OFFICIAL TRANSCRIPT

PROCEEDINGS BEFORE

THE SUPREME COURT

OF THE

UNITED STATES

CAPTION: KAISER ALUMINUM & CHEMICAL CORPORATION, ET AL., Petitioners V. JOSEPH A. BONJORNO, ET AL.; and JOSEPH A. BONJORNO, ET AL., Cross-Petitioners V. KAISER ALUMINUM & CHEMICAL

CASE NO: 88-1595; 88-1771

PLACE: Washington, D.C.

DATE: December 4, 1989

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IN THE SUPREME COURT OF THE UNITED STATES

KAISER ALUMINUM & CHEMICAL CORPORATION, ET AL.,

Petitioners

v. : No. 88-1595

JOSEPH A. BONJORNO, ET AL.;

and

JOSEPH A. BONJORNO, ET AL.,

Cross-Petitioners

v. : No. 88-1771

KAISER ALUMINUM & CHEMICAL CORPORATION, ET AL.

Washington, D.C.

Monday, December 4, 1989

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:03 a.m.

APPEARANCES:

RICHARD P. McELROY, ESQ., Philadelphia, Pennsylvania; on behalf of the Petitioners/Cross-Respondents.

HENRY T. REATH, ESQ., Philadelphia, Pennsylvania; on behalf of the Respondents/Cross-Petitioners.

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P R O C E E D I N G S

(11:03 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument next in Number 88-1595, Kaiser Aluminum & Chemical v. Joseph A. Bonjorno, and vice versa.

Mr. McElroy.

ORAL ARGUMENT OF RICHARD P. McELROY

ON BEHALF OF THE PETITIONERS/CROSS-RESPONDENTS

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

We ask the Court to reverse a decision of the Third Circuit court of appeals applying the post-judgment interest amendments in 1982 retroactive to a judgment entered against Kaiser prior to the effective date of those amendments. The decision conflicts with prior decisions of the second court -- Fifth, Sixth, Seventh and Ninth circuits. It conflicts with six years of prior practice within the Third Circuit. It conflicts with the practice in the First Circuit. And it conflicts with the interpretation given to the statute by the Administrative Office of the United States Courts, which has been charged with the obligation of administering that statute by Congress.

The Petition also raises the question whether the court of appeals erroneously ruled that judgment can

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run from the date of verdict, as opposed to the date of the entry of judgment, as the plain language of the statute mandates.

This case comes to this Court as a collateral proceeding for an award of interest in an antitrust case. The Plaintiff ultimately prevailed on the theory of liability under Section 2 of the Sherman Act, and recovered a judgment for treble damages in the amount of $9.6 million. That judgment was originally entered on December 4, 1981. However, the judgment was vacated on Kaiser's motion for judgment notwithstanding the verdict, and on appeal, the court of appeals reversed and directed that the judgment be reinstated. After this Court denied certiorari, with Justice White dissenting, the judgment was reinstated on July 2, 1986, and Kaiser paid the judgment in full the next day.

The Plaintiffs then asked the district court for an award of interest on that judgment. That proceeding took on more complications than normally would occur for the calculation of interest, which should be, under normal circumstances, a simple task. It was complicated by the procedural history of the case, but also by the fact that after the original entry of judgment on December 4, 1981, Congress, on April 2, 1982, enacted the Federal Courts Improvement Act, which, among other things, amended the

post-judgment interest statute in Section 1961 by changing the rates of interest applicable to judgments in federal court. Under the prior statute, interest carried -- judgments carried interest at state law rates. And under the amendment, interest was keyed to treasury bill rates, which are auctioned from time to time, and therefore change.

The Plaintiffs asked the district court to award interest from August 22 of 1979, not the date of the judgment on December 4, 1981. The August 22, 1979 date was the date that a prior judgment had been entered, but which had been vacated by the district court because the district court found that Plaintiffs had failed to prove its case for damages. It found that the verdict that underlie that judgment was the product of speculation and conjecture. It vacated the judgment. It was never reinstated, and there was never an appeal taken from that judgment.

Kaiser asked the court to award interest from July 2, 1986, the date that the judgment was entered on remand from the court of appeals. We argued, in the alternative, that the court could award interest from December 4, 1981, the original judgment date, but that if it did so, the interest that it carried should be at the interest under the prior statute rather than by the

amendment. The district court held, however, that interest shall run from the date of verdict, which was December 2, 1981, rather than from the date of judgment. It found itself bound by prior Third Circuit precedent in that regard. The court also ruled that it would not apply the amendments -- retroactively, because to do so would result in manifest injustice to Kaiser and would be contrary to legislative intent. A divided panel of the Third Circuit reversed the retroactivity holding of the district court, but affirmed the remainder of the opinion, and this Court granted certiorari.

This case presents a question of statutory construction, and as a result of that, congressional intent is the first inquiry of this Court.

QUESTION: I would think the language of the statute might be the first inquiry.

MR. McELROY: Precisely, in determining legislative intent, Your Honor, the first question is what the statute says.

The statute, as I said, was part of the Federal Courts Improvement Act. In Section 402 of that act, Congress expressly stated that unless otherwise specified, the provisions of the act shall take effect on October 1, 1982, six months after the date of the enactment of the statute. This Court has, on at least three prior

occasions, found that the existence of an effective date, and a delayed effective date in particular, is evidence that Congress did not intend that statute to apply retroactively.

And, in fact, it makes sense, because if Congress had intended that judgments entered prior to the effective date, and even prior to the enactment date, were to be governed by the amendment, there would be simply no reason whatsoever to delay the effective date for six months. Congress even stated in the legislative history that the reason that it was delaying the effective date was to permit a transition period for the Bar and the business community to become familiar with its terms. Again, a purpose that would be wholly meaningless if it were to be applied to judgments entered two, three years prior to the date of the amendment.

In addition, when Congress wanted this act to apply to pending cases, it knew exactly how to do so. In Section 403 of the act, under the title effect on pending cases, there is not one reference to the amendment to the post-judgment interest statute. There are, however, other provisions of the act which Congress wanted to have an effect on pending cases, and it knew how to express its intent in that regard.

Finally, the statutory scheme that Congress

adopted under the act, and which carries forward the statutory scheme under the prior statute, is to award interest as of the date of the entry of judgment. Once judgment is entered, interest remains constant throughout post trial, post judgment proceedings, through appeals, until the judgment is paid.

QUESTION: What is the effect of the appeal? Does that mean that the right to post-judgment interest is not vested during the appeal?

MR. McELROY: The right to post-judgment interest vests as of the date of the entry of judgment.

QUESTION: Regardless of the appeal?

MR. McELROY: Well, it is -- it is no doubt true that if the judgment is overturned there is no obligation on the part of the defendant to pay the judgment. But the subject matter of this statute is the rate of interest. And the rate of interest is set as of the date of entry of judgment, and does not change, no matter what happens. The mere fact that the obligation is extinguished by the fact that the court overturns the judgment should not -- does not change that rate.

And it is -- and, what I was going to say, Your Honor, was that Congress quite purposely chose that, because it had a very substantial countervailing concern about the reliance interest of defendants. It wanted

defendants to be able to know what the financial impact would be on the exercise of their post judgment remedies. And to -- under those circumstances it is implausible, I suggest, to ascribe to Congress an intent that it would change the post-judgment interest on a judgment entered prior to its effective date by retroactive application of the law.

QUESTION: Do you, do you think it is applying the statute retroactively to apply it to the period of time after the statute becomes effective?

MR. McELROY: Yes, Your Honor, because of the way the statute is set up. As I --

QUESTION: Well, there's -- after the -- the post-judgment interest ran after the date of the statute.

MR. McELROY: The post-judgment interest indeed ran after the date.

QUESTION: And why shouldn't it run at the T-bill rate, for that period at least?

MR. McELROY: Because it frustrates the reliance interests of defendants in knowing what their financial obligation is going to be once they embark on the process of seeking to overturn the judgment against them.

QUESTION: But you say -- you say that Congress specifically made a, made the effective date, they postponed the effective date of the statute to October 1,

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'82.

MR. McELROY: That is correct.

QUESTION: And you argue from that that they certainly therefore didn't intend the T-bill rate to apply before that date.

MR. McELROY: That is correct, Your Honor.

QUESTION: Well, what about after that date?

MR. McELROY: Well, they did in fact intend that the T-bill rate would apply after that date, but only to judgments entered after that date. As I -- as I stated, the statutory language is interest shall be calculated from the date of the entry of judgment. At that time, the interest is set for all time. It, once -- and, it's at that date, the date of the entry of judgment, that defendants are relying on what their financial obligations are going to be.

QUESTION: Well, maybe Congress meant that it would apply to judgments becoming final after that date. True, the judgment was entered earlier, but it didn't become final until after the effective date of the new law.

MR. McELROY: If the statute said that interest runs from the date of a final judgment, I agree that we don't have a question of retroactivity here --

QUESTION: No, no. It makes the date from which

it runs clearly go back, but it perhaps means that the rate of interest will attach according to when the judgment became final.

MR. McELROY: Oh, I don't -- I think that is clearly contrary to the express language of the statute, Your Honor. The rate of interest attaches as of the date of the entry of judgment, and it makes no difference, under the statutory scheme, what happens after the entry of judgment. It will be at that rate, and it doesn't change. And I think that it would be a perversion of the congressional intent to say that we are going to determine what the rate is as of a particular later time, when Congress has expressly said it will apply as of, and be calculated as of, the date of the entry of judgment.

That that is the proper construction of the statute is further reinforced, in our view, by the way in which the Administrative Office of the United States Courts has interpreted the statute. Under the amendment, Congress has charged the Administrative Office with the obligation of informing federal judges of the appropriate rates of interest that judgments will carry in federal court. On July 27, 1982, the Administrative Office issued a memorandum to all of the federal judges in response to several questions addressed to the office, and stated that, in their view, the statute should not be interpreted

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to apply to judgments entered prior to the effective date of the act.

As a result of that, the practice in most of the circuits has been just that. There has been reliance on that memorandum, and despite the fact that six or seven --

QUESTION: You are not asserting that the Administrative Office of the U.S. Court is entitled to deference on this, are you?

MR. McELROY: I am arguing that it is entitled to be given weight, because of the fact, under the circumstances of this case, Congress has set up a system pursuant to which it, the Administrative Office, has an obligation to inform the judiciary of what the rates of interest are on judgments. In doing so, it per force must interpret the statute to determine how to calculate interest under the scheme that Congress has set forth. Congress has stated the judiciary shall rely on what the Administrative Office says.

QUESTION: Is that in this statute, that it is the Administrative Office who will notify all of the courts what the T-bill rate is?

MR. McELROY: It is the last sentence of the statute. And Congress has expressly set that forth. Under that circumstance it is entitled to be given some weight, but the court of appeals in this case not only

didn't give it deference, it doesn't -- not even deal with what the Administrative Office does.

QUESTION: Well, was it argued?

MR. McELROY: It was definitely argued, yes, Your Honor.

In the absence of legislative intent, the Court has before it two competing presumptions of statutory construction. Under the Court's decision in Bradley v. Richmond School Board, the Court has said that courts are to apply the law in effect at the time that they render the decision, unless to do so will result in manifest injustice.

Last term this Court reaffirmed the long-standing principle of statutory construction that statutory enactments will not be construed retroactively unless their language requires that result.

The courts below have applied the Bradley standard to this issue. The district and the court of appeals also applied the Bradley standard, and we believe that it was seriously flawed in its analysis. And I would like to go through that at this point, because obviously if the Court were to find, to agree with us, that its analysis was flawed, it does not have to deal with the additional issue of these competing presumptions.

Under Bradley, this Court stated that courts

must look to three factors to determine whether or not manifest injustice exists. The nature of the parties, the nature of their rights, and to evaluate the impact that the change of law has on those rights. The first element, the nature of the parties, simply requires the court to identify whether they are private parties, and that their private interests are at stake by the retroactive application of the statute. This factor derives from Chief Justice Marshall's language in the Schooner Peggy case, that courts ought to struggle hard against a retroactive construction in cases -- in private cases between private individuals.

Chief Justice Marshall went on to say, however, that if the statute touches upon a matter of great national concern -- in that case it was a treaty between France and the United States -- if a statute touches upon a matter of great national concern, then the private interests of private parties should give way to that national interest.

In applying the Bradley and Schooner Peggy principles to this case, the court of appeals acknowledged that this was private individuals involved in this case, but then stated that because the underlying merits claim was an antitrust case, that it took on a matter of public interest, and therefore there was no impediment to the

retroactive application of the post-judgment interest statute.

We believe that the court identified the wrong statute. If a statute is to apply retroactively because it involves a matter of great national concern, then it is the post-judgment interest statute that the court should have looked to to determine whether or not it involves a matter of great national concern, thereby justifying retroactive application of the statute. It has not been seriously, as a matter of fact it has not been contended at all by anybody here, that the post-judgment interest statute involves the matter of great national concern.

The second Bradley -- standard was the nature of the rights. The court of appeals again identified the wrong thing. It said that the Plaintiff's right to receive interest was not mature and unconditional because there had been no final judgment. And therefore there was no impediment to the retroactive application of the statute.

But the change in law did not affect the right to recover. The change in law affect -- affected the rate that would be applied to the judgment. And the rate, as I have indicated, was fixed and became mature and unconditional when the judgment was entered. Moreover, it seems to me that in determining manifest injustice you

should attempt to identify the interests that are adversely affected by the statute.

Clearly it was not the Plaintiff's interests that were adversely affected by the -- the retroactive application of this statute, but it was the -- it was Kaiser's rights to a certain -- to pay -- Kaiser's obligation to pay at 6 percent, Kaiser's reliance interest on that being the rate of interest that would be applied to that judgment. Once having identified the appropriate rights, having fixed as of the date of the entry of judgment, it is clear that those rights, and the obligation that the statute imposed, was mature and unconditional.

The third Bradley factor involves the analysis of the impact of the change in law. In this case it was a $7 million impact. The court of appeals stated that once the law was changed it was not an unforeseen circumstance, and not an unforeseen obligation, that Kaiser would have to pay a higher rate of interest, because the statute may be applied retroactively to the judgment. We -- this is circular reasoning, and it is a misconstruction of Bradley.

In Bradley, which involved the statute that was changed which awarded attorneys' fees in a school desegregation case, what the court focused in -- on, was

the fact that there were two independent grounds for the award of attorneys' fees in school desegregation cases, separate and apart from the change in law in that case. Therefore, the Court held, that even as, from the beginning of the case when the complaint was filed, it was not an unforeseen obligation that the school board would have to pay attorneys' fees to the plaintiff, even though that statute did not come into existence until after the entry of final judgment in that case.

That's simply not this case. Therefore, the court of appeals picked the wrong statute, it identified the wrong rights and misapplied the impact standard of Bradley. And for that reason the judgment should be reversed.

But in any event we suggest that the Bradley standard of statutory construction ought to be reconsidered by the Court. The Bowen presumption that the statutes are -- will not be construed to apply retroactively unless their language requires that result, in our view is a better standard. The manifest injustice standard, although if all of -- all of the courts applied it in the proper fashion and applied it equally would have the same impact, the reality of it is that judges do often disagree as to whether or not manifest injustice exists in a particular case. And you need look no further than this

case in order to find proof of that. Two judges found that it would be manifestly unjust to apply this statute retroactively to Kaiser, and two judges held that it would not be manifestly unjust. And precise --

QUESTION: Unfortunately for you, one of the judges was on the district court that ruled your --

(Laughter.)

MR. McELROY: Absolutely, Your Honor. Absolutely. And precisely the same factual situation, a judgment under the antitrust laws, a unanimous panel in the Third Circuit in Litton v. AT&T, found that it would be manifestly unjust to apply the statute against AT&T in that case. It simply points out the fact that the manifest injustice standard results in inconsistent and often conflicting statutory obligations. Moreover, the standard invites constant relitigation of the same question. It invites a case by case analysis of statutory construction, which I believe is not an appropriate one.

And finally, and perhaps most importantly, the manifest injustice standard, because of its inconsistency and unpredictability, defeats the reliance interest that Defendant -- that parties have in knowing the law and being able to ascertain whether the obligations of law apply to them.

The second question presented is whether the

court erroneously adopted the date of verdict as the date to begin the running of interest in this case.

QUESTION: The date of what?

MR. McELROY: The date of verdict.

QUESTION: Oh, yes.

MR. McELROY: The statutory language is interest shall be calculated --

QUESTION: Mr. McElroy, may I interrupt you before you get into that argument?

I notice in the court of appeals opinion, they refer to December 2, 1981 as the judgment date, which is, as I know, erroneous. That is the verdict date. And I don't find anybody in the court of appeals even noticing that this issue was in the case, the difference between verdict and judgment. And I am just wondering if you really identified and argued it in the court of appeals, the difference between the two days.

MR. McELROY: I don't believe -- it was definitely dealt with, because of prior -- and I think the court cites to the Poleto decision, indicated that, and the Poleto decision in the Third Circuit was the precedent on which the district court relied in choosing the verdict date. There was not a great deal of litigation over this issue --

QUESTION: Was there any is my question.

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MR. McELROY: I don't believe that the case, the issue -- the issue was raised, in the sense that we were arguing for July 2, 1981 judgment date. We had argued that an appropriate alternative to that was December 4, 1981, as an appropriate date.

QUESTION: Where in the papers before us do we find that argument that you made? I couldn't find that you raised them -- if you tell me, then, I'm sure you did, but I -- I couldn't find it in the record myself.

MR. McELROY: I -- I --

QUESTION: (Inaudible.)

MR. McELROY: The difference between verdict and judgment date, I do not believe that that was briefed. Yes.

QUESTION: Well, it made a lot of -- I take it you think it made an awful lot of --

MR. McELROY: Well, if I can suggest --

QUESTION: The rate changed -- the rate changed after, between July 1 and, or between December 2 and December 4.

MR. McELROY: If I can, by way of explanation as to perhaps why that wasn't briefed, obviously two days of interest doesn't mean a great deal. But what happened was, after the decision the Plaintiffs raised a theory of construction of the statute with respect to whether the

auction date, or the settlement date, was the appropriate date on which the interest rates changed under the T-bill calculation.

And what happened was that under their novel theory of interpreting the statute, the interest rate was 14 percent rather than 11 percent, as of December 2. And on December 3, it changed, even they would agree, to 11 percent. So that, at least potentially, and that issue still is out there, and hasn't been decided, potentially that issue, the difference between December 2 and December 4, is a $4 million question. And obviously, it's a matter of great concern to us. And if we had known of the theory that they were going to advance, we certainly would have briefed the argument -- briefed the issue in particular.

QUESTION: And the difference there is because of fluctuations in the rate paid on T-bills?

MR. McELROY: That is correct, Your Honor.

QUESTION: Well, isn't -- do they -- is it normally assumed that a judgment should be entered on the day of the verdict?

MR. McELROY: Rule 58 of the Federal Rules of Civil Procedure --

QUESTION: This says promptly?

MR. McELROY: Says, mandates that judgments shall be entered forthwith.

QUESTION: What does that mean?

MR. McELROY: That means as soon as possible, I would presume.

QUESTION: Well, like the day the jury -- the verdict comes in.

MR. McELROY: Well, there had to be a delay in this case, I believe, Your Honor, because there were interrogatories. There was not a general verdict. There were interrogatories returned by the jury, the court had to approve a forum of judgment order. And not only that, because the judgment required trebling, it had to account for that as well. So there had to be a short delay. I think that the judgment was entered in this case as promptly as possible.

QUESTION: What day of the week did it come in?

MR. McELROY: You're testing my memory now, Your Honor.

QUESTION: You ought to remember that.

MR. McELROY: You're right, I should. I will say Wednesday, but I am not sure. I think it was the same week. It was not over a weekend or anything like that.

We think that the Congress, in delaying the effective date of the statute, meant that it was not to apply retroactively. We think that the majority of the circuits are correct in not applying it retroactively, and

we believe that the minority view of the Third and Eighth Circuits is wrong. We urge that the Court reverse the decision.

And I would like to reserve the remainder of my time for rebuttal. Thank you.

QUESTION: Thank you, Mr. McElroy.

Mr. Reath, we'll hear now from you.

ORAL ARGUMENT OF HENRY T. REATH

ON BEHALF OF THE RESPONDENTS/CROSS-PETITIONERS

MR. REATH: Thank you, Mr. Chief Justice, and may it please the Court:

It is wrong, Your Honors, that someone should be able to delay for 14 years full restitution from the date they destroyed another's business, lose every appeal in the courts, and still end up having the jury's award against them reduced by two thirds, and the cost of their long and losing defenses subsidized by the winning and wronged party. Yet that is precisely what the Defendant petitioner seeks at the hands of this Court. That, Your Honors, is not right. It is wrong. And my task is to try to point out to Your Honors how this Court can, and why it should, set that wrong right.

The issue in this case, Your Honors, is who is entitled to some $18.6 million, which is the undisputed value of the cost of money to this Defendant from 1979,

when the liability verdict was first entered against him, and never thereafter disturbed. And from 1979 on that is the only finding of liability, and the 1981 recalculation was based solely on the 1980 -- on the 1979 judgment.

QUESTION: May I interrupt just there?

MR. REATH: Yes, Your Honor.

QUESTION: My notes, maybe I mis-show that the 1979 judgment was for $5,445,000.

MR. REATH: That is correct.

QUESTION: And that was changed to the extent that you got it increased a couple of years later to $9.5 million.

MR. REATH: Yes, sir.

QUESTION: So that it is not correct that you are asking for interest on the $5.4 million, are you?

MR. REATH: Absolutely not. We are asking -- Your Honor, our position is, and I think we have set it forth in our briefs, and I think the justice of the case demands it, and that is that once you find that there has been liability, once you find that this Defendant, through willful, intentional and predatory acts, destroyed the small business of these Plaintiffs and drove them out of business and caused them harm. That was decided in 1979. And it was never reversed. They tried to get it reversed, they tried to get it changed. It was never reversed.

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What the lower court did was to say there will be a new trial limited to damages. And then the new trial came.

The reason for the two-and-a-half-year delay between the first trial and the second trial was the fact that unfortunately the district court judge sat on the case for that long period trying to make up her mind as to whether --

QUESTION: But we're talking about a fairly technical statute. It's talking about what rate of interest shall be and when it shall run from. I don't see why the determination of liability, without a judgment entered, should be critical, when the statute itself conditions the new rate on the entry of judgment.

MR. REATH: Your Honor, if I may, and what I would like to take my time to do -- I want to answer any questions the Court has about Mr. McElroy's presentation, but, as you know, there are cross-petitions here, and it is our position that the statute, the 1961 statute, does not apply in this case. That this Court and the courts of appeals, under Rule 37 of Federal Rules -- of the Federal Rules of Appellate Procedure, not only has the obligation -- has the right, but the obligation to give, at the time it renders its opinion, appropriate instructions with respect to interest.

QUESTION: Did you argue that in the court of

appeals?

MR. REATH: Absolutely, we did.

QUESTION: The court of appeals doesn't even mention it.

MR. REATH: I know that, Your Honor. I can show -- we argued it extensively. The briefs were extensive. And I am totally -- I just cannot understand how they dismissed the point with a -- with a single line. But we argued it most vigorously.

QUESTION: (Inaudible.)

MR. REATH: Excuse me, sir? No, we did not. We just felt that this issue would have to come on to this Court. In point of fact, we took the position, and Your Honors will recall this from the petitions for certiorari, we took the position that we would be willing to accept the treasury bill rate. We didn't think it was right, we didn't think it was enough, but this case has been going on for 15 years. These clients that I represent have invested their time, their businesses, their personal lives, in the last 15 years trying to work this thing out. They were willing to sign off at that point. Kaiser, on the other hand, said no, they wanted to petition for the appeal, in which event we said well, if they are going to appeal, we want to appeal also.

And the issue that I would like to focus on, if

I may, Your Honor, is this. If you recognize that what the fundamental purposes of interest are, the fundamental purpose of interest, we have set them forth in our brief, and they are fourfold. One, to preserve the value of the award against it diminution over time. Secondly, to disgorge the unjust enrichment that flows to the defendant from holding on and having the use of the plaintiff's money. The third is to vindicate the public policy considerations of the Congress in the sense that when a -- an award is made and a treble damage award is made in an antitrust case, that that award should be preserved and it shouldn't be devalued. And the fourth, and I think the fourth, Justice Rehnquist -- Mr. Chief Justice, is probably one of the most important of all facing the administration of this Court, it is to ensure that a defendant, by appealing, will not be unjustly enriched.

Now, what we have in this case, Your Honor, is by virtue of the fact of these appeals and the delay and the ultimate bringing this case to final judgment, you have the Defendant gaining at market rate $18.6 million.

QUESTION: Well, that is under your calculation of this, the award, of a rate even higher than T-bills.

MR. REATH: No, sir, of market rate, sir. That, and they do not dispute, they do not dispute that their cost of money throughout this period was market rate.

QUESTION: Well, you can -- but you can say the same thing, that so long as the statute provided for interest at state core rates, which were often 5 and 6 percents, a defendant had an advantage to appeal. I mean, that was the regime for a long time.

MR. REATH: Your Honor, where you have, and I think that is the very reason to come back to Rule 37, where you have a situation such as the present case, where you have long, extended appeals --

If Your Honors would take a look at the time chart that we attached to our brief, and I think we asked the Court to take a look at it, Your Honors will see there that there is an incredibly long time period over which this case was hanging on appeal. Now, what Rule 37 says is that where the court -- reinstates, where the court reinstates an earlier judgment, it shall give appropriate instructions with respect to interest.

Now, we say, and we have cited significant authority from this Court, that -- that instructions with respect to interest includes not only the time period, but also includes the rate. The question of what is fair and appropriate under the circumstances. For example, if I may cite, and we cite it in our brief, Your Honors, the case of Young v. Godbe, one of the earliest Supreme Court decision cases on the question of interest, decided in

1872, and there, in a unanimous opinion by Mr. Justice Davis for the Court, had to decide whether or not the Court had the power to award a rate of interest where there was no statute or any authority for them to do so.

And what the Court said, it was a case involving the territory of Utah, and what the Court there said was this. If there is no statute on the subject, interest will be allowed by way of damages for unreasonably withholding payment of an overdue assessment. The rate must be reasonable, and conform to the custom which obtains in the community in dealings of this character.

QUESTION: But here there is a statute on the subject.

MR. REATH: Your Honor, there is a statute, but very specifically, that statute does not apply to judgments and orders of the court of appeals. Under --

QUESTION: Well, do you think that Congress did not mean that it should be governed at the time of entering the district court in the most recent enactment?

MR. REATH: Your Honor, I think that the Congress never intended -- the Congress never intended that the -- that either this Court or the court of appeals' power to award appropriate interest would be foreclosed by the federal interest statute, which is intended for routine federal district court judgments.

QUESTION: Has your position been sustained by any court of appeals since the enactment of the federal interest statute?

MR. REATH: Absolutely. Oh, you mean on the question of the right to award fair market?

QUESTION: Yes.

MR. REATH: I am not sure, Your Honor, that it has been raised. And one of the reasons it hasn't been raised is because over time, and we point this out in our case -- in our briefs, over time the -- for a long, long time in history, both the T-bill rate and the federal interest rate, the 6 percent traditional legal rate of interest, was in point of fact above the so-called market rate. It has only been within the last 10 years or so when we have seen this astronomic increase in the market rate that this question has become much more significant.

Now, in this case, Your Honor --

QUESTION: Well, the interest statute only went into effect seven years ago.

MR. REATH: The amendment.

QUESTION: Yes.

MR. REATH: The 1982 amendment to 1961.

But, Your Honor, again I come back to the point that we have stressed in our brief. That there is a history which this Court has recognized, going back to the

original judiciary act of 1789, and followed through in cases like Young v. Godbe, and finally in the Billings case, which I would like to refer to in a moment, where it has been recognized over and over and over again that courts of appeals and this Court are not bound by the routine -- statute for awards in the federal district court.

And what you have here is that the federal court obviously made a serious mistake. The federal court made a mistake when it set aside the $9.5 million verdict, tried to cut it in half. We had to appeal that. We went up to the court of appeals. The court of appeals reversed. And when the court of appeals reversed, that was a finding that there was liability, that the liability was based on the events that were crystallized in the 1989 finding, in the 1989 --

QUESTION: '79.

MR. REATH: Excuse me, in the 1979, the 1979 finding. And that, under those circumstances, the court had to consider, under Rule 37, what was fair and appropriate under the circumstances. And thus the question of appropriate interest, as was so in any number of these other cases that we have cited, the question was does the court itself have power, does the court have to look to a delegation from the Congress.

And let me read to you, if I may, sir, from the Billings case, which Justice Blackmun, Your Honor, will remember, because you cited that in the Ralston Purina decision that you had when you were sitting on the Eighth Circuit. And -- let me find it here, here it is, in Billings. In Billings, Your Honors -- Billings was a case where the court had to determine whether or not there was -- whether or not interest would run on the failure to pay taxes. And the failure to pay taxes backdated a number of years until the final decision in the Supreme Court. And the two questions the Court had to consider was one, whether or not there would be interest, whether or not you could have -- whether the taxes were properly imposed. And secondly whether interest would run. And there the court held that both you could collect the delinquent taxes, and going back to the date when the delinquent taxes were first due, interest would also run from that date.

Now, there was no specific statute that would have covered the situation. And here is what the Court said. Thus as to the necessity for a statute, it was long ago here decided, and I am referring to this Court, in view of the true conception of interest, that a statute was not necessary to compel its payment where, in accordance with the principles of equity and justice in

the enforcement of an obligation interest should be allowed.

Now, that was precisely the situation that Justice Blackmun was faced with when he was on the Eighth Circuit, where, in the Ralston Purina case, it was a case where the defendant had won on a counter-claim in the first instance. The case went up to the appellate court. The appellate court reversed, sent it back for a new trial. On a new trial the defendant again won. So if this was the first time they had a formal judgment, the earlier judgment had been taken away.

QUESTION: Mr. Reath, can I ask you about that? I thought that Billings case did not involve interest on the judgment, but it involved interest as an added penalty for failure to pay the tax.

MR. REATH: No, sir. Oh -- no.

QUESTION: No?

MR. REATH: That is not my understanding of it, Your Honor.

QUESTION: I mean, the federal tax statutes do provide that if you don't pay the tax you are subject to the amount of the tax plus interest for your failure to pay the tax. And I had thought that that is what Billings involved. You think not; you think it involves interest on the judgment?

MR. REATH: I think it was, Your Honor, and I think that was the issue that the court had to concern itself with. And what the court was saying was we do not have to look to a federal, we do not have to look to a statute. Now, in point of fact, as I said before, I was going to refer to it, and I will refer to it now, Your Honor, the -- here it is -- 28 U.S. 1961, the very interest statute we are talking about, provides specifically, in Section C(4), this section shall not be construed to affect the interest on any judgment of any court not specified in this section. Now --

QUESTION: At what point, under your theory, Mr. Reath, do you say that the court of appeals should have prescribed this other interest rate? The most recent appeal?

MR. REATH: Your Honor, in 1984, when the court reversed and reinstated the earlier judgment, we could not -- the mandate wasn't going down because Kaiser decided that they wanted to appeal it. And therefore the moment that it came back to the court of appeals in 1986, when -- as soon as the case came back from this Court in 1986 to go to the court of appeals to issue its mandate, we went to the court and said under Rule 37, please give appropriate instructions with respect to the allowance of interest. And at that point they then -- then a

stipulation was reached between the parties that rather than have that issue decided by the court of appeals, it would be decided in the first instance by the lower court. So in effect the lower court was acting as an agent for the court of appeals in deciding the allowance of interest under Rule 37. So that -- and that is how this case came before this Court.

QUESTION: Well, so -- but it should have been in the 1984 proceeding before the court of appeals that the interest was fixed at the rate you set?

MR. REATH: Yes.

QUESTION: And then was that ultimately decided by the district court on remand, the point you --

MR. REATH: Yes, Your Honor. In other words, what happened -- in 1986, when the case came back from this Court to the court of appeals, that is when the issue was first presented, because -- and that is what the court below found in its opinion.

QUESTION: But neither the district court nor the court of appeals agreed with you on the -- on this market rate.

MR. REATH: That is right. And, respectfully, Your Honor, they were wrong.

Your Honor, when you realize that the value to this Defendant, the difference between the T-bill rate and

market rate in this case, over the full period that interest should run, is more than $8 million. Now, that means that if this Court rules that it doesn't have the power, it doesn't have the power to tell the court of appeals that it has the power to award -- appropriate proper interest, the result is that by taking these appeals, this Defendant will have, as a bare minimum, saved itself $8 million, merely by the delay of time, because that was the value to them on the use of our money.

QUESTION: At what point, in your view, should this higher rate of interest begin -- have begun to run?

MR. REATH: Your Honor, it begins to run, whatever rate of interest begins, and it is determined, and that is why -- it should be when the final decision is made that you are entitled to win. It wasn't until 1986 that we had any right at all to any interest. And that is the reason, among other things, that --

QUESTION: So it should run from 1986?

MR. REATH: No, sir, you deal with --

QUESTION: But my question is when should it have begun to run?

MR. REATH: Oh, it should begin to run as of the date of the judgment.

QUESTION: Well, but --

MR. REATH: The 1979 judgment of liability.

QUESTION: But Rule -- Rule 37 says if the judgment is affirmed the interest provided for in the district court statute is the rate of interest. If it is reversed or modified, then the court of appeals can provide. It doesn't make much sense, does it, to say that if the judgment is upheld you get one rate of interest from the time it runs; if it is reversed or modified you get a different rate?

MR. REATH: Your Honor, there is another provision in the statute that -- no, I don't think it does, to answer your question.

QUESTION: You say that isn't the necessary result of the language?

MR. REATH: That is not the necessary result, because there is another section of the Rule, which is Section 1912, which awards --

QUESTION: But that isn't Rule 37, though.

MR. REATH: No, sir. That is the counterpart of 37, which is Rule 38. Now, 38 -- that, there are three -- it gets complicated because --

QUESTION: Well, it sure does.

MR. REATH: It gets complicated not because of me, Your Honor, but because of the overlapping, the overlapping issues, Your Honor, between rules of court and

the statutes. But the fact comes back to the very fundamental. The fundamental issue, it seems to me, in this case is does or does not a court of appeals --

QUESTION: Well, what is your answer to the question that there are two different provisions in the very rule you rely on? One provides that interest at the statutory rate if the judgment is affirmed, the other -- you are saying a different rate if -- it seems to me that that is a very strange result. And you have to go outside the rule, I take it, to show why the rule doesn't obtain.

MR. REATH: Your Honor, the first sentence, and I am indebted to Mr. Mazo for pointing this out, first sentence of Federal Rule of Appellate Procedure Rule 37 says unless otherwise provided by law. I would suggest to Your Honor that in either situation, if you can show that there is a long, extended period, an unconscionable benefit flowing to the defendant from the result of a long period of delay, that the appellate court would have, and should have, the power to right that wrong and --

QUESTION: What provision of law is that?

MR. REATH: The provision of the law which says what are the purposes and fundamental reasons for -- of interest.

QUESTION: And where is that enacted into law?

MR. REATH: That is, that has, is part of the

federal common law that has been adopted and recognized by this Court.

QUESTION: So we should read unless otherwise provided by law as unless otherwise provided by law, including federal common law?

MR. REATH: I think that is a reasonable and permissible interpretation to make, yes, Your Honor. I think the question -- the question here is does the power -- does the court of appeals have the power to preserve the integrity of awards that come out of its court. Now, the fact of the matter is that here was a jury which said, one jury said this defendant was -- had his business destroyed. It was put out of business. It is entitled to be compensated. Another jury said it is to be compensated in the amount of $9.5 million.

Now, the question is, is the court powerless today to say you don't get the $9.5 million because you -- they have been deprived of the use of the money. If our -- if the market rate theory prevails, Your Honor, the amount of interest that is owed is $18.6 million, the amount of the verdict is $9.5 million, the total amount, the total amount of the claim is $28 million. That is what the $9.5 million in 1979 is worth today.

QUESTION: Mr. Billings -- Mr. Reath, here is what Billings, the case you rely upon, is establishing

this power says in part. Delinquent taxes do not bear interest, unless it is expressly so provided by statute, but it is competent for the legislature to prescribe the payment of interest as a penalty for delay in the payment of taxes and to regulate its rate. And the case goes on to discuss the issue of whether, not you get interest after the judgment for the government, but whether the government was entitled to interests from the date the tax was not paid. It is part of the judgment, not interest on the judgment. So do you have any other cases where, that might support your -- what you are arguing to us?

MR. REATH: Other cases to support post-judgment interest? I am not sure I understand Your Honor's question.

QUESTION: The power of the court to simply prescribe whatever that interest might properly be.

MR. REATH: Young v. Godbe, Your Honor, is another example. That's a case where there was no statute, the Court said there was no statute, said that we have the inherent power. The same -- so that, if I may, I think my time is about up, I would like to just get back again to say two points.

One, there cannot be any issue of retroactivity in this case, because the right to interest did not vest, it did not become a reality until 1984 at the earliest,

and 1986 at the latest. We could not go to the bank, we could not recover a cent of interest. Under those circumstances, if you are going to look to a Bradley kind of analysis, obviously, as the lower court found, Bradley would say you apply current law, unless the three factors are met. The court below analyzed those and pointed out why they don't apply. And for Kaiser to come in and say that there is an elephant -- element of manifest injustice here, where they knew, Your Honor, in 1979, when the Congress -- the first attempted effort to correct the disparity between state rates and federal rates came in a recommendation from President Carter in 1979 in February. And what the court said there was this. We can't -- Excuse me, sir?

QUESTION: What the who said? The court?

MR. REATH: No. This was President Carter to the Senate, stated -- stated to the Senate that the time would come that 1961 should be changed, because of the great disparity between state rates and true market rates. And what they point out there was that one of the reasons that the court has to be so concerned about this issue is because you cannot provide an incentive for delay by permitting one defendant to delay, and he pays -- his cost of money is up here at market, and he pays a submarket rate, and he uses the difference between the two to

subsidize the cost of his appeal.

In this case, I come back to the point we made earlier, Kaiser has benefitted to the extent of $18.6 million from the, from having the use of our money --

QUESTION: Mr. Reath, may I ask --

MR. REATH: -- since 1979.

QUESTION: Supposing we didn't have such large sums involved, we just had an ordinary personal injury case where you have a separate trial and liability, and then you follow it with a separate trial on damages. Is it your view that the rule should always be that the interest runs from the date of the liability verdict?

MR. REATH: Yes, Your Honor, and that was precisely what happened in the Mascuilli case which we cite out of the Third Circuit. And I think what was said in that case is particularly germane to this issue, because there the court had a long period of time between the liability and the final award, and it said -- the court said this, the lower court, which was affirmed by the Third Circuit. Plaintiff became entitled to interest as of the day the final judgment on liability was tendered in 1968. It would be inequitable to impose the costs associated with the use of money on her rather than on the defendant, whose wrongful conduct resulted in the invocation of the judicial process, and who had the use of

the money during the pendency of those various appeals.

QUESTION: Was there ever a judgment entered on the liability verdict, separate from the first --

MR. REATH: In this case?

QUESTION: -- judgment for damages?

MR. REATH: In this case? Yes, there was. There was a judgment, and then the judgment was set, put aside by the lower court and was never reinstated. It should have been.

QUESTION: Thank you, Mr. Reath.

MR. REATH: Yes, Your Honor.

QUESTION: Your time has expired.

Mr. McElroy, you have three minutes remaining.

REBUTTAL ARGUMENT OF RICHARD P. McELROY

ON BEHALF OF THE PETITIONERS/CROSS-RESPONDENTS

MR. McELROY: Chief Justice Rehnquist noted that this was complicated, and if there is any area that should be uncomplicated, it is the interest that judgment should carry, so that we avoid prolonging litigation that is prolonged already forever. Justice Scalia was quite right that the Billings case was a pre-judgment interest case, that that case involved delay damages that would be part of the recovery by the government for delinquent taxes.

But seven years later this Court -- this Court stated, in Pierce v. United States, that there is no

common law for post-judgment interest, and that in the absence of statute, interest -- excuse me, judgments will not carry interest. Rule 37 and Section 1961 have to be read in harmony with one another. There is no question that this -- the interest that is sought to be recovered in this case, is on a district court judgment, not on a court of appeals judgment.

For that reason we think that the court below's judgment ought to be reversed. Thank you.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. McElroy.

The case is submitted.

(Whereupon, at 12:00 p.m., the case in the above-entitled matter was submitted.)

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NO. 88-1595 - KAISER ALUMINUM & CHEMICAL CORPORATION, ET AL., Petitioners V. JOSEPH A. BONJORNO, ET AL.;

and

NO. 88-1771 - JOSEPH A. BONJORNO, ET AL., Cross-Petitioners V. KAISER ALUMINUM & CHEMICAL CORPORATION, ET AL.

and that these attached pages constitutes the original transcript of the proceedings for the records of the court.

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