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 PROVIDENT ENERGY, LTD. AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

JOHN THORNE
Counsel of Record
KELLOGG, HANSEN, TODD, FIGEL & FREDERICK, P.L.L.C.
1615 M Street, N.W.
Suite 400
Washington, D.C. 20036
(202) 326-7900
(jthorne@kellogghansen.com)

October 9, 2018

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTEREST OF *AMICUS CURIAE* 1

INTRODUCTION 2

ARGUMENT 4

I. The Tenth Circuit's Decision Undermines District Courts' Equitable Power To Set Fees That Protect Absent Class Members 4

II. The Tenth Circuit's Decision Is Contrary To Market Benchmarks For Fee Setting By Sophisticated Clients 7

CONCLUSION 10

TABLE OF AUTHORITIES

Page

CASES

Baffa v. Donaldson Lufkin & Jenrette Sec. Corp., No. 96 CIV. 0583(DAB), 2002 WL 1315603 (S.D.N.Y. June 17, 2002) 6

Central R.R. & Banking Co. v. Pettus, 113 U.S. 116 (1885) 3

Continental Illinois Sec. Litig., In re, 962 F.2d 566 (7th Cir. 1992)... 8

Dechert v. Cadle Co., 333 F.3d 801 (7th Cir. 2003)... 4

Dodge v. Tulleys, 144 U.S. 451 (1892)........................ 3

Grunin v. International House of Pancakes, 513 F.2d 114 (8th Cir. 1975) 4

Lachance v. Harrington, 965 F. Supp. 630 (E.D. Pa. 1997).. 5

Martin v. Franklin Capital Corp., 546 U.S. 132 (2005) 4

Ojeda v. Hackney, 452 F.2d 947 (5th Cir. 1972)........ 3

Polar Int'l Brokerage Corp. v. Reeve, 187 F.R.D. 108 (S.D.N.Y. 1999) 4

Swedish Hosp. Corp. v. Shalala, 1 F.3d 1261 (D.C. Cir. 1993).. 6

United States v. Burr, 25 F. Cas. 30 (C.C.D. Va. 1807)... 4

Wal-Mart Stores, Inc. v. Visa U.S.A. Inc., 396 F.3d 96 (2d Cir. 2005)..................................... 5

Xcel Energy, Inc., Sec., Derivative & "ERISA" Litig., In re, 364 F. Supp. 2d 980 (D. Minn. 2005)... 5-6

RULES

Fed. R. Civ. P.:

Rule 23(h) 2, 4

Rule 23(h) advisory committee's note to 2003 amendment 3

Sup. Ct. R.:

Rule 37.2(a) 1

Rule 37.6 1

OTHER MATERIALS

Sarah Boulden, Note, *The Business of Startup Law: Alternative Fee Arrangements and Agency Costs in Entrepreneurial Law*, 11 J. Telecomm. & High Tech. L. 279 (2013) 9

John C. Coffee, Jr., *The Regulation of Entrepreneurial Litigation: Balancing Fairness and Efficiency in the Large Class Action*, 54 U. Chi. L. Rev. 877 (1987) 8

Danny Ertel & Mark Gordon, *Points of Law: Unbundling Corporate Legal Services to Unlock Value*, Harv. Bus. Rev. (July-Aug. 2012), https://hbr.org/2012/07/points-of-law-unbundling-corporate-legal-services-to-unlock-value 8-9

Brian T. Fitzpatrick, *Can and Should the New Third-Party Litigation Financing Come to Class Actions?*, 19 Theoretical Inquiries L. 109 (2018) 10

David Howard, *Microsoft's New Strategic Partner Program*, LinkedIn (July 27, 2017), https://www.linkedin.com/pulse/microsofts-new-strategic-partner-program-david-howard/ 9

Jonathan R. Macey & Geoffrey P. Miller, *The Plaintiffs' Attorney's Role in Class Action and Derivative Litigation: Economic Analysis and Recommendations for Reform*, 58 U. Chi. L. Rev. 1 (1991) 5

2 Joseph M. McLaughlin, *McLaughlin on Class Actions* (14th ed. 2017) 6, 7

Jonathan T. Molot, *Litigation Finance: A Market Solution to a Procedural Problem*, 99 Geo. L.J. 65 (2010) 10

Larry E. Ribstein, *The Death of Big Law*, 2010 Wis. L. Rev. 749 8

5 William B. Rubenstein, *Newberg on Class Actions* (5th ed. 2018) 6, 8

Jennifer Williams-Alvarez, *GSK Moves Away from Hourly Billing*, LegalWeek (Aug. 12, 2016), https://www.law.com/legal-week/ sites/legalweek/2016/08/12/gsk-moves-away-from-hourly-billing-as-alternative-fee-arrangements-account-for-84-of-2015-work/ 9

INTEREST OF *AMICUS CURIAE*[*]

Amicus Provident Energy, Ltd. is a privately held oil and gas company based in Houston, Texas. Provident owns royalty interests in numerous wells in Oklahoma. Provident has been a class member in other similar royalty class-action cases, although it is not a class member in this case and has no financial interest in the outcome.

Royalty disputes often involve complex legal and accounting issues, requiring highly skilled counsel and experts to be litigated effectively. It would not be economically feasible for a small company like Provident to pursue a case like this on its own. Participating in a class action is the only option for a small company like Provident to litigate to protect its rights. In the other royalty class-action cases in which Provident has participated, Provident was not the class representative (and therefore did not select or control the attorneys), and it would not have been feasible for Provident to opt out and retain separate counsel.

Provident files this brief to provide the Court with the perspective of a class member that has no control over the selection or conduct of the attorneys representing its interest, yet will be bound by whatever result those attorneys achieve and then will have the pro rata cost of such representation deducted from the recovery. A class member in this position is wholly

---

[*] Pursuant to Supreme Court Rule 37.6, counsel for *amicus* represents that it authored this brief in its entirety and that none of the parties or their counsel, nor any other person or entity other than *amicus* or its counsel, made a monetary contribution intended to fund the preparation or submission of this brief. Pursuant to Rule 37.2(a), counsel for *amicus* also represents that all parties were provided notice of *amicus*'s intention to file this brief at least 10 days before its due date and that the parties have consented to the filing of this brief.

dependent on the district court's exercise of discretion under Rule 23(h) of the Federal Rules of Civil Procedure to award the attorneys a "reasonable . . . fee[]." The setting of such a fee award is important in two respects: The fee must not be excessive in relation to the result achieved and the effort properly expended in achieving the result. Also, the fee must be sufficient to attract counsel of skill and diligence who will be motivated to obtain all the relief the law allows. The size of the recovery – rather than the size of the fees deducted from the recovery – is typically the more important component of the net award to the class members. A larger settlement, closer to full recovery of allowable damages, makes it easier to pay the attorneys. Indeed, a settlement closer to full recovery requires the defendant more nearly to bear the full amount of harm that it caused, deterring wrongful conduct in the first place. Allowing district courts full equitable discretion in the method of setting common-fund fee awards in diversity cases will tend to produce better results for those class members that have not selected or controlled the class counsel but are along for the ride.

INTRODUCTION

Provident's experience has been that the award of attorney's fees is critical to how well a small company's legal rights will be enforced. Different methods of compensating counsel may not necessarily yield larger fees. An hourly rate may produce a larger or smaller fee than a simple percentage of the recovery. Often at the outset of a case, before a defendant has asserted its defenses and before the taking of any discovery, counsel will not know what fee-setting methodology would produce a greater amount. But the fee methodology counsel *expect* to be applied by the district court will matter in how a case is litigated.

As the Federal Rules Advisory Committee underscored, "[f]ee awards are a powerful influence on the way attorneys initiate, develop, and conclude class actions." Fed. R. Civ. P. 23(h) advisory committee's note to 2003 amendment.

Provident has seen firsthand that a fee award based on a percentage of the recovery is well-suited at aligning incentives between attorneys and clients. Class lawyers are motivated to obtain full compensation for all class members (increasing their own fees) in the most efficient manner available (reducing attorney time spent on the matter). For absent class members, who have not selected the counsel and do not have any levers of control during the pendency of the litigation, an arrangement that aligns incentives tends to produce larger net awards.

The Tenth Circuit panel held that common-fund fee awards in diversity cases are governed by state law rather than federal law and further held that Oklahoma law requires use of a "lodestar" or hourly billing fee methodology rather than a percentage-based fee. As petitioner explains, the Tenth Circuit's decision is contrary to decisions of this Court in *Central Railroad & Banking Co. v. Pettus*, 113 U.S. 116 (1885), and *Dodge v. Tulleys*, 144 U.S. 451 (1892), and creates a circuit conflict with the Fifth Circuit's decision in *Ojeda v. Hackney*, 452 F.2d 947 (5th Cir. 1972) (per curiam).

The Tenth Circuit's decision not only is wrong and out of step with the other circuits, but also will harm companies like Provident whose legal rights will be vindicated less effectively by the curtailment of the equitable discretion of district courts. The Court should grant the petition and hold that common-fund fee awards are governed by federal law.

ARGUMENT

I. The Tenth Circuit's Decision Undermines District Courts' Equitable Power To Set Fees That Protect Absent Class Members

Rule 23(h) of the Federal Rules of Civil Procedure provides that, 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." The term "may" is a grant of discretion that must be exercised according to "'sound legal principles.'" *Martin v. Franklin Capital Corp.*, 546 U.S. 132, 139 (2005) (quoting *United States v. Burr*, 25 F. Cas. 30, 35 (C.C.D. Va. 1807) (Marshall, C.J.)).

In determining common-fund fee awards, the district court is acting as a fiduciary or guardian of the class members. *See*, *e.g.*, *Grunin v. International House of Pancakes*, 513 F.2d 114, 123 (8th Cir. 1975) ("[T]he district court acts as a fiduciary who must serve as a guardian of the rights of absent class members."). Because most of the class members will have had no role in selecting the counsel nor any role in directing counsel's pursuit of the claims, there is a risk that the interests of class members and class counsel will not be fully aligned. *See*, *e.g.*, *Dechert v. Cadle Co.*, 333 F.3d 801, 803 (7th Cir. 2003) (Posner, J.) ("In the usual class-action case, in which the class representative's stake is so small that as a practical matter the lawyer for the class completely controls the litigation, there is a danger remarked in numerous cases that the lawyer will negotiate a settlement with the defendant that gives the lawyer a large fee but the class a meager recovery."); *Polar Int'l Brokerage Corp. v. Reeve*, 187 F.R.D. 108, 118-19 (S.D.N.Y. 1999) ("Many courts and commentators have described the danger of a conflict of interest between plaintiffs'

counsel in a class action suit and their clients – the class members they represent – namely, the temptation of class counsel to sacrifice procuring value for the class in exchange for maximizing attorney's fees.").

Giving district courts full equitable discretion to determine attorney's fees provides two benefits. It enables the court to prevent excessive fees, by limiting fees to no more than is reasonable in light of the benefits conferred on the class and other equitable factors. It also enables the court to award fees sufficient to attract good counsel who will efficiently vindicate the class's legal interests.

Most courts and commentators agree that percentage-of-recovery fees are superior to a lodestar in common-fund cases. For example, as the Second Circuit observed, the percentage methodology "directly aligns the interests of the class and its counsel and provides a powerful incentive for the efficient prosecution and early resolution of litigation." *Wal-Mart Stores, Inc. v. Visa U.S.A. Inc.*, 396 F.3d 96, 121 (2d Cir. 2005); *see also* Jonathan R. Macey & Geoffrey P. Miller, *The Plaintiffs' Attorney's Role in Class Action and Derivative Litigation: Economic Analysis and Recommendations for Reform*, 58 U. Chi. L. Rev. 1, 4 (1991) (describing academic consensus about superiority of percentage approach). The percentage methodology rewards attorneys for producing a good result, rather than rewarding the hours they spend producing the result. It creates healthy incentives: "[T]he more the attorney succeeds in recovering money for the client, and the fewer legal hours expended to reach that result, the higher dollar amount of fees the lawyer earns." *Lachance v. Harrington*, 965 F. Supp. 630, 647 (E.D. Pa. 1997); *see also In re Xcel Energy, Inc., Sec., Derivative & "ERISA" Litig.*, 364 F. Supp. 2d 980, 991

(D. Minn. 2005) (explaining "strong policy reasons behind the judicial and legislative preference" for percentage method).

By contrast, a lodestar methodology may create incentives adverse to class members. First, "attorneys are given incentive to spend as many hours as possible, billable to a firm's most expensive attorneys." *Swedish Hosp. Corp. v. Shalala*, 1 F.3d 1261, 1268 (D.C. Cir. 1993). Second, "there is a strong incentive against early settlement since attorneys will earn more the longer a litigation lasts." *Id.*; *see Baffa v. Donaldson Lufkin & Jenrette Sec. Corp.*, No. 96 CIV. 0583(DAB), 2002 WL 1315603, at *1 (S.D.N.Y. June 17, 2002) (the "lodestar create[s] an unanticipated disincentive to early settlements, tempt[s] lawyers to run up their hours, and compel[s] district courts to engage in a gimlet-eyed review of line-item fee audits"). If one side of the litigation is tempted to "run up their hours," the burden will be felt by the opposing side as well. Within the range of reasonable attorney zeal, attorneys being compensated by their quantity of billed hours may seek more discovery, file more motions, and pursue more low-probability claims.

It is not surprising, in light of these dynamics, that a "majority of federal and state courts currently calculate fee awards in common fund cases based on a percentage of the recovery." 2 Joseph M. McLaughlin, *McLaughlin on Class Actions* § 6:24 & n.52 (14th ed. 2017) (collecting cases); 5 William B. Rubenstein, *Newberg on Class Actions* § 15:62 n.3 (5th ed. 2018) (70-80 percent of courts use percentage approach in some fashion). To be sure, while most circuits have voiced a preference for the percentage method, a majority "have declined to require inflexible adherence to either method, and in common fund cases grant the district court discretion to choose between

the lodestar and percentage of recovery approaches." 2 *McLaughlin on Class Actions* § 6:24 & n.54.

In the case at hand, Chieftain engaged counsel on a contingency-fee basis, and its counsel were able to obtain roughly 100 percent of claimed damages for both Chieftain and the 21,000 other class members. This outcome mirrors what Provident has seen first-hand in other royalty cases: Under the percentage approach, class lawyers are motivated both to obtain all the damages that the law allows (because the more they recover, the higher their own fees) and to do so as quickly and efficiently as possible (to keep down their own investment of hours and out-of-pocket costs).

But now, the Tenth Circuit has ruled that district courts in diversity cases must apply state law, which, the court of appeals held, in Oklahoma, limits district courts to a lodestar method of determining fees. In our experience, this will greatly undermine the ability of class members to receive high-quality, effective representation. Because this curtailment of district court discretion contravenes this Court's decisions and creates a circuit split, the Court should grant review and reverse the Tenth Circuit's decision below.

II. The Tenth Circuit's Decision Is Contrary To Market Benchmarks For Fee Setting By Sophisticated Clients

Competitive markets can inform how a district court exercises discretion. If a fee-setting methodology is employed widely in circumstances that resemble class-action litigation, but where clients have competitive alternatives for legal services, there should be a presumption that such methodology is efficient in the class context also. Widespread use of a fee-setting methodology in the free market implies it has significant economizing properties, which in turn implies

that to forbid its use in class actions will drive up the class members' costs. *See* John C. Coffee, Jr., *The Regulation of Entrepreneurial Litigation: Balancing Fairness and Efficiency in the Large Class Action*, 54 U. Chi. L. Rev. 877, 877-78 (1987) (the usual "assumption of client control simply does not hold" in class actions; district courts should therefore set fees to "mimic the results that a healthy, functioning market for legal services would produce"). The free market also provides clues about the relative administrability of legal fees. *See In re Continental Illinois Sec. Litig.*, 962 F.2d 566, 572 (7th Cir. 1992) (Posner, J.) ("The judicial task might be simplified if the judge and the lawyers bent their efforts on finding out what the market in fact pays . . . for the ensemble of services rendered in a case of this character.").

In the free market for legal fees, where sophisticated clients are directly negotiating fees for counsel, hourly billed fees are becoming less common. For both plaintiff- and defendant-side cases, clients are negotiating flat fees and performance-based fees that align the incentives of counsel with the client to achieve desired results in an efficient manner. *See* 5 *Newberg on Class Actions* § 15:62 (the percentage method better "approximates the manner in which plaintiff contingent fee lawyers undertake work outside the class action context").

The shift away from hourly fees has accelerated over the past decade, beginning with the Great Recession, which caused corporate clients to rethink how they were paying and supervising outside counsel. *See* Larry E. Ribstein, *The Death of Big Law*, 2010 Wis. L. Rev. 749, 768-71 (describing "decline of hourly billing"); Danny Ertel & Mark Gordon, *Points of Law: Unbundling Corporate Legal Services to Unlock*

Value, Harv. Bus. Rev. (July-Aug. 2012) (noting large corporate clients like Cisco, DuPont, Microsoft, and Pfizer moving to alternative arrangements that "better align both sides' incentives"), https://hbr.org/2012/07/points-of-law-unbundling-corporate-legal-services-to-unlock-value.

GlaxoSmithKline now uses alternative fee arrangements, rather than hourly billing, for 84 percent of its legal work, up from only 3 percent in 2008. *See* Jennifer Williams-Alvarez, *GSK Moves Away from Hourly Billing*, LegalWeek (Aug. 12, 2016), https://www.law.com/legal-week/sites/legalweek/2016/08/12/gsk-moves-away-from-hourly-billing-as-alternative-fee-arrangements-account-for-84-of-2015-work/. Microsoft is seeking to move 90 percent of its legal work to alternative fee arrangements. *See* David Howard, *Microsoft's New Strategic Partner Program*, LinkedIn (July 27, 2017), https://www.linkedin.com/pulse/microsofts-new-strategic-partner-program-david-howard/. Microsoft says it "learned that simply comparing the billing rates of different firms doesn't tell us very much. Firms which work less efficiently usually cost us more, even if their billing rates are lower. Competing on the basis of a fixed fee or similar alternative fee permits a true apples-to-apples comparison." *Id.*

Startup companies that are cash strapped in their early phases are using alternative fee arrangements such as flat fees and success-based fees. *See generally* Sarah Boulden, Note, *The Business of Startup Law: Alternative Fee Arrangements and Agency Costs in Entrepreneurial Law*, 11 J. Telecomm. & High Tech. L. 279 (2013).

On the plaintiff side, corporate clients similarly prefer fixed-fee or contingent-fee arrangements. Such arrangements avoid the client's need to supervise time

accounting, encourage efficiency, and align the incentives of counsel and client. The advent of third-party litigation funding mirrors this preference. Litigation funders typically provide funds (at high interest rates) to firms that are pursuing contingent-fee claims, as opposed to billed hours. *See generally* Jonathan T. Molot, *Litigation Finance: A Market Solution to a Procedural Problem*, 99 Geo. L.J. 65 (2010); Brian T. Fitzpatrick, *Can and Should the New Third-Party Litigation Financing Come to Class Actions?*, 19 Theoretical Inquiries L. 109 (2018).

Small companies like Provident ought to have the same opportunity to receive high-quality representation as large companies. In holding that state law constrains the discretion of district courts in attorney-fee determinations in common-fund class actions, the Tenth Circuit's decision is harmful to the interests of class members.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

JOHN THORNE
Counsel of Record
KELLOGG, HANSEN, TODD,
FIGEL & FREDERICK,
P.L.L.C.
1615 M Street, N.W.
Suite 400
Washington, D.C. 20036
(202) 326-7900
(jthorne@kellogghansen.com)

October 9, 2018