IN THE SUPREME COURT OF THE UNITED STATES

- x

RAY HALUCH GRAVEL COMPANY, ET AL, :

Petitioners :

v. :

CENTRAL PENSION FUND OF THE : No. 12-992

INTERNATIONAL UNION OF OPERATING :

ENGINEERS AND PARTICIPATING :

EMPLOYERS, ET AL. :

- x

Washington, D.C.

Monday, December 9, 2013

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:06 a.m.

APPEARANCES:

DAN HIMMELFARB, ESQ., Washington, D.C.; on behalf of Petitioners.

JAMES A. FELDMAN, ESQ., Washington, D.C.; on behalf of Respondents.

C O N T E N T S

P R O C E E D I N G S

(11:06 a.m.)

CHIEF JUSTICE ROBERTS: We will hear argument next this morning in Case 12-992, Ray Haluch Gravel Company v. The Central Pension Fund.

Mr. Himmelfarb.

ORAL ARGUMENT OF DAN HIMMELFARB

ON BEHALF OF THE PETITIONERS

MR. HIMMELFARB: Thank, Mr. Chief Justice, and may it please the court:

Twenty-five years ago in Budinich v. Becton Dickinson, this Court unanimously held that a decision leaving unresolved the request for attorneys' fees is a final decision subject to immediate appeal. The fee awarded in Budinich was authorized by a statute that the same rule applies to fees awarded under a contract. In concluding otherwise, the First Circuit below held that Budinich may or may not apply to contractual attorneys' fees, depending upon whether the fee award in a particular case is deemed part of the merits or not.

The First Circuit's rule is inconsistent with each of the core aspects of Budinich, which is likely why Respondents no longer defend it. Whereas Budinich held that its rule applies regardless of whether the fees are deemed merits or nonmerits, that

distinction is the very foundation of the First Circuit's rule. And whereas Budinich emphasized the need for clarity, consistency, predictability, and practicality in jurisdictional rules, and thus, for a uniform and bright-line rule in this context, the First Circuit's rule is case-specific, fact-intensive, abstract, and hard to apply; in short, the very antithesis of a uniform and bright-line rule.

JUSTICE GINSBURG: As I understand it, the -- the First Circuit position is not what's being defended; instead, it's the Eleventh Circuit's position, which is a bright-line.

MR. HIMMELFARB: Well, it's not a bright-line rule, Justice Ginsburg. It's a different rule, but it's still a case-specific, fact-intensive rule. The line is just drawn in a different place.

JUSTICE GINSBURG: I thought it was that if it's statutory, Budinich controls; if it's contractual, then you -- you treat it as though it's a question of damages.

MR. HIMMELFARB: Right. It's not a bright-line rule in a number of respects. One of them is that, like the First Circuit, it relies on a distinction between merits and nonmerits fees, more specifically on what Respondents call damages fees as

opposed to cost fees. And Budinich says it's inappropriate to make this sort of case-by-case determination of whether a particular fee award is authorized --

JUSTICE KAGAN: But I think that's not right, Mr. Himmelfarb. I mean, the rationale that they use might have something to do with an underlying merits/nonmerits determination, but the test is just does the statute authorize it or is it authorized by contract?

MR. HIMMELFARB: Right. And we would say two things about that. One of them is sort of a practical point, a point about administrability. The one is an analytical point, a point about logic, or more specifically, illogic.

JUSTICE KAGAN: Well, just focusing on whether that's a bright-line rule or not, in other words, whether it's easy to apply or not, I thought you were suggesting whatever is true about whether it makes any sense or whether it's conceptually justifiable, I thought you were suggesting it wasn't easy to apply.

And it does seem to me that once you say contractual provisions will be treated this way, statutory provisions will be treated that way, that's not a hard rule to implement.

MR. HIMMELFARB: We actually think it is a hard rule to implement or at least there are going to be cases where it's hard. And in fact this case is an example. In this case, in the notice of motion for attorneys' fees of cost -- this is on page 74 of the Joint Appendix -- Respondents invoked only a statute, ERISA. In the supporting affidavit they invoked the statute and a contract.

The district court interpreted their request, apparently, to be made under statute and awarded fees invoking only the statute. Then the First Circuit viewed this case as one in which fees were requested and awarded under a contract, and that was the basis for its jurisdictional holding that's now on review before this Court.

So this case is an example of one where it's not always clear. There are many cases where a statute in some capacity and a contract in some capacity are both in play, where you potentially have two competing attorneys' fees provisions, one statutory and one contractual. They could be identical in all relevant respects, and yet in one of them the party happens to invokes the statutory provision and the other party happens to invoke the contractual provision. And under Respondent's rule you would have two different outcomes.

But what we think is really fundamentally wrong with Respondent's position is that at the end of the day it's just the opposite of the rule that this Court adopted in Budinich. Budinich recognized that statutory fees can be viewed as merits or non-merits depending upon the particular statute or decision law. Contractual fees are precisely the same. Some contractual fees, depending upon the contract's provision and the relevant decisional law, could be viewed as costs.

JUSTICE SOTOMAYOR: Wouldn't this view contradict 54(d)(2)? What do we do with that? If we accept your analysis that we should superimpose just a flat rule that all fees are not --

MR. HIMMELFARB: 54(d)(2) simply requires that in the case in which fees are sought by motion, they have to be made, the motion has to be made, within 14 days unless the fees are such that they are a part of the cause of action and they are submitted to a jury. 54(d) doesn't say that in the case where the fees are made by motion, but they should have been submitted to a jury, there's some other appealability rule. It simply says that in a case where a fee request is made by motion, it has to be made within 14 days.

JUSTICE SOTOMAYOR: I'm a little confused.

So is your rule that if a fee is made by, if a request is made by motion, whether it's contractual or statutory, that that then becomes a separate judgment and not a part of the final merits?

MR. HIMMELFARB: That's absolutely right. That's what Budinich says.

JUSTICE SOTOMAYOR: So you're not blocking a party from coming in and saying, you've got a -- how will a union know or a claiming party know whether or not you'll come back later and say you should have given it to the jury?

MR. HIMMELFARB: Well, our submission is that it doesn't matter whether it should have been given to a jury or not. What matters is whether it was given to the jury. And let me just say parenthetically the general practice in Federal courts, as I understand it, is that fee requests are not given to juries. At the very least, the amount of the fee is almost invariably determined by courts, not by juries. And in fact courts have held that there's no Seventh Amendment right to have juries determine the amount of attorneys' fees, and this makes sense when you think about it.

JUSTICE KENNEDY: We held that or just circuit courts?

MR. HIMMELFARB: No, lower courts have held

that. This makes sense because most attorneys' fees requests, very much including the fee request in this case, go up to the very end of the case. And by definition, when the jury still has the case, you know, the meter is still going and it's quite difficult, indeed, it's impossible, for a jury to decide what the fee award should be when there are more fees to follow.

JUSTICE SOTOMAYOR: So what do we do with the auditor's fees, which aren't traditional attorneys' fees and those hadn't been decided in this case? So why is the judgment nevertheless final, putting aside the attorneys' fees question? Why is the merits final when the auditor's fees weren't?

MR. HIMMELFARB: Our submission is that auditor's fees are treated just like attorneys' fees for purposes --

JUSTICE BREYER: Well, that's the problem. I mean, put Justice Kagan and Justice Sotomayor together. I don't see any problem that I can see in deciding whether a case is contractual or statutory, because the judge has to decide. If there's a contractual part of it, if he's going to deny it, he has to decide the contractual part. So if it's both, it's both. It counts at contractual. Eleventh Circuit rule applies.

On the other hand, if we don't, if we don't follow the Eleventh Circuit, we get into the question of well, what about auditor's fees, what about witness fees, what about prelitigation attorneys' fees, what about some language in the contract that seems to cover attorneys' fees but we're not certain, etcetera? And before you know it, that could even shade into the merits. And so the simple thing to do is just say what the Eleventh Circuit said. So we have one argument that yours isn't really an administrative objection and you have the other argument that if we follow you there's a big administrative problem.

MR. HIMMELFARB: Well, auditor's fees or any other sort of nonattorney professional fees or expert fees or anything else we think are not a problem because the truth of the matter is that that category of fees, as a general matter, just like attorneys' fees, are fees that are incurred in attempting to enforce the underlying right or to defend against the enforcement of the underlying right. They are not some measure of the value of the underlying issue.

JUSTICE BREYER: All right, so all we're going to have is a contract which in its discussion of the merits makes some general mention of fees. And now what we have is the initial notice of appeal has to be

within 30 days of the judgment when the fee issue is not yet resolved and you're going to try to separate the merits from -- I mean, some -- you see what I'm worried about, what Justice Sotomayor was worried about, that these things will be very messy when you get to many contracts.

MR. HIMMELFARB: I don't -- I don't think so. I mean, just think about this from a common sense point of view. This was a case where there was a bench trial. At the conclusion of the bench trial the parties, including Respondent, submitted proposed findings of fact and conclusions of law in which they said: Judge, you should find Petitioners liable, plaintiffs below, and you should award us damages. Then a few weeks later they separately submitted something that they call "Motion for Attorneys' Fees and Costs" in which they requested attorneys' fees, costs and auditor's fees.

All of those things -- I think the fact that they did it that way just confirms what I said before, which is that as a general proposition at least, you know, expert fees, nonprofessional -- nonattorney professional fees are not the sorts of things that you get to enforce the underlying right --

JUSTICE KAGAN: What if they hadn't done it

that way? What if they had listed those fees in their complaint and what if they had argued for them as part of the bench trial? Are you saying something would depend on that?

MR. HIMMELFARB: I'm not saying that. All I'm saying is that this is the way people -- litigants generally think about these two different categories of things and it's understandable that this is the way they did it. If they had requested auditor's fees and if they had requested, you know, attorneys' fees that were incurred at the very beginning, before the complaint was filed, in connection with their proposed findings of fact and conclusions of law, then it may well be that the judge would have awarded them, you know, with the ordinary damages and they wouldn't have that argument available to them.

But they chose to include them, as I say, I think because their intuition, if nothing else, was that these audit fees and these attorneys' fees, even attorneys' fees incurred before the litigation commenced, are attorneys' fees in the same sense that the kinds of things that courts decide separately from the merits.

As far as the so-called prelitigation attorneys' fees are concerned, this is the fallback

argument, the second argument that Respondents make in their brief. And the argument is that because some of the fees requested were incurred before the complaint was filed or at least at some remote time before the complaint was filed, what you have here is not covered by Budinich because the rule articulated in Budinich is that it applies to attorneys' fees for the litigation in question, for the litigation at hand, fees attributable to the case. And that's the language that Respondents rely on in our fallback argument.

What we would say in response to that is that what Budinich meant by that language is that its rule does not apply to a case where the attorneys' fees are for a prior case, as opposed to being attributable to the case, meaning the case in which the fees are incurred. So if you have a dispute between a lawyer and a prior, a former client, over fees, the former client hasn't paid fees and there's a lawsuit to recover the fees, Budinich won't apply in that situation.

JUSTICE SCALIA: I wrote it. I don't think that's what I meant.

(Laughter.)

JUSTICE SCALIA: It would be a strange, strange thing to worry about, it seems to me. It's a fairly infrequent situation, isn't it?

MR. HIMMELFARB: Well, yes, of course, it is. And not only is it infrequent, the situation you have here that gives rise to the question presented in this case just wouldn't arise there, because if you're talking about a lawsuit by a lawyer against a former client to recover fees owed, by definition, the fees are known and quantifiable before the suit is filed, so you would imagine that, in that case, there'd be a liability determination and the award of damages, which in that case just happened to be attorney's fees, and the case would be over, and this situation wouldn't present itself.

CHIEF JUSTICE ROBERTS: Why would the case be over? Presumably, you incurred attorney's fees, seeking to recover the attorney's fees.

MR. HIMMELFARB: Well, it would -- it would depend on what the -- you know, the contract between the lawyer and the client said, Mr. Chief Justice. I suppose it's possible that you could have a contractual fee provision that says, we get fees for attempting to recover our fees, and then, right, you would have the Budinich situation, but it would be as to the fees generated in attempting to enforce the underlying right, which is exactly what you have here.

JUSTICE ALITO: Do you think the district

court here relied solely on the contract -- on the contract and on ERISA, or just on ERISA, in awarding these fees?

MR. HIMMELFARB: It appears to us, Justice Alito, that the district court relied only on the statute. That was the only -- only thing that the court cited. The court didn't cite the contract. It was the court of appeals that sort of reconceptualized it as a case in which fees were awarded under a contract.

JUSTICE KENNEDY: I can see how if you're talking about lawyer's fees pretrial and lawyer's fees at the trial, that they would be interconnected, that it would be improper for the jury to hear about either, if there were a jury. But -- what about the auditor's fees? Can you -- is there an argument that would support your side, but I'm not sure there is the argument, that auditor fees are also -- have an effect on what the attorney's fees are or should be --

MR. HIMMELFARB: Well --

JUSTICE KENNEDY: Or are they really quite compartmentalized?

MR. HIMMELFARB: No, we say auditor's fees should be treated exactly the same way.

JUSTICE KENNEDY: No, but I'm asking if there's a relation between the two.

MR. HIMMELFARB: Sure, there are. I mean, oftentimes, auditors or any other sorts of experts are retained to, you know, assist the lawyers in litigating the case or investigating.

JUSTICE KENNEDY: And to the extent auditors have done a certain amount of work, then there should be no duplicative attorney's fees, so the judge considers both together.

MR. HIMMELFARB: Right. I think that's right.

CHIEF JUSTICE ROBERTS: Well, but I thought with respect to pre-litigation attorney's fees, you said you can treat those differently because they're set and determined. You know what they are. It would seem to me, most cases of an auditor's report, that's also true.

MR. HIMMELFARB: No. I want to be clear about this because it's an important distinction. What I was talking about was a case where a lawyer sues a former client, as an example, where the fees were incurred in a prior case, in a different case, involving a different dispute.

And in the case in which the fees are sought, that is the dispute, that's the case. What I would distinguish from that situation is the situation here, where lawyers are retained, auditors are retained,

to resolve an underlying dispute. The underlying dispute is whether contributions are owed to union benefit funds.

The lawyers and auditors investigate the case. They prepare to litigate it. They research potential claims. They draft the complaint. They file a demand, write a demand letter to the other side. They're unable to resolve it so they file a lawsuit. It's all one case. And the fact that some of the fees, whether they're attorney fees or auditor fees, were incurred before the complaint was filed is neither here nor there.

I mean, the -- the contractual provision at issue here authorizes that recovery, everybody agrees with that. And the truth of the matter is that even under the narrowest imaginable attorney's fees provision, surely, some fees incurred before the complaint was filed would be recoverable unless you had a really odd-ball statute or contractual provision which made --

JUSTICE KENNEDY: And the trial court needs to know the amount of the pretrial fees and what they were incurred for so that he doesn't give duplicative recovery when he provides for attorney's fees for the course of the trial.

MR. HIMMELFARB: Right. But if -- if Respondent's fallback position were correct, what that would mean is that in literally every case, contractual or statutory, you would have to -- litigants and courts alike -- would have to search through the request for attorney's fees, which are generally voluminous -- the one in this case runs to more than a hundred pages in the Joint Appendix; this was a three-day trial -- to decide are there any fees here that are "nonlitigation" fees? And I put nonlitigation in quotation marks. And that -- that has two consequences. One is, it requires sifting through this voluminous record.

And the second is, it requires making a very difficult kind of evaluative judgment about whether this particular pre-complaint fee is, you know, a "merit" -- I put that in quotation marks also -- fee or a "nonmerits" fee. If it's drafting a complaint, maybe that's a nonmerits fee, but if it's, you know, four months before the complaint was filed and it doesn't have to do with any drafting of a pleading, there's some way to conceptualize that as a merits fee. We just think it's completely --

JUSTICE SOTOMAYOR: So articulate, again, for me your rule. Would it go something like this: To the extent that a party leaves attorney's fees for after

trial, it then -- that's a separate judgment that will not run the finality of the prior judgment?

MR. HIMMELFARB: That's right. I mean --

JUSTICE SOTOMAYOR: But you're proposing not to estop parties if they choose to put this issue to a jury.

MR. HIMMELFARB: That's right.

JUSTICE SOTOMAYOR: You're just saying if they don't, then they have to treat it as the judgment that comes out of the contract dispute as final, the other aspects of it.

MR. HIMMELFARB: That's right. That's absolutely right. If there is a decision in a case that leaves unresolved everything except attorney's fees, Budinich applies no matter what --

JUSTICE BREYER: Because now you're saying not just attorney's fees, also auditor's fees.

MR. HIMMELFARB: That's true.

JUSTICE BREYER: And what about witness fees? Experts?

MR. HIMMELFARB: Well, witness fees are costs and there's no question --

JUSTICE BREYER: No, no. Experts, experts. The payment of an expert.

MR. HIMMELFARB: If -- if expert witness

fees are recoverable under the applicable statute --

JUSTICE BREYER: No, no, no. It's a contract.

MR. HIMMELFARB: Right, under the applicable statute or contract, and everybody who --

JUSTICE BREYER: So expert witnesses are -- are also, so we're talking about Budinich'ing or whatever, you want to do that for the attorney's fees, auditor's fees, expert witness fees, experts who helped the attorney but don't testify. What's the rule of what we're putting in here and what we're not?

MR. HIMMELFARB: Well, the rule is what I was suggesting before, which is that if these are fees that are incurred in an effort to vindicate the underlying right, then they're covered by Budinich. And that's -- I think that's what Budinich is getting at. But if instead, they are sort of -- it's a standalone case, and Justice Scalia, I think, may disagree with me about this, but if it's a standalone case where you hire an auditor and you don't pay the auditor's fees and then the auditor sues you for the fees, that's like the example of the lawyer who didn't get his fees paid and sues his former client.

JUSTICE KAGAN: Well, what about a different kind of standalone case? I mean, suppose that the fund

had actually paid up what it was due prior to the litigation, but -- but there was still all these outstanding costs that had been incurred for auditors and all of that, and -- and a suit was brought just involving those?

MR. HIMMELFARB: I think probably Budinich would not apply in that situation because it would be like the case I was talking about before where a lawyer sues a former client and the case is just the case about fees.

I also think, though, as with the case of a lawyer suing a former client, the situation is unlikely to arise, at least under this contractual fee provision because, by definition, in your hypothetical, you would know what the fees were at the time you filed the case. Presumably, the judgment would be, if it was a judgment for the funds, yes, you're entitled to recover costs and here's what the costs are, end of case.

You wouldn't have this separate pending request for attorney's fees.

JUSTICE ALITO: Well, Mr. Himmelfarb, if I think that we should aim for the rule that trips up the fewest lawyers, what rule would that be?

MR. HIMMELFARB: I mean, I just think that's absolutely our rule. It's the Budinich rule. The rule

we're advocating says, if you have a case and the -- the merits of the case are decided, liability is determined, damages are awarded, but there's a pending request for attorney's fees, which may or may not include other types of related professional fees, and you want to appeal that initial decision, you have to file a notice of appeal within 30 days.

Under either the First Circuit's Rule or the Eleventh Circuit's rule, you are going to trip up a lot of people because they may guess wrong, and they may think, I don't have to file a notice of appeal because this is a quote "merits" end quote decision and if it turns out they were wrong, and it's easy to think they might be because this is such a sort of, you know, esoteric kind of distinction what's a merits fee and what's not, you're going to get people tripped up under either the First Circuit's or the Eleventh Circuit's rule.

JUSTICE ALITO: So on auditor's fees or anything that might possibly be viewed as falling into the same category as attorney's fees, you can wait. That would trip up the fewest lawyers; is that right?

MR. HIMMELFARB: You -- you can't wait if you want to -- if you want to appeal the initial decision, if there's a pending request --

JUSTICE ALITO: No, right. But if you don't, you can wait and contest those things at a later time when you file -- when you appeal from the attorneys fees?

MR. HIMMELFARB: Right. You would have, in effect, two separate appeals if you wanted to appeal the attorneys fee decision.

JUSTICE SOTOMAYOR: You would argue to the contrary, no, that a rule that says wait till the end of everything that needs to be decided in the case. That's the finality rule and that's the idea behind the finality rule.

MR. HIMMELFARB: Right. I mean the -- the relevant statutory provision is Section 1291 in Title 28, which speaks of final decisions. And what a final decision is under that statute is a decision that either leaves nothing else to be resolved or leaves other things to be resolved, but the only other things that are left to be resolved are collateral to the merits.

And the holding of Budinich is that, as a general matter, attorneys fees are collateral to the merits and that even when they are not as a matter of the law that authorizes them, in the interests of certainty and predictability and uniformity you should treat them as if they are.

So Budinich has already held that in this circumstance the final decision is entered when the initial decision is entered and the attorneys fees are collateral no matter how they're characterized. It seems to us it would require a very compelling case to have a different rule just because of the source of authority.

JUSTICE BREYER: No, no, no. The words that make your point I think not absolutely obvious were when you said "which may or may not involve other kinds of fees." Now, at that point I'm thinking, well, if we follow your rule, there might be quite a lot of litigation going on about those words, "may or may not."

If you follow the opposite rule, we've got a clear exception for statutory attorneys fees and nothing else. All right. So do you want to add anything?

MR. HIMMELFARB: I'm not entirely sure I'm following your question, but if the concern is about the presence of fees other than attorneys fees, for example auditors fees or economists fees or what have you, I mean, keep in mind the same -- the same problem would arise under a statutory fee award. Perhaps the most common statutory authorization for fees, at least in the Federal system, is Section 1988 of Title 42, which is sort of a catch-all. It applies to 1983 actions. It

authorizes an award of expert fees.

So if you had a straightforward Budinich situation where you had a statutory fee award -- say it's a 1983 action -- surely Budinich applies to 1988 requests for fees, and 1988 itself authorizes an award of expert fees. So it seems to us you can't have a different rule for contracts if you accept our -- if you reject our principal submission, which is that contracts should be treated differently from statutes.

I'd like to reserve my remaining time for rebuttal.

CHIEF JUSTICE ROBERTS: Thank you, counsel.

Mr. Feldman.

ORAL ARGUMENT OF JAMES A. FELDMAN

ON BEHALF OF THE RESPONDENTS

MR. FELDMAN: Mr. Chief Justice, and may it please the Court:

There are two principles that I think resolve this case. The first one is that all damages claims, no matter how small or large, have to be resolved before a judgment is final under Section 1291. Although occasionally Petitioners have suggested that the size of the award somehow makes a difference, I don't think the Court has any basis to depart from that long-settled rule.

The second is that, as this Court itself held in the Vaughan Distilling case -- I'm sorry, in the Fleischmann Distilling case and the Vaughan v. Atkinson case, attorneys fees that are sought under a contract are damages. They are sought as damages. They are indistinguishable from any other kind of contract damages that are sought. When parties --

JUSTICE KENNEDY: In a case with a jury, would you submit the question of the amount of attorneys fees to the jury?

MR. FELDMAN: There -- you know, there is conflicting authority on that, but I would agree with my friend. The general rule is you do have to, when there's a jury, submit whether you get the fees to the jury or not. The amount then --

JUSTICE KENNEDY: Your answer was, I'm sure, clear, but I didn't get it.

MR. FELDMAN: I'm sorry. You do submit whether or not you get the fees to the jury. The amount of the fees some -- frequently waits later for practical reasons. It's a long history of that's the way it's been litigated, that's probably the way it was done in 1791. It doesn't create a Seventh Amendment problem.

JUSTICE KENNEDY: Well, that seems to me to indicate that there's a final judgment when -- when the

verdict is rendered.

MR. FELDMAN: You have to --

JUSTICE KENNEDY: When the fees are left it's just a collateral matter as to what the fees will be.

MR. FELDMAN: I don't think it's because it's a collateral matter. What you submit -- you do have to submit to the jury whether or not you get the fees. That question has to go to the jury and that's because it is part of the merits.

When people get together and make a contract and they decide about their mutual obligations and the consequences of somebody breaching that contract, they are defining what the merits of a contract claim is that will --

JUSTICE SCALIA: Mr. Feldman, what about -- what about a statute that says the plaintiff shall recover, as part of his damages, attorneys fees? What do we do with that for purposes of 1291?

MR. FELDMAN: I think what the courts have dealt with that, quite clearly, in Budinich --

JUSTICE SCALIA: Absolutely clearly.

MR. FELDMAN: Right.

JUSTICE SCALIA: So it is clear, is it not, that the criterion is not whether it is part of damages?

MR. FELDMAN: No, I --

JUSTICE SCALIA: Because if that were the criterion, Budinich would have come out the other way.

MR. FELDMAN: I disagree. I think that what Budinich said is we're going to -- Budinich was based on -- the question that was asked was are these merits or nonmerits determinations. And then it -- but what it said is because of the particular place this comes in, in litigation we have to deal with this as a categorical matter, and it doesn't matter --

JUSTICE SCALIA: Essentially it doesn't matter whether it's merits or nonmerits.

MR. FELDMAN: I don't -- that's actually not what the Court said.

JUSTICE SCALIA: For purposes of this rule.

MR. FELDMAN: What the Court said --

JUSTICE SCALIA: I don't know how else you can read it.

MR. FELDMAN: What the Court said several times in Budinich, they said -- the Court said, for example: It shouldn't turn upon the characterization of the fees or whether the fees are deemed to be one or the other, because the court had decided that it's indisputable that as a general matter, statute -- and I think it's only true of statutes, that statutory fees --

JUSTICE SCALIA: As a general matter. But the case acknowledges that that's not always true, and the holding says it doesn't matter when it's not true, they will still be treated as -- as separate. Even though they are damages, we're not going to treat them as damages.

MR. FELDMAN: And as the -- what the Court was -- it was correct with respect to statutory fees that was at issue in Budinich. The Court was quite correct in saying those -- it is indisputable that those as a general matter are not a part of the merits. They are costs, which have never been seen as part of the merits. But that's not true and never has been of contractual damages, and this Court itself has viewed contractual damages --

JUSTICE KAGAN: Why isn't it true? I mean assume a contract which just says if we go to litigation, the prevailing party will pay fees, in much the same way that a statute does. And now assume lots of contracts basically have that provision as their attorneys fees provision.

Why wouldn't we just say, you know, whether the source of the law is a contract or a statute makes no difference; they are essentially doing the exact same thing?

MR. FELDMAN: I mean, I wouldn't say that -- they are not doing the same thing. And also, the source of law is important, because the whole point os that the law has always been that statutes define what court costs are. Court costs are basically a narrow segment of the money that people pay each other under certain circumstances. They are defined by 28 U.S.C. 1920, by this Court's Rule 43, and by the fee-shifting statutes, now we know after Budinich.

Okay. But that's what statutes do. And in fact the Court said in the United States v. Idaho, in defining costs, costs are things that are provided for by rule, and I'm sure the Court intended statute also.

JUSTICE SCALIA: Yes, but Budinich acknowledged that some of these fees are not costs. It acknowledged that.

MR. FELDMAN: I would actually think what Court in Budinich acknowledged was that they are labeled different ways. They are deemed or characterized in different ways. The Court never actually said that they weren't. But they did, the Court did say it was operating on a categorical basis.

JUSTICE SCALIA: I don't understand the difference between deeming and being. When the statute deems it to be costs they are costs. They are costs.

MR. FELDMAN: The Court felt as a categorical matter that statute -- and quite correctly, that statutory fees are costs, but as a categorical matter contractual fees are not costs. When parties agree in a contract that one is going to pay another a certain amount of money in the event of some -- something happening related to a breach, that's what defines the damages that are due in a subsequent --

JUSTICE SCALIA: But we said in Budinich that they are costs, even when the statute makes clear that they are damages. I mean, we're saying it doesn't matter what the statute says, and I don't see why it should matter what the contract says.

MR. FELDMAN: I don't think it does matter what the contract says. It just matters that it's in a contract, because there's no history -- while there's a history of statutes defining what costs are, there's no history at all of contracts defining things that are obligations between the parties but that are not part of the merits of a subsequent dispute.

JUSTICE ALITO: If we have a different rule for statutory fees and contractual fees, will we have problems in some cases -- and maybe this is an example -- in determining whether an award of fees was based on a contract or based on the statute? Here the

district judge's opinion on fees says a lot about ERISA, and I don't see any references to the contract in there.

MR. FELDMAN: I -- I don't think there'll be any problem with that at all actually for about three reasons. And I could start with this case. In this case, our complaint talks about the contract. Our motion for summary judgment talked about the contract. As a base for fees I'm talking about, specifically --

JUSTICE ALITO: I thought also ERISA, too.

MR. FELDMAN: Also ERISA, also ERISA.

JUSTICE ALITO: Yes.

MR. FELDMAN: But it's -- for our purposes, it's irrelevant whether there was also a statute. The question is: Was there a contractual fees issue in the case and was it decided? Okay.

JUSTICE SOTOMAYOR: Let's be a little more precise. Your notice of motion referenced ERISA alone. The supporting affidavit mentions both, and the district court opinion mentioned only ERISA.

MR. FELDMAN: That's true. But --

JUSTICE SOTOMAYOR: So you didn't mention the contract in your notice of motion.

MR. FELDMAN: The notice of motion actually -- or what the notice of motion said -- this was the sequence of events: The affidavit was put in on, I

believe, April 4th. The notice of motion came in the next day, and I think actually the reason is because we didn't actually think we needed a notice of motion and later figured out that we did.

What the notice of motion said was defendants are liable for those monies pursuant to ERISA.

JUSTICE SOTOMAYOR: Would you tell me what page you're reading from?

MR. FELDMAN: This is page 72.

JUSTICE SOTOMAYOR: Of the Joint Appendix?

MR. FELDMAN: Of the Joint Appendix. Defendants are liable for those monies pursuant to ERISA and for the reasons detailed in the accompanying Wagner affidavit filed on the day before. Okay? It didn't say ERISA and for the reasons given. And if you look back at JA -- at the affidavit at JA 75 in paragraph 6 as indicated -- no, I'm sorry. It's paragraph 3 on 74. In accordance with the collective bargaining agreement, the trust agreement and ERISA, the defendants are liable for all auditor fees, attorney fees and so on.

JUSTICE GINSBURG: Mr. Feldman, before --

JUSTICE SCALIA: I don't want to have to go through this in every case.

MR. FELDMAN: But there's no need to.

All -- the only question that you have to ask is: Was the -- was there a contractual damages issue in the case? And then here's the other half of it.

JUSTICE GINSBURG: Mr. Feldman, there's a -- there's a question that has not been -- that's not surfaced yet, but after Budinich, however you pronounce it, the rule makers changed Rule 58(e), and now 58(e) provides a mechanism for deferring the finality of the judgment until the fee question is decided. You didn't seek an order under 58(e), did you? You didn't ask the district judge, please defer the finality of the judgment until the fee question is decided.

MR. FELDMAN: That's correct. Well --

JUSTICE GINSBURG: So you didn't make that --

MR. FELDMAN: I don't -- that -- that wouldn't have worked in this case because that's a situation where there's already been another judgment on the other merits issues in the case. At the time when we put in this affidavit, this affidavit was actually -- I think my friend was mistaken, because this affidavit was put in right at the end of the trial, actually at the same time, in effect, as the trial memorandum telling -- our post-trial brief telling the judge everything that we wanted. It's just for this part of

it we then -- we originally said we're going to get it in at the same time. We later said, can we get two weeks extra for this?

JUSTICE GINSBURG: You still could have said to the judge, please defer the entry of judgment until you resolve the fee question, and you -- you would not be entitled to that relief, but it would be in the discretion of the judge. And so that's how the rule makers thought this problem could be handled. You can't have a judgment that does not become final until the fee question is decided. But if there's -- absent that specific determination, then the judgment becomes final when it's final and the fees are a separate matter.

It seems to me that now that this mechanism in the rules to handle this, we should not depart from the rules, whether it's contract or statutory, it's separate. It's not part of the underlying judgment.

MR. FELDMAN: The problem with -- I do think that that rule was designed to address an issue when people put in their fees' motion two weeks after there's been a judgment in a case, not at the time -- at the end of the trial, before there's any kind of judgment of any sort in the case.

JUSTICE KENNEDY: I know the Petitioner doesn't rely on it, but it really is supplemental to

Justice Ginsburg's point. There was a judgment in this case, the June judgment. And it -- and it says -- it's entitled Judgment in a Civil Case and it says that the interest runs from this date. Now, I know there are cases in which we say that the description the trial judge gives to the judgment is not necessarily conclusive of this final order, but it does seem to me that this is what the judge thought he was doing.

MR. FELDMAN: I'm not sure that that's right. The judge says at the end of the other order, he says, "Now this case is concluded," and I have to look to see when the actual -- I mean, I don't -- I think the -- actually, I think the judge thought that the final judgment in the case was the one doing the attorneys' fees. He was maybe running the interest from the other one.

JUSTICE KENNEDY: The interest ran -- the interest ran from the June 17th judgment.

MR. FELDMAN: Right. That's correct. But I'd like to go back to a couple of other things. One is there's no sorting through things that's really a problem. First of all, there's very few cases that ever have both contract and statutory fees. We've looked through every case cited in the papers in this Court. None -- none -- actually, maybe one or two did, but in

those, there was no doubt at all that there were contractual fees that were at issue.

But more importantly, unlike other kinds of contract damages where if you want lost profits or if you want the cost of some replacement performance, you don't have to tell the judge what the legal source of getting those things are. You just have to tell the judge, this is what I want, I'm entitled to it, there was a breach of contract. But with fees, you don't get them, just as a matter of saying I want to get my fees. You have to give the Court some source that authorizes that and that usually, it is a statute or it's a contract. And parties, I think you'll find -- I couldn't find cases where there was any doubt as to where a court said I have some doubt as to whether it was statute or a contract.

JUSTICE BREYER: The -- in my own mind, what matters is you have to have one clear rule one way or the other.

MR. FELDMAN: That's right.

JUSTICE BREYER: And -- fine. Okay. We both agree that's right, I think. The -- so the First Circuit's approach is less referable. Which should it be? Well, go back to Justice Alito's question. What are ordinary lawyers going to think? What they normally

think now, I guess, is this: There's a piece of paper separate. It's called a judgment. Counsel, one set goes into the file. You have 30 days. If you're not going to change that judgment. And the fact that you want costs doesn't make a difference.

Now, what you want us to say is the fact that you want costs sometimes makes a difference. It makes a difference when it's nonstatutory. I grant you that's fairly simple. But isn't it better to tell the lawyers -- I mean, I think that's what they would say -- it's better to tell the lawyers, look, counsel, a piece of paper is there. You have 30 days. And try to minimize the exceptions to that.

MR. FELDMAN: I -- I don't think it is, and there's a number of reasons. Okay? One is that the -- what our rule does is you file the notice of appeal after the case is finished, at the end. Their -- under their rule, you'll necessarily sets a trap for the unwary. For lawyers who aren't sure or don't know the law or whatever, for those people who aren't up on it, they're going to find -- miss the earlier notice of appeal and they're going to lose their right to appeal altogether if you adopt Petitioner's rule. That would be what would happen.

If you adopt our rule, then that wouldn't

happen. It would be true, there would be people who would file a notice of appeal too early. But filing a notice of appeal too early is much less of a problem. Because if you file a notice of appeal too early, you can cure it by just filing another notice of appeal later. And under Federal Rule Appellate -- of Appellate Procedure 4(a), there are times when an early notice of appeal in, I think, a number of circumstances relates forward to a later judgment.

JUSTICE GINSBURG: Mr. Feldman, going back to my 58(e) question, one thing that's interesting about the rule maker's response to Budinich is they didn't -- they didn't make any distinction between statutory and contractual fee awards. You would have us divide the world up that way, statutes one rule, contracts another. But the -- the Rule 58(e) doesn't -- it's not confined to statutory fees.

MR. FELDMAN: They do -- actually, they did make a distinction between fees that have to be proved as part of the substantive claims in the case. And actually for -- you know, attorneys' fees are actually very close to that.

I would also point out that the other fees at issue here -- this is the other problem. Aside from the fact that there's a trap for the unwary set up by

their rule but not by our rule, and that other things being equal, procedural rules should be set up so they don't have those kinds of traps. But even aside from that, they do have to draw a distinction between attorneys' fees, auditor's fees, accountant's fees, architect's fees, real estate inspector's fees. There's many different kinds of provisions people can put into contracts and say if you breach the contract, I want a right to inspect the property. I want a right to inspect your books. I want a right to figure out whether you've met your covenants in this bond deal or in this business arrangement that we have. And you have to pay for it. Or you have to pay for it if it turns out that you really have breached the covenant or there really is something really wrong with the building.

In all those cases, I don't know under -- I don't know any way to figure out whether all those other types of professionals that may be involved in the case, they're all the same thing. They're all cases where someone is saying there might be a breach here and we want to figure it out.

JUSTICE BREYER: I believe this rule was cost of litigation.

MR. FELDMAN: But in this case.

JUSTICE BREYER: In this case it's lawyers,

but experts, such as 1988 experts, real estate, all those things the lawyer simply thinks costs of litigation, if it's cost of litigation I want, that doesn't make a difference, I better file it.

MR. FELDMAN: But these are not costs of litigation. I mean, when the auditors came -- this is what happened in this case, and this is not uncommon. There was a suspicion that Petitioners were not paying the contributions that were due. There were no attorneys involved in the case. The auditors came in to do what they're contractually entitled to do, which is look at the books, the Petitioner's books, and figure out whether they had or had not made the contribution.

JUSTICE SCALIA: Okay. So limit it to attorney's fees as the rule does. That's a pretty clear line. Attorney's fees, you know, you have to file right away. Anything else, it can extend.

MR. FELDMAN: And we would prevail in this case in that event. But even on attorney's fees --

JUSTICE SCALIA: I don't care about this case, frankly. I care about the rule that we're going to be adopting.

MR. FELDMAN: I think that there's no -- I think that there's -- once you start parsing contractual provisions out and saying some of them are merits-based

and some are not, even though they're all doing the same thing, that is they're all saying in the event this is what a damages provision --

JUSTICE SCALIA: I wouldn't be saying that. I would be saying there's attorney's fees and there's stuff other than attorney's fees. Merits doesn't matter.

MR. FELDMAN: Even then, even in attorney's fees, if I can just go back to this case for a second, because I don't think this is all so unusual, when the attorneys first came in they didn't come in to sue Petitioners. They came in because the auditors weren't getting cooperation and being given all the books that they were supposed to be given. And their first thing that involved a certain amount of time at that point was trying to get them to give the books to the auditors, which they eventually did, okay.

But those are costs of collection. Those fees under this contract and many, many contracts that are similarly worded, those are costs, costs including attorney's fees of collecting money due, and those costs are due and payable by Petitioners before any case is brought and whether or not any case is brought.

If it turned out that the auditors had found that there are some contributions that were not made and

the auditors then -- and then Respondents, the funds, came to the employer and said, you owe us $5,000 in contributions that weren't made, your books were no good, and we found it, and you owe us another $5,000 for the auditor's fees, they might have just paid that. They should have paid it, and in many cases they will or they might pay one or the other. But they're on an exact par. That money is totally due and owing under a provision like this. It's not a prevailing party provision, which is the sort of thing that statutes almost uniformly have. It's covering obligations that one party has to another based on the fact that they didn't comply with their contractual obligations.

You know, another -- another reason why it is important that the Court pay close attention, I think, to the rule against piecemeal appeals in a case like this and the strong policy that, at the very least, if there's any doubt you should avoid the piecemeal appeals is that for people, again, in this kind of situation, it can be very, very important to know whether you're going to get your fees paid before you have to file a notice of appeal.

CHIEF JUSTICE ROBERTS: I thought the procedure was, regardless of who prevails, it's not piecemeal appeals. I mean, they often combine the two

in the court of appeals for consideration.

MR. FELDMAN: They can be combined if the district -- they can be, if they come along at the right time and if the district court can see to it under Rule 58.

CHIEF JUSTICE ROBERTS: Well, even if it's -- if you don't need Rule 58, at least the practice I was familiar with, you file for attorneys' fees, they calculate -- unless the appellate court is moving with surprising speed, the first appeal is still pending by the time the district court rules on the attorneys' fees.

MR. FELDMAN: It can be done and there's always -- of course, but that's true always when the rule against -- or policy against piecemeal appeals applies. It always is a case an appellate court can put things together that would otherwise be apart.

The point of that rule, though, and what I was getting at, is for people in the situation of -- of Respondents here, we were -- there was, I think, $143,000 in fees at issue that we have to pay -- they have to pay the attorneys in this case. And it's very important to them to know whether they have to pay that amount before they decide whether they want to appeal the case or not.

It's just as important to decide whether they want to appeal that amount than to decide how much they're going to get for the basic contributions that was -- that Petitioners also owe us.

JUSTICE SCALIA: Well, if they're worried about it, they could always appeal and withdraw the appeal later.

MR. FELDMAN: They can do it, but --

JUSTICE SCALIA: If they -- if they don't get the amount, right?

MR. FELDMAN: They can do that, but it's -- the point of the rule against piecemeal appeals is these kinds of decisions are much best left -- and this has really long been accepted -- till the end of the litigation, not to try to push it up earlier, which creates traps for the unwary of the sort I was talking about.

JUSTICE GINSBURG: That would apply to statutory fees as well, the argument about piecemeal, duplicative appeals.

MR. FELDMAN: It would apply, but -- first of all, a statutory fees case are usually not as broad as this. They're usually prevailing parties fees. They're quite different. They look quite different. But they usually involve the exercise of district court

discretion. The court may, in its discretion, order fees. Nobody has ever written a contract, I don't think, like that.

But more importantly, in the statutory case, the court was quite correct in Budinich that it's really indisputable that as a general matter, statutory fees are costs, and costs have never been seen as part of the merits. They're defined by statute, 28 U.S.C. 1920. 1988 is just another provision defining costs and extending it a little bit farther.

JUSTICE SCALIA: Are you -- are you sure that, as a general matter, contractual provisions do not make attorneys' fees costs? I've seen a lot of contracts that say, you know, shall recover costs including, including attorneys' fees.

MR. FELDMAN: I think when contracts talk about -- I don't think -- there's very little, if any, history of contracts actually trying to allocate court costs of the sort that statutes do. I do think they used the word "costs." This provision here uses the word "costs," but quite differently. It uses the word "costs" to mean expense. Costs, including attorneys' fees of collecting payments, just like costs, including transportation of obtaining substitute performance if there's a breach, or any provision like that. They

don't use it in the technical sense of referring to court costs.

JUSTICE KAGAN: I guess I'm not quite sure why the word matters. I mean, you can say attorneys' fees are costs under a statute and they're damages under a contract, but why should that control the analysis of what we do? It's just which word we put up on it.

MR. FELDMAN: I don't actually think it's the word. I think it's the underlying issue of what the court is doing. In the contract case, the court is just adjudicating another claim by one party against another for some money based on their performance under the contract. And the simplest way and the way you have to make the least distinctions is say all of those things are damages and all those things are part of the merits that have been viewed as part of the merits of a case.

In fact, there's no authority that they are not viewed as part of the merits of the case and this Court in the Fleischmann Distilling and the Vaughan cases viewed it as part of the merits.

In the statutory case, the -- where Congress may right the statute, many, many of them are; the court may, in its discretion, award fees to the prevailing party. I think the intuition of Budinich was that Congress was tying into the long tradition of taking

litigation costs and extending it a little bit farther, and that's something Congress does. And if Congress wanted to say that contractual attorneys' fees are available under some circumstances or under -- however, then that would probably be defining costs, too, especially if they are tied to what goes on in the litigation.

But when it's a provision like this one and like many, many contractual provisions, and there's a wide, wide variety of them, that just talks about what happens when there's a breach, then there's going to be attorneys' fees, there's auditor's fees, there's other kinds of things, other kinds of expenses that the nonbreaching party has, those are just the damages of the case. They've always been seen as the damages of the case. And it would be odd if you do start to try to say, well, these have treated like they were costs, then it does inevitably raise the question what else has to be treated the way of costs?

Petitioners said that in this case there was no doubt that anybody had ever in this case that we were seeking contractual fees. And one reason that I think is pretty conclusive on that, aside from the fact that we mentioned it at every single opportunity throughout the case that we were seeking contractual fees, in our

summary judgment motion, in our trial brief, post-trial, in the complaint -- it was everywhere.

But the auditor's fees that we were seeking probably wouldn't have been awardable under ERISA, because the ERISA provision, 29 U.S.C. 1132(g) says you get a reasonable attorneys' fees and costs of the action to be paid by the defendant. And I'm not sure at all that that would include -- I don't know any authority that that includes auditor's fees.

But the contract was quite clear. Costs including attorneys' fees of collecting payments, and the auditor's fees did fit in that, in that basket. And nobody doubted it throughout the litigation. There was no litigation about whether we are entitled under anything to auditor's fees because there's no point in litigating the ERISA issue because it was clear under the contract and the district court absolutely knew that auditor's fees were involved in the case, because the district court awarded them separately and awarded us all the auditor's fees that we sought, not just -- well, just actually a relatively small portion of the attorneys' fees.

In any event, if -- our submission is that the Court -- that contractual attorneys' fees have always been seen as damages, should continue to be seen

as damages, and the easiest, simplest, and best procedural rule is to say that's what happens with contractual fees, that's the category that we're dealing with. Budinich deals with a different category of statutory fees. But even if not, I do think that in this case the nonlitigation fees, the attorneys' fees for a time when they were enforcing the contract which ultimately got enforced and before there was litigation and the auditor's fees for examining the books that were sums that were due and owing entirely without regard to whether there was -- to whether there was a judgment in the case or whether there ever was a court case at all, those things at the very least should be seen, are damages in the case. They were due and owing before the case was ever filed, and because those were in the case at the very least the judgment wasn't final until those were resolved. Thank you.

CHIEF JUSTICE ROBERTS: Thank you, counsel.

Mr. Himmelfarb, four minutes.

REBUTTAL ARGUMENT OF DAN HIMMELFARB

ON BEHALF OF THE PETITIONERS

MR. HIMMELFARB: One rule for statutory fees and one rule for contractual fees is severely flawed both from the point of view of administrability and from the point of view of logic. My friend Mr. Feldman

suggested that the fees in this case clearly were sought under a contract, and all I would say about that is that it seems to me the colloquy itself that that comment precipitated shows how confusing it can be to make the determination.

Mr. Feldman also suggested that there are a few other examples where you might be seeking fees under a contract in statute. Keep in mind that there are lots of State statutes that authorize an award of fees in contract cases of different kinds. Budinich itself was a case involving an employment dispute, which was necessarily a contractual dispute, and the Colorado statute at issue there provided for the award of fees in employment disputes.

So you can imagine the situation where you have a contract and a statute that say the same thing, there's an entitlement to fees, and yet, for whatever reason, the party seeking fees invokes one rather than the other and yet the outcome under Respondent's rule would depend upon which was invoked.

Mr. Feldman also suggested that our rule presents a trap for unwary. I have to say I'm having a hard time understanding that. The consequences of our rule are that you always have to file after the initial decision and if you do that there won't be any risks.

It won't be too late, and it won't be too early.

The consequences of either the First Circuit's rule or the Eleventh Circuit's rule are that if you file after the second decision, it may be too late and you won't be able to appeal the first decision, but if you file after the first decision, it may be too early if it's subsequently determined that these are merits fees and the case isn't over and your appeal will be dismissed and you have expended your resources on having an appeal dismissed.

As to the logic, the fundamental premise of respondent's position is that all statutory fees are costs, all contractual fees are damages and all I'd say about that is that it's just incorrect. There are statutory fees that look a lot like the contractual fees at issue here. There are contractual fees that are straightforward prevailing party provisions, some of which are bilateral, meaning that the defendants can prevail. If a defendant recovers attorneys' fees under a contract, whatever else that contractual provision is, it can't be damages.

Budinich said statutory funds can be merits or nonmerits. We're going to treat them as nonmerits. Likewise contractual fees can be merits or nonmerits. There's absolutely no reason to adopt the opposite rule

for that category of fees. Judgment should be reversed.

CHIEF JUSTICE ROBERTS: Thank you, counsel. The case is submitted.

(Whereupon, at 12:03 p.m., the case in the above-entitled matter was submitted.)