No. 18-301

In The
Supreme Court of the United States

CHIEFTAIN ROYALTY COMPANY,

Petitioner,

v.

CHARLES DAVID NUTLEY, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF OF AMICUS CURIAE ARTHUR R. MILLER IN SUPPORT OF CHIEFTAIN ROYALTY COMPANY'S PETITION FOR A WRIT OF CERTIORARI

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INTEREST OF AMICUS CURIAE[1]

I am a co-author of Charles Alan Wright, Arthur R. Miller, Mary Kay Kane & Richard L. Marcus, Federal Practice and Procedure (3d ed. 2014) (herein "Wright & Miller") and have devoted a substantial part of my professional career to the study of federal practice.[2] Federal courts often cite Wright & Miller, as did the two-judge panel in *Chieftain Royalty Co. v. Enervest Energy, et al.*, 2017 WL 2836806 (July 3, 2017) ("*Enervest*"). Following that decision, I wrote in support of Chieftain Royalty Company's Petition for Rehearing En Banc. The Tenth Circuit denied rehearing but issued an amended and superseding *Enervest* decision, 888 F.3d 455. In support of Chieftain Royalty Company's Petition for Certiorari, I write to emphasize the need for clarity on this important issue governing common-fund fee awards in diversity cases.

SUMMARY OF ARGUMENT

I have read Chieftain Royalty Company's Petition for Certiorari and agree that the Tenth Circuit's decision should be reviewed for the reasons stated therein.

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[1] The parties have consented to the filing of this brief and received timely notice of the intention to file. No counsel for any party authored this brief in whole or in part. No counsel or party made a monetary contribution intended to fund the preparation or submission of this brief.

[2] I am currently a University Professor at NYU School of Law. My complete biography is available at: https://its.law.nyu.edu/facultyprofiles/index.cfm?fuseaction=profile.biography&personid=20130.

However, I believe there are additional reasons this decision should be considered.

Enervest cites Wright & Miller to support its conclusion that state law governs fee awards in federal common fund class actions. 888 F.3d at 461 (citing Wright & Miller § 2669). Wright & Miller, and the law, say the opposite, however. *See* Wright & Miller §§ 1751-54, 1803-1803.2, 2675, and 4501-4519. The fee-shifting cases upon which *Enervest* rests are inapplicable to federal equitable common fund class actions such as this one. Federal law governs the attorney's fee and incentive award issues in this case, both under equity and Fed. R. Civ. P. 23.[3]

ARGUMENT

I. Substantive fee-shifting cases are inapplicable to equitable common fund cases.

The Court's opinion correctly identified this case as a common fund case.[4] And, like the district court below, it cited many of the Tenth Circuit's common fund cases expressing "a preference for a percentage of the fund method." 888 F.3d at 458-59. But the panel then detoured and interjected substantive fee-shifting

[3] *Enervest* cited only federal case law and federal court studies for its incentive award analysis. 888 F.3d at 464-469.

[4] *Id*. at 458 (noting that the district court "awarded attorney fees to class counsel and an incentive award to the lead plaintiff to be paid out of the *common fund* shared by class members") (emphasis added); 460 (referring to "this common-fund case . . . ").

jurisprudence. *Id*. at 460-62 (citing only substantive fee-shifting cases, and not equitable common fund cases).[5] Within this blending of cases, Wright & Miller was misunderstood. *Id*. at 461 (citing Wright & Miller § 2669, which addresses the application of state substantive fee-shifting law in diversity cases, not the application of equitable principles to determine fee awards in common fund cases).

Citing this Court's decision in *Blum v. Stenson*, 465 U.S. 886, 900, n.16 (1984), The Tenth Circuit previously recognized the difference between fee-shifting and common fund cases in *Brown v. Phillips Petroleum Co.*, 838 F.2d 451 (10th Cir.), *cert. denied*, 488 U.S. 822 (1988). *Brown* involved a fee award following the class settlement of royalty owners' state-law claims just like

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[5] *Enervest* relied upon inapplicable fee-shifting cases that are not based upon trial court's equitable powers including *Scottsdale Ins. Co. v. Tolliver*, 636 F.3d 1273, 1279 (10th Cir. 2011) (12 O.S. § 1101.1(B)); *N. Tex. Prod. Credit Ass'n v. McCurtain Cty. Nat'l Bank*, 222 F.3d 800, 817 (10th Cir. 2000) (42 O.S. § 176); *Davis v. Prudential Prop. & Cas. Co.*, 145 F.3d 1345, 1998 WL 237255 at *4 (10th Cir. 1998) (unpublished) (K.S.A. 40-256); *In re Volkswagen & Audi Warranty Extension Litig.*, 692 F.3d 4, 16 (1st Cir. 2012) (fee-shifting settlement agreement when the "settlement agreement itself has no agreement that federal law applies"); *Mathis v. Exxon Corp.*, 302 F.3d 448, 461 (5th Cir. 2002) (Tex. Civ. Prac. & Rem. Code § 38.001(8)); *Davis v. Mut. Life Ins. Co. of New York*, 6 F.3d 367, 382-83 (6th Cir. 1993) (Ohio Rev. Code § 1345.09(F)); *Riordan v. Nationwide Mut. Fire Ins. Co.*, 977 F.2d 47, 53 (2d Cir. 1992) (N.Y. Gen. Bus. Law § 349(h)); *N. Heel Corp. v. Compo Indus.*, 851 F.2d 456, 475 (1st Cir. 1988) (fee-shifting agreement between opposing parties). *See also* 888 F.3d at 460 (citing *Chambers v. NASCO, Inc*., 501 U.S. 32 (1991) (sanction case).

the settlement at issue in this case. In *Brown*, the Tenth Circuit emphasized that "[t]he award of attorneys' fees is based on substantially different underlying purposes in a common fund case than in a statutory fee case." *Id*. at 454.[6] This Court reasoned:

- "The common fund doctrine 'rests on the perception that persons who obtain the benefit of a lawsuit without contributing to its costs are unjustly enriched at the successful litigant's expense.'" *Id*. (quoting *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980)).
- "Fees in common fund cases are extracted from the predetermined damage recovery rather than obtained from the losing party." *Id*. So "unlike statutory fees, which result in a *shifting* of the fee burden to the losing party, common fund fees result in a *sharing* of the fees among

[6] The Circuits are consistent in acknowledging the distinctions. *See Staton v. Boeing Co.*, 327 F.3d 938, 967 (9th Cir. 2003) ("The procedures used to determine the amount of reasonable attorneys' fees differ concomitantly in cases involving a common fund from those in which attorneys' fees are sought under a fee-shifting statute."); *accord In re Thirteen Appeals Arising Out of San Juan Dupont Plaza Hotel Fire Litig.*, 56 F.3d 295, 305 (1st Cir. 1995); *In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Prod. Liab. Litig.*, 55 F.3d 768, 821 (3d Cir. 1995); *In re Washington Pub. Power Supply Sys. Sec. Litig.*, 19 F.3d 1291, 1295 (9th Cir. 1994); *Rawlings v. Prudential–Bache Props., Inc.*, 9 F.3d 513, 516 (6th Cir. 1993); *Swedish Hosp. Corp. v. Shalala*, 1 F.3d 1261, 1268-69 (D.C. Cir. 1993); *Harman v. Lyphomed, Inc.*, 945 F.2d 969, 975 (7th Cir. 1991); *Camden I Condo. Ass'n, Inc. v. Dunkle*, 946 F.2d 768, 773-74 (11th Cir. 1991).

those benefited by the litigation." *Id*. (emphasis in original).

- "Common fund fees are neither intrinsically punitive nor designed to further any statutory public policy. Conversely, statutory fees are intended to further a legislative purpose by punishing the nonprevailing party and encouraging private parties to enforce substantive statutory rights." *Id*.
- "[A]nother important difference is that normally a large number of people or entities benefit from a common fund case while the number benefited is not 'a consideration of significance in calculating in the award of statutory attorneys' fees.'" *Id.* (quoting *Blum*, 465 U.S. at 900 n.16).

Enervest cited *Brown*, but not for these propositions. 888 F.3d at 458-59. Had *Enervest* explored the fundamental differences as articulated in *Brown*, it would not have confused the statutory and equitable doctrines or reached the result it did for this common fund case.[7] If not reversed, *Enervest* stands to create

[7] Fee-shifting can also be contractual, with the choice of law supplied by the contract, or, when the contract is silent, the court. *In re Volkswagen & Audi Warranty Extension Litig.*, 692 F.3d 4, 16 (1st Cir. 2012) (fee-shifting settlement agreement in which the "settlement agreement itself has no agreement that federal law applies"). But most cases, even if initially pleaded with a state or federal statutory fee-shifting provision, are settled under a federal common law common fund concept.

confusion regarding these important differences throughout all circuits, not just in the Tenth Circuit.

As this Court noted in *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240, n.31 (1975), fee-shifting cases can involve competing, and perhaps conflicting, federal and state fee-shifting statutes which require an *Erie* analysis.[8] By contrast, in the common fund context, only one court has the settlement *res*; and that court applies its own inherent equitable rules to divide it.[9] State substantive law simply is not involved.

II. Historic equitable principles of the court in charge of the settlement *res* determine awards in common fund cases.

The common fund doctrine "is part of the historic equity jurisdiction of the federal courts." *Sprague v. Ticonic Nat'l Bank*, 307 U.S. 161, 165 (1939). The doctrine embodies the courts' equitable "power to award counsel fees out of a fund created or preserved through someone's efforts." 10 Wright & Miller § 2675 (citing *Trustees v. Greenough*, 105 U.S. 527 (1882); *Central R.R. Banking Co. v. Pettus*, 113 U.S. 116 (1885)). Most importantly, it is the court's jurisdiction "over the fund involved in the litigation" that invokes the court's equitable power to assess "attorney's fees against the entire fund, thus spreading fees proportionately among

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[8] *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 260, 95 S. Ct. 1612, 1623, 44 L. Ed. 2d 141 (1975).

[9] *See*, *e.g.*, *id.* at 257-59; *Staton v. Boeing Co.*, 327 F.3d 938, 968 (9th Cir. 2003).

those benefited by the suit." *Boeing*, 444 U.S. at 478 (emphasis added). That is, it is not the court's jurisdiction over the parties or the claims that enables the court to exercise its equitable authority but, rather, the court's jurisdiction over the fund itself.

No one disputes that federal law determines whether (a) the settlement is fair, reasonable, and adequate; (b) the final judgment approving the settlement is enforceable; or (c) the plan of allocation dividing the settlement *res* among the class members is fair and reasonable. So it is unsurprising that the federal court further divides the *res* for fees and incentive awards.

The court with the settlement *res* before it applies its own equitable principles. The choice of law is made by the creation and control of the settlement fund itself, not by what claims were made or settled, or how the court gained subject matter jurisdiction. *Boeing*, 444 U.S. at 478-79 (the common fund doctrine rests on the court's "[j]urisdiction over the fund involved in the litigation"). Responsibility for the settlement *res* that results from federal proceedings in a common fund case invokes the federal equitable powers, just like responsibility for the settlement *res* from state court proceedings in a common fund case invokes that state's equitable powers.

III. Rule 23(g) and (h) capture the pre-existing law, derived from the court's equitable powers, to award fees in common fund cases.

The "class action was an invention of equity" that has long "been a part of American jurisprudence." 7A Wright & Miller §§ 1751-54 (tracing the history of Rule 23 back to English common law). Rule 23 governs all class actions in federal court, whether by federal question, complete diversity, or CAFA minimal diversity jurisdiction. *See Shady Grove Orthopedic Assocs. v. Allstate Ins. Co.*, 559 U.S. 393 (2010). Rule 23 details the duties the federal court owes to the absent class members and empowers the court to act in their best interests with respect to the settlement *res* and awarding attorneys' fees to class counsel. "The court's authority for . . . attorney fees stems from the fact that the class-action device is a creature of equity and the allowance of attorney-related costs is considered part of the historic equity power of the federal courts." 7B Wright & Miller § 1803 (n.4 omitted). And, most pertinent for this case, Rule 23(g) and (h) explicitly empower the court presiding over a certified class action to appoint class counsel and set the terms of counsel's compensation.[10] The question then is "whether the

[10] No argument has been made that Rule 23 is unconstitutional or not within the ambit of the Enabling Act. *See also id*. at § 4504 ("to date no Rule has been found to exceed either constitutional bounds or the authorization of the Enabling Act"), and at § 4509 nn.30-31 (unlikely to be invalidated since the Rules are vetted with and approved by the Supreme Court). Consequently, the issue is whether Rule 23(g) and (h) now authorize federal courts to apply their preexisting equitable powers.

scope of the . . . [Rule] in fact is sufficiently broad to control the issue before the Court." 19 Wright & Miller § 4510 (quoting *Walker v. Armco Steel Corp*., 446 U.S. 740, 749-50 (1980)).

Rule 23 should be given its "plain meaning," not "narrowly construed in order to avoid a 'direct collision' with state law." 446 U.S. at 750 n.9. The court also may rely on the "'legislative history' as found in the Advisory Committee's Notes." 19 Wright & Miller § 4510.

Effective December 1, 2003, Rule 23(g) set forth the procedure that federal courts "must consider" in appointing class counsel, Fed. R. Civ. P. 23(g)(1)(A)(i-iv). It also permits the court to "propose terms for attorney's fees" and "include in the appointing order provisions about the award of attorney's fees . . . under Rule 23(h)." Fed. R. Civ. P. 23(g)(1)(C), (D).

Rule 23(g) applies to all class actions, whether resolved by settlement or a contest on the merits. During the settlement class certification process in this case, class counsel proposed a percentage of the recovery method for the payment of attorney's fees. The Notice of Settlement disclosed that proposal to the class members, as the district court directed in the preliminary approval order. Rule 23(g) authorized the preliminary approval order and the class notice addressing attorneys' fees.

Rule 23(h) provides in part: "In a certified class action, the court may award reasonable attorney's fees and nontaxable costs that are authorized by law or by the parties' agreement." This provision does not create

"new grounds" for an attorney's fee award.[11] Nor does it displace already existing federal law—such as the federal equitable common fund theory discussed at length in the Advisory Committee's Note. Instead, it acknowledges the federal court's authority to make fee awards when they "are authorized by law." Fed. R. Civ. P. 23(h); 7B Wright & Miller § 1803, at 325 (noting that "the power of the court to award attorney fees in a class action does not derive from the rule itself"). The power to award fees from the common fund in this case derives from the equitable powers of the federal court. Rule 23(g) and (h) codify the use of the power. This federal equitable common fund doctrine guides the award of fees and incentive amounts from the common fund recovery in a class action certified and adjudicated under federal Rule 23.

[11] The Advisory Committee Notes provide in pertinent part that Subdivision (h) applies to settlement classes; "does not undertake to create new grounds for an award of attorney fees or nontaxable costs"; but "authorizes an award of 'reasonable' attorney fees under the 'common fund' theory" applied in class actions and used in fee-shifting statutes but "does not attempt to resolve the question whether the lodestar or percentage approach should be viewed as preferable."

CONCLUSION

I respectfully urge acceptance of Chieftain Royalty Company's Petition for Certiorari to provide clarity on this important issue governing common-fund fee awards in diversity cases.

Respectfully submitted,

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