No. 05-___

IN THE

Supreme Court of the United States

Michael L. Bernback,

Petitioner,

v.

Thomas Greco, Individually and as President of Harvey's Lake Amphitheater, Inc.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Under 28 U.S.C. 1961, does interest on an award of attorney's fees run from the entry of the judgment establishing the *right* to fees (as the Fifth, Sixth, Eighth, Ninth, Eleventh, and Federal Circuits hold) or instead the entry of a later order fixing the *amount* of fees (as the Third, Seventh, and Tenth Circuits hold)?

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Michael L. Bernback respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

OPINIONS BELOW AND JURISDICTION

The opinions of the Third Circuit (Pet. App. 1a-2a) and district court (*id.* 3a-5a) are unpublished. The court of appeals issued its opinion on March 30, 2005. This Court has jurisdiction pursuant to 28 U.S.C. 1254(1).

RELEVANT STATUTORY PROVISION

28 U.S.C. 1961(a) provides in relevant part: "Interest shall be allowed on any money judgment in a civil case recovered in a district court. * * * Such interest shall be calculated from the date of the entry of the judgment * * *."

STATEMENT

1. On November 6, 2000, the U.S. District Court for the Middle District of Pennsylvania entered judgment in the amount of $225,000 on a jury verdict for petitioner in a breach of contract action against respondent. See *Bernback* v. *Greco*, No. 02-2742, 69 Fed. Appx. 98, 101 (CA3 July 11, 2003), cert. denied, 540 U.S. 1185 (2004). Under the terms of the contract, this judgment also entitled petitioner – as the "prevailing party" – to recover attorney's fees and costs. See 69 Fed. Appx. at 105.

Approximately twenty months later, on July 29, 2002, the district court entered an order fixing the amount of costs and fees at $162,748.62. See 69 Fed. Appx. at 101.[1]

2. When the parties could not agree upon the amount of interest due on the fee award, petitioner timely moved in the district court for an award of interest. Petitioner sought interest under 28 U.S.C. 1961 running from the November 6,

[1] On appeal, the Third Circuit affirmed. 69 Fed. Appx. at 105.

2000 entry of the judgment on the jury verdict. Pet. App. 1a-2a. Calculated from that date, petitioner would receive $85,917.44 in interest.

Respondent, by contrast, argued that interest did not begin to accrue until the award of attorney's fees was quantified in the district court's July 29, 2002 order. Calculated from that date, petitioner would receive $30,981.66 less, or $54,935.78. Pet. App. 1a-2a.

The district court agreed with respondent. It held that the question was governed by the Third Circuit's rule that "post judgment interest on an attorney's fee award runs from the date the award is quantified." Pet. App. 4a (quoting *Eaves* v. *County of Cape May*, 239 F.3d 527 (2001)).

3. Petitioner appealed to the Third Circuit, which affirmed. The court acknowledged that petitioner's position was supported by "precedent from other courts of appeal," but agreed with the district court that the "result [was] controlled by" its prior precedent holding that interest runs from the entry of the order quantifying the award of attorney's fees. Pet. App. 2a.

4. This petition followed.

REASONS FOR GRANTING THE WRIT

1. The question presented is the subject of a frequently recurring circuit conflict openly acknowledged by the courts of appeals. The question turns on the proper construction of 28 U.S.C. 1961, which provides that interest "shall be allowed on any money judgment." The courts of appeals uniformly agree that an award of attorney's fees qualifies as a judgment for purposes of Section 1961. See, *e.g.*, *Associated General Contractors of Ohio, Inc.* v. *Drabik*, 250 F.3d 482, 484-85 (CA6 2001); *Eaves*, 239 F.3d at 530.

Only the Seventh and Tenth Circuits agree with the Third Circuit's holding that, under Section 1961, interest on an award of attorney's fees and costs does not begin to accrue until the district court enters an order quantifying the fee award. *Eaves*, 239 F.3d at 528; *MidAmerica Federal Savings*

& Loan Association v. *Shearson/American Express, Inc.*, 962 F.2d 1470, 1476 (CA10 1992); *Fleming* v. *County of Kane*, 898 F.2d 553, 565 (CA7 1990).

The Fifth, Sixth, Eighth, Ninth, Eleventh, and Federal Circuits disagree, holding that interest begins to accrue with the original judgment entitling a party to recover fees and costs. *Drabik*, 250 F.3d at 495; *Friend* v. *Kolodzieczak*, 72 F.3d 1386, 1391-92 (CA9 1995), cert. denied, 516 U.S. 1146 (1996); *BankAtlantic* v. *Blythe Eastman Paine Webber, Inc.*, 12 F.3d 1045, 1052-53 (CA11 1994); *Jenkins* v. *Missouri*, 931 F.2d 1273, 1277 (CA8 1991); *Mathis* v. *Spears*, 857 F.2d 749, 760 (CAFC 1988); *Copper Liquor, Inc.* v. *Adolph Coors Co.*, 701 F.2d 542, 544-45 (CA5 1983) (en banc), overruled on other grounds by *International Woodworkers of America* v. *Champion International Corp.*, 790 F.2d 1174, 1175-76 (CA5 1986) (en banc).[2]

2. This Court's intervention is required because the circuit conflict is both longstanding and intractable. The split has existed since 1990 (see *Fleming*, 898 F.2d at 565) and is only growing more entrenched with time. In 2001, for example, the Third and Sixth Circuits addressed the issue for the first time. Although both courts acknowledged the division among the circuits and analyzed the question presented at some length, they reached opposite conclusions. In adopting the minority rule, the Third Circuit noted that

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[2] The Second Circuit has also indicated its agreement with the majority position. See *Estate of Calloway ex rel. LMN Products* v. *Marvel Entertainment Group*, 9 F.3d 237, 241-42 (1993) (citing *Mathis* for the proposition that interest on an attorney sanction award "runs from the date of the judgment authorizing the right to the award, not from the date of a later judgment establishing its exact amount"). See also, *e.g.*, *Foley* v. *City of Lowell*, 948 F.2d 10, 22 n.16 (CA1 1991) (acknowledging the split and reserving the issue); *King* v. *JCS Enterprises, Inc.*, 325 F. Supp. 2d 162, 174-75 (E.D.N.Y. 2004) (acknowledging the split and adopting the majority rule).

"there is no consensus among the Courts of Appeals" but explained that "[w]e do not find the reasoning of the courts adopting the 'majority view' persuasive." *Eaves*, 239 F.3d at 531-32; see also *MidAmerica*, 962 F.2d at 1476 ("We are fully aware that our holding contradicts the language of [the Fifth Circuit in] *Copper Liquor, Inc.* * * *."). On the other side of the split, the Sixth Circuit "respectfully decline[d] to accept the Third and Tenth Circuits'" interpretation of the phrase "money judgment" in 28 U.S.C. 1961. *Drabik*, 250 F.3d at 489; see also *Louisiana Power & Light Co.* v. *Kellstrom*, 50 F.3d 319, 332 (CA5 1995) ("Since *Kaiser*, three Circuits have addressed this issue. The Seventh and Tenth Circuits held that *Kaiser* does supersede *Copper Liquor*. The Eighth Circuit disagreed * * *. We agree with the Eighth Circuit."), cert. denied, 516 U.S. 862 (1996); *Jenkins*, 931 F.2d at 1275 ("The [Seventh Circuit's] *Fleming* result runs counter to the holdings of the Fifth Circuit in *Copper Liquor* and the Federal Circuit in *Mathis*." (citations omitted)).

That only this Court can bring uniformity to federal law is further demonstrated by the fact that several circuits have declined opportunities to resolve the issue en banc. See, *e.g.*, *Friend*, 72 F.3d at 1387 (amended opinion indicating denial of rehearing en banc); *Fox Industries, Inc.* v. *Structural Preservation Systems, Inc.*, 922 F.2d 801 (CAFC 1990), reh'g denied, 1991 U.S. App. LEXIS 397 (Jan. 14, 1991). Moreover, at least two circuits regard their prior holdings on the question presented as settled law and in subsequent cases have thus merely adhered to those prior holdings without further elaboration. See, *e.g.*, *Fox Industries*, 922 F.2d at 804 (addressing the issue by simply asserting that the district court "correctly calculated post-judgment interest from the date of the judgment establishing the right to the award" and citing *Mathis*, 857 F.2d at 760); Pet. App. 2a (Third Circuit holding only that "*Eaves* binds us").

This Court's intervention is required for the further reason that the conflict is rooted in a disagreement among the

circuits over the meaning of this Court's decision in *Kaiser Aluminum & Chemical Corp.* v. *Bonjorno*, 494 U.S. 827 (1990). Only this Court can resolve the uncertainty. In *Kaiser*, this Court relied on the plain text of the statute – which refers to the "date of judgment" – to hold that an award of post-judgment interest pursuant to 28 U.S.C. 1961 "properly runs from the date of the entry of judgment" rather than the date of the underlying jury verdict. *Id.* at 836. This Court further held that interest may not be calculated from the date of a judgment that is later found to be unsupported by the evidence, explaining that when "the judgment on damages was not supported by the evidence, the damages have not been 'ascertained' in any meaningful way." *Ibid.* The Third and Tenth Circuits have concluded that *Kaiser* mandates the minority rule. See *Eaves*, 239 F.3d at 539 ("[W]e view [*Kaiser*] as dictating our result."); *MidAmerica*, 962 F.2d at 1475 ("[W]e see no way to square MidAmerica's request for interest on an unliquidated attorneys' fees award with *Kaiser*."). These courts argue that attorney's fees are not "'ascertained' in any meaningful way" until they are quantified. See *Eaves*, 239 F.3d at 537-38; *MidAmerica*, 962 F.2d at 1476. By contrast, the Fifth, Sixth, Eighth, and Eleventh Circuits have explicitly held that *Kaiser* is consistent with or supports the majority position. See *Drabik*, 250 F.3d at 492 ("[A]n award of interest on attorney fees running from the date of the judgment entitling the prevailing party to such fees, albeit unquantified, is consistent with the requirements of [*Kaiser*]."); *Kellstrom*, 50 F.3d at 332 ("We therefore hold that *Kaiser* did not overrule *Copper Liquor*, so that the district court here did not err in awarding postjudgment interest from the date of the judgment on the merits."); *BankAtlantic*, 12 F.3d at 1273 (citing *Kaiser*); *Jenkins*, 931 F.2d at 1276 n.3 ("We * * * conclude that * * * [*Kaiser*] do[es] not address the issue before us.").

3. Certiorari is also warranted because the question presented is important and frequently recurs. Section 1961 governs "*any* money judgment in a civil case recovered in a

district court" (emphasis added). Awards of attorney's fees routinely implicate the question presented because there is very often a delay between a judgment on the merits entitling a party to attorney's fees and the later judgment quantifying those fees and costs. Attorney's fees typically continue to accrue until the very point that the judgment on the merits is entered and are, for that reason, frequently not quantified until later. Civil litigation thus often produces "two distinct judgments": "the 'merits judgment,' which grants the prevailing party the right to recover attorney's fees and the 'exact quantum judgment,' which defines the precise amount of the fee award." *McDonough* v. *City of Quincy*, 353 F. Supp. 2d 179, 192 (D. Mass. 2005). Indeed, the issue arises so frequently that *nine* circuits have decided the question presented.

In those circuits in which the issue has not yet been settled, it is frequently litigated in the district courts. See, *e.g.*, *Aiello* v. *Town of Brookhaven*, No. 94-CV-2622, 2005 U.S. Dist. LEXIS 11462, at *31 (E.D.N.Y. June 13, 2005); *Petrovits* v. *N.Y. City Transit Auth.*, No. 95 Civ. 9872, 2004 U.S. Dist. LEXIS 174, at *19 (S.D.N.Y. Jan. 7, 2004); *King*, 325 F. Supp. 2d at 174-75; *Mogilevsky* v. *Bally Total Fitness Corp.*, 311 F. Supp. 2d 212, 225-26 (D. Mass. 2004); *Tenax Corp.* v. *Tensar Corp.*, Civ. No. H-89-424, 1992 U.S. Dist. LEXIS 21620, at *20 (D. Md. Oct. 22, 1992); *Burston* v. *Virginia*, 595 F. Supp. 644, 652 (E.D. Va. 1984). These opinions of course represent only a small fraction of the total number of cases applying one of the conflicting interpretations of Section 1961. Most of the circuit court cases addressing the issue are appeals from district court opinions that are not published in any form. Moreover, in those circuits in which the issue is well-settled there is little chance of the issue being raised on appeal.

The issue is furthermore important because the circuits' conflicting interpretations regularly produce markedly inconsistent results. This case is a perfect illustration: had the case been brought in a circuit applying the majority rule,

petitioner would have received an additional $30,000 in interest. In other cases, the financial consequences of the rule have been even greater. In *MidAmerica*, calculations reveal that the Tenth Circuit's application of the minority rule reduced the plaintiff's recovery by more than $180,000. See 962 F.2d at 1475.[3]

4. This case presents an especially suitable vehicle to resolve the question presented because it is the only issue addressed in the decision below. In contrast to many of the other cases addressing this question, see, *e.g.*, *Friend*, 72 F.3d at 1389; *MidAmerica*, 962 F.2d at 1472, the parties do not dispute that petitioner is entitled to recover attorney's fees or the district court's determination of the amount owed.[4]

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[3] The importance of the question presented extends beyond the amount of interest due on attorney's fees awards. Courts have extended their construction of Section 1961 to govern the interest due on awards of costs as well. See *Wheeler* v. *John Deere Co.*, 986 F.2d 413, 415 (CA10 1993).

[4] The Third Circuit correctly rejected respondent's argument that petitioner is not entitled to interest accruing from the November 6, 2000 order even under the majority rule. Respondent's theory was that the judgment did not mention attorney's fees. See Resp. C.A. Br. 8, *Bernback* v. *Greco*, No. 04-2494, 127 Fed. Appx. 45 (Mar. 7, 2005). But as the Third Circuit recognized, the November 6, 2000 judgment was a "judgment on a jury verdict entitling a party to attorneys fee and expenses." Pet. App. 2a. Moreover, under the majority rule, interest begins to accrue with a judgment that "unconditionally entitle[s]" a party to recover fees, even if that judgment does not explicitly refer to attorney's fees. *Drabik*, 250 F.3d at 495. The November 6, 2000 judgment for petitioner on his breach of contract claim "unconditionally entitled" him to recover attorney's fees under the terms of the contract, which provided that the "prevailing party" "shall be entitled to recover from the other party actual attorney's fees incurred, court costs, and all other litigation-related expenses." *Bernback*, 69 Fed. Appx. at 101. And although respondent contended below – and presumably would argue on remand from a

5. Certiorari furthermore is warranted because the minority rule applied by the Third Circuit in this case is wrong on the merits. The text and purpose of 28 U.S.C. 1961 both support the majority rule. Moreover, this Court's interpretation of Section 1961 – far from "dictating" the Third Circuit's rule – is most consistent with the majority approach.

First, the Third Circuit's rule is inconsistent with Congress's determination in Section 1961 to award interest on "any money judgment * * * calculated from the date of the entry of the judgment." Courts applying the minority rule erroneously construe a judgment entitling a party to attorney's fees but not quantifying those fees not to be a "money judgment." The better view recognizes that a district court may enter a qualifying "money judgment" without specifying the particular amount due. Through the term "money judgment," Congress did not require a precise calculation but instead simply intended to contrast forms of judgments that do not give rise to a right to monetary relief. This usage is consistent with the common legal meaning of money judgment: "A judgment for damages subject to immediate execution, *as distinguished from* equitable or injunctive relief." BLACK'S LAW DICTIONARY 848 (7th ed. 1999) (emphasis added). An award giving rise to a right to fees thus triggers the right to interest "because it involves a judgment for money, i.e., attorney's fees, distinguishable from other types of judgments, such as judgments for equitable or injunctive relief." Nick J. Kemphaus & Richard A. Bales,

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decision of this Court – that the November 6, 2000 judgment did not "unconditionally entitle" petitioner to recover attorney's fees (because respondent denied that petitioner was in fact the "prevailing party"), under the majority rule a dispute over whether a party in fact "prevailed" does not preclude that party from recovering interest from the date of a merits judgment even if that judgment does not mention fees. See *Friend*, 72 F.3d at 1388. In any event, respondent's contention is at most an issue to be determined on remand.

Interest Accrual on Attorney's Fee Awards, 23 REV. LITIG. 115, 130 (2004).[5]

Second, the Third Circuit's rule is contrary to the purpose of Section 1961. Congress mandated the payment of interest on judgments to "compensate the plaintiff or to avoid unjust enrichment of the defendant." S. Rep. No. 97-275, at 11 (1982), *reprinted in* 1982 U.S.C.C.A.N. 11, 11.[6] Both goals are frustrated by the Third Circuit's rule deferring the accrual of interest. Interest should be paid between the date on which the right to fees arises and the later date the precise amount is calculated because the paying party has "the use of the money in the interim and because the statutory interest rate is tied to the U.S. Treasury Bill rate" and therefore accurately reflects the value of the right to use the funds during that time. *Jenkins*, 931 F.2d at 1277. See also Kemphaus & Bales, *supra*, at 133 ("[B]ecause the losing party maintains

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[5] To reach the contrary result and require that a judgment be quantified in order to count as a "money judgment," the Third Circuit relied on inapposite authorities from the bankruptcy context. See *Eaves*, 239 F.3d at 533 (citing *Penn Terra Limited* v. *Department of Environmental Resources*, 733 F.2d 267, 274-75 (CA3 1984)). The Third Circuit's reliance on its narrow interpretation of "money judgment" in *Penn Terra* is especially inapposite because that interpretation was driven by policy concerns that are irrelevant to 28 U.S.C. 1961. In that case, the statute at issue "render[ed] 'enforcement of a money judgment' by a government unit susceptible to the automatic stay." *Penn Terra*, 733 F.2d at 273 (quoting 11 U.S.C. 362(b)(5)). Based on the "general rule that pre-emption is not favored" and the particular language of the statute at issue, the court held that "money judgment" "should be construed *narrowly* so as to leave to the States as much of their police power as a fair reading of the statute allows." *Ibid.* No similar considerations demand a narrow reading of "money judgment" in Section 1961.

[6] This language refers to *pre*judgment interest, but the same rationales apply with even greater force to interest accruing after a judgment. See Kemphaus & Bales, *supra*, at 117.

possession of the fee award from the date of the merits judgment to the date of the exact quantum judgment, the losing party is not harmed by being required to pay interest on the fee award.").[7] Even the Third Circuit itself acknowledges that the majority rule better serves Section 1961's purpose of "compensation of the plaintiff (and the attorney) for the loss of the use of the money." *Eaves*, 239 F.3d at 531-32. The court adopted the minority rule despite these considerations only because it erroneously concluded that it was "dictated by the text" of Section 1961. *Ibid.*

Thus, in this case, between the November 6, 2000 judgment entitling petitioner to recover attorney's fees and the July 29, 2002 judgment quantifying those fees, respondent had the full use of more than $160,000 that was rightfully owed to the petitioner. Respondent was thus able to invest this sum and retain the interest. The Third Circuit's rule therefore gives parties in respondent's position an inappropriate incentive to delay the quantification of fees

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[7] In *Eaves*, the Third Circuit argued that the adverse policy implications of its rule could be mitigated through "delay-in-payment adjustment[s] to the lodestar amount" used to calculate attorney's fees. 239 F.3d at 541. However, such adjustments are impossible when, as in the instant case, Pet. App. 3a-4a, attorney's fees are determined not by the lodestar method but as a fixed percentage of the plaintiff's recovery. Moreover, such ad hoc adjustments are at odds with Section 1961's purpose, which is to provide consistent compensation for delayed payment across all district courts. See S. Rep. No. 97-275, at 11 (1982), *reprinted in* 1982 U.S.C.C.A.N. 11, 11 (referring to a "uniform national rate" and stating that Section 1961's "new interest rate on judgments will apply uniformly to suits between private litigants and suits against the government"). See also Kemphaus & Bales, *supra*, at 132 (stating that *Eaves*'s provision for adjustments to the lodestar method "expressly violates Congress's intent that interest payments under 1961(a) serve as the exclusive form of compensation to prevailing parties for delays in payment of damage awards").

owed "as a means of prolonging its free use of money owed the judgment creditor." *Mathis*, 857 F.2d at 760.

Third, the Third Circuit's rule is inconsistent with this Court's decision in *Kaiser*, which held that a party is not entitled to interest beginning from the date of a judgment later found to be legally insufficient. The issue presented in *Kaiser* was whether a party was entitled to interest dating from a judgment later found to be invalid. This Court held that "[t]he purpose of postjudgment interest is to compensate the successful plaintiff for being deprived of compensation for the loss from the time between the ascertainment of the damage and the payment by the defendant. Where the judgment on damages was not supported by the evidence, the damages have not been 'ascertained' in any meaningful way." *Kaiser*, 494 U.S. at 835-36 (citations and internal quotation marks omitted). In *Kaiser*, the plaintiff was not entitled to interest on a judgment because it created no valid entitlement to the funds. In this case, by contrast, petitioner's entitlement to attorney's fees was created by the November 6, 2000 judgment on the merits – the point when damages were "ascertained" in a "meaningful way." As the Sixth Circuit explained in considering the application of *Kaiser* to this circumstance, "[a]t the time the initial judgment was entered, the district court concluded that, in order to make [Plaintiff] whole, [Defendant] was required to pay [Plaintiff's] reasonable attorney fees. There exists no reason, in either the language or history of § 1961, nor in binding precedent, that prevents this Court from holding that interest accrues on an attorney fee award from the judgment which unconditionally entitles the prevailing party to such fees." *Drabik*, 250 F.3d at 491.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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