No. 99-1848

IN THE SUPREME COURT OF THE UNITED STATES

BUCKHANNON BOARD AND CARE HOME, INC., ET AL., PETITIONERS
v.
WEST VIRGINIA DEPARTMENT OF HEALTH AND HUMAN RESOURCES, ET AL., RESPONDENTS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE ALLIANCE OF AUTOMOBILE MANUFACTURERS, INC. AMICUS CURIAE SUPPORTING RESPONDENTS

CHARLES A. NEWMAN
Counsel of Record
KATHY A. WISNIEWSKI
JEROME H. BLOCK
Bryan Cave LLP
One Metropolitan Square
Suite 3600
St. Louis, Missouri 63102
(314) 259-2000

QUESTION PRESENTED

Whether, under a federal fee-shifting statute, attorneys' fees are recoverable when the plaintiff's claims did not result in a judgment, settlement, or consent decree?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES

FEDERAL STATUTES AND RULES

MISCELLANEOUS

INTEREST OF THE ALLIANCE[1/]

The Alliance of Automobile Manufacturers, Inc. ("the Alliance")[2/] is a non-profit, national, trade association committed to improving motor vehicle safety. It serves as a leading advocacy group for the automobile industry on public policy matters. The members of the Alliance are subject to the Motor Vehicle Safety Act, 49 U.S.C. § 30101, *et seq.*, ("the Act"), which authorizes the Secretary of Transportation to commence proceedings related to alleged motor vehicle defects.[3/] The Act's sweeping provisions vest jurisdiction in the Secretary over all safety-related defects.

[1/]Letters from the parties consenting to the filing of this brief have been lodged with the Clerk of this Court pursuant to Rule 37.3. In compliance with Rule 37.6, the Alliance of Automobile Manufacturers, Inc. states that no counsel for a party has authored this brief in whole or in part, and that no person or entity other than the Alliance of Automobile Manufacturers, Inc. and its counsel has made a monetary contribution to the preparation of this brief.

[2/]The members of the Alliance manufacture and sell motor vehicles: BMW Group; DaimlerChrysler Corporation; Fiat Auto S.P.A.; Ford Motor Company; General Motors Corporation; Isuzu Motors America, Inc.; Mazda North American Operations; Mitsubishi Motor Sales of America, Inc.; Nissan North America, Inc.; Porsche Cars North America, Inc.; Toyota Motor North America, Inc.; Volkswagen of America, Inc.; and Volvo Cars of North America, Inc.

[3/]The National Traffic and Motor Vehicle Safety Act, recodified as the Motor Vehicle Safety Act, was passed by Congress in 1966 in response to the "soaring rate of death and debilitation on the Nation's highways." S.Rep. No. 1301, 89th Cong., 2d Sess. I, *reprinted in* 1966 U.S.C.C.A.N. 2709. The Act reflects Congress's "intention that the primary responsibility for setting standards regulating the national automobile manufacturing industry rested upon the federal government, not the states." *Wood v. General Motors Corp.*, 865 F.2d 395, 397 (1st Cir. 1988), *cert denied*, 494 U.S. 1065 (1990).

49 U.S.C. § 30111. The Act authorizes the Secretary to investigate and to determine whether any motor vehicle contains a defect, and, if it does, to require the manufacturer to "remedy such defect" by repairing the vehicle, replacing the vehicle, or refunding, less depreciation, the purchase price of the vehicle. 49 U.S.C. §§ 30118, 30120(a)(1)(A). The Secretary has delegated authority to effectuate the Act to the National Highway Traffic Safety Administration ("NHTSA"). 49 C.F.R. §§ 501.1, 501.2. NHTSA has the exclusive authority to enforce motor vehicle safety standards, to investigate possible safety-related defects, and to make non-compliance and defect determinations.[4/] 49 C.F.R. § 554.1.

Because of NHTSA's expertise in motor vehicle safety issues, courts considering civil claims alleging motor vehicle defects have invoked the doctrine of primary jurisdiction and deferred to that agency's expertise. *See, e.g., Walsh v. Ford Motor Co.*, 130 F.R.D. 260, 267 (D.D.C. 1990) (indicating that courts should "avoid entanglement with a regulatory scheme designed and intended to empower principally the Department of Transportation, rather than the courts, to order and oversee motor vehicle recalls"); *In re General Motors Corp. Pickup Truck Fuel Tank Products Liability Litigation*, 846 F.Supp. 330, 343-44 (E.D.Pa. 1993), *vacated on other grounds*, 55 F.3d 768 (3d Cir. 1995) (court refused to issue

[4/]While NHTSA is the "chosen instrument" for investigating and remedying vehicle defects, a civil plaintiff is "the chosen instrument of Congress" to enforce civil rights statutes. *Christiansburg Garment Co. v. Equal Employment Opportunity Commission*, 434 U.S. 412, 418 (1978). This distinction, in and of itself, clearly counsels against a uniform interpretation of all federal fee-shifting statutes to allow for "catalyst" fees.

injunctive relief ordering manufacturer to recall vehicles because "NHTSA, rather than the court, provides the more appropriate forum for any possible recall/retrofit remedy"). Even absent any court involvement, however, vehicle manufacturers are required to cooperate fully with NHTSA's Office of Defect Investigation ("ODI"), which is responsible for conducting investigations concerning the "identification and correction of safety-related defects in motor vehicles." 49 C.F.R. § 554.5.

The ODI's investigations are public. First, the information compiled by the ODI can be easily accessed by the public at NHTSA's Internet site (www.nhtsa.dot.gov), which contains an "Investigations Database." Second, if the ODI makes an "initial decision" that a safety-related defect exists, it must publish notice of its determination in the federal register. 49 U.S.C. § 30118(a); 49 C.F.R. § 554.10. Third, if the vehicle manufacturer contests the ODI'S initial decision, the matter proceeds to a public hearing which may result in NHTSA's final determination and an order for a recall, if warranted.[5/] 49 U.S.C. § 30118(b); 49 C.F.R. § 554.11.

Although a private party (or that party's counsel) can petition NHTSA to commence a vehicle safety investigation and seek a recall, 49 C.F.R. § 552.3, few do. Rather, the publication of NHTSA's actions is often the starting gun for the race to the courthouse and the ensuing jockeying for lead plaintiffs' counsel status. For example, in *Chin v. Chrysler Corp.*, Civil Action No. 95-5569-JCL (D.N.J.) -- a

[5/]At any time during this process, a manufacturer may elect to initiate a voluntary recall. 49 U.S.C. § 30118(c).

nationwide putative class action alleging a motor vehicle defect -- plaintiffs' counsel are presently pursuing an award of "catalyst" attorneys' fees[6/] under the Magnuson-Moss Warranty Act, 15 U.S.C. § 2301, *et seq.*, based on a theory that they were the "catalyst" to the defendant's voluntary recall of the allegedly defective vehicle. The claim for "catalyst" fees is being pursued although: (1) a NHTSA investigation predated the civil action; (2) Chrysler announced and completed a voluntary recall of the affected vehicles; (3) plaintiffs' unsuccessfully sought an injunction to prevent the voluntary recall (although their complaint sought a recall); (4) some claims were dismissed by motion; (5) the court denied class certification; (6) the plaintiffs dismissed their remaining individual claims; and (7) the vast majority of the relief sought was never granted or accomplished.

This type of scenario is repeated all-too-often and aided substantially by the courts of appeal, (except for the Fourth Circuit). These judicially-enabled practices assault the "American Rule" -- a fundamental hallmark of our jurisprudence on attorney's fees -- which mandates that even a "prevailing litigant" not "collect a reasonable attorneys' fee from the loser" in the absence of a statute authorizing such an award. *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240, 247 (1975).

[6/]As used herein, the "catalyst" theory and "catalyst" fees refer to attorneys' fees sought by plaintiffs' counsel when there has been neither a settlement of the case, nor a judgment or a consent decree entered on the merits of the plaintiff's claims.

The members of the Alliance seek to preserve their freedom to make decisions regarding the safety and satisfaction of their customers, without fear that they will incur "penalties" in the form of paying enormous "catalyst" attorneys' fees to attorneys who file strategically-timed lawsuits. Although this case directly involves only the attorneys' fee provisions of the Fair Housing Amendments Act and the Americans with Disabilities Act, 42 U.S.C. § 12205; 42 U.S.C. § 3613(c)(2), this case is important to the Alliance and its members who are all-too-often targets of catalyst claims under other federal fee-shifting statutes. Members of the Alliance face a mounting volume of class actions asserting that vehicles are defective, and seeking damages for "diminution in value," class certification and, of course, attorneys' fees. The "fuel" for these vehicle cases, despite the regulatory schema, is the expectation of class counsel that they can obtain a large award of "catalyst" fees. Indeed, the economic self-interest of many plaintiffs' counsel has been judicially noticed, *Davis v. Carl Cannon Chevrolet-Olds, Inc.*, 182 F.3d 792, 796 (11th Cir. 1999), and is especially pronounced in consumer class actions that are often "virtual-plaintiff" cases and attorney-driven. *See* Rand Institute for Civil Justice, *Class Action Dilemnas: Pursuing Public Goals for Private Gain Executive Summary* 9 (1999) ("When class action lawsuits are successful, they may yield enormous fees for attorneys . . . So, attorneys have substantial incentives to seek out opportunities for litigation, rather than waiting for clients to come to them").

STATEMENT OF THE CASE

After Petitioners (residents in a private care facility) filed a lawsuit challenging the validity of specified state

statutes relating to residential care facilities, the State of West Virginia amended the laws to delete the offending provisions. The State then sought an involuntary dismissal of Petitioners' claims on the ground that they were moot.

The attorneys for Petitioners then requested that the court enter an award of "catalyst" fees. Petitioners sought the fees under the fee-shifting provisions of the Fair Housing Amendments Act ("FHAA") and the Americans with Disabilities Act ("ADA"), both of which provide for an attorney fee award to a "prevailing party." 42 U.S.C. § 12205; 42 U.S.C. § 3613(c)(2). Petitioners argued that they "prevailed" in the litigation (even without a judgment, consent decree, or settlement) because, through the defendants' voluntary action, they obtained "all" of the relief they sought in their complaint.

The district court granted the defendants' motion to dismiss, finding that the Petitioners' claims were moot. The district court then denied Petitioners' request for attorneys' fees holding that a party who does not obtain relief through a formal judgment, consent decree, or settlement cannot be a "prevailing party" under the FHAA or the ADA. The Fourth Circuit Court of Appeals affirmed the district court's order on the attorneys' fee issue.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

Allowing the recovery of "catalyst" fees in product liability cases -- in the absence of any formal judgment, consent decree, or settlement -- is fraught with mischief. And the problems inherent in allowing an award of "catalyst"

fees are exponentially greater in class-actions which are often nothing more than an "entrepreneurial" venture "created" to secure attorneys' fees. *See, e.g., Davis v. Carl Cannon Chevrolet-Olds, Inc.*, 182 F.3d 792, 796 (11th Cir. 1999) (noting that plaintiff class action lawyers are merely "'entrepreneurs' who take a case in the expectation of making money from it"); *Hearing of the Courts and Intellectual Property Subcommittee of the House Judiciary Committee; Subject: Mass Torts and Class Action Lawsuits*, statement of Richard Thornburgh, former Governor of Pennsylvania, Attorney General of the United States, and Under Secretary of the United Nations (March 9, 1998) (commenting that lawyers "have lately perverted the class action device into their own personal litigation lottery"). Would-be class counsel -- knowing that attorneys' fees are available under a "catalyst" theory even if they do not shepherd the litigation to a final conclusion -- are motivated to "create" lawsuits regarding matters that could be addressed without litigation, and to abandon those lawsuits when the time is most ripe for their own personal profitability. And, it is not unheard of for a majority of the fees sought by those attorneys (and thus the court's expenditure of resources) to be attributable to the actual pursuit of fees, rather than to the resolution of the claims made in the complaint. These persistent and all-too-common problems cry out for abolishment of any "catalyst" theory that would allow the recovery of attorneys' fees without a judgment, consent decree, or settlement.

If any "catalyst" theory is recognized that allows for the recovery of attorneys' fees in the absence of a judgment, settlement, or consent decree, it should be based only on a statute-by-statute analysis. A broad pronouncement could

render all of the more than 100 fee-shifting statutes found in federal law susceptible to such a "catalyst" theory. *See Marek v. Chesney*, 473 U.S. 1, 43-51 (1985). Some of the federal fee-shifting statutes contain language distinct from that found in statutes such as the FHAA and the ADA, and expressly provide that, in order to be entitled to an award of attorneys' fees, a party must first obtain an enforceable "judgment". *See, e.g.*, 15 U.S.C. § 2310(d)(2); 29 U.S.C. § 216(b). Neither Congress, nor the statutes, contemplated an award of attorneys' fees without a judgment, consent decree, or settlement.

Finally, a "catalyst" theory for recovery of attorneys' fees should be recognized, if at all, only when specific, stringent standards are met. A plaintiff who seeks such fees should be required to show that the defendant's voluntary acts have rendered the plaintiff's claims moot in their entirety, that the defendant would not have acted "but for" the plaintiff's filing of his lawsuit, and that the relief provided by the defendant would have been "required by law" if the plaintiff succeeded on his claims.

ARGUMENT

Virtually every federal fee-shifting provision requires that a plaintiff "prevail" in order to be entitled to an award of attorneys' fees. *See, e.g.*, 42 U.S.C. § 1988 ("the court, in its discretion, may allow the *prevailing party* . . . a reasonable attorney's fee" (emphasis added)); 15 U.S.C. § 2310(d)(2) ("[i]f a consumer *finally prevails* in any action . . . he may be allowed by the court to recover as part of the judgment" his reasonable attorneys' fees (emphasis added)). And, this

Court has made a clear and unequivocal pronouncement as to when a plaintiff can claim to have "prevailed" in a case:

> [T]o qualify as a prevailing party, a civil rights plaintiff must obtain at least some relief *on the merits of his claim*. The plaintiff *must obtain an enforceable judgment* against the defendant from whom fees are sought, *or comparable relief through a consent decree or settlement*. Whatever relief the plaintiff secures must directly benefit him at the time of the judgment or settlement.

Farrar v. Hobby, 506 U.S. 103, 111 (1992) (citations omitted) (emphasis added).

Farrar precludes the notion that a plaintiff can be deemed to have "prevailed" without a judgment, settlement, or consent decree. *Id.* It would be an unwarranted and unreasonable extension of *Farrar* to sanction an award of fees without any of the prerequisites pronounced by this Court. All the more so, since most fee-shifting provisions are operative, either by their terms or interpretively, only in favor of a "prevailing party" which this Court has defined as including only those who obtain a judgment, settlement, or consent decree. Indeed, awarding attorneys' fees without a judgment, settlement, or consent decree is an invitation to federalize and prolong every case which can possibly be pled under any of the more-than-100 fee-shifting statutes.

I. IT IS PROBLEMATIC TO ALLOW FEES WITHOUT A JUDGMENT, CONSENT DECREE, OR SETTLEMENT.

Both Petitioners and their *amici* argue that an award of attorneys' fees under a "catalyst" theory should be recognized if a plaintiff merely "achieves" "some relief" and benefits from that relief, regardless of how the case at issue is disposed of. This boundless proposition is unworthy of adoption.

The many problems inherent in awarding "catalyst" fees are illustrated by the case of *Chin v. Chrysler Corp.*, Civil Action No. 95-5569-JCL (D.N.J.). In *Chin*, the sole remaining issue of "catalyst" fees has been before the court for more than one year.[7/] Filed as a putative nationwide class action on October 27, 1995, the *Chin* complaint alleged that certain Chrysler[8/] vehicles equipped with a Bendix 9 or 10 antilock braking system were "dangerously defective." *Chin*

[7/]The *Chin* case is one of several "catalyst" cases currently pending against members of the Alliance. It is discussed at length herein because it best highlights most of the problems inherent in a "catalyst" theory which would allow for the recovery of attorneys' fees even in the absence of a judgment, settlement, or consent decree. The court in *Chin* has already held that the "catalyst" theory is applicable to that case. *Chin v. Chrysler Corp.*, Civ. No. 95-5569-JCL (December 15, 1999) (The *Chin* opinion regarding the "catalyst" issue is unpublished, and is thus attached in the appendix hereto). The parties have continued to litigate whether the plaintiffs' claims were a "substantial cause" of the defendant's alleged "voluntary" conduct.

[8/]Chrysler Corporation is now known as DaimlerChrysler Corporation and is one of the thirteen automobile manufacturers represented by the Alliance.

v. Chrysler Corp., 182 F.R.D. 448, 451 (D.N.J. 1998). Plaintiffs' claims included, *inter alia*, breach of warranty under the Magnuson-Moss Warranty Act, 15 U.S.C. § 2301, *et seq.*, which contains a "fee-shifting" provision (*i.e.*, a consumer who "finally prevails" can recover attorneys' fees "as part of the judgment"). 15 U.S.C. § 2310(d)(2).

The filing of the *Chin* case came only after NHTSA had initiated an inquiry and investigation into the Bendix 10 antilock braking system.[9/] *Chin*, 182 F.R.D. at 451-52. After the filing of *Chin*, Chrysler, with the oversight of NHTSA, announced that it would voluntarily recall all vehicles equipped with Bendix 9 and 10 antilock braking systems.[10/] *Id.* The final voluntary recall (involving the Bendix 9 system) was announced in October, 1996. *Id.*, at 452.

Despite Chrysler's voluntary recalls, and NHTSA's oversight of them, the plaintiffs in *Chin* continued to prosecute their claims for two more years. 182 F.R.D. 448. The plaintiffs' counsel moved the court to certify a nationwide class of owners of Chrysler-manufactured vehicles equipped with the subject antilock braking systems. *Id.* It was only after the court denied the plaintiffs' request for certification that the plaintiffs' counsel decided to abandon all of their clients' claims, assert "victory" based on the recalls, and seek attorneys' fees under the "catalyst"

[9/]NHTSA's inquiry and investigation into the Bendix 9 antilock braking system was not instituted until after the filing of *Chin*.

[10/]The plaintiffs' counsel in *Chin* sought an injunction to preclude the voluntary recall, but the court denied their motion.

theory. *Chin v. Chrysler Corp.*, Civ. No. 95-5569-JCL (December 15, 1999) (Appendix A).

Chin is illustrative of at least four problems inherent in awarding "catalyst" fees absent a judgment, settlement, or consent decree: (1) the proliferation of litigation; (2) the prolonging of litigation; (3) the discouraging of voluntary corrective action; and (4) the lack of objective standards leading to inconsistent results.

Proliferation of litigation. Recognition of the "catalyst" theory would further encourage the immediate initiation of a lawsuit whenever a lawyer learns of a pending investigation by NHTSA or a voluntary investigation by a manufacturer. It would discourage lawyers -- and the consumers they purport to represent -- from seeking, or waiting for, a satisfactory outcome without litigation. As such, it frustrates the regulatory scheme enacted by Congress which entrusts NHTSA with primary jurisdiction for investigating and remedying alleged vehicle defects. *See, e.g., Walsh*, 130 F.R.D. at 267. A lawyer knows that running to the courthouse before a regulatory resolution is achieved will provide a basis upon which he can claim "victory." Witness *Chin*: an inquiry was started by NHTSA into an automotive defect; before the NHTSA investigation was completed and before NHTSA and Chrysler came to a resolution, a lawsuit was filed; plaintiff's counsel, after successive strategic failures, then claimed "victory" based on that recall, and sought fees arguing that they obtained "some relief" (even though that relief occurred in the context of the pending NHTSA investigation). *See also See S-1 v. State Board of Education of North Carolina*, 6 F.3d 160, 172 (4th Cir. 1993), *rev'd*, 21 F.2d 49 (4th Cir. 1994) (Wilkinson, J.

dissenting) (noting that the "catalyst theory provides incentives for filing marginal, even frivolous, lawsuits. Any change in conduct by the defendant, for whatever reason, may offer a promising payout to attorneys who file a complaint, whether or not that complaint has any ultimate legal merit").

Prolonging of litigation. The issues as to the propriety of an award of "catalyst" fees can survive long after the plaintiff's claims have been resolved. Courts become enmeshed in the quagmire of developing and reviewing a factual record to decide: whether the voluntary relief provided by the defendant is the equivalent of "some" of the relief originally sought by the plaintiff; whether the plaintiff benefited from that relief; whether the plaintiff's filing of a lawsuit was the cause of the defendant's voluntary action; and what amount of attorneys' fees is reasonable. These issues make for a case-within-a-case, and consume more judicial resources than were spent on the substantive issues of the plaintiff's claims -- a result that runs counter to this Court's prior admonishment that "[a] request for attorney's fees should not result in a second major litigation." *Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983). This case is a prime example. Although it has been pending for more than four years, it is undisputed that the Petitioners' claims became moot seventeen months into the litigation; the last two years and six months (and still counting) have focused solely on Petitioners' counsel's claim to attorneys' fees under a "catalyst" theory. More time has been spent on the "catalyst" issue than on the substantive claims underlying the litigation. *See also Chin*, Civ. No. 95-5569-JCL (December 15, 1999) (Appendix) (unresolved issue of "catalyst" attorneys' fees pending over one year).

Discouraging voluntary corrective action. Once suit has been filed, the risk of an attorneys' fee award based on the value of the supposed "results" achieved poses a strong disincentive to voluntary remedial action. If a defendant will be confronted with a claim for thousands of dollars in attorneys' fees even if he voluntarily remedies a problem, he may conclude that the risk of such a payment outweighs the benefits of a voluntary corrective action. Thus, by discouraging voluntary action, the catalyst theory harms the very class of people that it purports to benefit. *See S-1*, 6 F.3d at 172 (Wilkinson, J. dissenting) (noting "catalyst" theory discourages voluntary action).

Lack of objective standards leading to inconsistent results. There are no objective standards to ensure consistent results if an award of "catalyst" fees is allowed based on a plaintiff obtaining "some relief." Take a typical case in which the relief sought in the complaint includes cessation of offensive conduct, remedial action to correct conditions resulting from that offensive conduct, compensatory damages, and punitive damages. If the defendant voluntarily ceases the offending conduct, and the plaintiff abandons all claims for remedial action and compensatory and punitive damages, one court is free to find the "some relief" standard is satisfied, while another court is free to find otherwise. This consequential problem is particularly evident in class actions when multiple claims are pending in different jurisdictions based on the same alleged product defect. And, even if an objective standard is applied to the "some relief" criteria so that it is mandated that a court find it is met so long as a plaintiff obtains even just one of the types of relief originally sought, the amount of the attorneys' fees to be

awarded is yet another issue which is not prone to any consistent result.

Other problems inherent in the "catalyst" theory, while less obvious, are equally compelling. A "catalyst" theory under which a plaintiff's attorney is entitled to fees if he shows that he obtained "some relief" sought in a complaint leaves that plaintiff's attorney with an inherent ethical conflict: should a client's arguably meritorious claims be sacrificed when a defendant provides "some relief" originally sought by the client in order to optimize his counsel's chance of recovering attorneys' fees? This dilemma becomes more pronounced the less likely the chance of obtaining any additional relief on the other claims because if the plaintiff's counsel continues to litigate the claims after the defendant provides "some relief" and ultimately loses on those claims, how could he ever claim to be a "prevailing" party? Again, *Chin* is illustrative. The *Chin* plaintiffs sought various types of relief, including a recall of the allegedly defective vehicles and compensatory damages for lost resale value. 182 F.R.D. at 451. The defendant voluntarily conducted a recall of the vehicles within months of the filing of the lawsuit, but the plaintiffs' counsel continued to prosecute their clients' claims (believing that those claims were not moot and that the plaintiffs were entitled to additional damages and relief). *Id.*, at 448. Only after the court denied class certification did the plaintiffs decide to abandon their claims through a voluntarily dismissal. *Chin v. Chrysler Corp.*, Civ. No. 95-5569-JCL (December 15, 1999) (Appendix A). The plaintiffs' counsel then opted to seek an award of attorneys' fees under the "catalyst" theory based on the voluntary recall conducted two years earlier. *Id.* But this strategy abandoned the individual claims of the named plaintiffs that the

plaintiffs' counsel apparently believed to be meritorious even after the recall.

Furthermore, in the context of class action litigation, an award of "catalyst" fees entered as to the claims of the putative class members is inherently unfair. It subjects a defendant to the payment of attorneys' fees on a class-wide basis while that defendant remains susceptible to ongoing litigation by putative class members whose claims are not barred because there has been no judgment, settlement, or consent decree extinguishing their claims. *See, e.g., Chin*, No. 95-5569-JCL (Appendix A) (voluntary dismissal taken as to named plaintiff only since class certification had been denied).

Finally, the notion of an award of "catalyst" fees is at odds with Fed.R.Civ.P. 54. When a plaintiff voluntarily dismisses his claims with prejudice the defendant is deemed to be the "prevailing party" under Rule 54(d)(1), and, as such, is entitled to an award of costs. *See, e.g., Schwartz v. Folloder*, 767 F.2d 125, 130-31; 10 J.W. Moore, *Moore's Federal Practice*, § 54.101[3], 54-158 (3d ed. 2000). But, a "catalyst" theory would permit a plaintiff to turn the "prevailing party" label on its head by requiring a defendant who is a "prevailing party" for purposes of costs to pay attorneys' fees under a notion that the plaintiff is the "prevailing party" under the applicable fee-shifting statute. Clearly, Congress did not intend for one party to "prevail" for purposes of costs and the other party to "prevail" for purposes of fees. See *Farrar*, 506 U.S. at 118 (O'Connor, J., concurring) (because 42 U.S.C. § 1988 authorizes fees "as part of the costs . . . when a court denies costs, it must deny

fees as well; if there are no costs, there is nothing for the fees to be awarded "as part of").

Thus, it is clear that there are numerous problems if "catalyst" fees are allowed without a judgment, settlement, or consent decree. These problems cry out for abolition of any "catalyst" theory that allows fees without a judgment, settlement, or consent decree.

II. EVEN IF UPHELD UNDER THE FHAA AND THE ADA, THE "CATALYST" THEORY DOES NOT APPLY UNDER ALL FEE-SHIFTING STATUTES.

Even though this case involves only the FHAA and the ADA, Petitioners and *amici* suggest that all of the more than 100 federal fee-shifting statutes should be treated uniformly. *See* Petitioners' Brief, p. 20; Brief for Public Citizen and the American Civil Liberties Union, pp. 3-5; *see also* Brief for the United States, p. 2 ("this case . . . will likely provide guidance on the availability of fees under a wide variety of federal fee-shifting statutes"). However, this Court's maxims for statutory interpretation clearly counsel that the issue of whether "catalyst" attorneys' fees are permitted is one of statutory interpretation which necessarily must "begin[] with the language of [each specific] statute." *Harris Trust and Savings Bank v. Salomon Smith Barney Inc.*, -- U.S. --, 120 S.Ct. 2180, 2191 (2000).

Indeed, this Court has recognized the need to analyze fee-shifting statutes individually, according to their own words and purposes. For example, in *Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 523-24 (1994), this Court refused to interpret the fee-shifting provision in the Copyright Act

coextensively with 42 U.S.C. § 1988 because, although the provisions shared similar language, the "goals and objectives of the two Acts are likewise not completely similar." *Id.*, at 524; *see also, Stomper v. Amalgamated Transit Union, Local 241,* 27 F.3d 316, 318 (7th Cir. 1994) ("Any tendency to treat all attorneys' fees statutes as if they were insignificant variations on § 1988 was squelched by *Fogerty* . . . which holds that even a statute with the same text as § 1988 does not necessarily have the same meaning . . . Different statutes receive individual analysis, with principal focus on their language . . . "); *Aetna Casualty and Surety Co. v. Liebowitz,* 730 F.2d 905, 907-08 (2d Cir. 1984) ("Nothing in the statute's language indicates an intent to authorize an attorney's fee award . . . for a plaintiff's successfully negotiating a settlement of his claim").

Adoption of a statute-by-statute approach to the issue of "catalyst" fees is consistent with *Fogerty*, which noted that courts must be "mindful that Congress legislates against the strong background of the American Rule" (*i.e.* "unless Congress provides otherwise, parties are to bear their own attorneys' fees"). 510 U.S. at 533. And, such an approach assures that Congressional intent will be honored and that litigants will be able to rely on the plain-language of a particular fee-shifting statute when that language is clear.

A disturbing trend has emerged. Courts, relying solely on cases interpreting civil rights statutes, have been extending the catalyst "theory" well beyond its civil rights roots without any analysis of the specific fee-shifting provision at issue. *See, e.g., Klamath Siskiyou Wildlands Center v. Babbitt,* 105 F.Supp.2d 1132, 1135 (D.Or. 2000) (without analysis of wording of statute at issue, and relying

exclusively on cases interpreting civil rights statutes as allowing the recovery of attorneys' fees under a "catalyst" theory, court held "catalyst" theory was viable under the Endangered Species Act, 16 U.S.C. § 1531, et seq. (*citing Sablan v. Dept. of Finance of the Commonwealth of the Northern Mariana Islands,* 856 F.2d 1317 (9th Cir. 1988))); *Folsom v. Heartland Bank,* No. Civ. A. 98-2308, 2000 WL 718345 *2 (D.Kan. 2000) (court concluded that, because plaintiffs were "prevailing parties" as interpreted in cases applying the fee-shifting provisions of 42 U.S.C. § 1988, they were entitled to an award of "catalyst" fees under the Truth-in-Lending Act fee-shifting provision, 15 U.S.C. § 1640(a)(3), even though the words "prevailing party" appear nowhere within the provisions of that Act (*citing Ellis v. University of Kansas Medical Center,* 163 F.3d 1186, 1194 (10th Cir. 1999); *Foremaster v. City of St. George,* 882 F.2d 1485, 1488 (10th Cir. 1989))). The moral weight and imperatives of many compelling civil rights cases have often led a court to award "catalyst" fees in a vastly different statutory scheme, without regard to the specific language of the statute at issue or the intent behind it.

Take, for example, the Magnuson-Moss Warranty Act, 15 U.S.C. § 2301, *et seq.*, a statute of particular interest to the Alliance. The fee-shifting provision of that Act provides that "[i]f a consumer *finally* prevails in any action . . . he may be allowed by the court to recover *as part of the judgment*" his reasonable attorneys' fees. 15 U.S.C. § 2310(d)(2) (emphasis added). Despite the statutory language requiring a party to "finally" prevail before being awarded attorneys' fees, and the express statutory language indicating that attorneys' fees can only be recovered as "part of the judgment," the court in *Chin v. Chrysler Corp.*, Civ. No. 95-

5569-JCL (December 15, 1999) (Appendix A), held that the Magnuson-Moss Act permits recovery of "catalyst" fees even when a plaintiff voluntarily dismisses his claims. In reaching its conclusion, the court relied heavily on *Baumgartner v. Harrisburg Housing Auth.*, 21 F.3d 541 (3d Cir. 1994) -- a case holding that the "catalyst theory" applies to 42 U.S.C. § 1988. *Id.* Yet, the Magnuson-Moss Act, unlike 42 U.S.C. § 1988, precludes an award of attorneys' fees in the absence of an enforceable "judgment" of which attorneys' fees can be made a "part." 15 U.S.C. § 2310(d)(2). And, the Magnuson-Moss Act, unlike 42 U.S.C. § 1988, requires the plaintiff to "*finally* prevail[]" in the lawsuit. 15 U.S.C. § 2310(d)(2) (emphasis added). Taking § 2310(d)(2) on its face, nothing short of a final judgment (*i.e.*, a "judgment" in which the plaintiff "finally prevails") could support an award of attorneys' fees under the Magnuson-Moss Act; yet, relying on civil rights cases, the *Chin* court found that a "catalyst" theory applied.

The members of the Alliance, like other employers, are also subject to the Fair Labor Standards Act, 29 U.S.C. § 201, *et seq.* It provides that a court must "in addition to any *judgment* awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee . . . " 29 U.S.C.§ 216(b) (emphasis added). Notwithstanding the fact that this fee-shifting provision explicitly indicates that an award of any attorneys' fees is to be made only as an "addition to any *judgment*," the court in *Wisnewski v. Champion Healthcare Corp.*, No. Civ. A3-96-72, 2000 WL 1474414 *8 (D.N.D. 2000), held that a plaintiff can recover attorneys' fees under a "catalyst" theory even without a judgment. Indeed, the *Wisnewski* court expressly acknowledged that the plaintiffs in that case had "not received actual relief on the merits of their claim

through a judgment, consent decree, or settlement." 2000 WL 1474414 *9. Nonetheless, the court made an award of attorneys' fees to the plaintiffs' counsel on the basis of the defendant's "voluntary" act of correcting its formula for the computation of overtime. 2000 WL 1474414 *10. The court in *Wisnewski* did not analyze the "in addition to any *judgment*" language of the Fair Labor Standards Act, but, rather, relied solely on cases interpreting a civil rights statute -- 42 U.S.C. § 1988. *Id.*, at *8-9 (*citing Tyler v. Corner Constr. Corp.*, 167 F.3d 1202, 1205 (8th Cir. 1999)).

Many Alliance members are also covered by the provisions of the Labor-Management Reporting and Disclosure Act, 29 U.S.C. § 401, *et seq.* ("LMRDA"). The expansion of the "catalyst" theory, without careful consideration of the statutory provision at issue, is nowhere more clear than in the cases interpreting the LMDRA. Although one court has held that Title II of the LMRDA prohibits an award of "catalyst" attorneys' fees because its express language indicates that fees are to be awarded only "in addition to any *judgment*," *Stomper v. Amalgamated Transit Union, Local 241*, 27 F.3d 316, 318-20 (7th Cir. 1994) (emphasis added), another has held that the "catalyst" theory applies to Title I of the LMRDA, *even though that part of the statute has no fee-shifting provision, whatsoever. Brown v. Brotherhood of Electrical Workers*, 76 F.3d 762, 770-71 (6th Cir. 1996). Relying on this Court's pronouncement in *Hall v. Cole*, 412 U.S. 1, 9 (1973), authorizing a court to use its "equitable power" to shift fees under Title I of the LMRDA to a prevailing union member whose lawsuit produces a "common benefit" for the union members at large, the court in *Brown* determined that, in a Title I LMRDA action, a plaintiff need not prevail on the

merits for such fee-shifting to occur. The court based its analysis solely on case law finding that "catalyst" fees are available in civil rights cases, despite the fact that there is a complete absence of any statutory authority for such fees within the LMRDA. 76 F.3d at 770 (*citing Hewitt v. Helms*, 482 U.S. 755, 760 (1987); *Maher v. Gagne*, 448 U.S. 122, 129 (1980)).

As these cases document, there is a near-cavalier attitude toward expanding the "catalyst" theory to all fee-shifting statutes without regard to, and indeed in spite of, express statutory language.

III. "CATALYST" FEES SHOULD BE ALLOWED ONLY UNDER SPECIFIC STANDARDS.

If this Court determines that "catalyst" fees are recoverable without a judgment, settlement, or consent decree, it should set forth specific, stringent standards for determining when such fees will be awarded. The standards currently applied vary from circuit to circuit producing inconsistent results. *Compare, e.g., Morris v. City of West Palm Beach,* 194 F.3d 1203, 1210 (11th Cir. 1999) (requiring three elements: (1) the plaintiff achieved "substantial success" in which there has been a "material alteration of the legal relationship of the parties"; (2) the lawsuit was a "substantial factor" in obtaining the relief; and (3) the defendant's voluntary remedial action would have been "required by law") *with Commissioners Court of Medina County v. United States,* 683 F.2d 435, 442 (D.C. Cir. 1982) (requiring just two elements: (1) the plaintiff "substantially received the relief sought"; and (2) the lawsuit was a "substantial factor in attaining the relief").

The Alliance suggests a tripartite test to determine whether a party is entitled to an award of "catalyst" fees: (1) the plaintiffs' claims must be completely moot, and thus lack any legal basis; (2) the plaintiff must prove that "but for" the filing of the lawsuit, the defendant would not have taken the remedial action; and (3) the plaintiff must show that the remedial action would have been "required by law" if he had succeeded on the merits of his claims.

First, a plaintiff should be required to show that the defendant's action rendered the plaintiff's lawsuit moot in its entirety, and that he thus has no legal basis to pursue any of the claims filed against the defendant.[11/] Without a showing of complete mootness, the "catalyst" theory is inapplicable because the plaintiff's claims can still be adjudicated thereby clearly answering the "prevailing party" question. Further, requiring a finding of mootness lessens the ethical dilemmas inherent in a system that would allow a plaintiff's meritorious claims to be abandoned in favor of seeking immediate "catalyst" fees. In short, the "catalyst" theory should not apply unless the defendant's voluntary remedy puts the plaintiff out of court.

[11/]Such a requirement is implicitly acknowledged by Petitioners and their *amici*. *See, e.g.*, Petitioners' Brief, p. 18 (arguing that the plaintiff is entitled catalyst attorneys' fees "*when a case is rendered moot* as a result of the plaintiff catalyzing the defendant into making changes consistent with the relief requested by the plaintiff" (emphasis added)); Brief for the United States, p. 20 (arguing that the plaintiff is entitled to catalyst attorneys' fees when the defendant "voluntarily complies with the plaintiff's demand for relief[,] *eliminates the basis for the plaintiff's legal challenge, moots the plaintiff's legal action*, and relieves the parties of their obligation to litigate the suit" (emphasis added)).

Second, the plaintiff must bear the burden to prove that the defendant would not have taken the remedial action "but for" the plaintiff's lawsuit. This standard was aptly characterized in *Langton v. Johnston,* 928 F.2d 1206, 1224-25 (1st Cir. 1991):

> The catalyst test . . . is invoked in those cases in which plaintiffs do not receive a favorable judgment, yet claim to have succeeded in bringing about a beneficial change in defendants' conduct or in the conditions complained of -- a change which would not have occurred *but for* the institution of the suit. The critical inquiry is whether the suit prompted defendants to take action to meet plaintiff's claim . . . In this inquiry, the litigation's provocative role is a *sine qua non*[12/] . . . If the defendant acted other than in response to the spur of plaintiffs' lawsuit, the catalyst theory does not apply.

(emphasis added) (internal quotations and citations omitted) (*interpreting Nadeau v. Helgemoe,* 581 F.2d 275 (1st Cir. 1978)[13/]).

[12/]A "but for" test contemplates that the plaintiffs' lawsuit is the *sine qua non* for the defendant's voluntary action. *See Black's Law Dictionary* (West 7th ed. 1999) (defining *sine qua non* as an "indispensable condition or thing; something on which something else necessarily depends").

[13/]The standards set forth in *Nadeau* have been cited, with approval, by Petitioners.

Allowing the recovery of "catalyst" fees under a lesser standard will act as a strong incentive to litigate first and to attempt to preempt regulatory processes. Only a "but for" standard will act to protect defendants who act in good-faith in response to expressed customer concerns or government regulation. Only a "but for" standard provides the "safe harbor" necessary to ensure that defendants will feel free to act without the fear that a huge attorneys' fee payment looms.[14/]

Third, the plaintiff should be required to show that the remedial action would have been "required by law" had the plaintiff succeeded on the merits of the lawsuit. *See, e.g., Owner-Operator Independent Drivers Association, Inc. v. Bissell,* 210 F.3d 595, 598 (6th Cir. 2000) (if the voluntary relief "is not required by law, then defendants must be held to have acted gratuitously and plaintiffs have not prevailed in a legal sense" (citations omitted)); *Foreman v. Dallas County,* 193 F.3d 314, 322 (5th Cir. 1999) ("A defendant cannot be asked to pay attorneys' fees for relief which was never demanded, or even made clear, in the plaintiff's complaint"); *Morris v. City of West Palm Beach,* 194 F.3d 1203, 1210 (11th Cir. 1999) ("The third element of the catalyst test has been expressed as requiring a showing that the defendant's conduct was required by law" (quotations and citations omitted); *Nadeau v. Helgemoe,* 581 F.2d 275, 281 (1st Cir. 1978) (indicating that a plaintiff does not

---

[14/]The "substantial factor" approach suggested by Petitioners and their *amici* fails to address such concerns because it permits the recovery of attorneys' fees, even if the plaintiff's lawsuit was not a *sine qua non* (*i.e.* an indispensable condition) to defendant's voluntary remedial action.

"prevail" for purposes of a fee award under the "catalyst" theory if the defendant's voluntary conduct "is not required by law").

This third essential element assures that plaintiffs will "not be deemed to be prevailing parties if their claims are objectively unmeritorious." *Morris,* 194 F.3d at 1210. And, in the context of the automotive industry, the adoption of the "required by law" element will minimize the number of unnecessary lawsuits that are filed after publication of NHTSA regulatory efforts.[15/]

CONCLUSION

This Court should affirm the decision of the Fourth Circuit Court of Appeals.

[15/]For example, in *Chin* the plaintiffs asserted entitlement to attorneys' fees based on the defendant's voluntary "recall" of allegedly defective automobiles, one of the many types of relief listed as being "sought" in their civil complaint. *Chin v. Chrysler Corp.*, 182 F.R.D. 448, 451 (D.N.J. 1998); *Chin v. Chrysler Corp.*, Civ. No. 95-5569-JCL (December 15, 1999) (Appendix A). However, because the exclusive authority to order recalls lies with NHTSA, (49 U.S.C. § 30118(b); 49 C.F.R. § 554.11; *see also Freightliner Corp. v. Myrick*, 514 U.S. 280, 283-84 (1995)), the district court could never have granted such relief.

Respectfully submitted,

CHARLES A. NEWMAN
Counsel of Record
KATHY A. WISNIEWSKI
JEROME H. BLOCK
Bryan Cave LLP
One Metropolitan Square
Suite 3600
St. Louis, Missouri 63102
(314) 259-2000

APPENDIX

NOT FOR PUBLICATION

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

DAVID CHIN, ET AL.,	:	
	:	Civ.No.95-5569 (JCL)
PLAINTIFFS,	:	
	:	
v.	:	
	:	**MEMORANDUM AND**
CHRYSLER CORPORATION,	:	**ORDER**
	:	
DEFENDANT.	:	

LIFLAND, District Judge

Presently before the Court is plaintiffs' appeal of Magistrate Judge Chesler's August 24, 1999 Order denying plaintiffs' motion for a declaration of their right to attorneys' fees. Also before the Court are plaintiffs' motion for further discovery and defendant's motion to strike the declaration of Clarence Ditlow. For the reasons discussed herein, the Magistrate Judge's Order will be reversed, plaintiffs' motion for discovery will be granted, and defendant's motion to strike will be denied.

BACKGROUND

Plaintiffs brought this action on behalf of themselves and other buyers and lessees of Chrysler cars and trucks employing Bendix 9 and 10 anti-lock brakes, alleging violations of the Magnuson-Moss act, 15 U.S.C. § 2301 et seq., ("the Act" or "Magnuson-Moss") and state laws governing fraud and breach of warranty. Plaintiffs' motion

for class certification was denied by this Court on September 11, 1998. See Chin v. Chrysler Corp., 182 F.R.D. 448 (D.N.J. 1998) (providing a more complete account of the facts preceding the present appeal and motions). This Court then granted plaintiffs' motion to dismiss pursuant to FRCP 41(a)(2).

Plaintiffs appeal Magistrate Judge Chesler's determination that they are not entitled to attorneys' fees as the party that finally prevail[ed]" in accordance with the fee-shifting provisions of the Act. See 15 U.S.C. § 2310(d)(2). Magistrate Judge Chesler found that the Act requires a party to litigate its claim to finality before it may be considered a prevailing party entitled to attorneys' fees. Applying a plain meaning analysis to the statutory words, the Magistrate Judge determined that the words "finally prevails" in the Act differentiate it from other fee-shifting statutes that allow a broad interpretation of "prevailing party" and do not require a party to litigate his claims to a resolution on the merits to be eligible for attorneys' fees. Under many statutes using "prevailing party" language, court have ruled that a party may recover attorneys' fees even if it did not win the case, if the party can demonstrate that its lawsuit was a catalyst that brought about the desired relief. Under this "catalyst theory," a party may recover attorneys fees even if it dropped its claim because the lawsuit had been mooted by voluntary action taken by the other party. The party seeking attorneys' fees must demonstrate that it received relief that it originally sought and that there was a causal connection between the lawsuit and attainment of that relief.

Having determined the catalyst theory inapplicable, the Magistrate Judge did not reach the merits of the factual dispute as to whether plaintiffs' lawsuit was a catalyst for

Chrysler's recall of vehicles with the Bendix 9 and 10 anti-lock braking systems or whether that recall was due to an investigation by the National Highway Traffic Safety administration ("NHTSA") or to other factors.

Plaintiffs argue that the catalyst theory is viable under the Act and request additional discovery from defendant to prove that their lawsuit was a catalyst for Chrysler's recall of vehicles employing the Bendix 9 and 10 anti-lock braking systems, which was part of the relief originally sought in their lawsuit. Defendant argues that Magistrate Judge Chesler was correct in determining that the catalyst theory is not available under the Act that that plaintiffs, having been denied class certification and seeking voluntary dismissal of their lawsuit, cannot be said to have finally prevailed.

STANDARD OF REVIEW

The court may reverse a magistrate's order only if it finds the ruling clearly erroneous or contrary to law. See 28 U.S.C. § 636(b)(1)(A); Fed. R. Civ. P. 72(a); L. Civ. R. 72.1(c)(1)(A). The district court is bound by the clearly erroneous rule in findings of fact, while the phrase "contrary to law" indicates plenary review as to matters of law. See Haines v. Liggett Group Inc., 975 F.2d 81, 91 (3d Cir. 1992). When an appellant challenges a magistrate's interpretation of specified statutory language, the court's standard of review is plenary. See United States v. Hayden, 64 F.3d 126, 129 (3d Cir. 1995); United States v. Accetturo, 623 F. Supp. 746, 753 (D.N.J. 1985). Because Magistrate Judge Chesler's opinion turned on statutory interpretation, this Court's review is plenary.

DISCUSSION

1. The Statute's Terms

Magnuson-Moss authorizes lawsuits for damages or other legal or equitable relief by any "consumer who is damaged by the failure of a supplier, warrantor, or service contractor to comply with any obligation under this chapter, or under a written warranty, implied warranty, or service contract." 15 U.S.C. § 2310(d)(1). Regarding recovery of attorneys' fees, the Act states:

> If a consumer finally prevails in any action brought under [15 U.S.C. § 2310(d)(1)], he may be allowed by the court to recover as part of the judgment a sum equal to the aggregate amount of cost and expenses (including attorneys' fees based on actual time expended) determined by the court to have been reasonably incurred by the plaintiff for or in connection with the commencement and prosecution of such action, unless the court in its discretion shall determine that such an award of attorneys' fees would be inappropriate.

15 U.S.C. § 2310(d)(2).

The legal issue is whether Congress' use of the terms "as part of the judgment," "prevails," and "finally" in the Act's fee-shifting provision permits the court to apply the catalyst theory to award attorneys' fees. The question is a matter of first impression. If the catalyst theory is available, then the factual question remains: whether this action was a catalyst for Chrysler's recall.

The paramount canon of statutory interpretation is that a court must first direct its inquiry to the statute's actual language. See Connecticut Nat'l Bank v. Germain, 503 U.S. 249, 253-54 (1992); Smith v. Fidelity Consumer Discount Co., 898 F.2d 907, 909-10 (3d Cir. 1990). Where the statutory language is clear on its fact, a court must give it full force and effect. See United States v. Menasche, 348 U.S. 528, 520 (1955) (citations omitted). Absent a clear meaning, a court may seek the meaning of the statutory terms by looking to other statutes with similar language, legislative purposes, and underlying policies and may analogize to the meaning given by courts interpreting those statutes. See Brown v. Gardner, 513 U.S. 115, 118-19 (1994). The court also may seek the legislative intent of the statutes from its legislative history, the policies underlying the statute, reasonableness, and public policy concerns. See Blanchard v. Bergeron, 489 U.S. 87, 91 (1989); Montana Wilderness Assoc. v. United States Forest Serv., 665 F.2d 951, 955-57 (9th Cir. 1981). The interpretation ultimately accorded to a statute's terms must be given in a common sense manner that advances the legislative purposes of the statute. See United States v. Brown, 333 U.S. 18, 25-26 (1948) ("The canon in favor of strict construction is not an inexorable command to override common sense and evident statutory purpose. It does not require magnified emphasis upon a single ambiguous word in order to give it a meaning contradictory to the fair import of the whole remaining language."); Connecticut Nat'l Bank v. Germain, 503 U.S. 249, 255 (1992) (Stevens, J., concurring) (quoting Judge Learned Hand's opinion in Lehigh Valley Coal Co. v. Yensavage, 218 F. 547, 553 (2d Cir. 1914) advising that statutes "should be construed, not as theorems of Euclid, but with some imagination of the purposes which lie behind them.").

a) "As part of the judgment"

The Act's fee-shifting provision states that a consumer may recover attorneys' fees "as part of the judgment." Many courts have ruled that a final adjudication of the merits of the case is not required to trigger the provision. For example, a plaintiff who accepts a settlement offer can be considered a "prevailing party" entitled to attorneys' fees under Magnuson-Moss. See McGinty v. Sunbird Boat Co., Inc., 1998 WL 544953 (E.D. Pa. Aug. 26, 1998) (plaintiffs who settled for a replacement for defective boat may still be the prevailing party); Anderson v. Ford Motor Co., 1997 WL 158133, at *1 (E.D. Pa. Apr. 1, 1997); Allen v. Chrysler Corp., 1997 WL 117015, at *1 (E.D. Pa. Mar. 13, 1997); Rivera v. Ford Motor Co., 1996 W.L. 383306, at *1 (E.D. Pa. July 3, 1996); Ianelli v. Chrysler Corp., 1996 WL 368317, at *1 (E.D. Pa. June 24, 1996); Stitsworth v. Ford Motor Co., 1996 WL 67610, at *1 (E.D. Pa. Feb. 13, 1996) ("A party accepting a settlement offer may be considered the 'prevailing party.'"); Taylor v. Chrysler Corp., 1995 WL 635195, at *1 (E.D. Pa. Oct. 24, 1995); DeVries v. Pitts Pontiac GMC-Trucks, Inc., 545 N.Y.S.2d 1009, 1013 (City Ct., Monroe Co. 1989) (legislative history indicates that a settling consumer can be the "prevailing party").

Furthermore, a plaintiff who accepts an arbitration award can be a prevailing party eligible for attorneys' fees under the Act. See Elder v. Chrysler Corp., 1997 WL 734036 (E.D. Pa. Nov. 5, 1997). Such is the case even if the plaintiff achieved only limited success in the arbitration, although the limited degree of success may decrease the total amount of the attorneys' fees award. See Hines v. Chrysler Corp., 971 F. Supp. 212, 214 (E.D. Pa. 1997) ("Although plaintiff only achieved limited success at the arbitration of

this matter, she is still considered a 'prevailing party' for purposes of the Magnuson-Moss Act and may be entitled to attorneys' fees."); Gibbs v. Hyundai Motor Am., 1997 WL 325788 (E.D. Pa. June 4, 1997).

The New Jersey courts have allowed consumers accepting rescission as to a faulty product to recover attorneys' fees as a prevailing party under the Act even in the absence of a judgment for any damages. See Ventura v. Ford Motor Corp., 173 N.J. Super. 501 (Ch. Div. 1980), aff'd 180 N.J. Super. 45 (App. Div. 1981). The New Jersey courts have focused on whether consumers received any relief rather than on the amount received when awarding attorneys' fees under the Act, holding that a limited amount of damages does not necessarily limit the fees to be awarded to a prevailing party. See General Motors Acceptance Corp. v. Jankowitz, 230 N.J. Super. 555 (App. Div. 1989). These cases have underscored that the trial judge is not "slavishly bound under Magnuson-Moss" when considering whether and to what degree to award attorneys' fees, but may award attorneys' fees to the party who has "properly sought and received relief" under the Act regardless of whether a damages award was entered. See id. at 560.

Thus, courts that have considered the issue have found that litigating a case to trial is not required. Rather, a consumer who obtains a settlement or even a partial victory through arbitration can still be said to have prevailed sufficiently to warrant attorneys' fees. Such an interpretation is consistent with the legislative history of the Act. See Senate Committee on Commerce, Magnuson-Moss Warranty-Federal Trade Commission Improvement Act, S. Rep. 93-151, at 22-24 (1973) (discussing the private remedies available under the Act, particularly "reasonable

attorney's fees available if successful in the litigation (including settlement)").

In the cases discussed above, the courts did not resolve the merits of the claims, but they did enter judgments involving either settlement, an arbitration award, or rescission of the contract. In most of these cases, attorneys' fees were awarded "as part of the judgment" in accordance with the Act. The Court finds that it is not necessary for a Magnuson-Moss plaintiff to receive a damages award or to litigate to a decision on the merits of its claim in order to be eligible for attorneys' fees as part of a judgment. A dismissal of a lawsuit and a court-ordered award of attorneys' fees would be a judgment that is both enforceable and appealable. The Court has already dismissed plaintiffs' claims in the present matter. If the Court were to find after discovery on the catalyst issue that an award of attorneys' fees is warranted, it would enter a judgment awarding such fees. That would be sufficient to meet the Act's requirement that fees be awarded "as part of the judgment."

b) "Prevails"

What it means to "prevail" has a broad meaning under many fee-shifting statutes, with a great many courts finding under the catalyst theory that a party can still be said to prevail even if his cause of action has been mooted by some voluntary action of the opposing party. For example, the fee-shifting statute applicable to federal civil rights claims, 42 U.S.C. § 1988, provides that "the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs." 42 U.S.C. § 1988(b). Courts interpreting the term "prevailing party" in § 1988 have construed it to include

parties who prevail through settlement. See, e.g., Maher v. Gagne, 448 U.S. 122, 129 (1980) ("The fact that respondent prevailed through a settlement rather than through litigation does not weaken her claim to fees."). Courts applying the catalyst theory have found that civil rights litigants have prevailed "if they succeed on any significant issue in litigation which achieves some of the benefit the parties sought in bringing suit." See Hensley v. Eckerhart, 461 U.S. 424, 433 (1983); see also Hewitt v. Helms, 482 U.S. 755, 760 (1987) ("[R]elief need not be judicially decreed in order to justify a fee award under §1988."). The Supreme Court explained the jurisprudential underpinnings of the catalyst theory in Hewitt v. Helms, in which it noted:

> [a] lawsuit sometimes produces voluntary action by the defendant that affords the plaintiff all or some of the relief he sought through a judgment - e.g., a monetary settlement or a change in conduct that redresses the plaintiff's grievances. When that occurs, the plaintiff is deemed to have prevailed despite the absence of a formal judgment in his favor. . . . In all civil litigation, the judicial decree is not the end but the means. At the end of the rainbow lies not a judgment, but some action (or cessation of action) by the defendant that the judgment produces - the payment of damages, or some specific performance, or the termination of some conduct.

482 U.S. at 760-01.

The Third Circuit has specifically adopted the catalyst theory in civil rights cases. See Baumgartner v. Harrisburg Housing Auth., 21 F.3d 541 (3d Cir. 1994); Institutionalized Juveniles v. Secretary of Pub. Welfare, 758 F.2d 897, 910

(3d Cir. 1985); Sullivan v. Commonwealth of Pa. Dept. of Labor & Indus., 663 F.2d 443, 452 (3d Cir. 1981). Of relevance to the present motion, the Third Circuit in Baumgartner found that the catalyst theory could apply even in a case in which plaintiffs did not litigate their claims to completion but voluntarily dismissed the case, as long as plaintiffs could prove that their lawsuit accomplished its objectives. See Baumgartner, 231 F.3d at 545. The Baumgartner court noted that the Supreme Court has held that a "catalyst" plaintiff cannot recover attorneys' fees based on a purely moral victory but must secure some enforceable judgment, and then held that the catalyst theory could still apply in a case in which a plaintiff did not seek solely money damages and realized significant benefits sought by the lawsuit. See id. at 545-46 (citing Farrar v. Hobby, 506 U.S. 103, 112 (1992)). The Third Circuit recognized the continuing viability of the catalyst theory, noting that all the circuit courts to have considered the theory's applicability under prevailing party statutes have adopted it. See id. at 544-45 ("This firmly-entrenched doctrine has also been recognized by each of the other eleven courts of appeals to have considered the issue.") (citing cases from each circuit).

Not all fee-shifting provisions are alike and the case law history of the civil rights statute's attorney-fee provision is not applied across the board. See Stomper v. Amalgamated Transit Union, Local 241, 27 F.3d 316, 318 (7th Cir. 1994). ("Any tendency to treat all attorneys' fees statutes as if they were insignificant variations on § 1988 was squelched by Fogerty v. Fantasy, Inc., 510 U.S. 517 (1994), which holds that even a statute with the same text as § 1988 does not necessarily have the same meaning. . . . Different statutes receive individual analysis, with principal focus on their language."). But several other federal statutes that provide

that the party who prevails may recover attorneys' fees have been interpreted to embrace the catalyst theory. Accordingly, the Court will review the language of various attorney-fee provisions to determine whether those statutes are interpreted to support the catalyst theory.

The catalyst theory has been applied to the fee-shifting provision of the Individuals with Disabilities Education Act ("IDEA"), which allows attorneys' fees the "parents or guardian of a child or youth with a disability who is the prevailing party." See Kathleen H. v. Massachusetts Dep't of Educ., 154 F.3d 8, 14 (1st Cir. 1998) (quoting 20 U.S.C. § 1415(e)(4)(B)); B.K. v. Toms River Bd. of Educ., 998 F. Supp. 462, 474 (D.N.J. 1998); Cf. Combs v. School Bd. of Rockingham County, 15 F.3d 357, 361 (45th Cir. 1994) (finding plaintiff not entitled to fees, but leaving open whether fees are recoverable under catalyst theory absent judgment, consent decree, or settlement).

The Third Circuit has applied the catalyst theory to the Education of the Handicapped Act ("EHA"), which allows a court to "award reasonable attorney's fees as part of the costs to the parents or guardian of a handicapped child or youth who is the prevailing party." Wheeler v. Towanda Area Schl. Dist., 950 F.2d 128, 132 (3d Cir. 1991) (quoting 20 U.S.C. § 1415(e)(4)(B)).

The catalyst theory also has been applied under the Equal Access to Justice Act ("EAJA"). See Dunn v. Sullivan, 794 F. Supp. 133, 135, 137 (D. Del. 1992). The EAJA states that a court may award reasonable attorneys' fees to "the prevailing party in any civil action brought by or against the United States . . . . " See 28 U.S.C. § 2412(b). Of relevance, the catalyst theory was applied in Dunn v.

Sullivan to Social Security benefits claimants seeking attorneys' fees under EAJA even after their lawsuit had been dismissed as moot. See Dunn, 794 F. Supp. at 135 (finding that a dismissal is a "final judgment" under EAJA and can entitle a prevailing party to recover attorneys' fees).

The catalyst theory has also been applied to the Fair Housing Act ("FHA"), which states that "the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee and costs." 42 U.S.C. §3613(c)(2); see Oxford House-A v. City of University City, 87 F.3d 1022, 1024 (8th Cir. 1996). Some statutes, such as the FHA, define the term "prevailing party" according to § 1988. See 42 U.S.C. §3602(o) ("'Prevailing party' has the same meaning as such term has in section 1988 of this title"). In other cases, courts have applied the catalyst theory even in the absence of "prevailing party" language in the statute. For example, the catalyst theory has been applied under the Labor-Management Reporting and Disclosure Act ("LMRDA"), which provides that "[t]he court in such action may, in its discretion, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action." See Brown v. Local 58, 76 F.3d 762, 773 (6th Cir. 1996) (quoting 29 U.S.C. § 431(c)). But see Stomper, 27 F.3d at 318 (Seventh Circuit finding that LMRDA requires a plaintiff to prevail by formal judgment rather than settlement to be eligible for attorneys' fees).

The catalyst theory has not been applied to the fee-shifting provision of the Racketeer-Influenced and Corrupt Organizations ("RICO") Act, which provides that the victorious plaintiff may recover treble damages and which allows recovery of attorneys' fees only as part of that

damages award. See Aetna Cas. & Sur. Co. v. Liebowitz, 730 F.2d 905, 906 (2d Cir. 1984) (citing 18 U.S.C. § 1964(c)). The civil RICO statute has been interpreted as requiring a plaintiff to obtain a judgment for damages before being eligible for attorneys' fees, since the statute does not contain the "considerably broader and more flexible" language found in "prevailing party" statutes and instead allows a plaintiff to "recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee." Id. at 907.

The statutory language of the Clayton Anti-Trust Act is instructive because it contains different fee-shifting provisions for different types of lawsuits, one allowing recovery of attorneys' fees only as part of a treble damages award and two others containing "prevailing party" language which do not require a damages award for recovery of attorneys' fees. See 15 U.S.C. § 15(a) (allowing an injured party to recover "threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee"); 15 U.S.C. § 26 (providing that a party suing for injunctive relief may recover attorneys' fees if he "substantially prevails"); 15 U.S.C. § 4304 (providing that any "substantially prevailing claimant under the antitrust laws" may be awarded attorneys' fees in a lawsuit based on a joint venture). Courts interpreting 15 U.S.C. § 15(a) have held that a party must secure a damage award before it may be eligible for attorneys' fees. See City of Detroit v. Grinnell Corp., 495 F.2d 448, 459 (2d Cir. 1974) ("The provision for recovery of attorneys' fees contained in Section 4 of the Clayton Act [15 U.S.C. § 15(a)] is dependent upon recovery of a judgment."). The Clayton Act was later amended to include "prevailing party" language, a change that resulted in courts adopting the catalyst theory to allow recovery of

attorneys' fees under these sections by plaintiffs who did not win a damages award but who achieved success on other aspects of their claims. See F. & M. Schaeffer Corp. v. C. Schmidt & Sons, Inc., 476 F. Supp. 203, 207 (S.D.N.Y. 1979) (construing 15 U.S.C. § 26).

These examples suggest that when Congress ties attorneys' fees to treble damage awards, it means to exclude a catalyst theory of recovery. But when Congress inserts terminology regarding the party who prevails, it intends that attorneys' fees may be awarded absent adjudication of the merits of the lawsuit. Preemptively, Congress is aware of the way in which courts have interpreted the "prevailing party" language of fee-shifting statutes. See Aetna Cas. & Sur. Co., 730 F.2d at 908 & n.3 (citing the various statutes in which "prevailing party" or similar terms are used as evidence that Congress is knowledgeable regarding how to permit the award of attorneys' fees to a plaintiff who does not litigate his claim through to trial). Hensley plainly states that the catalyst theory applies to all prevailing party fee-shifting statutes. See Hensley, 461 U.S. at 433 n.7. The Third Circuit has firmly endorsed the catalyst theory as well.

This Court concludes that the use of prevailing party language in Magnuson-Moss suggests that attorneys' fees are not tied to damages award and that the catalyst theory is available. Accordingly, a party whose lawsuit causes a defendant to take remedial action that the plaintiff sought in his lawsuit is the party who "prevails" under Magnuson-Moss.

c) "Finally"

The Magistrate Judge found that a plain-meaning reading of Magnuson-Moss' fee-shifting provision precluded application of the catalyst theory because the statute used the term "finally" to modify "prevails," rather than simply saying "prevailing party." Although "finally prevails" may suggest that a consumer must win the litigation in order to merit attorneys' fees, the cases discussed above demonstrate that is not always the case. The parties have not alerted the Court to, nor is the Court aware of, any judicial opinion that directly addresses the meaning of the term "finally" under Magnuson-Moss. In view of the cases discussed above, this Court concludes that the term "finally" does not exclude the catalyst theory.

None of the cases allowing recovery of attorneys' fees after settlement, rescission, or arbitration placed any special emphasis on the word "finally." In fact, all of the courts that considered awarding attorneys' fees under Magnuson-Moss treated it simply as a "prevailing party" statute governed by Hensley. See e.g., McGinty, 1998 WL 544953; Elder, 1997 WL 734036; Hines, 971 F. Supp. at 214 (E.D. Pa. 1997); Allen, 1997 WL 117015 at *1; Rivera, 1996 WL 383306 at *1; Estel v. Chrysler Corp., 1996 WL 208375 (E.D. Pa. 1996); Stitsworth, 1996 WL 67610 at *1. Likewise, the New Jersey courts in Ventura and Jankowitz did not placed any emphasis on the term "finally" when considering whether the consumers could be prevailing parties under the Act.

The court sees nothing talismanic about the word "finally" which would suggest that the fee-shifting provision of Magnuson-Moss has a meaning any more or less restrictive than the term "prevailing party" in similar fee-

shifting provisions of other statutes. Rather, the Court believes the word "finally" means that a party may not recover attorneys' fee until the litigation is over. Congress thus differentiated Magnuson-Moss from fee-shifting statutes that allow interlocutory awards of attorney's fees, such as the Criminal Justice Act. See 18 U.S.C. § 3006A. Thus, attorneys' fees are available under Manguson-Moss only when a case is concluded.

As the Supreme Court noted in Hewitt, the desired end of litigation is not always a court's judgment, but rather cessation or effectuation of some conduct by a party. When a defendant accedes to a plaintiff's demands and a lawsuit is thereby mooted and must be dismissed, that lawsuit can be said to have reached finality even in the absence of a court's resolution of the merits. At the time Magistrate Judge Chesler considered the catalyst issue, plaintiffs' case was still being litigated and had not reached finality. Now, the case has been dismissed at the request of the plaintiffs. Dismissal is a "final" order that satisfies the finality requirement of the Act.

2. Legislative Intent and Public Policy

Allowing a catalyst theory is consistent with the legislative history and public policies underlying Magnuson-Moss. The Act authorizes consumers to commence civil actions for damages or other relief for the breach of any express or implied warranty or service contract by the provider of consumer goods. See Alperin & Chase, Consumer Law, § 258 at 431-32. The Act is remedial in nature and meant to provide "exceedingly broad" enforcement power for consumers. See id. Amount the goals of the Magnuson-Moss Act were "to make warranties

on consumer products more readily understood and enforceable" and to enhance consumer protection. See H.R. Rep. 93-1107.

Congress intended "to make the pursuit of consumer rights involving inexpensive products economically feasible" by allowing consumers to act as private attorneys general and to recover attorneys fees when their efforts vindicate the rights of consumers. See S. Rep. 93-151, 23-24 (1973); see also Derfner & Wolf, Court Awarded Attorney Fees, § 5.03[4] (noting that "[t]he fee shifting measures contained in consumer protection laws . . . are decidedly pro-plaintiff" and discussing Magnuson-Moss as an example of a statute meant to assist consumer enforcement of congressional policies). Commentators have deemed the Act's fee-shifting provisions to be the most important aspect of the Act. See Bixby, "Judicial Interpretation of the Magnuson-Moss Warranty Act," 22 Am. Bus. L.J. 125, 154 (1984). It is perhaps only because of the fee-shifting provision that the Act has become a useful consumer tool to enforce product warranties. See id. at 162 ("It is largely because of the attorneys' fees provision that the Act has been able partially to fulfill its purpose."). Without the opportunity to recover attorneys' fees, the high cost of litigation would outweigh the benefits of consumer enforcement of warranties for less-costly goods. See id. ("The 'lemon-aid' Congress intended to serve consumers by enacting the Magnuson-Moss Warranty Act would be unaffordable without the routine awarding of attorneys' fees to successful plaintiffs.").

Courts have found under other statutes authorizing consumers to act as private attorneys general that awarding attorneys' fees is essential to enforcement and that allowing a defendant to avoid attorneys' fees by taking voluntary action

to moot the controversy would defeat legislative intent. See e.g., Southwest Marine, Inc. v. Campbell Indus., 732 F.2d 744 (9th Cir. 1984) (applying catalyst theory under amended fee-shifting section of Clayton Act). The Third Circuit clearly expressed such concerns in Baumgartner when it stated: "[F]rom a policy standpoint, if defendants could deprive plaintiffs of attorney's fees by unilaterally mooting the underlying case by conceding to plaintiffs' demands, attorneys might be more hesitant about bringing these . . . suits, a result inconsistent with Congress' intent . . . ." Baumgartner, 21 F.3d at 548 (applying catalyst theory under § 1988). This Court believes that ruling out the catalyst theory under Magnuson-Moss could encourage defendants who find that their case is going poorly to take voluntary action to moot the case and thereby deprive plaintiffs of the opportunity to recover attorneys' fees. This could deter consumers from bringing meritorious claims because they could risk being left with a large bill for attorneys' fees. That is inconsistent with the civil enforcement rationale of the Act and the legislative policy goals of compensating injured consumers and encouraging a safer marketplace. Allowing defendants to escape from meritorious claims and leave consumers with legal bills would work against Congress' purpose that the Act should "make the pursuit of consumer rights involving inexpensive products economically feasible." S. Rep. 93-151, 23-24 (1973).

The Third Circuit has applied the catalyst theory under § 1988, IDEA, EHA and EAJA, while other circuits have applied it under the LMRDA and the FHA. All are citizen-protection statutes meant to encourage individuals to act as private attorneys general in the public interest and the catalyst theory serves those interests. For similar reasons, the New Jersey courts found that the legislative and public

policies underlying Magnuson-Moss are served allowing the catalyst theory. See Ventura, 180 N.J. Super. at 66 ("The award of counsel fees fulfills the intent of the Magnuson-Moss Warranty Act. Without such an award consumers frequently would be unable to vindicate warranty rights accorded by law.").

This Court believes that Baumgartner guides its analysis of the viability of the catalyst theory for attorneys' fees under Magnuson-Moss. The Act is intended to enforce consumer warranties and thereby protect consumers and public at large from unsafe consumer products. As stated earlier, a court's construction of a statute should not place "magnified emphasis upon a single ambiguous word in order to give it a meaning contradictory to the fair import of the whole remaining language." United States v. Brown, 333 U.S. 18, 25-26 (1948). In this court's view, it would not serve the legislative intent of Magnuson-Moss or public policy to construe its "finally prevails" language as meaning something more restrictive than the "prevailing party' language in many similar fee-shifting provisions with similar legislative purposes. For the policy reasons set out by the Third Circuit in Baumgartner, the Court finds that the legislative intent and the public policies underlying Magnuson-Moss are best served by recognizing a catalyst theory for recovery of attorneys' fees. Thus, a plaintiff who can demonstrate the lawsuit was a catalyst for the change sought can be deemed a prevailing party eligible for an award of attorneys' fees.

3. Summary

For the reasons discussed above, this Court finds that terms "finally, "prevails," and "as part of the judgment" in

the attorneys-fee provision of Magnuson-Moss do not preclude application of the catalyst theory to determine if a consumer plaintiff is eligible for a recovery of attorneys' fees. Rather, the Court finds that a plaintiff who can demonstrate a change in legal status between himself and the defendant and a causal link between his lawsuit and that change can be said to have "prevailed" under Magnuson-Moss. Such a prevailing plaintiff would be eligible for attorneys' fees when the action is "final," meaning that the lawsuit is concluded, because interlocutory fees are not available. The prevailing plaintiff may recover attorneys' fees "as part of the judgment" entered by the Court upon termination of the case, including a dismissal, regardless of whether the plaintiff has secured an award of damages or litigated to a decision on the merits. Permitting the catalyst theory under the fee-shifting provision of Magnuson-Moss serves the legislative intent of the Act as well as the policies underlying it. Accordingly, this Court will reverse the Magistrate Judge's determination that the language of the Act precluded application of the catalyst theory.

4. Test for Prevailing Party

Determining that the catalyst theory is available does not guarantee that a party claiming victory will be awarded attorneys' fees. See Hewitt, 482 U.S. at 760 (recognizing the vitality of the catalyst theory, yet denying recovery of attorneys' fees to civil rights litigants); Hines, 971 F. Supp. at 214 (noting that an award of attorneys' fees to the prevailing party under Magnuson-Moss is not automatic; rather, the party seeking fees bears the burden of proof); Kathleen H., 154 F.3d at 14 (acknowledging that a plaintiff can demonstrate that she prevailed by showing that she acted as a catalyst for a change in the legal relationship of the

parties, but denying plaintiffs' fee application). A party seeking attorneys' fees still has the burden of proving causation before it is entitled to recovery. See B.K., 998 F. Supp. at 474 (plaintiffs can demonstrate prevailing party status by establishing causation under the catalyst theory); Brown v. Local 58, 76 F.2d at 773 (noting that while the catalyst theory applied under LMRDA, plaintiffs' action was not in fact causally related to the union's subsequent amendment of its bylaws).

The Third Circuit laid out the two-part test for a prevailing party to recover under the catalyst theory in Baumgartner. A court considering an attorney-fee request should ask: "[1] whether plaintiffs achieved relief and [2] whether there is a causal connection between the litigation and the relief from the defendant." Baumgartner, 21 F.3d at 546 (citing Wheeler, 950 F.2d at 131). The first prong may be satisfied by a plaintiff who achieves "some of the benefit sought in a lawsuit, even through the plaintiff does not ultimately succeed in securing a favorable judgment." Id. The second prong of the test, causation, may be established

> either by obtaining a judgment, consent decree or a settlement that 'change[s] the legal relations of the parties such that defendants [are] legally compelled to grant relief' or through a 'catalyst' theory, where even though the litigation did not result in a favorable judgment, the pressure of the lawsuit was a material contributing factor in bringing about extrajudicial relief.

Id. (citing Wheeler, 950 F.2d at 131). Plaintiffs must show that they received "some of the benefit sought" and that "the pressure of the lawsuit was a material contributing factor in

bringing about extrajudicial relief." Baumgartner, 21 F.3d at 546; see also Metropolitan Pittsburgh Crusade for Voters v. City of Pittsburgh, 964 F.3d 244, 250 (3rd Cir. 1992) (finding that the inquiry under the catalyst theory is "whether plaintiff achieved some of the benefit sought by the party bringing suit" and that the lawsuit was a "material contributing factor" to the attainment of the relief).

Defendant argues that applying the catalyst theory under Magnuson-Moss will cause increased litigation because plaintiffs' attorneys will piggyback on consumer products investigations by governmental agencies and file lawsuits hoping to recover attorneys' fees if regulatory action results. This is a false fear. Applying the Baumgartner test will defeat "piggyback" claims because the causation prong requires plaintiffs to demonstrate that their lawsuit was, in large part, responsible for the action taken. The test requires plaintiffs to prove that they actually caused the result, not just that they were along for the ride.

5. Discovery on Catalyst Issue

Plaintiffs have argued that extended time for discovery is needed so that they can prove that their lawsuit was a catalyst for the recall of the Bendix 9 and 10 braking systems and that plaintiffs thus qualify as the prevailing party. Plaintiffs claim that despite a 19-month investigation of the Bendix 10 braking system by the NHTSA, defendant showed no interest in recalling the system until plaintiffs filed their lawsuit. Additionally, plaintiffs state that their lawsuit called for a recall of the Benedix 9 braking system a year before the NHTSA began its inquiry into that system. Plaintiffs argue that each of these occurrences suggests that their lawsuit was a motivating factor in the recalls and that

discovery of internal Chrysler memoranda will enable them to prove these claims.

Defendant argues that additional discovery is not needed because plaintiffs cannot be said to have prevailed in their lawsuit. Specifically, defendant notes that plaintiffs failed to gain class certification, that they originally sought money damages and received none, that they continued to litigate the case for two years after the recall of the braking systems, and that the recalls were prompted by the NHTSA investigation, not plaintiffs' lawsuit.

The facts that plaintiffs continued to litigate their case after the recall was announced and sought but not receive money damages are immaterial to the question of whether plaintiffs' lawsuit was a catalyst for the recall. Plaintiffs need not have obtained all of the relief they sought in order to qualify as the prevailing party, nor need they have abandoned the lawsuit when they received part of the relief they were seeking. Plaintiffs also need not prove that their lawsuit was the sole cause of Chrysler's action.

The timing of Chrysler's recall, following filing of this lawsuit, raises a question of whether the lawsuit was a material contributing factor in Chrysler's decision to recall the Bendix 9 and 10 braking systems. Also at issue are whether the NHTSA investigations were the superseding motivating factors. Deciding these issues will require the Court to analyze the chronology of events and the circumstances under which defendant decided to recall the braking systems. Further discovery into the factors that contributed to Chrysler's recall could help the Court decide the ultimate issue of whether plaintiffs' lawsuit was a catalyst for the recall. Accordingly, the Court will grant the

plaintiffs' motion for further discovery into the motivations and decision-making process for Chrysler's remedial actions.

The question of whether plaintiffs should be awarded attorneys' fees will be remanded to Magistrate Judge Chesler for consideration in accordance with this opinion.

6. Defendant's Motion to Strike Ditlow Declaration

Defendant has moved to have this Court strike the declaration of Clarence Ditlow in support of plaintiffs' motion for attorneys' fees. Defendant argues that the Ditlow declaration contains primarily legal arguments and opinions rather than statements of fact within the personal knowledge of the affiant as required by Local Rule 7.2(a). This Court's consideration of plaintiffs' appeal of Magistrate Judge Chesler's Order involved statutory interpretation, which is wholly a question of law. The Court did not rely on affidavits submitted because the fact question of plaintiffs' right to attorneys' fees was not before the Court. Therefore, defendant's motion to strike the Ditlow declaration is moot at this point and will be denied.

Accordingly, **IT IS** on this _[14th]_ day of December 1999 **ORDERED** that Magistrate Judge Chesler's August 24, 1999 Order is reversed and the matter is remanded for further consideration consistent with this opinion.

IT IS FURTHER ORDERED that plaintiffs' motion for further discovery pertaining to the catalyst issue is granted.

IT IS FURTHER ORDERED that defendant's motion to strike the declaration of Clarence Ditlow is denied as moot.

[signed]
John C. Lifland
United States District Judge