (2002).
74. 42 U.S.C. §§ 3613(c)(2), 12205 (2012).
75. *Buckhannon*, 532 U.S. at 602-03 & n.4.
76. See *Ruckelshaus v. Sierra Club*, 463 U.S. 680, 701 & nn.11-12 (1983) (Stevens, J., dissenting) (noting the different language used to define the threshold parties must meet to be entitled to attorney's fees).
77. *CRST Van Expedited, Inc. v. EEOC*, 136 S. Ct. 1642, 1646 (2016) ("Congress has included the term 'prevailing party' in various fee-shifting statutes, and it has been the Court's approach to interpret the term in a consistent manner.").
78. See, e.g., *Oahu Publ'ns, Inc. v. Abercrombie*, 332 P.3d 159, 169 (Haw. 2014); *MC, Inc. v. Cascade City-Cty. Bd. of Health*, 343 P.3d 1208, 1217 (Mont. 2015); see also *Hedicke v. Gunville*, 62 P.3d 1217, 1224-25 (N.M. Ct. App. 2002) (defining the prevailing party as "the party who wins on the merits or on the main issue of the case"); *Wachovia SBA Lending, Inc. v. Kraft*, 200 P.3d 683, 688 (Wash. 2009) (en banc) (holding that "[b]ecause a voluntary dismissal is not a final judgment" the defendant was not a prevailing party); *Conn. Hous. Fin. Auth. v. Alfaro*, No. SC 19720, 2018 WL 576698, at \*9 (Conn. Jan. 26, 2018) (Espinosa, J., dissenting) (citing



The problem, however, is that *Buckhannon's* rule does not fit the reciprocal-fee statute context. *Buckhannon* was a decision interpreting the fee-shifting provisions within a broader statutory scheme. State fee-shifting statutes, by contrast, have different goals, including equalizing access to qualified counsel.<sup>79</sup> Although state courts often adopt federal jurisprudence wholesale,<sup>80</sup> the rationales used to justify *Buckhannon's* final-judgment requirement simply do not apply to reciprocal-fee statutes.<sup>81</sup> These rationales that supported a narrower reading in *Buckhannon* include (1) avoidance of deviations from the American Rule;<sup>82</sup> (2) distaste of awarding fees for legal claims that do not receive a favorable “judicial imprimatur”;<sup>83</sup> (3) reticence to assume a causal connection between instituting litigation and achieving the desired end;<sup>84</sup> and (4) the lack of “empirical evidence” that failure to obtain attorney’s fees would reduce plaintiffs’ capacity to

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the Connecticut Supreme Court’s approval of *Buckhannon* in *Wallerstein v. Stew Leonard’s Dairy*, 780 A.2d 916 (Conn. 2001), to justify a restrictive reading of Connecticut’s reciprocal-fee statute); *infra* Appendix. Even states without reciprocal-fee statutes have used *Buckhannon's* logic to restrict consumers’ access to fees in consumer-contract actions. See, e.g., *Bank of N.Y. Mellon v. Maslowski*, 2013 WL 6843577, at \*9-10 (Ill. App. Ct. Dec. 23, 2013) (relying on *City of Elgin v. All Nations Worship Ctr.*, 868 N.E.2d 385, 387-88 (Ill. App. Ct. 2007), which itself used *Buckhannon* to define “prevailing party,” in construing a statute allowing prevailing mortgagors to receive attorney’s fees); *Credit Acceptance Corp. v. Woodard*, 812 N.W.2d 525, 528-29 (Wis. Ct. App. 2012) (finding that, because there was no judicial recognition that the plaintiff violated Wisconsin’s Consumer Act, the consumer-defendant had not prevailed for purposes of receiving attorney’s fees). Some states also have statutory language approximating *Buckhannon's* limitation. See *infra* note 105 and accompanying text.

79. See *supra* notes 48-51 and accompanying text.
80. Cf. Robert F. Williams, *State Courts Adopting Federal Constitutional Doctrine: Case-by-Case Adoptionism or Prospective Lockstepping?*, 46 WM. & MARY L. REV. 1499, 1502 (2005) (reporting that state courts usually import federal courts’ reasoning even when not bound by the federal decision).
81. Additionally, the Court’s analysis in *Buckhannon* of the legislative history of federal fee-shifting statutes has no applicability to state reciprocal-fee statutes, which have their own legislative histories and purposes. See *Buckhannon*, 532 U.S. at 603-04, 607-08.
82. *Id.* at 602 (“Under this ‘American rule,’ we follow ‘a general practice of not awarding fees to a prevailing party absent explicit statutory authority.’” (quoting *Key Tronic Corp. v. United States*, 511 U.S. 809, 819 (1994))).
83. *Id.* at 605 (requiring a plaintiff’s claims to have more than minimal “legal merit;” rather, the plaintiff must achieve a “judicially sanctioned change in the legal relationship of the parties”).
84. *Id.* at 606 (“We cannot agree that the term ‘prevailing party’ authorizes federal courts to award attorney’s fees to a plaintiff who, by simply filing a nonfrivolous but nonetheless potentially meritless lawsuit . . . has reached the ‘sought-after destination’ without obtaining any judicial relief.”).

obtain representation.<sup>85</sup> None of these four rationales accords with the realities surrounding reciprocal-fee statutes. Consequently, in order to be faithful to the purposes for which reciprocal-fee statutes were enacted, courts should adopt a more robust understanding of “prevailing party” that contemplates the greater variety of ways in which defendants can succeed in litigation.

First, unlike plaintiff-side fee-shifting, reciprocal-fee statutes are designed to even the playing field *after* a unilateral attorney-fee clause already disrupted the American Rule. When a unilateral-fee clause exists in the contract at issue, one party has already bargained (or forced) its way from under the American Rule: that party will not have to bear its own litigation costs if successful. In this way, reciprocal-fee statutes sharply contrast with the federal fee-shifting statutes considered in *Buckhannon*, which, without any preexisting disruption, abrogated the American Rule in favor of plaintiffs. The litigation incentives proffered by these two sets of statutes thus differ remarkably. While the statutes in *Buckhannon* catered to plaintiffs seeking to affirmatively vindicate their rights, reciprocal-fee statutes empower defendants to ward off attack by providing them the same tools available to their counterparty.

Second, regarding the lack of a “judicial imprimatur,” because consumers are overwhelmingly defendants in consumer contract actions, ascertaining whether they have succeeded simply requires determining whether the lender-plaintiff’s collection action was “rebuffed,” regardless of the basis for the suit’s termination.<sup>86</sup> Unlike plaintiffs, who seek a “judicially sanctioned” “material alteration” in the parties’ legal relationship, defendants seek only “to prevent this alteration to the extent it is in the plaintiff’s favor.”<sup>87</sup> Consequently, defendants do not require a “judicial imprimatur” to achieve their goal; if mere assertion of a defense prompts the plaintiff to “beat a hasty retreat,”<sup>88</sup> so much the better (and cheaper) for the defendant.<sup>89</sup> Especially when litigating against an industry “betting that consumers will lack the resources to respond”<sup>90</sup> — where success is not predicated on a plaintiff building a winning case — a defendant’s ability to obtain fees should

85. *Id.* at 608 (“We are skeptical of these assertions [that defendants will be encouraged to moot meritorious cases and plaintiffs will be discouraged from bringing suit], which are entirely speculative and unsupported by any empirical evidence.”).

86. *CRST Van Expedited, Inc. v. EEOC*, 136 S. Ct. 1642, 1651 (2016).

87. *Id.*

88. *Bank of N.Y. v. Bell*, 23 A.3d 121, 127 (Conn. Super. Ct. 2011).

89. *Cf. Buckhannon*, 532 U.S. at 605. Confusingly, the Court recently extended *Buckhannon*’s “judicial imprimatur” requirement to defendants without explanation while asserting that “[c]ommon sense” dictates that defendants prevail whenever a plaintiff is “rebuffed.” *CRST Van Expedited*, 136 S. Ct. at 1651-52.

90. *Midland Funding, LLC v. Johnson*, 137 S. Ct. 1407, 1417 (2017) (Sotomayor, J., dissenting).

not depend on whether the plaintiff is foolish enough to bring an ill-prepared suit and then compound that error by continuing to fight until the defendant obtains final judgment.<sup>91</sup> By contrast, for plaintiffs, the desired end—a favorable declaration of legal rights—is not possible without a judicial imprimatur, or at least a defendant’s recognition of the rights the plaintiff has asserted. In more economically straightforward collection actions, consistent with the “[c]ommon sense” principles underlying fee-shifting jurisprudence, defendants should be considered successful if they achieve their ultimate objective: maintaining the legal status quo, whether by a disposition on the merits or the plaintiff’s voluntary withdrawal.<sup>92</sup>

Third, in terms of assuming a causal connection, it is much more likely for a creditor-plaintiff to drop a lawsuit in response to a consumer-defendant’s legal defense than it was for the civil rights defendants in *Buckhannon* to amend their behavior in response to the civil rights plaintiff’s litigation posture. This is because the lender-plaintiff’s voluntary withdrawal, nonsuit, or dismissal is a litigation-specific action generally made in response to the opposing party’s defenses and the perceived costs and risks of litigating the case to verdict.<sup>93</sup> By contrast, a civil rights defendant’s extrajudicial, voluntary action (that happens to coincide with the civil rights plaintiff’s requested relief) is more likely due to factors beyond the current litigation, such as a shift in public opinion, turnover of administration, or change in overall fiscal resources.<sup>94</sup> Extrajudicial factors are more likely at play in multifaceted lawsuits against large, institutional defendants than in individual debt-collection actions. There is likely a greater causal nexus between one party’s litigation posture and the other’s subsequent, in-court actions in the reciprocal-fee statute context: the voluntary termination of a single lawsuit only affects, and therefore is likely only caused by, the defendant.

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91. Rather than linking consumer-defendants’ access to attorney’s fees with the level of plaintiffs’ ineptitude, “[s]ociety has a vital stake in assuring equal access to justice because it is not possible for our democracy to sustain the rule of law without it.” Jon D. Levy, *The World Is Round: Why We Must Assure Equal Access to Civil Justice*, 62 ME. L. REV. 562, 563 (2010).

92. *CRST Van Expedited*, 136 S. Ct. at 1651.

93. A consumer-defendant’s viable defense may push the costs of litigation beyond what could be recovered through the lawsuit, especially where the plaintiff filed the lawsuit betting that the consumer could not afford to defend himself. See *Midland Funding*, 137 S. Ct. at 1417–18 (Sotomayor, J., dissenting).

94. For example, in *Buckhannon*, a host of political considerations beyond the instant litigation could, at least in theory, have prompted West Virginia’s legislative and administrative changes, including extrajudicial lobbying by assisted-living facilities, an independent reexamination by the responsible state agency, or public pressure generated by the families affected by the state’s allegedly discriminatory rule.

Fourth and finally, the low rates at which consumer-defendants are represented in collection lawsuits,<sup>95</sup> the abuses pervading the debt-collection industry,<sup>96</sup> the prevalence of collection actions based on time-barred debt,<sup>97</sup> and the high likelihood that attorneys can make a real difference in individual consumer actions<sup>98</sup> provide ample empirical evidence that, without resources to obtain legal representation, consumers remain vulnerable to meritless, predatory litigation.<sup>99</sup> Given the potential (but unrealized) role that *Buckhannon* left for empirical evidence in interpreting fee-shifting statutes,<sup>100</sup> the growing number of studies combined with the state and local initiatives around consumers' lack of access to counsel should guide judicial interpretation of reciprocal-fee statutes,<sup>101</sup> prompting a return to the more liberal, pre-*Buckhannon* standard.

Unfortunately, as the next Section explores, despite the rising tide of debt collection abuses, even the few states that possess reciprocal-fee statutes have applied the inapposite federal *Buckhannon* standard to jettison consumer protections where they are needed most.

#### *B. Restrictive Definitions of “Prevailing Party” Undermine State Reciprocal-Fee Statutes*

Many state reciprocal-fee statutes were enacted when courts were applying the pre-*Buckhannon* “general rule . . . that the defendant is regarded as having

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95. See *supra* notes 10, 33, 36 and accompanying text.

96. See *supra* text accompanying note 31; see also 15 U.S.C. § 1692(a) (2012) (“There is abundant evidence of the use of abusive, deceptive, and unfair debt collection practices by many debt collectors.”).

97. See *supra* text accompanying notes 32-34.

98. See, e.g., Rebecca L. Sandefur, *Elements of Professional Expertise: Understanding Relational and Substantive Expertise Through Lawyers’ Impact*, 80 AM. SOC. REV. 909, 921 (2015) (finding that having an attorney results in up to a 149-fold increase in the odds of winning a procedurally complex case).

99. Indeed, weighing the realities of consumers’ access to justice against *Buckhannon*’s theoretical framework recalls Justice Holmes’s aphorism in *New York Trust Co. v. Eisner*, 256 U.S. 345, 349 (1921), that “[u]pon this point a page of history is worth a volume of logic.”

100. *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep’t of Health & Human Res.*, 532 U.S. 598, 608 (2001) (noting that the plaintiffs’ claims were “entirely speculative and unsupported by any empirical evidence,” thereby suggesting that non-speculative and empirically grounded claims may hold greater weight).

101. See *supra* notes 24-25 and accompanying text.

prevailed” when a plaintiff voluntarily withdraws the action without consideration.<sup>102</sup> Early interpretations of state reciprocal-fee statutes assumed that state legislatures “must naturally have had in mind that a defendant who ‘prevails’ is ordinarily one against whom no affirmative judgment is entered.”<sup>103</sup> In justifying adherence to this conception of prevailing party, courts noted that “[t]his interpretation will inhibit frivolous or badly prepared lawsuits and will protect parties from the expense of defending claims which do not result in liability.”<sup>104</sup>

Admittedly, a few reciprocal-fee statutes explicitly limit the definition of “prevailing party” to those obtaining final judgment.<sup>105</sup> This suggests that these state legislatures did want to limit fee-shifting in a manner similar to the Court in *Buckhannon*. Yet the very fact that this minority of states used explicit language to narrow the definition of “prevailing party” provides further evidence that the generally applicable meaning was broader. If “prevailing party” status intrinsically required a favorable final judgment, the limiting language in these state statutes would be redundant, contravening the interpretive presumption against superfluity.<sup>106</sup> Moreover, many state courts have agreed that this broader definition of “prevailing party” is generally applicable, giving way only in the face of explicitly restrictive statutory language.<sup>107</sup> Given this tradition, state reciprocal-fee statutes should be read in light of the background, commonsense

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102. *Andersen v. Gold Seal Vineyards, Inc.*, 505 P.2d 790, 793 (Wash. 1973) (en banc); *accord* *Drybread v. Chipain Chiropractic Corp.*, 60 Cal. Rptr. 3d 580, 585 (Cal. Ct. App. 2007); *Thornber v. City of Fort Walton Beach*, 568 So. 2d 914, 919 (Fla. 1990); *Dean Vincent, Inc. v. Krishell Labs., Inc.*, 532 P.2d 237, 238 (Or. 1975) (en banc). All but one reciprocal-fee statute was enacted before *Buckhannon* was decided. *See infra* Appendix.

103. *Andersen*, 505 P.2d at 793; *accord* *Trugreen Landcare, LLC v. Elm City Dev. & Constr. Servs., LLC*, 919 A.2d 1077, 1079 (Conn. App. Ct. 2007) (predicting the state of mind of contracting parties rather than the state legislature); *Dean Vincent*, 532 P.2d at 238.

104. *Walji v. Candyco, Inc.*, 787 P.2d 946, 948 (Wash. Ct. App. 1990); *accord* *Fraser v. ETA Ass'n*, 580 A.2d 94, 96 (Conn. Super. Ct. 1990); *Dolphin Towers Condominium Ass'n v. Del Bene*, 388 So. 2d 1268, 1269 (Fla. Dist. Ct. App. 1980) (noting the defendant's efforts in asserting a “meritorious affirmative defense” as well as preparing for and participating in trial).

105. *See* CAL. CIV. CODE § 1717(b)(2) (West 2009); WASH. REV. CODE § 4.84.330 (2017); *Carlson v. Blumenstein*, 651 P.2d 710, 713 (Or. 1982) (applying the restrictive language that remained in Oregon's reciprocal-fee statute until 2001). For the text and interpretation of these statutes, *see infra* Appendix.

106. *Hibbs v. Winn*, 542 U.S. 88, 108 (2004).

107. *Walji*, 787 P.2d at 948; *see also* *Santisas v. Goodin*, 951 P.2d 399, 405 (Cal. 1998) (explaining that the standard definition applies because plaintiffs have not demonstrated that another applicable statute provides otherwise); *Trugreen Landcare*, 919 A.2d at 1079 (citing, in the case of nonsuit, *Ballentine's Law Dictionary* for the proposition that partial success may allow a party to be considered prevailing); *Attaway, Inc. v. Saffer*, 770 P.2d 596, 597-98 (Or. Ct. App. 1989) (identifying the defendant as the prevailing party following voluntary dismissal for purposes

rule that entitles consumer-defendants to fees after mounting a valid legal defense against claims that “do not result in liability.”<sup>108</sup>

This original understanding of when consumer-defendants prevail is undermined by post-*Buckhannon* developments that ushered in a narrow definition of success. Although not every state with a reciprocal-fee statute has followed *Buckhannon* in judicially restricting consumer-defendants’ access to attorney’s fees,<sup>109</sup> many states’ adoption of *Buckhannon* implies that, if reciprocal-fee statutes are adopted in additional states without explicit definitions for “prevail” or “succeed,” *Buckhannon*’s logic will limit these statutes’ benefits for consumers.<sup>110</sup> In other words, even if state legislators take the laudable step of passing laws to level the playing field between consumers and debt holders, cramped judicial understandings would undermine the financial support and incentives that reciprocal-fee statutes promise, leaving consumers at a significant disadvantage.

Between this original, broad conception of “prevailing” and the increasingly popular final-judgment rule established by *Buckhannon*, some state courts have considered a modified catalyst theory that examines “the reason that the plaintiff withdrew its action” to determine whether the defendant’s litigation posture was the cause.<sup>111</sup> This “soft standard” ultimately turns on the subjective motivations

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of awarding costs despite recognizing that Oregon’s reciprocal-fee statute would not allow the award of attorney’s fees); *Hawk v. Branjes*, 986 P.2d 841, 843 (Wash. Ct. App. 1999) (quoting *Walji*).

108. See *Walji*, 787 P.2d at 948.

109. See *supra* note 78 and accompanying text (noting that Hawaii, Montana, Washington, and, during the pendency of Mr. Alfaro’s appeal, Connecticut, have explicitly or implicitly used *Buckhannon*’s logic to narrow application of their reciprocal-fee statutes).

110. See *Wallerstein v. Stew Leonard’s Dairy*, 780 A.2d 916, 919-20 (Conn. 2001); *City of Elgin v. All Nations Worship Ctr.*, 868 N.E.2d 385, 387-88 (Ill. App. Ct. 2007); *Delgado v. Boyles*, 922 N.E.2d 1267, 1271 (Ind. Ct. App. 2010); *Curo Enters., LLC v. Dunes Residential Servs., Inc.*, 342 P.3d 948, 956-57 (Kan. Ct. App. 2015); *Ronnisch Constr. Grp., Inc. v. Lofts on the Nine, LLC*, 886 N.W.2d 113, 123 (Mich. 2016); *Azzarello v. Humboldt River Ranch Ass’n*, 385 P.3d 50 (Nev. 2016); *J.B.H. Props., Inc. v. N.E.S. Corp.*, No. 2007-L-024, 2007 WL 4564392, at \*3 (Ohio Ct. App. Dec. 28, 2007); *Tibbetts v. Sight ‘N Sound Appliance Ctrs., Inc.*, 77 P.3d 1042, 1053 (Okla. 2003); *Direct Action for Rights & Equal. v. Gannon*, 819 A.2d 651, 659-60 (R.I. 2003); *Fannon v. City of LaFollette*, 329 S.W.3d 418, 430-31 (Tenn. 2010); *Epps v. Fowler*, 351 S.W.3d 862, 867-67 (Tex. 2011). *But see Conn. Hous. Fin. Auth. v. Alfaro*, No. SC 19720, 2018 WL 576698, at \*8 n.13 (Conn. Jan. 26, 2018) (professing consistency with *Buckhannon* but approvingly quoting Justice Ginsburg’s dissenting opinion).

111. *Conn. Hous. Fin. Auth. v. Alfaro*, 135 A.3d 1256, 1258 (Conn. App. Ct. 2016), *rev’d*, No. SC 19720, 2018 WL 576698 (Conn. Jan. 26, 2018); see also *Simmons v. Schimmel*, 476 So. 2d 1342, 1345 (Fla. Dist. Ct. App. 1985) (“[A]lthough a formal merits determination is not necessary to support a fee award made pursuant to a statute allowing the award to a prevailing party, there must be some end to the litigation on the merits so that the court can determine whether the party requesting fees has prevailed.”); *Bilanzich v. Lonetti*, 160 P.3d 1041, 1047 (Utah

prompting plaintiffs' withdrawal, "creat[ing] an intensely fact-based jurisprudence that [is] difficult to apply."<sup>112</sup> Although a seemingly attractive middle ground between *Buckhannon's* restrictiveness and the golden rule, the catalyst theory would beget inconsistent results and increase litigation. It would require a postmortem to determine if the consumer-defendant actually prompted the creditor-plaintiff's withdrawal.

While this modified approach fares slightly better for consumer-defendants than the *Buckhannon* rule, it is narrower than legislators' original intent, difficult to apply, and insufficient to realize the promise of these statutes. Instead of mirroring courts in assessments of plaintiffs' state-of-mind – contradicting courts' desire to stop "[a] request for attorney's fees" from "result[ing] in a second major litigation"<sup>113</sup> – courts should return to the original understanding of state reciprocal-fee statutes, a bright-line rule.<sup>114</sup>

### III. INTERPRETING RECIPROCAL-FEE STATUTES: WHY THE "GOLDEN RULE" IS BOTH EQUITABLE AND WORKABLE, UNLIKE *BUCKHANNON* AND THE CATALYST THEORY

In addition to being inconsistent with legislators' original intent, the *Buckhannon* definition – that to "prevail" or to "succeed" requires a favorable judgment<sup>115</sup> – is inequitable. It privileges plaintiffs (typically commercial parties with already superior bargaining power) over defendants (typically consumers).<sup>116</sup> Meanwhile, the catalyst theory suffers from two significant flaws of its own. First, its imprecision makes it difficult to implement. Second, through the "prevailing" or "successful" party standard, it imposes on defendants a burden few can shoulder: proving what was in the mind of the plaintiff at the time it withdrew the action.

This Part considers three possible definitions for "prevailing party." We argue that the "golden rule" is equitable and workable, unlike the *Buckhannon* definition and the catalyst theory. We also respond to the objection that adopting the

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2007) (directing courts to "apply common sense principles in determining the prevailing party").

112. *Alhambra Homeowners Ass'n v. Asad*, 943 So. 2d 316, 321 (Fla. Dist. Ct. App. 2006).

113. *Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983).

114. This rule is roughly analogous to the approach taken by a Florida appellate court in *Alhambra*.

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

116. For a discussion of the staggering number of commercial plaintiffs seeking to recover on consumer debt, see *supra* notes 17–18 and accompanying text.

golden rule definition for “prevailing party” might raise the cost of consumer credit and increase the costs of litigation.

*A. Parity Between Plaintiffs and Defendants: Why the Golden Rule Is More Equitable Than Buckhannon*

The inequity of the *Buckhannon* definition is that it spans every conceivable plaintiff victory, awarding fees appropriately in all such cases, but is under-inclusive for defendants, awarding fees in only a narrow subset of defendant victories. This is because success takes many forms for a defendant, who generally hopes merely to maintain the status quo.<sup>117</sup> Unilateral withdrawal of an action, a dismissal for failure to prosecute, granting of a motion to dismiss, or success on summary judgment or at trial – any of these might reasonably be considered a victory by the defendant, who is just as well-off at the end of these actions as when the case began. A plaintiff, by contrast, has only one way to win: through a favorable judgment.<sup>118</sup> By requiring a “judicial imprimatur” of victory,<sup>119</sup> the *Buckhannon* standard disproportionately favors plaintiffs. Since their victories entail a judicial pronouncement, plaintiffs receive attorney’s fee awards whenever they succeed under *Buckhannon*, whereas defendants are often left to shoulder the costs of even successful litigation.

A more equitable definition would ensure that defendants also receive attorney’s fees when they get the outcome they want. Under the golden rule, a plaintiff is the “successful” or “prevailing party,” and should receive attorney’s fees if the plaintiff’s claim succeeds; that is, if the plaintiff wins a favorable judgment. The golden rule mirrors this for defendants. A defendant is “successful” or the “prevailing party,” and therefore entitled to attorney’s fees, if the plaintiff’s claim fails – that is, if the claim did not result in a favorable judgment.<sup>120</sup> Neither party

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117. See *CRST Van Expedited, Inc. v. EEOC*, 136 S. Ct. 1642, 1651 (2016).

118. This analysis excludes settlements, which are not useful in distinguishing the three definitions. Under all of the definitions, neither settling party is entitled to fees. This is reasonable; in a settlement, neither party has uniquely prevailed because both parties likely made concessions. And, from a practical standpoint, settling parties can take attorney’s fees into consideration when negotiating the terms of a settlement.

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

120. This approach accords with these statutes’ legislative history. See, e.g., An Act Concerning Attorney’s Fee Clauses in Consumer Contracts, 1979 Conn. Acts 643-44 (Reg. Sess.) (proposing to award attorney’s fees “to the consumer who successfully prosecutes or defends an action or counterclaim based upon the contract or lease”).



is the “successful” or “prevailing party” if the case settles, with each party providing some form of consideration to the other.<sup>121</sup>

This definition continues to provide plaintiffs with fee awards whenever they succeed—by default judgment, summary judgment, or favorable verdict. But it also provides defendants with fee awards whenever plaintiffs fail. For example, when a plaintiff realizes its lawsuit is faulty and unilaterally withdraws, the plaintiff would pay the defendant any reasonable attorney’s fees the defendant accrued.<sup>122</sup> This proposal is thus more faithful to the realities of litigation, respecting the variety of ways a defendant can succeed.

*B. Defendants Aren’t Mind Readers: Why the Golden Rule Is Fairer and More Workable Than the Catalyst Theory*

Under the catalyst theory, courts award fees to a defendant when he can prove that the case terminated due to his actions. The catalyst theory is closer to equitable than *Buckhannon* is, but it still favors plaintiffs. Moreover, it is difficult to administer.

Although the catalyst theory generally awards plaintiffs fees when they succeed and awards defendants fees when plaintiffs fail, it misses the mark in an important category of cases: withdrawals. When a plaintiff withdraws an action, it might do so for one of many reasons, but regardless of the reason, if the plaintiff has forced a defendant to accrue fees in defending himself, it should bear the burden of its failed litigation. The golden rule produces this result. By contrast, unless the defendant can prove that he caused the withdrawal, the catalyst theory will not allow for fees.<sup>123</sup> This unfairly requires the defendant to pay for his attorney’s work during the time between the erroneous filing and the withdrawal.

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121. See *Andersen v. Gold Seal Vineyards*, 505 P.2d 790, 793 (Wash. 1973) (en banc) (imagining that the defendant would not prevail “if the dismissal results from a settlement of the plaintiff’s claim before trial”).

122. *Bank of N.Y. v. Williams*, 979 So. 2d 347, 347-48 (Fla. Dist. Ct. App. 2008) (awarding attorney’s fees in a foreclosure action voluntarily dismissed without prejudice, even though the mortgagee brought an identical, second action designed to circumvent the mortgagor’s defenses in the first action); *Andersen*, 505 P.2d at 793 (noting that “where there is a dismissal of an action, even where such dismissal is voluntary and without prejudice, the defendant is the prevailing party”).

123. The Connecticut Supreme Court adopted a different solution—requiring the plaintiff to prove a lack of causation. It held that “after a termination of proceedings that in some way favors the defendant, there exists a rebuttable presumption that the defendant is entitled to [attorney’s] fees unless the plaintiff can show, by a preponderance of the evidence, that the with-

The catalyst theory may have some appeal in borderline cases. A plaintiff may occasionally withdraw for some reason completely unrelated to the merits; for example, a foreclosing plaintiff may learn that the property is environmentally contaminated and decide not to foreclose for that reason. Though it is a closer call, we believe that even in this case the plaintiff should pay. These are consumer cases, and the commercial party has superior resources.<sup>124</sup> When it fails to investigate its claim and therefore imposes attorney's fees on a defendant, it should internalize those costs. This will incentivize commercial parties to effectively investigate before bringing a suit, both preserving judicial economy and saving consumers from burdensome litigation.

Moreover, these borderline cases are better addressed when deciding the amount of attorney's fees in individual cases, not when defining "prevailing party." In considering a request for fees, a court must determine: (1) whether the movant is entitled to attorney's fees (i.e., did the movant prevail?); and, if so, (2) the appropriate amount of attorney's fees.<sup>125</sup> The first inquiry is best addressed by a clear definition like the golden rule, while the second question is best answered on a case-by-case basis through the trial courts' historic experience and expertise in setting attorney's fees.<sup>126</sup> When a plaintiff has voluntarily withdrawn a case for an unusual reason, the golden rule properly recognizes that the defendant has prevailed. But it leaves the courts with broad discretion to determine what a reasonable award would be, in light of the case's unusual posture.<sup>127</sup>

In addition to unfairly depriving defendants of fees in some cases, a second and arguably more serious issue with the catalyst theory is that it imposes an

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drawal occurred because of some reason other than the actions taken by the defendant's counsel." *Conn. Hous. Fin. Auth. v. Alfaro*, No. SC 19720, 2018 WL 576698, at \*8 (Conn. Jan. 26, 2018).

124. This is one of the primary reasons reciprocal-fee statutes were enacted. *See supra* note 48 and accompanying text.
125. *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983).
126. *Id.* at 433, 437 (establishing a "generous formulation" for the threshold for entitlement to attorney's fees and recognizing that the trial court "necessarily has discretion in making this equitable judgment" as to the reasonableness of the amount of attorney's fees awarded).
127. "[C]ourts possess expertise" in assessing "the reasonableness of the fee, the reasonableness of the hours and the significance of the outcome." *Holywell Corp. v. Smith*, 967 F.2d 568, 571 (11th Cir. 1992) (emphasis omitted) (quoting *Norman v. Hous. Auth.*, 836 F.2d 1292, 1304 (11th Cir. 1988)); *see Copeland v. Marshall*, 641 F.2d 880, 901 (D.C. Cir. 1980) (noting that, because trial judges have "far better means of knowing what is just and reasonable than an appellate court can have . . . it is better to have th[e] discretion [to award fees] exercised by the court which has been most intimately connected with [the] case" (first quoting *Trustees v. Greenough*, 105 U.S. 527, 537 (1882), and then quoting *Cuneo v. Rumsfeld*, 553 F.2d 1360, 1368 (D.C. Cir. 1977))).

unreasonably heavy evidentiary burden on the consumers these statutes were designed to protect. In the case of a plaintiff's withdrawal of the action, the catalyst theory requires the defendant to prove what the plaintiff was thinking when it withdrew the action, because only then can the defendant show that it *caused* the action to end.<sup>128</sup> This requires parsing whether the defense attorney's filings were meritorious, a sort of mini-litigation of the merits that further drains scarce resources from consumer-defendants and their attorneys.<sup>129</sup> At worst, it may require an impermissible inquiry into the mind of the plaintiff or its counsel.<sup>130</sup> By contrast, the golden rule is much more workable because it draws a bright line that accounts for the variety of ways in which a defendant can succeed. Under the golden rule, if an action was withdrawn without consideration – for whatever reason – the defendant is entitled to attorney's fees.

*C. Encouraging Consumer Representation Through Reciprocal Fee-Shifting Will Increase Market Efficiency*

The benefits of reducing frivolous litigation are not, however, limited to consumer-defendants and courts. Some might worry that reciprocal-fee statutes will decrease liquidity by raising the costs of litigation – costs that will be passed along to consumers seeking credit. This objection fails to account for the increase in market efficiencies that will result from real-time private enforcement of consumer protections.

Although each generation attempts to address perceived debt collection abuses through broad regulatory regimes, these efforts are necessarily limited to ex post detection, investigation, and enforcement of prior abuses.<sup>131</sup> Furthermore, they are, by design, slow to adapt to changing realities, and can lead to

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128. See *supra* Section II.B; cf. *Eckerhart*, 461 U.S. at 433 (noting that even if “prevailing” is defined generously as a “threshold” statutory inquiry, “[i]t remains for the district court to determine what fee is ‘reasonable’”).

129. In considering definitions for “prevailing party,” courts are careful to avoid standards that require these sorts of mini-litigations of the merits. See, e.g., *Alhambra Homeowners Ass’n v. Asad*, 943 So. 2d 316, 321 (Fla. Dist. Ct. App. 2006) (awarding fees in light of plaintiff’s voluntary dismissal and rejecting a proposed alternative standard that would have required a determination of whether the dismissal “represents an end or finality to the litigation on the merits” because “[s]uch a soft standard would yield inconsistent results, foment litigation, and create an intensely fact-based jurisprudence that would be difficult to apply”).

130. See *Conn. Hous. Fin. Auth. v. Alfaro*, 135 A.3d 1256, 1259 (Conn. App. Ct. 2016).

131. Most recently, the CFPB considered proposals to overhaul the debt collection market in July 2016. See *Consumer Financial Protection Bureau Considers Proposal To Overhaul Debt Collection Market*, CONSUMER FIN. PROTECTION BUREAU (Jul. 28, 2016), <http://www.consumerfinance>

backlash.<sup>132</sup> Reciprocal-fee statutes can serve as a booster to state and federal government debt collection regimes. They will help prevent endemic debt-collection abuses before they occur by incentivizing active representation and private attorney-general oversight as the debt-collection process unfolds. By providing consumers the means to find representation where meritorious defenses or claims exist, reciprocal-fee statutes provide targeted enforcement where abuses are occurring in real time, reducing the pressure on centralized regulatory regimes.

Reciprocal fee-shifting statutes can reduce burdens on regulators and regulated entities alike by forcing creditors to internalize the costs of unsuccessful collection actions. The long history of abusive debt collection practices has in the past led to government intervention.<sup>133</sup> The Fair Debt Collection Practices Act,<sup>134</sup> the more recent Dodd-Frank Act, and the outpouring of industry regulation from the CFPB<sup>135</sup> are evidence that the government will act in response to

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gov/about-us/newsroom/consumer-financial-protection-bureau-considers-proposal-overhaul-debt-collection-market [http://perma.cc/K9EW-7ZQM].

132. See generally Lauren Goldberg, Note, *Dealing in Debt: The High-Stakes World of Debt Collection After FDCPA*, 79 S. CAL. L. REV. 711 (2006) (describing waves of debt-collection laws from the 1898 Bankruptcy Act to the Fair Debt Collection Practices Act and the perils of a “static” regulatory regime); see also *Jerman v. Carlisle*, 559 U.S. 573, 617 (2010) (Kennedy, J., dissenting) (faulting the Fair Debt Collection Practices Act for creating a “cottage industry” of litigation” that benefits attorneys policing technical violations of the Act) (quoting *Fed. Home Loan Mortg. Corp. v. Lamar*, 503 F.3d 504, 513 (6th Cir. 2007)).
133. See generally DAVID CAPLOVITZ, *CONSUMERS IN TROUBLE: A STUDY OF DEBTORS IN DEFAULT* (1974); TERESA A. SULLIVAN ET AL., *AS WE FORGIVE OUR DEBTORS: BANKRUPTCY AND CONSUMER CREDIT IN AMERICA* (1999); Dalié Jiménez, *Dirty Debts Sold Dirt Cheap*, 52 HARV. J. ON LEGIS. 41 (2015); Oren Bar-Gill & Elizabeth Warren, *Making Credit Safer*, 157 U. PA. L. REV. 1 (2008); Annie Waldman & Paul Kiel, *Racial Disparity in Debt Collection Lawsuits: A Study of Three Metro Areas*, PROPUBLICA (Oct. 8, 2015), <http://static.propublica.org/projects/race-and-debt/assets/pdf/ProPublica-garnishments-whitepaper.pdf> [http://perma.cc/HFN7-WKMZ].
134. Fair Debt Collection Practices Act, Pub. L. No. 95-109, 91 Stat. 874 (1977) (codified as amended at 15 U.S.C. § 1692-1692p (2012)).
135. Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 1011(a), 124 Stat. 1376, 1964 (2010) (codified at 12 U.S.C. § 5491(a) (2012)) (establishing the Consumer Financial Protection Bureau).

regular cycles of economic crisis and public pressure.<sup>136</sup> And the pressure is certainly rising in the debt-collection context.<sup>137</sup> While we do not argue that regulation creates deadweight loss, those who subscribe to this view should support the passage of reciprocal-fee statutes. Fee-shifting statutes allow attorneys to police one another and therefore cause lenders to internalize the cost of unlawful debt collection practices.<sup>138</sup> Fee-shifting targets bad actors with surgical precision: only those who invoke the power of the courts with an ill-prepared or fraudulent case will be liable for fees.<sup>139</sup>

Take the recent foreclosure crisis as an example. Legal services organizations were overwhelmed with cases and unable to provide representation to the hundreds of thousands of families in foreclosure,<sup>140</sup> while mortgage servicers began

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136. For an example of a recent CFPB action that responded to public pressure to reform mandatory arbitration and class-action waiver clauses in adhesive consumer contracts, see *Arbitration Agreements*, 82 Fed. Reg. 33,210 (July 19, 2017) (to be codified at 12 C.F.R. pt. 1040). By pushing more consumer disputes into the courts, this rule may further increase demand for consumer-law attorneys. Myriad consumer advocate and veterans' rights groups pushed for the arbitration rule, and vigorously defended it against its ultimate review under the Congressional Review Act. See Lauren Saunders, *Consumer Arbitration Rule Protects Our Servicemembers and Veterans*, HUFFINGTON POST (Oct. 24, 2017), <http://www.huffingtonpost.com/entry/59ee5173e4bof777352c871b> [<http://perma.cc/6T5X-SQN8>].

137. See *supra* notes 24-34 and accompanying text.

138. Cf. Margaret H. Lemos, *Special Incentives To Sue*, 95 MINN. L. REV. 782, 788-91 (2011) (explaining that fee-shifting encourages litigation that supplements the activities of resource-strapped enforcement agencies and that empowers private litigants to enforce legal protections in situations where violations are difficult to detect).

139. See *Fraser v. ETA Ass'n*, 580 A.2d 94, 96 (Conn. Super. Ct. 1990) ("Not only will [interpreting the reciprocal-fee statute broadly] discourage frivolous suits, but it will place the burden where it belongs – on the party with the poorly thought out complaint or the hastily conceived writ.").

140. See *Chief Judge Calls on Maryland's Attorneys To Help Homeowners As Foreclosures Skyrocket*, JUST. MATTERS 1, 6 (Fall 2008), <http://mdcourts.gov/publications/justicematterspdfs/jmfallo8.pdf> [<http://perma.cc/389D-RD3C>] (quoting the Maryland Chief Judge's description of the recent push for more foreclosure defense attorneys as "one of the most important pro bono initiatives of our time," in whose absence "thousands of individuals and families now at risk would almost surely move from being homeowners to becoming homeless"); Clark & Barron, *supra* note 36, at 16 (reporting that Legal Services Corporation grantees have been "besieged with requests for foreclosure assistance" but that, "even before the current increase in demand, already half of those seeking help were turned away because of lack of resources"); *Statewide Effort Provides Legal Assistance for Homeowners Facing Foreclosure*, SUP. CT. OHIO & OHIO JUD. SYS. (Apr. 1, 2008), [http://www.supremecourt.ohio.gov/PIO/news/2008/savethedream\\_040108.asp](http://www.supremecourt.ohio.gov/PIO/news/2008/savethedream_040108.asp) [<http://perma.cc/EMF9-NR6K>] (announcing a pro bono foreclosure defense system to "supplement the resources available in the legal services community which alone are inadequate to address the current need").

developing faulty (and sometimes fraudulent) practices to churn through foreclosures more quickly.<sup>141</sup> Lenders' bad practices soon became bad habits: "The institutions seem to adopt the attitude that since they have been doing this for so long, unchallenged, this practice equates with legal compliance."<sup>142</sup> Were more consumers able to obtain legal representation, those attorneys would have served as private enforcement of long-established foreclosure laws. Thus, while government regulation is a useful ex-post check on consumer lending, reciprocal-fee statutes can offer an independent, complementary mechanism for ensuring compliance.

Incentivizing lawyers to defend consumer contract cases will not only aid individual consumers, but also provide a real-time check on commercial parties engaged in consumer finance. In the foreclosure crisis, consumers had to wait until Congress created the CFPB and then went through notice and comment rulemaking before it could implement sweeping protections from abusive foreclosure practices.<sup>143</sup> By contrast, reciprocal-fee statutes allow consumers' attorneys to enforce the law immediately. Awarding fees according to the golden rule encourages lawyers to enter these legal fields and ensure commercial parties' compliance with procedural and substantive law. Moreover, the costs of initiating failed litigation would be borne by the responsible plaintiffs, and the possibility that the consumer will win attorney's fees should the plaintiffs' lawsuits fail would provide plaintiffs an additional incentive to settle disputes rather than prolong litigation, again increasing judicial economy by coming to speedy resolutions.<sup>144</sup>

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141. DAYEN, *supra* note 39 (exposing the prevalence of fraudulent documents used to support mortgagees' assertions that they owned the debt in foreclosure actions); Clark & Barron, *supra* note 36, at 17 ("[W]ith so few lawyers available to pursue civil remedies for homeowners who are injured by these violations, the homeowners get victimized repeatedly and the lenders are permitted to violate the law with impunity.").

142. KATHLEEN C. ENGEL & PATRICIA A. MCCOY, *THE SUBPRIME VIRUS: RECKLESS CREDIT, REGULATORY FAILURE, AND NEXT STEPS* 85 (2011) (quoting *In re* Foreclosure Cases, Nos. 1:07CV2282, 07CV2532, 07CV2560, 07CV2602, 07CV2631, 07CV2638, 07CV2681, 07CV2695, 07CV2920, 07CV2930, 07CV2949, 07CV2950, 07CV3000, 07CV3029, 2007 WL 3232430, at \*3 n.3 (N.D. Ohio Oct. 31, 2007)).

143. Integrated Mortgage Disclosures Under the Real Estate Settlement Procedures Act (Regulation X) and the Truth in Lending Act (Regulation Z), 78 Fed. Reg. 79,730, 79,730 (Dec. 31, 2013) (to be codified at 12 C.F.R. pts. 1024 & 1026).

144. See, e.g., Carabetta Mgmt. Co. v. Sealy, No. HDSP-161852, 2012 WL 2161670, at \*3 (Conn. Super. Ct. May 30, 2012); Malcolm v. Diaz, No. HDSP-156276, 2011 WL 880930, at \*2 (Conn. Super. Ct. Mar. 3, 2011).

Industry will surely fight interpretations of reciprocal-fee statutes that align with these statutes' original consumer-protective purposes, but the historic pattern of debt-collection abuses and increased governmental regulation shows that fostering robust private enforcement is the best way to prevent future rounds of public crackdowns while checking creditors' abuses in real time.

## CONCLUSION

Providing for attorney's fees in consumer-contract disputes becomes increasingly important as more households find themselves burdened by consumer debt, and as the debt-collection industry grows increasingly aggressive. As Mr. Alfaro's case shows, adopting the golden rule or a similar standard can be an important first step toward a robust system of consumer defense and would be consistent with the equitable purpose of reciprocal-fee statutes: to eliminate the asymmetry between commercial parties and consumers in obtaining legal representation.<sup>145</sup> The golden rule treats plaintiffs and defendants equitably, unlike *Buckhannon*, and it is easier for judges to administer than the catalyst theory. Moreover, by offering financial incentives for legal representation, the golden rule not only aids consumers, but also helps mitigate the need for more heavy-handed regulation.

A more expansive understanding of "prevailing party" is no panacea, though, as many states have no consumer reciprocal-fee statutes.<sup>146</sup> Moreover, even in states with a fee-shifting statute and consumer-sympathetic jurisprudence, consumer-defendants are at a relative disadvantage. For instance, recent reports from Florida indicate that there remains substantial need for consumer representation, despite a fee-shifting statute and a broad interpretation of "prevailing party."<sup>147</sup> The increased availability of fees should theoretically increase the supply of consumer-defense attorneys, yet the demand for consumer lawyers still

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145. In rejecting *Buckhannon*'s logic and adopting a consumer-friendly approach in *Alfaro*, the Connecticut Supreme Court recognized that a "prevailing party" standard in a reciprocal-fee statute would "impede access to court for the less well heeled," "shrink the incentive" to engage legal representation to enforce consumer protections, and allow creditor-plaintiffs "to escape a statutory obligation to pay" attorney's fees. Conn. Hous. Fin. Auth. v. Alfaro, No. SC19720, 2018 WL 576698, at \*8 n.13 (Conn. Jan. 26, 2018) (quoting *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Human Res.*, 532 U.S. 598, 622-23 (2001) (Ginsburg, J., dissenting)).

146. See *infra* Appendix (state-by-state summary of reciprocal-fee statutes).

147. See Smith, *supra* note 59. For recent interpretations of Florida's reciprocal-fee statute, see *Mihalyi v. LaSalle Bank, N.A.*, 162 So. 3d 113, 115 (Fla. Dist. Ct. App. 2014); *Nudel v. Flagstar Bank, FSB*, 60 So. 3d 1163, 1165 (Fla. Dist. Ct. App. 2011); and *Alhambra Homeowners Ass'n v. Asad*, 943 So. 2d 316, 321 (Fla. Dist. Ct. App. 2006).

appears to be outpacing the supply.<sup>148</sup> To address this misalignment, local bar associations should consider implementing training programs to make lawyers aware of this professional path, educate them on consumer law, and connect interested lawyers with clients in need.<sup>149</sup>

This need for additional education demonstrates that the golden rule will not, by itself, ensure that reciprocal-fee statutes achieve their goals. Still, it is an important first step. Consumer lawyers should press this issue until courts recognize that the golden rule is the interpretation most consistent with the purpose of reciprocal-fee statutes. Consistent with that purpose, when courts adopt the golden rule, they warn commercial parties to bring only meritorious cases: sue unto others as you would have others sue unto you.

NATHAN NASH, SOLANGE HILFINGER-PARDO & JAMES MANDILK\*

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148. Telephone Interview with James Kowalski and Lynn Drysdale, Attorneys, Jacksonville Area Legal Aid (Oct. 16, 2017) (reporting that, to serve nearly ten million indigent consumers, Florida has only about twenty legal aid attorneys who regularly work on consumer issues, and only about 100 additional attorneys who focus on consumer-defense litigation).

149. For instance, one Florida Clerk of Court is seeking to create a limited-scope representation program that would provide, among other things, consumer contract defense. Smith, *supra* note 59. Such a program could be self-sustaining through the legal fees it would produce, as well as provide an effective way to train lawyers while pairing them with clients who require their immediate assistance. See generally James Mandilk, Note, *Attorney for the Day: Measuring the Efficacy of In-Court Limited-Scope Representation*, 127 YALE L.J. (forthcoming 2018).

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**APPENDIX: STATE CONTRACTUAL RECIPROCAL-FEE STATUTES**

This Appendix collects and organizes reciprocal-fee statutes, with a focus on how each statute, and associated case law, defines “prevailing party.” The Appendix does not discuss other means by which states may mitigate the facial one-sidedness of reciprocal-fee statutes.<sup>150</sup>

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150. Beyond reciprocal-fee statutes, states use several other approaches to expand consumers’ access to legal representation through fee-shifting. Some states invalidate attorney-fee clauses entirely in certain consumer contexts, see ALA. CODE § 35-9A-163(a)(3) (2014) (invalidating clauses obligating the tenant to pay the landlord’s attorney’s fees); IOWA CODE § 537.2507 (2011) (“With respect to a consumer credit transaction, the agreement may not provide for the payment by the consumer of attorney fees.”); KAN. STAT. ANN. § 58-2547(a)(3) (2005) (invalidating clauses obligating either the tenant or the landlord to pay the other party’s attorney’s fees); ME. REV. STAT. ANN. tit. 14, § 6030(2)(B) (2003) (invalidating clauses obligating the tenant to pay the landlord’s legal fees); OHIO REV. CODE ANN. § 1319.02(C) (LexisNexis 2012) (“A commitment to pay attorneys’ fees is enforceable under this section only if the total amount owed on the contract of indebtedness at the time the contract was entered into exceeds one hundred thousand dollars.”); and WIS. STAT. § 422.411(1) (2012) (“Except [in mortgage cases complying with various requirements], with respect to a consumer credit transaction no term of a writing may provide for the payment by the customer of attorney fees.”), or create bilateral attorney’s fees clauses by statute, see ARIZ. REV. STAT. ANN. § 12-341.01(A) (2016) (permitting a court to award “the successful party” in “any contested action arising out of a contract . . . reasonable attorney fees”); ARK. CODE ANN. § 16-22-308 (1999) (“In any civil action to recover on . . . [a] contract . . . the prevailing party may be allowed a reasonable attorney’s fee to be assessed by the court . . . .”); IDAHO CODE § 12-120(3) (2010) (“In any civil action to recover on . . . [a] contract . . . the prevailing party shall be allowed a reasonable attorney’s fee to be set by the court . . . .”); DEL. CODE ANN. tit. 6, §§ 4344, 7613 (2013) (providing that “[r]easonable attorney’s fees and costs shall be awarded to the prevailing party” in certain contractual actions); N.M. STAT. ANN. § 47-8-48 (LexisNexis 2012) (providing that “the prevailing party shall be entitled to reasonable attorneys’ fees” in actions concerning residential leases); and OKLA. STAT. ANN. tit. 42, § 176 (West 2017) (“In an action brought to enforce any lien the party for whom judgment is rendered shall be entitled to recover a reasonable attorney’s fee . . . .”), or simply provide consumers with general entitlements to attorney’s fees in certain contexts, see 735 ILL. COMP. STAT. 5/15-1510(a) (2017) (“The court may award reasonable attorney’s fees and costs to the defendant who prevails in a motion, an affirmative defense or counterclaim, or in the foreclosure action.”); NEV. REV. STAT. ANN. § 18.010 (West 2017) (when contract does not provide that the prevailing party is entitled to attorney’s fees, the authorizing court is to award “attorney’s fees to a prevailing party . . . [w]hen the prevailing party has not recovered more than \$20,000”); 41 PA. STAT. AND CONS. STAT. ANN. § 503 (West 2017) (“If a borrower or debtor, including but not limited to a residential mortgage debtor, prevails in an action arising under this act [concerning usury], he shall recover the aggregate amount of costs and expenses determined by the court to have been reasonably incurred on his behalf in connection with the prosecution of this action, together with a reasonable amount for attorney’s fee.”); TEX. CIV. PRAC. & REM. CODE ANN. § 38.001 (West 2017) (“A person may recover reasonable attorney’s fees . . . if the claim is for . . . an oral or written contract.”); and WIS. STAT. § 425.308(1) (providing that a prevailing “customer” is entitled to “recover the aggregate amount of costs and expenses determined

The Appendix's primary division is between general and specific reciprocal-fee statutes. General reciprocal-fee statutes (Table 1) award fees to anyone who prevails on a contract claim when the contract provides for fees for one party. Specific reciprocal-fee statutes (Table 2) award fees only to those who prevail on a particular kind of contract claim (e.g., evictions). The particular contexts in which specific reciprocal-fee statutes apply are indicated in parentheses in the "State" column.

For each state, we report (1) the year in which the reciprocal-fee statute was enacted; (2) the relevant definition of the threshold that parties must pass to be entitled to attorney's fees under the statute; (3) how state courts have interpreted the statutory threshold, if they have addressed the question; and (4) how state courts have interpreted analogous fee-shifting statutes. We attempt to note particularly where it appears that the state has generally adopted *Buckhannon's* logic and applied *Buckhannon* to its reciprocal-fee statute.

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by the court to have been reasonably incurred on the customer's behalf in connection with the prosecution or defense" of "an action arising from a consumer transaction").

**TABLE 1.**  
**GENERAL RECIPROCAL-FEE STATUTES**

State	Statute	Year Enacted	Statutory Threshold of When Parties Are Entitled to Attorney's Fees	Judicial Interpretation of Statutory Threshold	Alternative Rule, If Any
California	CAL. CIV. CODE § 1717(b)(2) (West 2009)	1968	"Where an action has been voluntarily dismissed or dismissed pursuant to a settlement of the case, there shall be no prevailing party . . . ."	Governed by statute's explicit definition, as recognized in <i>Santisas v. Goodin</i> , 951 P.2d 399, 411 (Cal. 1998).	<i>Santisas v. Goodin</i> , 951 P.2d 399, 411 (Cal. 1998) (recognizing that attorney's fees are available for voluntarily dismissed actions not governed by § 1717).
Florida	FLA. STAT. ANN. § 57.105(7) (West 2006)	1988	Allows attorney's fees when the reciprocal party "prevails in any action, whether as plaintiff or defendant, with respect to the contract."	<i>Nadel v. Flagstar Bank</i> , 60 So. 3d 1163, 1165 (Fla. Dist. Ct. App. 2011) (holding that a dismissal without prejudice can justify attorney-fee awards to defendants).	<i>Thornber v. City of Fort Walton Beach</i> , 568 So. 2d 914, 919 (Fla. 1990) ("In general, when a plaintiff voluntarily dismisses an action, the defendant is the prevailing party.")
Hawai'i	HAW. REV. STAT. ANN. § 607-14 (West 2012)	1993	Allows attorney's fees "to be paid by the losing party" in all actions on a written contract providing for an attorney's fee.	<i>Ranger Ins. Co. v. Hinshau</i> , 79 P.3d 119, 124 (Haw. 2003) (considering voluntary dismissal sufficient to make the defendant the prevailing party).	<i>Oahu Publ'ns, Inc. v. Abercrombie</i> , 332 P.3d 159, 168-69 (Haw. 2014) (purporting to distinguish <i>Ranger</i> as to another fee-shifting statute and adopt <i>Buckhamton</i> to determine the prevailing party).

Montana	MONT. CODE ANN. § 28-3-704 (2015)	1971	The “prevailing party” in any action based on a contract with an attorney-fees clause “is entitled to recover reasonable attorney fees from the losing party.”	<i>Lyle v. Moore</i> , 599 P.2d 336, 339 (Mont. 1979) (considering the defendants to be the “prevailing party” after judgment for the plaintiff was reversed on appeal).	<i>MC, Inc. v. Cascade City-Cty. Bd. of Health</i> , 343 P.3d 1208, 1217 (Mont. 2015) (adopting the <i>Buckhannon</i> definition of “prevailing party” in statutory interpretation).
Oregon	OR. REV. STAT. § 20.096(1) (2015)	1971 (amended in 2001 to liberalize “prevailing party” definition)	“[T]he party that prevails on the [contract] claim shall be entitled to reasonable attorney fees in addition to costs and disbursements . . . .”	<i>Dean Vincent, Inc. v. Krishell Laboratories, Inc.</i> , 532 P.2d 237, 238 (Or. 1975) (en banc) (establishing that “voluntary nonsuit” and “termination without prejudice” could still make the defendant the prevailing party under § 20.096(1)).	A 2001 amendment repealed the previous § 20.096(5), which provided that the “prevailing party” is “the party in whose favor final judgment or decree is rendered.” See 2001 Or. Laws 1305; see also <i>Carlson v. Blumenstein</i> , 651 P.2d 710, 713 (Or. 1982) (awarding attorney fees under the prior definition of “prevailing party”).
Utah	UTAH CODE ANN. § 78B-5-826 (West 2017)	1986	“A court may award costs and attorney’s fees to either party that prevails in a civil action based upon . . . [a] written contract, . . . when the provisions . . . allow at least one party to recover attorney fees.”	<i>Bilanzich v. Lonetti</i> , 160 P.3d 1041, 1046 (Utah 2007) (recognizing the discretion to award fees that the statute invests in district courts and instructing those courts to award fees “liberally”).	<i>Bilanzich v. Lonetti</i> , 160 P.3d 1041, 1046 n.7 (Utah 2007) (distinguishing the Utah reciprocal-fee statute from other fee-shifting schemes, noting that prevailing defendants should receive attorney fees, even when the action was instituted in good faith).
Washington	WASH. REV. CODE ANN. § 4.84.330 (West 2017)	1977	“[P]revailing party” means the party in whose favor final judgment is rendered.”	<i>Wachovia SBA Lending, Inc. v. Kraft</i> , 200 P.3d 683, 688 (Wash. 2009) (holding that a “voluntary dismissal” is not a final judgment under § 4.84.330).	<i>Walji v. Candyco, Inc.</i> , 787 P.2d 946, 948 (Wash. App. 1990) (“At the time of a voluntary dismissal, the defendant has ‘pre-vailed’ in the common sense meaning of the word.”).

**TABLE 2.**  
**SPECIFIC RECIPROCAL-FEE STATUTES**

State	Statute	Year Enacted	Statutory Prevailing Party Definition	Judicial Interpretation of Statutory Threshold	Alternative Rule, If Any
Connecticut (Consumer Contracts and Leases)	CONN. GEN. STAT. ANN. § 42-150bb (West 2012)	1979	"[A]n attorney's fee shall be awarded as a matter of law to the consumer who successfully prosecutes or defends an action or a counterclaim . . ."	<i>Conn. Hous. Fin. Auth. v. Alfaro</i> , No. SC 19720, 2018 WL 576698, at *8 (Conn. Jan. 26, 2018) ("[O]nce a defendant moves for an award of attorney's fees pursuant to § 42-150bb after a termination of proceedings that in some way favors the defendant, there exists a rebuttable presumption that the defendant is entitled to such fees . . .").	<i>Conn. Hous. Fin. Auth. v. Alfaro</i> , No. SC 19720, 2018 WL 576698, at *8 n.13 (Conn. Jan. 26, 2018) (purporting to maintain consistency with the <i>Buckhamon</i> decision while quoting and relying on the reasoning of the dissenting opinion in <i>Buckhamon</i> ).
Massachusetts (Residential Leases)	MASS. GEN. LAWS ch. 186, § 20 (2016)	1977	Tenants shall be entitled to "reasonable attorneys' fees and expenses incurred" due to the landlord's failure to perform a covenant under the lease or a "successful" defense or prosecution of a claim against the landlord.	<i>Avilists v. Murray</i> , 26 N.E.3d 748, 750 (Mass. App. Ct. 2015) (appearing to use "prevailing" interchangeably with the statute's word "successful").	<i>Brown v. F.L. Roberts &amp; Co.</i> , 896 N.E.2d 1279, 1291 (Mass. 2008) (noting that Massachusetts has rejected application of <i>Buckhamon</i> to state fee-shifting statutes).

New Hampshire (Retail Sales Contracts)	N.H. REV. STAT. ANN. § 361-C:2 (2011)	1975	<p>“Reasonable attorney’s fees shall be awarded to the buyer, borrower or debtor if he prevails . . . .”</p> <p>“If a buyer, borrower or debtor successfully asserts a partial defense or set-off, recoupment or counterclaim to an action . . . the court may withhold . . . such portion of the attorney fees as the court considers equitable.”</p>	<p><i>Gaucher v. Cold Springs RV Corp.</i>, 700 A.2d 299, 302 (N.H. 1997) (confirming judicial power to withhold attorney’s fees from the lender when the buyer was successful in pursuing its own claims).</p>	<p><i>Belknap v. Boston &amp; Maine R.R. Co.</i>, 48 N.H. 388, 389-90 (1869) (explaining that, for a defendant to prevail, “it is only necessary that he should defeat the plaintiff’s suit, so that nothing be recovered against him”).</p>
New York (Residential Leases; Residential Mortgages)	N.Y. REAL PROP. LAW §§ 234, 282 (McKinney 2017)	1966; 2010	<p>Awards attorney’s fees if the lessor/mortgagee violates a covenant of the parties’ agreement or the lessee/mortgagor successfully defends a contract action.</p>	<p><i>DKR Mortg. Asset Tr. I v. Rivera</i>, 14 N.Y.S.3d 414, 417 (N.Y. App. Div. 2015) (holding that a “voluntary discontinuance” without prejudice does not constitute a successful defense).</p>	<p><i>N.V. Madison, Inc. v. Saurwein</i>, 431 N.Y.S.2d 251, 253 (N.Y. App. Term 1980) (considering a dismissal without prejudice on procedural grounds to constitute a “successful defense” under § 234).</p>





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