Non-prevailing Parties Who Bring Successful Actions under Consumer Protection Statutes

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Many federal statutes provide for the recovery of attorney’s fees for the plaintiff. These statutes use a variety of phrases to indicate when a plaintiff is entitled to such fees. Some statutes give fees to “prevailing parties,” others give fees to plaintiffs who “substantially prevail.” Both the Fair Credit Reporting Act¹ (Credit Act) and the Fair Debt Collection Practices Act² (Debt Act) (collectively “Acts”) authorize attorney’s fees for plaintiffs who bring “successful actions.” There is currently a circuit split regarding whether an action is successful if a court finds that a defendant violated one of the duties outlined in the Acts but also finds that the consumer was not injured by this violation.

Three circuits have held that the plain language of these Acts demands that a plaintiff prove damages before being entitled to recover attorney’s fees. Three other circuits have ruled that an award of attorney’s fees is mandatory in most cases where a consumer proves a violation, regardless of whether she also proves damages. The Seventh Circuit has recently held that a Supreme Court case, Buckhannon Board & Care Home, Inc v West Virginia Department of Health & Human Resources, should serve as a controlling precedent. In Buckhannon, the Court defined the term “prevailing party” to require an

³ 15 USC § 1681o(a)(2); 15 USC § 1692k(a)(3).
⁴ See Nagle v Experian Information Solutions, Inc, 297 F3d 1305, 1306-07 (11th Cir 2002) (holding that the plaintiff “must receive some relief beyond mere entry of judgment” under the Credit Act); Crabill v Trans Union, LLC, 259 F3d 662, 667 (7th Cir 2001) (holding that the plaintiff must obtain formal judicial relief in order to obtain attorney’s fees under the Credit Act); Johnson v Eaton, 80 F3d 148, 151 (5th Cir 1996) (holding that attorney’s fees are available under the Debt Act only where the defendant is liable for damages).
⁵ See Emanuel v American Credit Exchange, 870 F2d 805, 809 (2d Cir 1989) (“Emanuel is not entitled to . . . damages, but [ ], because we now find a violation, he should be awarded costs and reasonable attorney’s fees.”); Graziano v Harrison, 950 F2d 107, 113-14 (3d Cir 1991) (finding that the deterrence rationale undergirding the Debt Act mandated that plaintiffs who prove violations receive fees); Carroll v Wolpoff & Abramson, 53 F3d 626, 628 (4th Cir 1995) (finding that fee awards are “mandatory in all but the most unusual circumstances”).
⁷ Crabill, 259 F3d at 666-67.
enforceable judgment such as an award of damages." The Seventh Circuit reasoned that "successful action" should be defined in the same way as "prevailing party."

Paying special attention to the applicability of Buckhannon, this Comment examines whether private plaintiffs under the Credit Act and Debt Act should be denied attorney's fees if they fail to prove that they suffered damages. Part I introduces the Acts and highlights the similarities in their fee-shifting provisions. Part II examines the pre-Buckhannon case law interpreting these Acts, the Buckhannon decision itself, and post-Buckhannon interpretations of fee-shifting provisions. Part III argues that the plain language of the Acts does not unambiguously illuminate the meaning of the phrase "successful action." This Part also argues that Buckhannon is not applicable to these Acts. The Buckhannon decision derived its force from the fact that "prevailing party" was a legal term of art with a definition set out in Black's Law Dictionary. "Successful action," however, is not a term of art and its meaning is more ambiguous. The legislative purposes and histories of the Acts suggest Congress intended fee shifting to be liberally applied to consumers so that they could effectively enforce compliance, freeing the government to expend resources elsewhere. Under the plain language of the Acts, courts retain some discretion to adjust fee awards in order to prevent opportunistic lawsuits with little merit. Therefore, the Comment concludes that the Acts authorize, but do not mandate, fee awards for consumers who prove violations but fail to prove damages.

I. STATUTORY BACKGROUND

The Debt Act creates rules that govern methods of debt collection. For example, debt collectors must include in their collection let-

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8 532 US at 605.
9 Crabill, 259 F3d at 667.
10 Black's Law Dictionary 1145 (West 7th ed 1999). See Buckhannon, 532 US at 603. Although courts have extended the Buckhannon logic to phrases that are not defined in Black's Law Dictionary, such as "substantially prevails," these cases argue that "prevail" is the key phrase, and rely on "prevail" having a set legal definition. See Oil, Chemical & Atomic Workers International Union v Department of Energy, 288 F3d 452, 455–56 (DC Cir 2002) (treating "substantially prevail" as functionally equivalent to "prevailing party" and "party who prevails"); J. Douglas Klein, Note. Does Buckhannon Apply?: An Analysis of Judicial Application and Extension of the Supreme Court Decision Eighteen Months After and Beyond, 13 Duke Envir L & Pol F 99, 117–21, 140–41 (2002) (arguing that because "prevail" is the operative word in Buckhannon's claim that "prevailing party" is a term of art, it is "logical to extend Buckhannon to statutes employing all forms of the root word 'prevail'").
11 "Successful action" is not listed in Black's Law Dictionary.
12 The relevant portion of the Debt Act states:

Civil liability

(a) Amount of damages
ners the source of the debt and a notice of the consumer's rights. The Debt Act authorizes private parties to sue debt collectors to recover actual damages and punitive damages. The purpose of the Debt Act is to curb abusive and deceptive debt collection tactics.

The Credit Act imposes obligations on credit reporting companies to ensure a minimum level of information accuracy. For example, all reporting companies must employ "reasonable procedures" to ensure the accuracy of their data. The Credit Act authorizes private parties to sue credit reporting companies to recover actual damages.

Except as otherwise provided by this section, any debt collector who fails to comply with any provision of this subchapter with respect to any person is liable to such person in an amount equal to the sum of—

1. any actual damage sustained by such person as a result of such failure;
2. in the case of any action by an individual, such additional damages as the court may allow, but not exceeding $1,000...;
3. in the case of any successful action to enforce the foregoing liability, the costs of the action, together with a reasonable attorney's fee as determined by the court. On a finding by the court that an action under this section was brought in bad faith and for the purpose of harassment, the court may award to the defendant attorney's fees reasonable in relation to the work expended and costs.

b) Factors considered by court

In determining the amount of liability in any action under subsection (a) of this section, the court shall consider, among other relevant factors—

1. in any individual action under subsection (a)(2)(A) of this section, the frequency and persistence of noncompliance by the debt collector, the nature of such noncompliance, and the extent to which such noncompliance was intentional.

15 USC § 1692k (emphasis added).
13 15 USC § 1692k(a)(1)-(2).
14 Fair Debt Collection Practices Act, S Rep No 95-382, 95th Cong, 1st Sess 1-2 (1977) (noting that the Debt Act was designed to "protect consumers from a host of unfair, harassing, and deceptive debt collection practices").
15 The relevant portion of the Credit Act states:

Civil liability for negligent noncompliance

(a) In general

Any person who is negligent in failing to comply with any requirement imposed under this subchapter with respect to any consumer is liable to that consumer in an amount equal to the sum of—

1. any actual damages sustained by the consumer as a result of the failure;
2. in the case of any successful action to enforce any liability under this section, the costs of the action together with reasonable attorney's fees as determined by the court.

(b) Attorney's fees

On a finding by the court that an unsuccessful pleading, motion, or other paper filed in connection with an action under this section was filed in bad faith or for purposes of harassment, the court shall award to the prevailing party attorney's fees reasonable in relation to the work expended in responding to the pleading, motion, or other paper.

15 USC § 1681o (emphasis added).
16 15 USC § 1681e(b).
17 15 USC § 1681o(a).
and, in limited circumstances, punitive damages. The purpose of the Credit Act is to ensure that credit reporting practices are “fair and equitable to the consumer.”

Both the Debt Act and the Credit Act also contain fee-shifting provisions. Traditional American legal practice requires that litigants bear their own costs, including attorney’s fees. To alter this default rule, a statute must explicitly authorize fee shifting. Legislative history indicating an intention to alter the default rule is insufficient.

Many federal statutes alter this default rule with fee-shifting provisions, which allow a litigant to recover some or all of her incurred attorney’s fees.

The Debt Act and the Credit Act contain near-identical fee-shifting provisions. The Debt Act provides:

[I]n the case of any successful action to enforce the foregoing liability, [the violator is liable for] the costs of the action, together with a reasonable attorney’s fee as determined by the court.

“Foregoing liability” refers to the recovery for actual damages sustained by the litigant and any punitive damages.

The Credit Act provides:

[I]n the case of any successful action to enforce any liability under this section, [a violator is liable for] the costs of the action to-

18 Under the Credit Act private plaintiffs can only receive punitive damages if the violations are willful rather than negligent. 15 USC § 1681n(a)(2).

19 15 USC § 1681(b). See also Guimond v Trans Union Credit Information Co, 45 F3d 1329, 1333 (9th Cir 1995) (noting that the Credit Act was “crafted to protect consumers from the transmission of inaccurate information about them”).

20 See Alyeska Pipeline Service Co v Wilderness Society, 421 US 240, 247 (1975) (“In the United States, the prevailing litigant is ordinarily not entitled to collect a reasonable attorneys’ fee from the loser.”).

21 Id at 262 (“[T]he circumstances under which attorneys’ fees are to be awarded and the range of discretion of the courts in making those awards are matters for Congress to determine.”).

22 The Court in Buckhannon cited language from both the House and the Senate indicating that formal judicial imprimatur was not required:

The House Report to § 1988 states that “[t]he phrase ‘prevailing party’ is not intended to be limited to the victor only after entry of a final judgment following a full trial on the merits,” HR Rep No 94-1558, 94th Cong, 2d Sess 7 (1976), while the Senate Report explains that “parties may be considered to have prevailed when they vindicate rights through a consent judgment or without formally obtaining relief,” S Rep No 94-1011, 94th Cong, 2d Sess 5 (1976).

Buckhannon, 532 US at 607-08 (emphasis added). Yet the Court deemed this legislative history ambiguous, and not sufficient given the requirement of explicit statutory authorization to depart from the American Rule. Id.

23 For a partial list of federal fee-shifting provisions, see Marek v Chesney, 473 US 1, 43-51 (1985) (Brennan dissenting) (appendix).

24 15 USC § 1692k(a)(3).

25 15 USC § 1692k(a)(1)-(2)(A).
together with reasonable attorney's fees as determined by the court.\textsuperscript{26}

The only liability "under this section" consists of actual damages sustained by the litigant.\textsuperscript{27}

Congress envisioned private suits as the primary mechanism to enforce compliance. The Debt Act is "primarily self-enforcing; consumers who have been subjected to collection abuses will be enforcing compliance."\textsuperscript{28} Private actions, however, fail as an enforcement mechanism if plaintiffs cannot recover attorney's fees. The damages resulting from violations of the Debt Act are often less than $100 while the cost of litigation can be over $10,000.\textsuperscript{29} A similar, although typically much less drastic, disparity sometimes exists in Credit Act litigation.\textsuperscript{30} Thus, many suits would not be worth pursuing unless attorney's fees were recoverable.

The potential for recovering attorney's fees can lead to nuisance lawsuits. Congress partially addressed this issue in both Acts by authorizing courts to order plaintiffs to pay the defendant's fees under certain circumstances. The Debt Act provides that, "[o]n a finding by the court that an action under this section was brought in bad faith and for the purpose of harassment, the court may award to the defendant attorney's fees reasonable in relation to the work expended and costs."\textsuperscript{31} Thus, a potential plaintiff risks having to pay the debt collector's attorney's fees. The legislative history confirms that the clause represents Congress's sole attempt to prevent nuisance lawsuits.\textsuperscript{32} The Credit Act contains a similar provision.\textsuperscript{33}

\textsuperscript{26} 15 USC § 1681o(a)(2).
\textsuperscript{27} 15 USC § 1681o(a)(1). Unlike the Debt Act, the Credit Act only provides for punitive damages when the violation was willful.
\textsuperscript{28} S Rep No 95-382 at 5 (cited in note 14).
\textsuperscript{29} See, for example, \textit{Carroll v Wolpoff & Abramson}, 53 F3d 626, 627, 630 (4th Cir 1995) ($50 in damages, $10,000 in fees); \textit{Zagorski v Midwest Billing Services, Inc}, 128 F3d 1164, 1165 (7th Cir 1997) ($100 in damages).
\textsuperscript{30} See, for example, \textit{Bryant v TRW, Inc}, 689 F2d 72, 74 (6th Cir 1982) ($8,000 in damages, $13,700 in fees); \textit{Nagle v Experian Information Solutions, Inc}, 297 F3d 1305, 1306 (11th Cir 2002) (no damages awarded, over $100,000 in fees).
\textsuperscript{31} 15 USC § 1692k(a)(3).
\textsuperscript{32} "In order to protect debt collectors from nuisance lawsuits, if the court finds that an action was brought by a consumer in bad faith and for harassment, the court may award the debt collector reasonable attorney's fees and costs." S Rep No 95-382 at 5 (cited in note 14).
\textsuperscript{33} The Credit Act provides that
\textit{[o]n a finding by the court that an unsuccessful pleading, motion, or other paper filed in connection with an action under this section was filed in bad faith or for purposes of harassment, the court shall award to the prevailing party attorney's fees reasonable in relation to the work expended in responding to the pleading, motion, or other paper.}

15 USC § 1681o(b).
The Debt Act and the Credit Act have similar purposes and language. Both Acts deal with consumer protection issues, grant private rights of action to injured consumers, and provide for the recovery of reasonable attorney's fees in the case of "any successful action to enforce" the liability outlined in the Acts. The similarities between the Acts have led some courts to use precedent from one Act to interpret the other.\footnote{See, for example, Bumgardner v Lite Cellular, Inc, 996 F Supp 525, 529 (ED Va 1998) (applying the Fifth Circuit's interpretation of "successful action" to the Credit Act). See also Lewis v Ohio Professional Electronic Network LLC, 190 F Supp 2d 1049, 1057 (SD Ohio 2002) (applying Debt Act precedent regarding the interpretation of the term "regularly" to the Credit Act).}

II. CASE LAW BACKGROUND

Prior to \textit{Buckhannon}, most courts interpreted the Debt Act’s fee-shifting provision to be mandatory any time the court found that a debt collector had violated the Debt Act.\footnote{Id.} After \textit{Buckhannon}, these decisions have been called into question. If \textit{Buckhannon} applies, fees will no longer be mandatory in cases where there is a violation but no damages. In fact, such fee awards will be forbidden.

A. Interpretation Prior to \textit{Buckhannon}

Prior to \textit{Buckhannon}, several courts addressed the attorney’s fees provisions of the Debt Act and the Credit Act. These courts essentially disagreed about the proper definition of "successful action."

In interpreting the Debt Act, the Second, Third, and Fourth Circuits suggested that attorney’s fees can be awarded in the absence of any award for actual damages. These courts ruled that an award of attorney’s fees is mandatory in most actions under the Debt Act. The Second Circuit defined “successful action” as any action that results in a finding that the debt collector violated the Debt Act.\footnote{Emanuel v American Credit Exchange, 870 F2d 805, 809 (2d Cir 1989) ("Emanuel is not entitled to . . . damages, but [ ] because we now find a violation, he should be awarded costs and reasonable attorney's fees.").} It stated that a violation “mandates such an award.”\footnote{Id.} The Third Circuit did not directly address whether an award of attorney’s fees is appropriate when the plaintiff does not prove any damages, but did rule that fees should be granted even if the plaintiff receives only nominal punitive damages.\footnote{See Graziano v Harrison, 950 F2d 107, 113–14 (3d Cir 1991).} The court reasoned that “the Act mandates an award of attorney’s fees as a means of fulfilling Congress’s intent that the Act
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should be enforced by debtors acting as private attorneys general.” The court also noted in dicta that the structure of the Debt Act shows that a debt collector “is liable” for three independent sources of costs: actual damages, statutory damages, and attorney’s fees. Thus, an award of attorney’s fees is not dependent on an award of either statutory or actual damages. The Fourth Circuit found that “the fee award under § 1692k is mandatory in all but the most unusual circumstances.” However, the court also noted that the district courts have wide discretion in determining the amount of this award. Thus, the court affirmed an award of $500 even though the plaintiff had incurred almost $10,000 in fees.

The Seventh Circuit adopted a more flexible approach and found that a “successful action” should be defined in reference to three factors: the difference between the amount of the award and the recovery sought, the significance of the legal issues, and the public purpose served by the litigation. The court suggested that the public purpose of checking harmful debt collection is an important consideration. Under this test, a court could award attorney’s fees even if the plaintiff received no relief, as long as the action served as a deterrent to future violations.

In Johnson v Eaton, the Fifth Circuit disagreed with the reasoning of its sister circuits and held that an award of attorney’s fees under the Debt Act requires more than a “successful action”; it requires a “successful action to enforce the foregoing liability.” The court reasoned that the phrase “to enforce the foregoing liability” provides insights into the meaning of “successful action.” To be successful, an action must yield some liability, not merely an abstract finding that a creditor has violated the Act. The court also noted that Congress probably did not intend to reward lawyers who brought suits based on behavior that, by definition, had not injured anyone.

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39 Id at 113.
40 Id.
42 Carroll, 53 F3d at 629 (“[The Debt Act] does not mandate a fee award in the lodestar amount. If the concept of discretion is to have any meaning at all, it must encompass the ability to depart from the lodestar in appropriate circumstances.”).
43 Id (noting that the court should look to the degree of success in determining what award is “reasonable”).
44 Zagorski v Midwest Billing Services, Inc, 128 F3d 1164, 1167 n 5 (7th Cir 1997) (basing this test on Justice O’Connor’s concurrence in Farrar v Hobby, 506 US 103, 121–22 (1992)).
45 Zagorski, 128 F3d at 1167 n 6 (noting that other courts find “the deterrent effect of the litigation to be an important consideration when evaluating the ‘degree of success’”).
46 80 F3d 148 (5th Cir 1996).
47 Id at 151 (emphasis added).
48 Id.
There is only one pre-Buckhannon case interpreting the analogous provision of the Credit Act. A district court in Virginia applied the Fifth Circuit's analysis in *Johnson* to the Credit Act. The court held that attorney's fees can only be awarded under the Credit Act if the plaintiff is awarded damages. The court noted that the Credit Act and the Debt Act provisions were virtually identical, and concluded that the Credit Act also requires that the plaintiff successfully enforce some liability.

The circuit split thus revolves around a disagreement about the definition of "successful action." The Second, Third, and Fourth Circuits define it somewhat rigidly: an action is successful if a statutory violation is proved. The Fifth Circuit subscribes to an equally rigid, but contrasting definition: an action is successful only if liability is proved. The Seventh Circuit used a more flexible, case by case, definition of "successful action."

B. *Buckhannon* and Its Aftermath

In *Buckhannon*, the Supreme Court held that a party who cannot prove that she suffered even nominal damages is not a "prevailing party" under the standard legal definition of the term. Since this decision, courts have used the definition of "prevailing party" to interpret other statutes that use similar language.

1. The *Buckhannon* decision.

In *Buckhannon*, the Supreme Court interpreted two fee-shifting provisions that each limited fee awards to "prevailing parties." Citing *Black's Law Dictionary*, the Court found that "prevailing party" was a legal term of art. The Court held that, to "prevail," a party must re-

49 *Bumgardner v Lite Cellular, Inc*, 996 F Supp 525, 529 (ED Va 1998) ("Because there was no award of damages or equitable relief against any defendant in this case, the [Credit Act] does not grant the Court authority to award Plaintiff attorney's fees and costs."). The court did not cite or address *Carroll*, where the Fourth Circuit found that fee awards are "mandatory in all but the most unusual circumstances." 53 F3d at 628. The court was probably unaware of the decision. See *Bumgardner*, 996 F Supp at 529 ("Plaintiff does not cite any persuasive authority that a party who receives no damages and no equitable relief can be a 'prevailing party' or a 'successful' party under the [Credit or Debt Acts]."). Alternatively, the court may have believed that *Carroll* misinterpreted the relevant Supreme Court precedent. See id (finding the Fifth Circuit's approach in *Johnson* to be "consistent with the Supreme Court's decision in [Farrar v Hobby]").

50 *Bumgardner*, 996 F Supp at 529.

51 Although the Fourth Circuit adopts the Third Circuit's view that fees are mandatory in most cases, it gives district courts wide discretion to determine the amount of the fee award.


53 *Buckhannon*, 532 US at 603.
receive formal judicial relief. A party “prevails” only when judicial relief creates a “material alteration of the legal relationship of the parties.”

Specifically, Buckhannon addressed and rejected the “catalyst theory” of attorney’s fees. Under the catalyst theory, a court can award attorney’s fees if the lawsuit brings about a voluntary change by the defendant that in effect grants the relief that the plaintiff is seeking. That is, the lawsuit serves as a catalyst for a change in the defendant’s practice. After such voluntary alterations in behavior, cases often become moot and are dismissed. Thus, the catalyst theory could be used to award attorney’s fees even if the case had not been adjudicated on the merits. The Court held that “[a] defendant’s voluntary change in conduct, although perhaps accomplishing what the plaintiff sought to achieve by the lawsuit, lacks the necessary judicial imprimatur on the change."

This Comment does not address catalytic effects; it addresses cases where a court has reached a decision on the merits, finding a violation but denying damages. The significance of Buckhannon is its insistence that a party does not “prevail” unless he or she receives some judicial relief that alters the legal relationship between the parties. A monetary award of any size creates such an alteration. A mere finding of a violation, without more, does not provide the required alteration to bestow “prevailing party” status. Thus, if Buckhannon applies to the Debt and Credit Acts, courts cannot award attorney’s fees to plaintiffs who failed to prove that they suffered damages.

2. Buckhannon’s applicability to other statutes.

Although Buckhannon’s holding was limited to the Americans with Disabilities Act and the Fair Housing Amendments Act, courts have applied its reasoning to other statutes using the term “prevailing party,” as well as to statutes that use language similar but not identical to “prevailing party.”

Statutes using the term “prevailing party” have been read in light of Buckhannon. In Brickwood Contractors, Inc v United States, the Federal Circuit applied Buckhannon to the fee-shifting provisions of

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55 In Buckhannon, the plaintiff challenged a West Virginia fire safety ordinance under the Americans with Disabilities Act and the Fair Housing Amendments Act. The case was rendered moot after the West Virginia legislature removed the offending clause from the ordinance. This legislative action was arguably caused by the threat of losing the lawsuit.
56 Buckhannon, 532 US at 605.
57 Id at 604, citing Farrar, 506 US 103.
58 Buckhannon, 532 US at 606.
59 288 F3d 1371 (Fed Cir 2002).
the Equal Access to Justice Act, which also uses the term “prevailing party.” The court noted that statutory interpretations are usually applicable to other statutes with the same language. However, the court also noted that the same interpretation need not be given to the same language if the text or legislative history compels a different result.

Statutes using similar but not identical language have also been read in light of Buckhannon. The D.C. Circuit held that the phrase “complainant has substantially prevailed” in the Freedom of Information Act (FOIA) was similar enough to the term “prevailing party” to apply Buckhannon. The court noted that “substantially prevailed” is not a term of art, but that it and “prevailing party” must be considered synonymous. Similarly, a district court in the Western District of Virginia applied Buckhannon to the phrase “consumer [who] finally prevails,” holding that it should be read in the same way as “prevailing party.”


There have been no post-Buckhannon cases on point regarding fees under the Debt Act. The Seventh Circuit and the Eleventh Circuit have looked to Buckhannon in interpreting the Credit Act.

In Crabill v Trans Union LLC, the most aggressive extension of Buckhannon to date, the Seventh Circuit held that the term “successful action” was equivalent to “prevailing party,” and thus Buckhannon controlled. The court first found that a “prevailing party” was the same as a “successful party.” This comports with Black’s Law Dictionary, which lists “successful party” as a synonym for “prevailing party.” The court then assumed without discussion that “successful action” should be interpreted in the same manner as “successful

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62 Brickwood Contractors, 288 F3d at 1377–78.
63 Id at 1377.
64 5 USC § 552 (2000).
66 Id.
68 259 F3d 662 (7th Cir 2001).
69 Id at 667.
70 Id at 666.
71 Black’s Law Dictionary at 1145 (cited in note 10).
party. This is the first and only case to explicitly extend *Buckhannon* to a statute that refers to actions rather than parties as the unit of analysis that must prevail or succeed. Similarly, this is the first court to apply *Buckhannon* to a statute that lacked some form of the term "prevail." The relative fidelity to the term "prevailing party" exhibited by other courts is to be expected given that the logic of *Buckhannon* hinged on the fact that "prevailing party" was a legal term of art.

The *Crabill* court limited its holding to the Credit Act. It did not explicitly overturn its earlier precedent under the Debt Act, which adopted a multi-factor balancing test to define "successful action." However, because the statutes are nearly identical, this decision essentially repudiates the court's prior multi-factor approach to defining "successful action."

The Eleventh Circuit found that the plain language of the Credit Act demands that a plaintiff receive an award before she is entitled to fees. Much like the pre-*Buckhannon* reasoning of the Fifth Circuit in *Johnson*, the Eleventh Circuit assumed "successful action to enforce

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72 *Crabill*, 259 F3d at 667. *Crabill* also contained an alternate argument. The court reasoned that the standing doctrine precludes the court from granting attorney's fees under the Credit Act unless the plaintiff receives monetary relief for personal damages. Id at 665–66.

The injury requirement of standing must be alleged at the pleading stage, supported by affidavits or other evidence at the summary judgment phase, and proved at trial. See *Lujan v Defenders of Wildlife*, 504 US 555, 561–62 (1992). Thus if the court finds a violation of the Credit Act or Debt Act, but also finds that the plaintiff has sustained no injury, then there is no case or controversy and the case must be dismissed for lack of standing.

The possibility of recovering fees is itself insufficient to create standing. *Steel Co v Citizens for a Better Environment*, 523 US 83, 107–08 (1998). If the Seventh Circuit is correct, then there is no need to interpret the term "successful action" because a consumer that does not prove damages has no standing to seek attorney's fees.

This argument takes the standing doctrine too far by extending its reach to the very end of trial. Merely because the plaintiff is found to have suffered no injury after a trial on the merits does not mean that the plaintiff did not have standing to assert a claim of injury in the first place. The burden of standing is much lighter than the burden of showing injury during a trial on the merits. Consider *Lujan*, 504 US at 561–62 (emphasis added):

> [T]he nature and extent of facts that must be averred . . . in order to establish standing depends considerably upon whether the plaintiff is himself an object of the action (or forgone action) at issue. If he is, there is ordinarily little question that the action or inaction has caused him injury.

73 Compare, for example, *Alcatel USA, Inc v Cisco Systems, Inc*, 239 F Supp 2d 660, 674–75 (ED Tex 2002) (applying *Buckhannon* to a statute that provides fees for "[e]ach person who prevails") (emphasis added); *Pitchford*, 212 F Supp 2d at 617 (applying *Buckhannon* to a statute that provides fees for a consumer who "finally prevails") (emphasis added).

74 See *Smyth v Rivero*, 282 F3d 268, 274 (4th Cir 2002) ("The term 'prevailing party,' as used in § 1988(b) and other fee-shifting provisions, is a 'legal term of art.'"); *Mary D. Fan, Case Note, Textual Imagination*, 111 Yale L J 1251, 1253 (2002) ("The Court's 5–4 decision in *Buckhannon* ultimately hinged on the meaning of 'prevailing party.'"); *Klein, Note, 13 Duke Envir L & Pol F* at 103 (cited in note 10) (noting that *Buckhannon*'s holding depends, at least in part, on deeming "prevailing party" to be a legal term of art).

75 *Zagorski*, 128 F3d at 1167 n 5.

76 For a discussion of this flexible approach, see text accompanying notes 44–45.
any liability” meant “successful in enforcing any liability.” Although the court did not find Buckhannon controlling, it cited both Buckhannon and Crabill in support of its plain language argument.\textsuperscript{76}

Prior to Buckhannon, a majority of the circuit courts that addressed the fee-shifting provisions of the Acts did not require monetary damages before awarding fees. If the analysis of the Seventh Circuit is correct, then these decisions are called into question. If Buckhannon is applied to the Acts, then the state of the law on this issue will shift, creating tension with congressional intent to utilize private suits to enforce compliance.

III. “Succesful Action” Should Not Be Defined Solely As an Action That Results in Monetary Damages

In this Part, I examine the fee-shifting provisions of the Debt Act and the Credit Act in light of their plain language, structure, legislative purpose, and legislative history.\textsuperscript{77} There are two parts to the plain language inquiry. First, I examine whether the language of the clause as a whole determines the meaning of “successful action.” I conclude that it does not. Second, I discuss the plain language meaning of the phrase “successful action” standing alone. I conclude that there is no clear plain language meaning of the term “successful action” in isolation; this term is not listed in either legal or generic dictionaries and is not a term of art. Thus, the fee-shifting provision should be read with reference to the express legislative purposes. Also, the provisions should be read in light of the purposes that can be fairly inferred from the course of legislative history. These purposes suggest that an action is successful if it serves to enforce compliance with the Acts, regardless of whether a court awards damages to the consumer.

A. The Plain Language and Structure of the Acts Suggest That Damages Are Not Essential to the “Success” of an “Action”

The Debt Act authorizes fees “in the case of any successful action to enforce the foregoing liability.” The Credit Act authorizes fees “in the case of any successful action to enforce any liability under this section.” There is sufficient ambiguity in these phrases to prevent plain language from ending our inquiry. Instead of defining the proper interpretation of “successful action,” they may merely clarify that the

\textsuperscript{77} Nagle v Experian Information Solutions, Inc. 297 F3d 1305, 1307 (11th Cir 2002) (holding that “[t]he plain language of the statute requires that the plaintiff be successful in enforcing liability”).

\textsuperscript{78} Id.

\textsuperscript{79} See Cass R. Sunstein, Interpreting Statutes in the Regulatory State, 103 Harv L Rev 405, 412-13 (1989) (listing these as the major sources of statutory interpretation).
fee-shifting provisions apply only to suits brought under the respective sections of the Debt Act and Credit Act. Because there are multiple reasonable interpretations of the larger phrases, the Fifth and Eleventh Circuit's reliance on plain language alone to interpret the Acts is questionable. Further, because "successful action" is not a legal term of art, the Seventh Circuit's analysis of *Buckhannon* is inapposite. Thus the plain language does not help define "successful action."

1. Plain language meaning of "successful action" in light of the clause as a whole.

As long as there are at least two reasonable interpretations, then the plain language is indeterminate. Given such indeterminacy, one must look to the structure and purposes of the act to decide between competing interpretations. It is reasonable to interpret the syntax such that "successful" is not modified or defined in reference to the word "liability.”

The syntax of the Debt Act's phrase "successful action to enforce the foregoing liability" suggests that "successful" is not modified or defined in reference to the word "liability.” If Congress’s goal were to define "successful," it would have included a phrase that answered the question: what type of success is required? It would be natural to use the fragment "an action that is successful in enforcing the foregoing liability.” This is not the language that Congress used. Instead, Congress used the phrase "to enforce the foregoing liability.” This phrase most naturally serves to answer the question: what type of action is required?

The grammar of the fragment supports this reading. The phrase "to enforce the foregoing liability” is an infinitive phrase. Infinitive phrases are most often used to express purpose. Therefore the most probable meaning of the phrase is to express the purposes for which the action was brought. The fee-shifting provision would thus apply to those actions brought for the purpose of enforcing the liability defined in § 1692.

This understanding is sensible because attorney's fees provisions often include some limiting phrase that clarifies that the fee-shifting provision applies only to actions that are instituted under or concern that statute. For example, in the Americans with Disabilities Act, the fee-shifting provision begins: "In any action or administrative

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80 15 USC § 1692k(a)(3).
82 Id.
proceeding commenced pursuant to this chapter . . . .” In the Fair Housing Amendments Act, a fee-shifting provision begins: “In a civil action under subsection (a) of this section . . . .” Provisions of this type are nearly ubiquitous in fee-shifting statutes.

Like the phrase “to enforce the foregoing liability,” the word “successful” also modifies “action.” In order to qualify for attorney’s fees, an action must meet two criteria. First, it must have been brought for the purpose of enforcing the liability of § 1692k. Second, it must be successful. An action that is brought for the purposes of enforcing the liability defined in § 1692 can be successful even where the amount of liability turns out to be zero. To conclude otherwise is to equate actions with the plaintiffs who bring them.

Both the foregoing interpretation and the Fifth Circuit’s reading of the phrase are problematic. Most importantly, my interpretation equates “action to enforce the foregoing liability” with “action brought under this section.” This transmutation favors the structure of the phrase over the particular words within the phrase. The Fifth Circuit’s interpretation, by contrast, ignores the most probable function of an infinitive phrase and equates actions with the plaintiffs who bring them. Because both interpretations are reasonable yet problematic, our interpretive efforts should not end with the plain language.

The Credit Act’s language is subject to a similar analysis. The phrase “to enforce any liability under this section” may merely serve to define those actions to which the fee-shifting provision will apply. Such scope clauses are especially important in statutes such as the Credit Act, which contain multiple fee-shifting provisions that apply to various sections of the statute respectively.

Unlike the corresponding language in the Debt Act, however, the fee-shifting provision of the Credit Act contains a redundancy. The applicability of the fee-shifting provision could be fully defined using only the prepositional phrase “under this section.” The addition of the phrase “to enforce liability” is redundant under my interpretation.

In general, courts are hostile to interpretations that create redundancy in statutory text. The Fifth Circuit would avoid this redundancy by reading “to enforce liability” to modify “successful” rather than “action.” However, application of this canon of construction is outside the scope of a plain language interpretation. The canon invites

84 42 USC § 3613(c)(2) (2000).
85 Johnson v Eaton, 80 F3d 148, 151 (5th Cir 1996) (holding that attorney’s fees are available under the Debt Act only where the defendant is liable for damages).
86 United States v Alaska, 521 US 1, 59 (1997) (“The Court will avoid an interpretation of a statute that renders some words altogether redundant.”) (quotation marks omitted).
87 See Johnson, 80 F3d at 152.
courts to adopt interpretations that may be in tension with the plain language. Once a court looks beyond the plain language of the clause, it should also consider the legislative history and legislative purposes of the Act. As discussed below, these factors counsel for the redundant interpretation.

2. Plain language meaning of "successful action" alone.

_Buckhannon_ does not illuminate the plain language meaning of "successful action." The holding in _Buckhannon_ turned on the clear meaning of "prevailing party"; the Court found that "prevailing party" was a legal term of art. Its plain meaning definition in _Black's_ is "[a] party in whose favor a judgment is rendered, regardless of the amount of damages awarded." Drawing on prior precedent, the Court generalized this definition to any formal judicial relief that materially alters the legal relationship between the parties.

The meaning of "successful action" as used in the Debt Act and the Credit Act is not as plain as the meaning of "prevailing party." "Successful action" is not listed in either _Black's_ or _Webster's Third New International Dictionary_. It is not a legal term of art; thus the logic of _Buckhannon_ is inapposite. Although lower courts have extended _Buckhannon_'s applicability to statutes that use similar but not identical terms, these courts remained faithful to the original term-of-art logic by applying _Buckhannon_ only where a statute contains the term "prevail" and also identifies a party (rather than an action) as the one who must "prevail." The Seventh Circuit's analysis of the Credit Act is the lone exception in the federal courts.

_Black's Law Dictionary_ equates successful parties with prevailing parties. However, neither the Debt Act nor the Credit Act uses this term. Rather, the Acts authorize fees when an action is successful, not when a party is successful. An action could be successful although the plaintiff is not. This could happen when a court finds a violation but awards no damages. In this circumstance, the plaintiff is not personally successful, but the action may have vindicated other important con-

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88 See Part III.B.
89 _Buckhannon_, 532 US at 603.
90 _Black's Law Dictionary_ at 1145 (cited in note 10). The clause "regardless of the amount of damages" could be interpreted to include damage awards of zero dollars; however, the Supreme Court has rejected this interpretation. See _Buckhannon_, 532 US at 605-06 (noting favorably that fees were not awarded after a finding of a constitutional violation where there was no corresponding award of damages).
91 _Webster's Third New International Dictionary of the English Language_ (Merriam-Webster 1993).
92 See Part II.B.2.
93 _Black's Law Dictionary_ at 1145 (cited in note 10).
gressional purposes: for example, to deter violations.\(^\text{94}\) Given that "successful action" is not a term of art, and that there are reasonable interpretations of "successful action" that do not hinge on the success of the plaintiff, the plain language arguments of *Buckhannon* should not apply.

Under the above analysis, the term "successful action" in the Debt Act and the Credit Act is not defined by the plain language or syntax of the provisions. This leaves open the meaning of the term "successful action."


Both Acts require that the court calculate total liability by adding up various elements. The Debt Act provides that a violator:

is liable to such person in an amount equal to the sum of—

(1) [actual damages];

(2)(A) [punitive damages];

... 

(3) in the case of any successful action to enforce the foregoing liability, the costs of the action, together with a reasonable attorney's fee.\(^\text{95}\)

Because each element of liability is listed separately, the structure initially suggests that each section could independently contribute to the stated "sum." However, any conclusion from the structure begs the question regarding the meaning of section (3). The structure is not perfectly separable from the text. In order to conclude that the structure suggests that section (3) can yield liability independently from the other sections, one must first conclude that the text does not set clear limits on this structural inference. For example, no one would conclude that there was a valid structural inference if section (3) read: "If and only if the plaintiff proves liability under the previous sections, she is also entitled to fees." Thus the Third Circuit's comments on structural inferences are unhelpful.\(^\text{96}\) The Credit Act is subject to a similar analysis.

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\(^{94}\) See Part III.B for a discussion of the purposes of the Acts.

\(^{95}\) 15 USC § 1692k(a).

\(^{96}\) See *Graziano v Harrison*, 950 F2d 107, 113 (3d Cir 1991).
B. The Legislative Purposes and Legislative Histories Help Define “Successful”

Consumers subjected to collection or reporting abuses should not be categorically denied attorney’s fees solely because they have not proven damages. First, Congress specifically addressed the possibility of overzealous enforcement though private suits by including special provisions for suits brought in bad faith or for harassing purposes. Congress made no attempt to curb good faith lawsuits. The inclusion of a bad faith provision suggests that Congress thought its solutions were sufficient. Second, Congress intended to favor consumers over debt collectors and credit reporting agencies in the litigation process. Further, for the Credit Act, there is sufficient legislative history to confirm the Act’s proconsumer bias.

Although sparse and somewhat conflicting, the legislative purposes of the Debt Act suggest that an action is successful whenever it results in a finding of a violation that serves to enforce compliance. The purpose of the Debt Act is “to protect consumers from a host of unfair, harassing, and deceptive debt collection practices without imposing unnecessary restrictions on ethical debt collectors.” The restrictions referred to are the technical requirements that the Act sets out. For example, the Act requires that debt collection notices inform the customer of certain rights. At issue in this Comment is not the balance struck in setting out the restrictions themselves, but rather the balance struck in the manner in which those restrictions are enforced.

Congress struck the balance between debt collectors and consumers by protecting collectors from lawsuits brought in bad faith or for harassment. “On a finding by the court that an action under this section was brought in bad faith and for the purpose of harassment, the court may award to the defendant attorney’s fees reasonable in relation to the work expended and costs.” This bad faith provision indicates that Congress thought that a discretionary fee award would be sufficient protection for debt collectors. Restricting the award of attorney’s fees to instances where the plaintiff proves damages is an additional barrier to bringing suit that Congress implicitly rejected when it opted for the bad faith provisions.

Congress intended that consumers be able to protect themselves from such slight injuries as exposure to profanity. Given this low threshold for injury, it is doubtful that any plaintiff who brings a case in good faith was actually uninjured. However, courts are not receptive to all such subjective low-damage claims. Consumers may refrain

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97 S Rep No 95-382 at 1–2 (cited in note 14).
98 15 USC § 1692k(a)(3).
from bringing suit because the consequences of failing to prove damages are catastrophic if fees are thereby denied. This would thwart Congress's intention to prevent even minuscule injuries resulting from abusive debt collection practices.

Even the truly uninjured consumer-plaintiffs should have access to attorney's fees if their good faith suit served to deter future violations. Abusive debt collectors are equally culpable regardless of whether their target is more or less resilient to humiliating collection tactics. From the standpoint of deterrence, it does not matter whether the plaintiff wins both fees and damages or just fees. Damages are likely to be much smaller than fees, and hence have a negligible deterrence effect over and above the liability for fees.

A primary purpose of creating the private right of action was to protect consumers as a whole, not just particular plaintiffs. Uninjured plaintiffs can equally accomplish the deterrence envisioned by the Debt Act. Both injured and uninjured plaintiffs are "subjected to collection abuses," and "consumers who have been subjected to collection abuses will be enforcing compliance." Thus, fees should not be denied to plaintiffs who meet their initial burden under the standing doctrine to show possible injury, and whose suits serve the deterrent ends of the Debt Act. The only exception is the plaintiff who has brought a suit in bad faith. Under these circumstances, Congress elected to punish the morally culpable plaintiff despite any deterrence benefit that her suit produces. There is nothing to indicate, however, that a plaintiff should be similarly punished for a good faith miscalculation of her actual damages.

Congress intended to favor consumers over debt collectors. Consumers have a right to attorney's fees and costs for any successful action: "a debt collector . . . is liable [for] attorney's fee[s]." In contrast, the court has discretion over whether to award fees to a debt collector, even if the lawsuit is clearly brought for a harassing purpose: "the court may award [the debt collector] attorney's fees." This discrepancy illustrates a proconsumer bias. Such bias is understandable given that Congress saw abusive debt collection as a "widespread and serious national problem."

The legislative history of the Debt Act does not unequivocally support the purposes presented above. Parts of the legislative history seem to premise attorney's fees on an award of actual damages. The Senate Report states that "[a] debt collector who violates the Act is li-
able for actual damages plus costs and reasonable attorney’s fees.”

The word “plus” might suggest that fees should be awarded only in conjunction with actual damages. However, this statement might reflect an erroneous assumption that all violations will produce actual damages.

Despite these ambiguities, the weight of the evidence suggests that Congress intended to promote good faith private suits under the Debt Act in order to prevent even slight injury. Congress envisioned such suits to be integral to its enforcement scheme. Because these suits will not be brought if consumers fear they may have to pay for their own fees, Congress must have intended to give fees to any consumer that brings a good faith suit that deters abusive debt collection practices.

The Credit Act, like the Debt Act, contains a provision that penalizes suits brought in bad faith. Under a 1996 amendment to the Credit Act, Congress chose to deter only bad faith lawsuits:

On a finding by the court that an unsuccessful pleading, motion, or other paper filed in connection with an action under this section was filed in bad faith or for purposes of harassment, the court shall award to the prevailing party attorney’s fees.

Because Congress chose to deter only bad faith lawsuits, this amendment suggests that courts should not deny fees to good faith suits that further the purposes of the Credit Act: to ensure that credit agencies maintain procedures that promote the accuracy of credit reports. Further, consumers may refrain from bringing suit because they fear that they will not be able to prove subjective damages like annoyance and humiliation. The consequences of such a failure are onerous for the plaintiff if fees are denied on the same basis. Thus, only consumers with more documentable injuries will bring suit, and credit agencies will not be deterred from causing subjective injury.

The Credit Act is proconsumer. The purpose of the Credit Act is to “require that consumer reporting agencies adopt reasonable procedures for meeting the needs of commerce for consumer credit . . . in a manner which is fair and equitable to the consumer.” In conference, the bill’s proconsumer theme was strengthened. First, the threshold for liability was lowered from gross negligence to negligence, making
it easier to prove liability. Second, the cap on punitive damages for willful violations was removed, allowing a plaintiff to recover more.  

The subsequent passage of a bill containing these changes fortified the proconsumer theme of the Credit Act. In introducing a precursor to the Credit Act, Senator Joseph D. Tydings of Maryland said its purpose was to "redress[] the vast imbalance of power that now exists between the buyer and the dishonest seller [of credit]."

The legislative history suggests that the Credit Act was intended to favor the consumer over the credit reporting agency. It also suggests that Congress intended to hinder only bad faith suits. If good faith suits are to serve their purpose of enforcing compliance, consumers must have an incentive to bring them. This incentive is undermined when courts are unreceptive to claims of subjective injury and this unreceptiveness results in a denial of fees. Thus, courts should grant reasonable attorney's fees whenever a good faith action has served to deter violations of the Credit Act.

C. Overdeterrence Can Be Avoided by Awarding Only "Reasonable" Attorney's Fees

Because of the high costs of litigation, a liberal rule for granting attorney's fees could lead to inefficient overdeterrence of small violations. However, the Acts already contain sufficient flexibility for the courts to deal with these problems without resorting to a blanket rule that denies all fees to consumers who fail to prove damages.

Courts have discretion to award less than the full amount of attorney's fees when the plaintiff does not obtain damages. Both Acts allow for the recovery of "reasonable" attorney's fees. In *Farrar v Hobby*, the Court grappled with the definition of "reasonable" within a fee-shifting provision. "When a plaintiff recovers only nominal damages because of his failure to prove an essential element of his claim for monetary relief, the only reasonable fee is usually no fee at all." Similarly, when a plaintiff does not even obtain nominal damages, the reasonable fee would usually be no fee at all.

The special circumstances of the Credit Act and the Debt Act exempt them from this "usual" rule. First, *Farrar* dealt with a statute that

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(Oct 8, 1970).

110 Id.


112 15 USC § 1681o(a)(2); 15 USC § 1692k(a)(3).


114 Id at 114.

115 Id at 115 (citation omitted).
authorized fees for a "prevailing party." In defining reasonableness, the Court naturally looked to the degree to which the party prevailed. Under the Credit Act and the Debt Act, fees are awarded based on successful actions. Reasonableness in this context should relate to the degree to which the action, not the party, succeeded. As discussed above, an action may be successful in proportion to the degree to which it serves as a disincentive to abusive practices.

Second, suits to recover minuscule damages should not be treated in the same way as suits that seek millions of dollars. In Farrar, the plaintiff sought $17 million in damages, and after ten years of litigation received only nominal damages of $1. In contrast, plaintiffs under the Credit Act and Debt Act often seek damages based only on stress and humiliation. Such damages are likely to be low, highly subjective, and hard to prove. Yet Congress intended consumers to be able to vindicate these minuscule and elusive damages. In order to encourage vindication of these damages, consumers must have access to attorney's fees.

Although plaintiffs who prove violations but not damages should not categorically be denied all of their attorney's fees, courts retain discretion to decrease fee awards. Farrar affirmed that courts are not forced to calculate reasonable attorney's fees based solely on the lodestar method. Rather, "reasonableness" is a flexible standard that can be used to reduce a fee award. Only in certain extreme circumstances, like those of Farrar itself, is the flexibility diminished. As the Supreme Court stated in Hensley v Eckerhart:

If, on the other hand, a plaintiff has achieved only partial or limited success, the product of hours reasonably expended on the litigation as a whole times a reasonable hourly rate may be an excessive amount.

There is no precise rule or formula for making these determinations. The district court may attempt to identify specific hours that should be eliminated, or it may simply reduce the award to account for the limited success. The court necessarily has discretion in making this equitable judgment.

Courts can use the reasonableness inquiry to adjust an award of fees downward in cases where the violation was especially technical.

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116 Id at 105.
117 Id at 116.
118 See, for example, Johnson, 80 F3d at 150.
120 Id at 436–37.
Allowing a reduced recovery of fees can minimize the incentive to bring suit for technical violations that have not caused damages. Partial recoveries also protect consumers from having to pay for the totality of their suit. Most importantly, the text of the Credit Act and the Debt Act supports such judicial balancing (rather than a blanket rule) by allowing some discretion in the calculation of fees.

CONCLUSION

An analysis of the plain language of the Acts, Congress's intent, and the potential for overdeterrence reveals that consumers who prove violations but fail to prove damages should be entitled nonetheless to an award of reasonable attorney's fees. The plain language of the clauses does not unambiguously illustrate the meaning of the phrase "successful action." This phrase is not a legal term of art, thus *Buckhannon* should not be applied. An action may be successful even when the plaintiff does not prevail. This interpretation comports with the legislative histories of the two Acts. These histories suggest Congress intended fee shifting to be liberally applied to consumers so that they could effectively enforce compliance. Extension of *Buckhannon* to the Acts would thwart this intent. Courts can adequately deal with the threat of overdeterrence by adjusting what counts as a "reasonable" fee award. Therefore, the Acts should be interpreted to authorize, but not require, full fee awards for consumers who prove violations but fail to prove damages.