

1 IN THE SUPREME COURT OF THE UNITED STATES

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3 RAY HALUCH GRAVEL COMPANY, ET AL, :

4 Petitioners :

5 v. :

6 CENTRAL PENSION FUND OF THE : No. 12-992

7 INTERNATIONAL UNION OF OPERATING :

8 ENGINEERS AND PARTICIPATING :

9 EMPLOYERS, ET AL. :

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11 Washington, D.C.

12 Monday, December 9, 2013

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

17 APPEARANCES:

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

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

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1 P R O C E E D I N G S

2 (11:06 a.m.)

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

6 Mr. Himmelfarb.

7 ORAL ARGUMENT OF DAN HIMMELFARB

8 ON BEHALF OF THE PETITIONERS

9 MR. HIMMELFARB: Thank, Mr. Chief Justice,
10 and may it please the Court:

11 Twenty-five years ago, in Budinich v. Becton
12 Dickinson, this Court unanimously held that a decision
13 leaving unresolved the request for attorneys' fees is a
14 final decision subject to immediate appeal. The fee
15 awarded in Budinich was authorized by a statute that the
16 same rule applies to fees awarded under a contract.

17 In concluding otherwise, the First Circuit
18 below held that Budinich may or may not apply to
19 contractual attorneys' fees, depending upon whether the
20 fee award in a particular case is deemed part of the
21 merits or not.

22 The First Circuit's rule is inconsistent
23 with each of the core aspects of Budinich, which is
24 likely why Respondents no longer defend it. Whereas
25 Budinich held that its rule applies regardless of

1 whether the fees are deemed merits or nonmerits, that
2 distinction is the very foundation of the First
3 Circuit's rule.

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

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

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

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

23 MR. HIMMELFARB: Right. It's not a
24 bright-line rule in a number of respects. One of them
25 is that, like the First Circuit, it relies on a

1 distinction between merits and nonmerits fees, more
2 specifically on what Respondents call damages fees, as
3 opposed to cost fees. And Budinich says it's
4 inappropriate to make this sort of case-by-case
5 determination of whether a particular fee award is
6 authorized --

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

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

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

24 And it does seem to me that once you say
25 contractual provisions will be treated this way,

1 statutory provisions will be treated that way, that's
2 not a hard rule to implement.

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

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

18 So this case is an example of one where it's
19 not always clear. There are many cases where a statute
20 in some capacity and a contract in some capacity are
21 both in play, where you potentially have two competing
22 attorneys' fees provisions, one statutory and one
23 contractual.

24 They could be identical in all relevant
25 respects, and yet, in one of them, the party happens to

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2 happens to invoke the contractual provision, and under
3 Respondents' rule, you would have two different
4 outcomes.

5 But what we think is really fundamentally
6 wrong with Respondents' position is that, at the end of
7 the day, it's just the opposite of the rule that this
8 Court adopted in Budinich. Budinich recognized that
9 statutory fees can be viewed as merits or non-merits,
10 depending upon the particular statute or decision law.
11 Contractual fees are precisely the same.

12 Some contractual fees, depending upon the
13 contract's provision and the relevant decision law,
14 could be viewed as costs.

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

19 MR. HIMMELFARB: 54(d)(2) simply requires
20 that, in the case in which fees are sought by motion,
21 they have to be made -- the motion has to be made,
22 within 14 days, unless the fees are such that they are a
23 part of the cause of action and they are submitted to a
24 jury.

25 54(d) doesn't say that, in a case where

1 the fees are made by motion, but they should have been
2 submitted to a jury, there's some other appealability
3 rule. It simply says that, in a case where a fee
4 request is made by motion, it has to be made within 14
5 days.

6 JUSTICE SOTOMAYOR: I -- I'm a little
7 confused. So is your rule that if a fee is made by --
8 if a request is made by motion, whether it's contractual
9 or statutory, that that then becomes a separate judgment
10 and not a part of the final merits?

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

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

18 MR. HIMMELFARB: Well, our submission is
19 that it doesn't matter whether it should have been given
20 to a jury or not. What matters is whether it was given
21 to the jury. And let me just say, parenthetically, the
22 general practice in Federal courts, as I understand it,
23 is that fee requests are not given to juries.

24 At the very least, the amount of the fee is
25 almost invariably determined by courts, not by juries.

1 And, in fact, courts have held that there's no Seventh
2 Amendment right to have juries determine the amount of
3 attorneys' fees, and this makes sense when you think
4 about it.

5 JUSTICE KENNEDY: It does make sense.
6 We held that or just circuit courts?

7 MR. HIMMELFARB: No, lower courts have held
8 that. This makes sense because most attorneys' fees
9 request, very much including the fee request in this
10 case, go up to the very end of the case. And by
11 definition, when the jury still has the case -- you
12 know, the meter is still going, and it's quite
13 difficult, indeed, it's impossible, for a jury to decide
14 what the fee award should be when there are more fees to
15 follow.

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

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

25 JUSTICE BREYER: Well, that's the problem.

1 I mean, put Justice Kagan and Justice Sotomayor
2 together. I don't see any problem that I can see in
3 deciding whether a case is contractual or statutory
4 because the judge has to decide.

5 If there's a contractual part of it, if he's
6 going to deny it, he has to decide the contractual part.
7 So if it's both, it's both. It counts as contractual.
8 The Eleventh Circuit rule applies.

9 On the other hand, if we don't -- if we
10 don't follow the Eleventh Circuit, we get into the
11 question of, well, what about auditor's fees, what about
12 witness fees, what about prelitigation attorneys' fees,
13 what about some language in the contract that seems to
14 cover attorneys' fees, but we're not certain, et cetera?

15 And before you know it, that could even
16 shade into the merits. And so the simple thing to do is
17 just say what the Eleventh Circuit said. So we have one
18 argument, that yours isn't really an administrative
19 objection, and you have the other argument that, if we
20 follow you, there's a big administrative problem.

21 MR. HIMMELFARB: Well, auditor's fees or any
22 other sort of nonattorney professional fees or expert
23 fees or anything else, we think, are not a problem
24 because the truth of the matter is that that category of
25 fees, as a general matter, just like attorneys' fees,

1 are fees that are incurred in attempting to enforce the
2 underlying right or to defend against the enforcement of
3 the underlying right.

4 They are not some measure of the value of
5 the underlying issue.

6 JUSTICE BREYER: All right. So all we're
7 going to have is a contract which, in its discussion of
8 the merits, makes some general mention of fees. And
9 now, what we have is the initial notice of appeal has to
10 be within 30 days of the judgment, when the fee issue is
11 not yet resolved, and you're going to try to separate
12 the merits from -- I mean, some -- you see what I'm
13 worried about, what Justice Sotomayor was worried about,
14 that these things will be very messy when you get to
15 many contracts.

16 MR. HIMMELFARB: I don't -- I don't think
17 so. I mean, just think about this from a common sense
18 point of view. This was a case where there was a bench
19 trial. At the conclusion of the bench trial, the
20 parties, including Respondent, submitted proposed
21 findings of fact and conclusions of law, in which they
22 said, judge, you should find Petitioners liable,
23 plaintiffs below, and you should award us damages.

24 Then a few weeks later, they separately
25 submitted something that they call "Motion for

1 Attorneys' Fees and Costs," in which they requested
2 attorneys' fees, costs, and auditor's fees.

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

9 JUSTICE KAGAN: But what if they hadn't done it
10 that way? What if they had listed those fees in their
11 complaint, and what if they had argued for them as part
12 of the bench trial? Are you saying something would
13 depend on that?

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

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

8 As far as the so-called prelitigation
9 attorneys' fees are concerned, this is the fallback
10 argument -- the second argument that Respondents make in
11 their brief. And the argument is that, because some of
12 the fees requested were incurred before the complaint
13 was filed -- or at least at some remote time before the
14 complaint was filed, what you have here is not covered
15 by Budinich because the rule articulated in Budinich is
16 that it applies to attorneys' fees for the litigation in
17 question, for the litigation at hand, fees attributable
18 to the case. And that's the language that Respondents
19 rely on in our fallback argument.

20 What we would say in response to that is
21 that what Budinich meant by that language is that its
22 rule does not apply to a case where the attorneys' fees
23 are for a prior case, as opposed to being attributable
24 to the case, meaning the case in which the fees are
25 incurred.

1 So if you have a dispute between a lawyer
2 and a prior -- a former client, over fees, the former
3 client hasn't paid fees, and there's a lawsuit to
4 recover the fees, Budinich won't apply in that
5 situation.

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

8 (Laughter.)

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

12 MR. HIMMELFARB: Well, yes, of course, it
13 is. And not only is it infrequent, the situation you
14 have here that gives rise to the question presented in
15 this case just wouldn't arise there because, if you're
16 talking about a lawsuit by a lawyer against a former
17 client to recover fees owed, by definition, the fees are
18 known and quantifiable before the suit is filed.

19 So you would imagine that, in that case,
20 there'd be a liability determination and the award of
21 damages, which in that case just happened to be
22 attorneys' fees, and the case would be over, and this
23 situation wouldn't present itself.

24 CHIEF JUSTICE ROBERTS: Why would the case
25 be over? Presumably, you incurred attorneys' fees,

1 seeking to recover the attorneys' fees.

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

11 JUSTICE ALITO: Do you think the district
12 court here relied solely on the contract -- on the
13 contract and on ERISA, or just on ERISA, in awarding
14 these fees?

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

21 JUSTICE KENNEDY: I can see how, if you're
22 talking about lawyers' fees pretrial and lawyers' fees
23 at the trial, that they would be interconnected, that it
24 would be improper for the jury to hear about either, if
25 there were a jury.

1 But -- what about the auditor's fees? Can
2 you -- is there an argument that would support your
3 side, but I'm not sure there is the argument, that
4 auditor fees are also -- have an effect on what the
5 attorneys' fees are or should be.

6 MR. HIMMELFARB: Well --

7 JUSTICE KENNEDY: Or are they really quite
8 compartmentalized?

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

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

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

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

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

23 CHIEF JUSTICE ROBERTS: Well, but I thought,
24 with respect to pre-litigation attorneys' fees, you said
25 you can treat those differently because they're set and

1 determined. You know what they are. It would seem to
2 me, in most cases of an auditor's report, that's also
3 true.

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

10 And in the case in which the fees are
11 sought, that is the dispute, that's the case. What I
12 would distinguish from that situation is the situation
13 here, where lawyers are retained, auditors are retained,
14 to resolve an underlying dispute. The underlying
15 dispute is whether contributions are owed to union
16 benefit funds.

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

1 I mean, the -- the contractual provision at
2 issue here authorizes that recovery. Everybody agrees
3 with that. And the truth of the matter is that, even
4 under the narrowest imaginable attorneys' fees
5 provision, surely, some fees incurred before the
6 complaint was filed would be recoverable, unless you had
7 a really odd-ball statute or contractual provision,
8 which made --

9 JUSTICE KENNEDY: And the trial court needs
10 to know the amount of the pretrial fees and the -- and
11 what they were incurred for, so that he doesn't give
12 duplicative recovery when he provides for attorneys'
13 fees for the course of the trial.

14 MR. HIMMELFARB: Right, but if -- if
15 Respondents' fallback position were correct, what that
16 would mean is that, in literally every case, contractual
17 or statutory, you would have to -- litigants and courts
18 alike -- would have to search through the request for
19 attorneys' fees, which are generally voluminous -- the
20 one in this case runs to more than a hundred pages in
21 the Joint Appendix; this was a three-day trial -- to
22 decide are there any fees here that are "nonlitigation"
23 fees?

24 And I put "nonlitigation" in quotation
25 marks. And that -- that has two consequences. One is

1 it requires sifting through this voluminous record, and
2 the second is it requires making a very difficult kind
3 of evaluative judgment about whether this particular
4 pre-complaint fee is -- you know, a "merit" - and I put
5 that in quotation marks, also -- fee or a "nonmerits"
6 fee.

7 If it's drafting a complaint, maybe that's a
8 nonmerits fee, but if it's -- you know, four months
9 before the complaint was filed, and it doesn't have to
10 do with any drafting of a pleading, there's some way to
11 conceptualize that as a merits fee. We just think it's
12 completely --

13 JUSTICE SOTOMAYOR: So articulate, again,
14 for me your rule. Would it go something like this: To
15 the extent that a party leaves attorneys' fees for after
16 trial, it then -- that's a separate judgment that will
17 not run the finality of the prior judgment?

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

19 JUSTICE SOTOMAYOR: But -- but you're
20 proposing not to estop parties if they choose to put
21 this issue to a jury?

22 MR. HIMMELFARB: That's right.

23 JUSTICE SOTOMAYOR: If you're saying, if
24 they don't, then they have to treat it as the judgment
25 that comes out of the contract dispute as final, the

1 other aspects of it.

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

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

8 MR. HIMMELFARB: That's true.

9 JUSTICE BREYER: And what about witness
10 fees? Experts?

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

13 JUSTICE BREYER: No, no. Experts, experts,
14 the payment of an expert.

15 MR. HIMMELFARB: If -- if expert witness
16 fees are recoverable under the applicable statute --

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

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

21 JUSTICE BREYER: So expert witnesses are --
22 are also, so we're talking about Budinich'ing or
23 whatever, you want to do that for the attorneys' fees,
24 auditor's fees, expert witness fees, experts who helped
25 the attorney, but don't testify, what's the rule of what

1 we're putting in here and what we're not?

2 MR. HIMMELFARB: Well, the rule is what I
3 was suggesting before, which is that, if these are fees
4 that are incurred in an effort to vindicate the
5 underlying right, then they're covered by Budinich. And
6 that's -- I think that's what Budinich is getting at.

7 But if, instead, they are sort of -- it's a
8 standalone case -- and Justice Scalia, I think, may
9 disagree with me about this -- but if it's a standalone
10 case where you hire an auditor and you don't pay the
11 auditor's fees and then the auditor sues you for the
12 fees, that's like the example of the lawyer who didn't
13 get his fees paid and sues his former client.

14 JUSTICE KAGAN: Well, what about a different
15 kind of standalone case? I mean, suppose that the fund
16 had actually paid up what it was due prior to the
17 litigation, but -- but there was still all these
18 outstanding costs that had been incurred for auditors
19 and all of that, and -- and a suit was brought just
20 involving those?

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

1 I also think, though, as with the case of a
2 lawyer suing a former client, the situation is unlikely
3 to arise, at least under this contractual fee provision
4 because, by definition, in your hypothetical, you would
5 know what the fees were at the time you filed the case.

6 Presumably, the judgment would be, if it was
7 a judgment for the funds, yes, you're entitled to
8 recover costs, and here's what the costs are, end of
9 case. You wouldn't have this separate pending request
10 for attorneys' fees.

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

14 MR. HIMMELFARB: I mean, I just think that's
15 absolutely our rule. It's the Budinich rule. The rule
16 we're advocating says, if you have a case and the -- the
17 merits of the case are decided, liability is determined,
18 damages are awarded, but there's a pending request for
19 attorneys' fees, which may or may not include other
20 types of related professional fees, and you want to
21 appeal that initial decision, you have to file a notice
22 of appeal within 30 days.

23 Under either the First Circuit's rule or the
24 Eleventh Circuit's rule, you are going to trip up a lot
25 of people because they may guess wrong, and they may

1 think, I don't have to file a notice of appeal because
2 this is a, quote, "merits," end quote, decision and if
3 it turns out they were wrong, and it's easy to think
4 they might be because this is such a sort of -- you
5 know, esoteric kind of distinction, what's a merits fee
6 and what's not, you're going to get people tripped up
7 under either the First Circuit's or the Eleventh
8 Circuit's rule.

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

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

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

20 MR. HIMMELFARB: Right. You would have, in
21 effect, two separate appeals if you wanted to appeal the
22 attorneys' fees decision.

23 JUSTICE SOTOMAYOR: You would argue to the
24 contrary, no, that a rule that says wait till the end of
25 everything that needs to be decided in the case, that's

1 the finality rule, and that's the idea behind the
2 finality rule.

3 MR. HIMMELFARB: Right, I mean, the -- the
4 relevant statutory provision is Section 1291 of Title
5 28, which speaks of final decisions. And what a final
6 decision is under that statute is a decision that either
7 leaves nothing else to be resolved or leaves other
8 things to be resolved, but the only other things that
9 are left to be resolved are collateral to the merits.

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

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

23 JUSTICE BREYER: No, no, no. The words that
24 make your point, I think, not absolutely obvious were
25 when you said, "which may or may not involve other kinds

1 of fees." Now, at that point, I'm thinking, well, if we
2 follow your rule, there might be quite a lot of
3 litigation going on about those words, "may or may not."

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

8 MR. HIMMELFARB: I'm not entirely sure I'm
9 following the question, but if the concern is about the
10 presence of fees other than attorneys' fees, for
11 example, auditor's fees or economist's fees or what have
12 you, I mean, keep in mind, the same -- the same problem
13 would arise under a statutory fee award.

14 Perhaps the most common statutory
15 authorization for fees, at least in the Federal system,
16 is Section 1988 of Title 42, which is sort of a
17 catch-all. It applies to 1983 actions. It authorizes
18 an award of expert fees.

19 So if you had a straightforward Budinich
20 situation, where you have a statutory fee award -- say,
21 it's a 1983 action -- surely, Budinich applies to 1988
22 requests for fees, and 1988 itself authorizes an award
23 of expert fees.

24 So it seems to us you can't have a different
25 rule for contracts if you -- if you accept our -- if you

1 reject their principal submission, which is that contracts
2 should be treated differently from statutes.

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

5 CHIEF JUSTICE ROBERTS: Thank you, counsel.
6 Mr. Feldman.

7 ORAL ARGUMENT OF JAMES A. FELDMAN

8 ON BEHALF OF THE RESPONDENTS

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

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

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

1 When parties --

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

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

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

12 MR. FELDMAN: I'm sorry. You do submit
13 whether or not you get the fees to the jury. The amount
14 of the fees -- frequently waits later for practical
15 reasons. It's a long history of that's the way it's
16 been litigated, it's probably the way it was done in
17 1791. It doesn't create a Seventh Amendment problem.

18 JUSTICE KENNEDY: Well, that seems, to me,
19 to indicate that there's a final judgment when -- when
20 the verdict is rendered.

21 MR. FELDMAN: You have to --

22 JUSTICE KENNEDY: If the fees are left,
23 it's just a collateral matter as to what the fees will
24 be.

25 MR. FELDMAN: I don't think it's because

1 it's a collateral matter. What you submit -- you do
2 have to submit to the jury whether or not you get the
3 fees. That question has to go to the jury, and that's
4 because it is part of the merits.

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

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

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

16 JUSTICE SCALIA: Absolutely clearly?

17 MR. FELDMAN: Right.

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

20 MR. FELDMAN: No, I --

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

23 MR. FELDMAN: I disagree. I think that what
24 Budinich said is we're going to -- Budinich was based
25 on -- the question it was asking was are these merits

1 or nonmerits determinations. And then it -- but what it
2 said is, because of the particular place this comes in,
3 in litigation, we have to deal with this on a -- as a
4 categorical matter, and it doesn't matter --

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

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

9 JUSTICE SCALIA: For purposes of -- for
10 purposes of this rule.

11 MR. FELDMAN: What the Court said --

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

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

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

1 them as damages.

2 MR. FELDMAN: And as the -- what the Court
3 was -- it was correct in -- with respect to statutory
4 fees that was at issue in Budinich, the Court was quite
5 correct in saying those -- it is indisputable that
6 those, as a general matter, are not a part of the
7 merits. They are costs, which have never been seen as
8 part of the merits.

9 But that's not true and never has been, of
10 contractual damages, and this Court, itself, has viewed
11 contractual damages --

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

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

22 MR. FELDMAN: I mean, I wouldn't say that --
23 they are not doing the same thing. And also, the source
24 of law is important because what -- the whole point is
25 that the law has always been that statutes define what

1 court costs are.

2 Court costs are basically a narrow segment
3 of the money that people pay each other under certain
4 circumstances. They are defined by 28 USC 1920, by this
5 Court's Rule 43, and by the fee-shifting statutes, now
6 we know, after Budinich.

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

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

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

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

25 MR. FELDMAN: The Court felt, as a

1 categorical matter, that -- and quite correctly, that
2 statutory fees are costs, but as a categorical matter,
3 contractual fees are not costs.

4 When parties agree in a contract that one is
5 going to pay another a certain amount of money in the
6 event of some -- something happening related to a
7 breach, that's what defines the -- the damages that are
8 due in a subsequent --

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

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

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

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

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

11 JUSTICE ALITO: I thought, also, ERISA, too.

12 MR. FELDMAN: Also ERISA, also ERISA.

13 JUSTICE ALITO: Yes.

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

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

22 MR. FELDMAN: That's true, but --

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

25 MR. FELDMAN: The notice of

1 motion actually -- what the notice of motion said --
2 this was the sequence of events: The affidavit was put
3 in on, I believe, April 4th. The notice of motion came
4 in the next day, and I think actually the reason is
5 because we didn't actually think we needed a notice of
6 motion and later figured out that we did.

7 What the notice of motion said was
8 defendants are liable for those monies, pursuant to
9 ERISA --

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

12 MR. FELDMAN: This is page 72.

13 JUSTICE SOTOMAYOR: Of the Joint Appendix?

14 MR. FELDMAN: Of the Joint Appendix.

15 "Defendants are liable for those monies pursuant to
16 ERISA and for the reasons detailed in the accompanying
17 Wagner affidavit filed on the day before." Okay?

18 It didn't say -- it said ERISA and for the
19 reasons given. And if you look back at JA -- at the
20 affidavit at JA 75, in paragraph 6, as indicated -- no,
21 I'm sorry -- it's paragraph 3 on 74.

22 "In accordance with a collective
23 bargaining agreement, the trust agreement, and ERISA,
24 the defendants are liable for all auditor fees,
25 attorneys' fees, and so on."

1 JUSTICE GINSBURG: Mr. Feldman, before --

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

4 MR. FELDMAN: But there's no need to.
5 All -- the only question that you have to ask is: Was
6 the -- was there a contractual damages issue in the
7 case? And then here's the other half of it --

8 JUSTICE GINSBURG: Mr. Feldman, there's a --
9 there's a question that has not been -- that's not
10 surfaced yet, but after Budinich, however you pronounce
11 it, the rule makers changed Rule 58(e), and now, 58(e)
12 provides a mechanism for deferring the finality of the
13 judgment until the fee question is decided.

14 You didn't seek an order under 58(e), did
15 you? You didn't ask the district judge, please defer
16 the finality of the judgment until the fee question is
17 decided.

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

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

21 MR. FELDMAN: I don't -- that -- that
22 wouldn't have worked in this case because that's a
23 situation where there's already been another judgment on
24 the other merits issues in the case.

25 At the time when we put in this affidavit,

1 this affidavit was actually -- I think my friend was
2 mistaken -- because this affidavit was put in right at
3 the end of the trial, actually, at the same time, in
4 effect, as the trial memorandum telling -- our
5 post-trial brief telling the judge everything that we
6 wanted.

7 It's just, for this part of it, we then --
8 we originally said we're going to get it in at the same
9 time. We later said, can we get two weeks extra for
10 this.

11 JUSTICE GINSBURG: You still could have said
12 to the judge, please defer the entry of judgment until
13 you resolve the fee question, and you -- you would not
14 be entitled to that relief, but it would be in the
15 discretion of the judge.

16 And so that's how the rulemakers thought
17 this problem could be handled. You can't have a
18 judgment that does not become final until the fee
19 question is decided. But if there's -- absent that
20 specific determination, then the judgment becomes final
21 when it's final, and the fees are a separate matter.

22 I mean, it seems to me that, now, that this
23 mechanism in the rules to handle this, we should not
24 depart from the rules, whether it's contract or
25 statutory, it's separate. It's not part of the

1 underlying judgment.

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

8 JUSTICE KENNEDY: I know the Petitioner
9 doesn't rely on it, but it really is supplemental to
10 Justice Ginsburg's point. There was a judgment in this
11 case, the June judgment. And it -- and it says -- it's
12 entitled, "Judgment in a Civil Case," and it says that
13 the interest runs from this date.

14 Now, I know there are cases in which we say
15 that the description the trial judge gives to the
16 judgment is not necessarily conclusive of this final
17 order, but it does seem to me that this is what the
18 judge thought he was doing.

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

1 He was maybe running the -- the interest
2 from the other one.

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

5 MR. FELDMAN: Right. That's correct. But
6 I'd like to go back to a couple of other things. One is
7 there's no sorting through things that's really a
8 problem. First of all, there's very few cases that ever
9 have both contract and statutory fees.

10 We've looked through every case cited in the
11 papers in this Court. None -- none -- actually, maybe
12 one or two did, but in those, there was no doubt at all
13 that there were contractual fees that were at issue.

14 But more importantly, unlike other kinds of
15 contract damages where, if you want lost profits or if
16 you want the cost of some replacement performance, you
17 don't have to tell the judge what the legal source of
18 getting those things are. You just have to tell the
19 judge, this is what I want, I'm entitled to it, there
20 was a breach of contract.

21 But with fees, you don't get them, just as a
22 matter of saying, I want to get my fees. You have to
23 give the Court some source that authorizes them and that
24 usually -- it is a statute, or it's a contract. And
25 parties, I think you'll find -- I couldn't find cases

1 where there was any doubt as to where a court said, I
2 have some doubt as to whether it was statute or a
3 contract.

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

7 MR. FELDMAN: That's right.

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

13 What they normally think now, I guess, is
14 this: There's a piece of paper separate. It's called a
15 judgment. Counsel, one set goes into the file. You
16 have 30 days, if you're not going to change that
17 judgment, and the fact that you want costs doesn't make
18 a difference.

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

1 the exceptions to that.

2 MR. FELDMAN: I -- I don't think it is, and
3 there's a number of reasons. Okay? One is that the --
4 what our rule does is you file the notice of appeal
5 after the case is finished, at the end. Their -- under
6 their rule, you'll necessarily set a trap for the
7 unwary.

8 For lawyers who aren't sure or don't know
9 the law or whatever, for those people who aren't up on
10 it, they're going to find -- miss the earlier notice of
11 appeal, and they're going to lose their right to appeal
12 altogether, if you adopt Petitioners' rule. That would
13 be what would happen.

14 If you adopt our rule, then that wouldn't
15 happen. It would be true, there would be people who
16 would file a notice of appeal too early, but filing a
17 notice of appeal too early is much less of a problem
18 because, if you file a notice of appeal too early, you
19 can cure it by just filing another notice of appeal
20 later.

21 And under Federal Rule Appellate -- of
22 Appellate Procedure 4(a), there are times when an early
23 notice of appeal in, I think, a number of circumstances,
24 relates forward to a later judgment.

25 JUSTICE GINSBURG: Mr. Feldman, going back

1 to my 58(e) question, one thing that's interesting about
2 the rulemakers' response to Budinich is they didn't --
3 they didn't make any distinction between statutory and
4 contractual fee awards.

5 You would have us divide the world up that
6 way, statutes one rule, contracts another. But the --
7 the Rule 58(e) doesn't -- it's not confined to statutory
8 fees.

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

14 I would also point out that the other fees
15 at issue here -- this is the other problem -- aside from
16 the fact that there's a trap for the unwary set up by
17 their rule, but not by our rule, and that other things
18 being equal, procedural rules should be set up, so they
19 don't have those kinds of traps.

20 But even aside from that, they do have to
21 draw a distinction between attorneys' fees, auditor's
22 fees, accountant's fees, architect's fees, real estate
23 inspector's fees, there's many different kinds of
24 provisions people can put into contracts and say, if you
25 breach the contract, I want a right to inspect the

1 property, I want a right to inspect your books, I want a
2 right to figure out whether you've met your covenants in
3 this bond deal or in this business arrangement that we
4 have.

5 And you have to pay for it. Or you have to
6 pay for it if it turns out that you really have breached
7 the covenant or there really is something wrong
8 with the building.

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

15 In this --

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

18 MR. FELDMAN: But in this case --

19 JUSTICE BREYER: In this case, it's lawyers,
20 but it's going to treat the same -- experts, such as
21 1988, experts, real estate, all those things the lawyer
22 simply thinks, costs of litigation, if it's cost of
23 litigation I want, that doesn't make a difference, I
24 better file it.

25 MR. FELDMAN: But these are not costs of

1 litigation. I mean, when the auditors came -- this is
2 what happened, in this case -- and this is not uncommon.
3 The -- there was a suspicion that Petitioners were not
4 paying the contributions that were due.

5 There were no attorneys involved in the
6 case. The auditors came in to do what they're
7 contractually entitled to do, which is look at the books
8 that -- the Petitioners' books, to figure out whether
9 they had or had not made the contribution.

10 JUSTICE SCALIA: Okay. So limit it to
11 attorneys' fees, as the rule does. That's a pretty
12 clear line. Attorneys' fees -- you know, you -- you
13 have to file right away. Anything else, it can extend.

14 MR. FELDMAN: And we would prevail in this
15 case under that -- in that event. But even on
16 attorneys' fees --

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

20 MR. FELDMAN: Right. I think that there's
21 no -- I think that there's -- once you start parsing
22 contractual provisions out and saying, some of them are
23 merits-based, and some are not, even though they're all
24 doing the same thing, that is, they're all saying, in
25 the event -- this is what a damages provision --

1 JUSTICE SCALIA: I wouldn't be saying that.
2 I would be saying there's attorneys' fees and there's
3 stuff other than attorneys' fees. Merits doesn't
4 matter.

5 MR. FELDMAN: And even then -- even in
6 attorneys' fees, if I can just go back to this case for
7 a second, because I don't think this is all so unusual,
8 when the attorneys first came in, they didn't come in to
9 sue Petitioners. They came in because the auditors
10 weren't getting cooperation and being given all the
11 books that they were supposed to be given.

12 And their first thing that involved a
13 certain amount of time at that point was trying to get
14 them to give the books to the auditors, which they
15 eventually did, okay?

16 But those are costs of collection. Those
17 fees, under this contract and many, many contracts that
18 are similarly worded, those are costs, costs, including
19 attorneys' fees, of collecting money due, and those
20 costs are due and payable by Petitioners before any case
21 is brought and whether or not any case is brought.

22 If it turned out that the auditors had found
23 that there are some contributions that were not made and
24 the auditors then -- and then Respondents -- the
25 funds came to the employer and said, you owe us \$5,000

1 in contributions that weren't made, your books were no
2 good, and we found it, and you owe us another \$5,000 for
3 the auditor's fees, they might have just paid that.

4 They should have paid it. And in many
5 cases, they will, or they might pay one or the
6 other. But they're on an exact par. That money is
7 totally due and owing under a provision like this.

8 It's not a prevailing party provision, which
9 is the sort of thing that -- that statutes almost
10 uniformly have. It's covering obligations that one
11 party has to another, based on the fact that they didn't
12 comply with their contractual obligations.

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

22 CHIEF JUSTICE ROBERTS: I thought the
23 procedure was, regardless of who prevails, it's not
24 piecemeal appeals. I mean, they often combine the two
25 in the court of appeals for consideration.

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

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

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

17 The point of that rule, though, and what I
18 was getting at, is, for people in the situation of -- of
19 Respondents here, we were -- there was, I think,
20 \$143,000 in fees at issue that we have to pay -- they
21 have to pay the attorneys in this case.

22 And it's very important to them to know
23 whether they have to pay that amount before they decide
24 whether they want to appeal the case or not.

25 It's just as important to decide whether

1 they want to appeal that amount than to decide how much
2 they're going to get for the basic contributions that
3 was -- that Petitioners also owe us.

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

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

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

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

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

20 MR. FELDMAN: It would apply, but -- first
21 of all, a statutory fees case are usually not as broad
22 as this. They're usually prevailing parties' fees.
23 They're quite different -- they look quite different.
24 But they usually involve exercise of district court
25 discretion. The court may, in its discretion, order

1 fees. Nobody has ever written a contract, I don't
2 think, like that.

3 But more importantly, in the statutory case,
4 the court was quite correct, in Budinich, that it's
5 really indisputable that, as a general matter, statutory
6 fees are costs, and costs have never been seen as part
7 of the merits. They're defined by statute, 28 USC 1920.
8 1988 is just another provision defining costs and
9 extending it a little bit farther.

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

15 MR. FELDMAN: I think when contracts talk
16 about -- I don't think -- there's very little, if any,
17 history of contracts actually trying to allocate court
18 costs of the sort that statutes do. I do think they
19 used the word "costs." This provision here uses the
20 word "costs," but quite differently.

21 It uses the word "costs" to mean expense,
22 costs, including attorneys' fees, of collecting
23 payments, just like costs, including transportation of
24 obtaining substitute -- substitute performance, if
25 there's a breach, or any provision like that.

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

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

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

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

22 In the statutory case, the -- where Congress
23 may -- writes a statute, many, many of them are; the
24 court may, in its discretion, award fees to a prevailing
25 party. I think the intuition of Budinich was that the

1 court -- Congress was tying into the long tradition of
2 taking litigation costs and extending it a little bit
3 farther, and that's something that Congress does.

4 And if Congress wanted to say the
5 contractual attorneys' fees are available under some
6 circumstances or under -- however, then that would
7 probably be defining costs, too, especially if they are
8 tied to what goes on in the litigation.

9 But when it's a provision like this one, and
10 like many, many contractual provisions -- and there's a
11 wide, wide variety of them -- that just talks about what
12 happens when there's a breach, and there's going to be
13 attorneys' fees, there's auditor's fees, there's other
14 kinds of things -- other kinds of expenses that the
15 nonbreaching party has, those are just the damages of
16 the case.

17 They've always been seen as the damages of
18 the case. And it would be odd if you do start to try to
19 say, well, these have to be treated like they were
20 costs, then it does inevitably raise the question what
21 else has to be treated the way of -- the -- costs.

22 Petitioners said that -- you know, in this
23 case, there was no doubt that anybody had ever, in this
24 case, that we were seeking contractual fees. And one
25 reason that I think is pretty conclusive on that, aside

1 from the fact that we mentioned it at every single
2 opportunity throughout the case, that we were seeking
3 contractual fees, in our summary judgment motion, in our
4 trial brief, post-trial, in the complaint -- it was
5 everywhere.

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

13 But the contract was quite clear. Costs,
14 including attorneys' fees of collecting payments, and
15 the auditor's fees did fit in that -- in that basket.
16 And nobody doubted it throughout the litigation. There
17 was no litigation about whether we are entitled under
18 anything to auditor's fees because there's no point in
19 litigating the ERISA issue because it was clear under
20 the contract.

21 And the district court absolutely knew that
22 auditor's fees were involved in the case because the
23 district court awarded them separately and awarded us
24 all the auditor's fees that we sought, not just -- well,
25 just actually a relatively small portion of the

1 attorneys' fees.

2 In any event, if -- our submission is that
3 the Court -- that contractual attorneys' fees have
4 always been seen as damages, should continue to be seen
5 as damages, and the easiest, simplest, and best
6 procedural rule is to say that's what happens with
7 contractual fees, that's the category that we're dealing
8 with. Budinich deals with a different category of
9 statutory fees.

10 But even if not, I do think that, in this
11 case, the nonlitigation fees, the attorneys' fees for a
12 time when they were enforcing the contract, which
13 ultimately got enforced and before there was litigation,
14 and the auditor's fees for examining the books that were
15 sums that were due and owing, entirely without regard to
16 whether there was -- to whether there was a judgment in
17 the case or whether there ever was a court case at all,
18 those things, at the very least, should be seen -- are
19 damages in the case.

20 They were due and owing before the case was
21 ever filed, and because those were in the case, at the
22 very least, the judgment wasn't final until those were
23 resolved.

24 Thank you.

25 CHIEF JUSTICE ROBERTS: Thank you, counsel.

1 Mr. Himmelfarb, four minutes.

2 REBUTTAL ARGUMENT OF DAN HIMMELFARB

3 ON BEHALF OF THE PETITIONERS

4 MR. HIMMELFARB: One rule for statutory fees
5 and one rule for contractual fees is severely flawed,
6 both from the point of view of administrability and from
7 the point of view of logic. My friend, Mr. Feldman,
8 suggested that the fees in this case, clearly, were
9 sought under a contract, and all I would say about that
10 is that it seems to me the colloquy itself that that
11 comment precipitated shows how confusing it can be to
12 make the determination.

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

22 So you can imagine a situation where you
23 have a contract and a statute that say the same thing,
24 there's an entitlement to fees, and yet, for whatever
25 reason, the party seeking fees invokes one, rather than

1 the other, and yet, the outcome under Respondents' rule
2 would depend upon which was invoked.

3 Mr. Feldman also suggested that our rule
4 presents a trap for the unwary. I have to say I'm having a
5 hard time understanding that. The consequences of our
6 rule are that you always have to file after the initial
7 decision, and if you do that, there won't be any risks.
8 It won't be too late, and it won't be too early.

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

18 As to the logic, the -- the fundamental
19 premise of Respondents' position is that all statutory
20 fees are costs, all contractual fees are damages, and
21 all I'd say about that is that it's just incorrect.
22 There are statutory fees that look a lot like the
23 contractual fees at issue here.

24 There are contractual fees that are
25 straightforward prevailing party provisions, some of

1 which are bilateral, meaning that the defendants can
2 prevail. If a defendant recovers attorneys' fees under
3 a contract, whatever else that contractual provision is,
4 it can't be damages.

5 Budinich said statutory fees can be merits
6 or nonmerits. We're going to treat them as nonmerits.
7 Likewise, contractual fees can be merits or nonmerits.
8 There's absolutely no reason to adopt the opposite rule
9 for that category of fees.

10 Judgment should be reversed.

11 CHIEF JUSTICE ROBERTS: Thank you, counsel.

12 The case is submitted.

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

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