

**Litigation**

**Rocky Mountain Mineral Institute — Current Trends  
in Class Action Royalty Settlements**

*By V&E lawyers Mark Rodriguez, Justin Marlles, and Tifani Jones*

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## **I. Introduction**

Oil and gas royalty class actions often consist of thousands of interest owners covering hundreds, if not thousands, of wells and leases. Typical claims include highly technical claims such as failure to develop oil and gas reserves and improper deduction of post-production costs. Given the complexity all of this creates, parties to royalty class actions spend significant time and resources negotiating acceptable settlement terms that cover the thousands of owners in the class and that address the claims and issues in the case. The work, however, is not over once the settlement is inked. In many ways, the work is only beginning.

Settlement of a royalty class action presents a number of challenges. Beginning with the request for preliminary approval of the settlement and the settlement class, and continuing through the approval process and distribution of the settlement fund, the parties and their counsel must effectively manage the numerous procedural and practical challenges inherent in a royalty class action. Failure to effectively manage these challenges can substantially increase the time, expense, and risk associated with a class settlement and, in some cases, can jeopardize the settlement itself.

The purpose of this paper is to examine and discuss the mechanics of settling a royalty class action. In many respects, parties in a royalty class action face many of the same challenges that exist in any class action settlement, such as obtaining court approval, dealing with opt-outs, and responding to objections to the settlement. However, there are a number of issues that are unique to the settlement of a royalty class action, such as how to handle owners-in-suspense and claims for contribution from co-working interest owners. Although it is impossible to predict all of the issues that will arise out of any given class action royalty settlement, this paper attempts to identify the issues and challenges commonly faced by parties to class action royalty settlements in order to provide insight on the applicable legal standards and practical considerations that shape the settlement process.

## II. Creation of the Settlement Class and the Applicable Legal Standards for Approval of the Class and the Settlement

### A. Federal Law

#### 1. Must Satisfy the Proof Requirements of Federal Rule of Civil Procedure 23(a), (b), and (e)

The formation of settlement classes under federal law is largely a function of Federal Rule 23(a), (b), and (e) and case authorities addressing the key factors federal courts consider in deciding whether to approve a class settlement.<sup>1</sup> A party seeking to create a settlement-only class must satisfy the class certification requirements of Rule 23(a) and (b), with the exception of Rule 23(b)(3)(D) concerning the “likely difficulties” in management of the class action in determining whether common issues of law or fact predominate and whether the class action is superior to other available methods for adjudication. The party must also satisfy the requirements of Rule 23(e), the most notable of which is the “fair, reasonable and adequate” requirement of Rule 23(e)(2).<sup>2</sup>

Rule 23(a) sets out the widely recognized prerequisites for class certification (*i.e.*, numerosity, commonality, typicality, and the requirement that the class representatives will “fairly and adequately” protect the interests of the class).<sup>3</sup> Provided that Rule 23(a) is satisfied, Rule 23(b) states that a class will be certified:

- (i) if failure to certify a common class and subsequent individual litigation would result in inconsistent adjudications;
- (ii) if individual adjudications would be dispositive of the interests of other members not parties to the individual litigation; or
- (iii) if the party opposing the class has acted or refused to act on grounds that apply generally to the class such that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole.

<sup>1</sup> See FED. R. CIV. PRO. 23 (2008).

<sup>2</sup> A court need not reopen the requirements of Rule 23(a) and (b) where it has previously certified the class prior to the settlement. *See Rutter & Wilbanks Corp. v. Shell Oil Co.*, 314 F.3d 1180, 1188 (10th Cir. 2002). However, courts may oftentimes review pre-settlement grants of class certification if the initial grant was preliminary or provisional in nature. *See IUE-CWA v. General Motors Corp.*, 238 F.R.D. 583, 591 (E.D. Mich. 2006). In the case of an already-certified class action, courts will require a showing to satisfy the “fair, reasonable and adequate” requirement of Rule 23(e)(2). *See, e.g., Schipper*, 2008 WL 2002044, at \*1 (applying Fifth Circuit test from *Parker v. Anderson*, 667 F.2d 1204, 1209 (5th Cir. 1982), which requires a fairness determination by reviewing a proposed settlement for: “(i) the existence of fraud or collusion behind the settlement; (ii) the complexity, expense and likely duration of the litigation; (iii) the stage of the proceedings and the amount of discovery completed; (iv) the probability of plaintiffs’ success on the merits; [(v)]the range of possible recovery; and (vi) the opinions of the class counsel, class representatives, and absent class members.”).

<sup>3</sup> *See, e.g., In re Integra Realty Resources, Inc.*, 354 F.3d 1246, 1262 (10th Cir. 2004).

Rule 23(b) further provides that as long as questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy, a court may certify the class. For purposes of approval of a settlement class, the matters pertinent to these latter findings include the class members' interests in individually controlling the prosecution or defense of separate actions, the extent and nature of any litigation concerning the controversy already begun by or against class members, and the desirability or undesirability of concentrating the litigation of the claims in the particular forum.<sup>4</sup>

Rule 23(e) applies specifically to the settlement of class actions and provides that a class action cannot be settled without the approval of the federal court.<sup>5</sup> Rule 23(e)(1) mandates that before settlement, the court must provide notice to all class members who would be bound by the proposal. Rule 23(e)(2) states that the court must approve a settlement only if it is “fair, reasonable and adequate.” Under Rule 23(e)(3), parties seeking approval of a settlement “must file a statement identifying any agreement made in connection with the proposal.” Under Rule 23(e)(4), if the class action was previously certified on the basis that questions of common law or fact predominated, “the court may refuse to approve a settlement unless it affords a new opportunity to request exclusion to individual class members who had an earlier opportunity to request exclusion but did not do so.” Finally, Rule 23(e)(5) provides that any class member may object to the settlement and that objections may be withdrawn only with the court’s approval. As noted by one federal court, “there is a strong presumption in favor of finding the [s]ettlement [a]greement fair.”<sup>6</sup>

## 2. The United States Supreme Court’s Decision in *Amchem*

While the requirements for a settlement-only class are well settled under federal law, that has not always been the case. Prior to the United States Supreme Court’s 1997 decision in *Amchem Products v. Windsor*,<sup>7</sup> federal courts were uncertain whether parties seeking certification of a settlement-only class were required to pass only the hurdle set out by Rule 23(e), or the entire pantheon of requirements of Rule 23(a), (b), and (e). The *Amchem* case resolved the issue by examining “the legitimacy under Rule 23 of the Federal Rules of Civil Procedure of a class-action certification [meant] to achieve global settlement of current and future asbestos-related claims.”<sup>8</sup> The class action in *Amchem* was “not intended to be litigated,” and the Court “granted review to decide the role settlement may play, under existing Rule 23, in determining the propriety of a class certification.”<sup>9</sup>

In *Amchem*, the Court explained that parties attempting to gain the approval of a court for a settlement class must meet the requirements of Rule 23(a), (b), and (e), holding that

<sup>4</sup> FED. R. CIV. PRO. 23(b)(3)(A), (B), (C), (D).

<sup>5</sup> However, “the Court’s power to approve or reject settlements does not permit it to modify the terms of a negotiated settlement.” *Dehoyos v. Allstate Corp.*, 240 F.R.D. 269, 286 (W.D. Tex. 2007).

<sup>6</sup> *Dehoyos*, 240 F.R.D. at 286.

<sup>7</sup> *Amchem Products, Inc. v. Windsor*, 521 U.S. 591 (1997).

<sup>8</sup> *Id.* at 597.

<sup>9</sup> *Id.* at 601, 619.

Rule 23(e) “was designed to function as an additional requirement, not a superseding direction, for the ‘class action’ to which Rule 23(e) refers is one qualified for certification under Rule 23(a) and (b).”<sup>10</sup> The Court opined that “[t]he safeguards provided by the Rule 23(a) and (b) class-qualifying criteria...are not impractical impediments – checks shorn of utility – in the settlement-class action.”<sup>11</sup> As noted above, the only requirement of Rule 23 singled out by the Court as not applicable in the context of a settlement-only class is that of Rule 23(b)(3)(D), which considers the “likely difficulties” in the trial court’s management of a class action in determining whether questions of law or fact predominate and whether a class action is superior to other available methods of adjudication.<sup>12</sup>

### 3. “Heightened Scrutiny” Requires Federal Courts to Act as a “Quasi-Fiduciary”

*Amchem* is also significant for the Court’s discussion of the level of scrutiny to be applied in considering whether to certify a pure settlement class. The Court emphasized that “[s]ettlement, though a relevant factor, does not inevitably signal that class-action certification should be granted more readily than it would be were the case to be litigated” and “proposed settlement classes sometimes warrant more, not less caution on the question of certification.”<sup>13</sup> In sum, “other specifications of the Rule – those designed to protect absentees by blocking unwarranted or overbroad class definitions – demand undiluted, even heightened, attention in the settlement context.”<sup>14</sup> Thus, under *Amchem*, federal courts are to carefully review proposed settlement classes.

A number of federal courts have adopted the “heightened scrutiny” requirement set out in *Amchem*. For example, the Ninth Circuit, in the non-royalty case of *Hanlon v. Chrysler Corp.*, explained that “[s]everal circuits have held that settlement approval that takes place prior to formal class certification requires a higher standard of fairness” and that “[n]o circuit has held to the contrary.”<sup>15</sup> The Ninth Circuit continued, holding that “[t]he dangers of collusion between the class counsel and the defendant, as well as the need for additional protections when the settlement is not negotiated by a court designated class representative, weigh in favor of a more probing inquiry than may normally be required under Rule 23(e).”<sup>16</sup>

The “heightened scrutiny” has been described by some federal courts as rising to the level of a quasi-fiduciary whose role is to protect the interests of absent class members. As explained by the Third Circuit in *In re General Motors Corp. Pick-Up Truck Fuel Tank Prods. Liability Litig.*, 55 F.3d 768, 801 (3d Cir. 1995), “the court plays the important role of protector of the absentees’ interests, in a sort of fiduciary capacity, by approving appropriate representative plaintiffs and class counsel.” Thus, federal courts will not simply “rubber stamp” a settlement

<sup>10</sup> *Id.* at 621.

<sup>11</sup> *Id.* at 621.

<sup>12</sup> *Id.* at 620.

<sup>13</sup> *Id.* at 620 n.16.

<sup>14</sup> *Id.* at 620. *But see In re Warfarin Sodium Antitrust Litig.*, 391 F.3d 516 (3d Cir. 2004) (applying lower standard to review of settlement class).

<sup>15</sup> 150 F.3d 1011, 1026 (9th Cir. 1998) (citing *In re General Motors Corp. Pick-Up Truck Fuel Tank Products Liability Litig.*, 55 F.3d 768, 805 (3d Cir. 1995); *Mars Steel Corp. v. Cont’l Illinois Nat’l Bank & Trust*, 834 F.2d 677, 681 (7th Cir. 1987); *Weinberger v. Kendrick*, 698 F.2d 61, 73 (2d Cir. 1982)).

<sup>16</sup> *Hanlon*, 150 F.3d at 1026.

class, and parties and counsel alike should take seriously their obligation to satisfy the requirements of Rule 23(a), (b), and (e).

The successful application of Rule 23 in the creation of a settlement class can be observed in the opinion of the Southern District of Texas in the 1999 case of *In re Lease Oil Antitrust Litigation (No. II)*.<sup>17</sup> The federal court in that case applied Rule 23 and the *Amchem* ruling to a review of eight proposed settlement agreements relating to claims for violation of the Sherman Act based on an alleged price-fixing conspiracy by oil and gas leaseholders to underpay royalty interest owners.<sup>18</sup> The court explained that “a district court must first find that a class satisfies the requirements of Rule 23, regardless of whether it is certifying the class for trial or for settlement.”<sup>19</sup> The court, summarizing the *Amchem* opinion, reiterated “the importance of applying the class certification requirements of Rules 23(a) and (b) separately from its fairness determination under Rule 23(e).”<sup>20</sup> Notably, the court also opined that “the key to *Amchem* appears to be the careful inquiry into the adequacy of representation.”<sup>21</sup> The remarks of the court in *In re Lease Oil Antitrust Litigation (No. II)*, coupled with *Amchem*’s holding that Rule 23’s provisions are meant to prevent overbroad class definitions and deserve “heightened attention in the settlement context,”<sup>22</sup> are further proof that federal courts will require strict proof from the settling parties.

#### 4. Establishing Fairness under Rule 23(e)

When seeking approval of a class settlement, special attention must be devoted to the manner in which courts have interpreted the “fair, reasonable and adequate” requirement of Rule 23(e)(2). Federal courts have identified a number of factors to be considered in determining whether a class action settlement is fair.

The court in *In re Lease Oil Antitrust Litigation (No. II)* explained that although “Rule 23(e) provides no standard by which a court is to consider the settlement of a class action,” the Fifth Circuit has identified six factors which are used to examine the terms of and circumstances surrounding the proposed settlement.<sup>23</sup> These include: “(1) the existence of fraud or collusion behind the settlement; (2) the complexity, expense, and likely duration of the litigation; (3) the stage of the proceedings and the amount of discovery completed; (4) the probability of plaintiffs’ success on the merits; (5) the range of possible recovery; (6) the opinions of the class counsel, class representatives, and absent class members.”<sup>24</sup>

The Tenth Circuit in *Rutter & Wilbanks Corp. v. Shell Oil Co.* enumerated a similar four-part test for determining whether a proposed settlement satisfies Rule 23(e)(2), which includes:

<sup>17</sup> *In re Lease Oil Antitrust Litig. (No. II)*, 186 F.R.D. 403, 418 (S.D. Tex. 1999).

<sup>18</sup> *See id.* at 407, 407 n.2.

<sup>19</sup> *Id.* at 418.

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> *Amchem*, 521 U.S. at 620.

<sup>23</sup> 186 F.R.D. at 431.

<sup>24</sup> *Id.* (citing *Reed v. General Motors Corp.*, 703 F.2d 170, 172 (5th Cir. 1983)). *See also Ayers v. Thompson*, 358 F.3d 356, 369 (5th Cir. 2004) (citing *Parker v. Anderson*, 667 F.2d 1204, 1209 (5th Cir. 1982)).

“(1) whether the proposed settlement was fairly and honestly negotiated; (2) whether serious questions of law and fact exist, placing the ultimate outcome of the litigation in doubt; (3) whether the value of an immediate recovery outweighs the mere possibility of future relief after protracted and expensive litigation; and (4) the judgment of the parties that the settlement is fair and reasonable.”<sup>25</sup>

Thus, while Rule 23(e) does not specify the requirements to establish fairness, federal court decisions make clear that a federal court reviewing a proposed class settlement will consider the nature of the settlement negotiations (*i.e.*, were they arm’s length and without collusion), the nature of the litigation and the plaintiffs’ probability of success on the merits, the range of possible recovery and where the settlement falls within that range, and the parties’, class members’, and counsel’s views concerning the fairness of the settlement.

## **B. State Law**

Most state standards for settlement class certification follow Federal Rule 23(a), (b), and (e). For purposes of this paper, we focus on the law of four prominent producing states: Colorado, Oklahoma, New Mexico, and Texas.<sup>26</sup>

### **1. Colorado**

Under Colorado law, “[a] class action shall not be...compromised without the approval of the court, and notice of the proposed...compromise shall be given to all members of the class in such manner as the court decides.”<sup>27</sup> Colorado law, like federal law, allows for the creation of both settlement classes and the settlement of already-certified class actions, even though the creation of settlement-only classes is not explicitly provided for in Colorado Rule of Civil Procedure (C.R.C.P.) Rule 23.<sup>28</sup> As in *Amchem*, the requirements of Rule 23(a) and (b) of the C.R.C.P., which closely parallel Rule 23(a) and (b) of the Federal Rules, must be met before pursuing a “fairness” evaluation under Rule 23(e).<sup>29</sup>

Because C.R.C.P. 23 is “virtually identical to Fed. R. Civ. P. 23, [Colorado courts] look to case law regarding the federal rule for guidance.”<sup>30</sup> The factors that govern the fairness inquiry are similar to those announced by federal courts and include (1) the strength of the plaintiff’s case, (2) the risk, expense, complexity and likely duration of further litigation, (3) the risk of maintaining class action status throughout the trial, (4) the amount offered in the proposed settlement, (5) the extent of discovery completed, (6) the experience and views

<sup>25</sup> *Rutter & Wilbanks Corp.*, 314 F.3d 1180, 1188 (10th Cir. 2002). Note: The authors’ law firm served as counsel to some of the defendants-appellees in the *Rutter & Wilbanks* case.

<sup>26</sup> The authors have focused on these states primarily due to the significant role they play in oil and gas production in the United States. See Energy Information Administration, *U.S. Crude Oil, Natural Gas, and Natural Gas Liquids Reserves 2006 Annual Report* (EIA 2007).

<sup>27</sup> COLO. R. CIV. PRO. 23(e) (2008).

<sup>28</sup> William A. Bianco & Shannon Wells Stevenson, Rule 23 Class Actions in 11 COLO. PRAC., CIVIL PROCEDURE FORMS & COMMENTARY § 23.8 (2d ed. West 2008); Tobin D. Kern, *Approval of a Class Action Settlement Under C.R.C.P. 23(E)*, Colorado Lawyer (May 2002).

<sup>29</sup> Kern, *Approval of a Class Action Settlement Under C.R.C.P. 23(E)*.

<sup>30</sup> *Toothman v. Freeborn & Peters*, 80 P.3d 804, 809 (Colo. App. 2002).

of counsel, and (7) the reaction of class members.<sup>31</sup> The proposed settlement should be in the best interest of all those who will be affected by it, but there is no rule that settlements must benefit all class members equally.<sup>32</sup> Only named class members, or class members who have filed with the trial court a motion to intervene in the action, may appeal a Rule 23(e) approval order, which is reviewed under the “abuse of discretion” standard.<sup>33</sup>

Like federal courts, Colorado courts have adopted the view that the reviewing court acts as a quasi-fiduciary to protect the absent class members and to ensure that the settlement is in their best interest. As noted by one commentator, “[Colorado] Rule 23(e) imposes on the trial court a ‘fiduciary duty’ to safeguard the interests of all class members when a class action settlement is proposed.”<sup>34</sup>

## 2. Oklahoma

The Oklahoma statute pertaining to class action settlements, 12 Okla. Stat. § 2023, is identical to the Colorado statute and requires court approval and notice to all class members in a manner as the court directs.<sup>35</sup> Oklahoma generally follows federal jurisprudence in evaluating the fairness, adequacy, and reasonableness of proposed settlements. In the words of the Court of Civil Appeals of Oklahoma, “[b]ecause § 2023 bears great similarity to the provisions of Federal Rule of Civil Procedure 23, we may resort to federal authority to shed light on its rationale.”<sup>36</sup>

Oklahoma state courts have considered factors from the Tenth Circuit in determining whether a settlement is fair, including (1) whether the proposed settlement was fairly and honestly negotiated, (2) whether serious questions of law and fact exist, (3) whether the value of immediate recovery outweighs the mere possibility of future relief, and (4) the judgment of the parties that the settlement is fair.<sup>37</sup> Additionally, Oklahoma courts have cited factors from the Second Circuit, including (1) the complexity, expense, and likely duration of the litigation, (2) the reaction of the class to the settlement, (3) the stage of the proceedings, (4) the likelihood of establishing liability, (5) the likelihood of proving damages, (6) the risks of maintaining class action status through the trial, (7) the ability of defendants to withstand greater judgment, (8) the reasonableness of the settlement in light of the best possible recovery, and (9) the reasonableness of the settlement to recovery considering all the attendant risks of litigation.<sup>38</sup>

<sup>31</sup> See *Helen G. Bonfils Foundation v. Denver Post Employees Stock Trust*, 674 P.2d 997, 999 (Colo. App. 1983).

<sup>32</sup> See *Highley v. Kidder, Peabody & Co., Inc.*, 920 P.2d 884, 891 (Colo. App. 1996).

<sup>33</sup> Kern, *Approval of a Class Action Settlement Under C.R.C.P. 23(E)* (citing *Gottlieb v. Barry*, 43 F.3d 474 (10th Cir. 1994)); *Highley*, 920 P.2d at 889.

<sup>34</sup> Kern, *Approval of a Class Action Settlement Under C.R.C.P. 23(E)*.

<sup>35</sup> 12 OKLA. STAT. § 12-2023 (2008).

<sup>36</sup> *Bayhille v. Jiffy Lube Intern., Inc.*, 146 P.3d 856, 859 (Okla. Civ. App. Div. 4 2006).

<sup>37</sup> See *Velma-Alma Independent School District No. 15 v. Texaco, Inc.*, 162 P.3d 238, 243 (Okla. Civ. App. Div. 1 2007) (citing *In re Integra Realty Resources, Inc.*, 354 F.3d 1246 (10th Cir. 2004)).

<sup>38</sup> See *id.* (citing *Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 95 (2nd Cir. 2005)).

“Oklahoma’s class action statute does not impose a ‘fiduciary’ duty upon trial courts, nor does it impose any higher duty upon those courts than the considerable duties they already have.”<sup>39</sup> In this respect, Oklahoma law differs from both federal law and the law of Colorado.

### 3. New Mexico

New Mexico’s Rule 1-023(F) covering class action settlements is identical to those of Colorado and Oklahoma, also requiring court approval and notification to all class members in a manner directed by the court.<sup>40</sup> According to the rule, “[a] class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs.”<sup>41</sup> New Mexico’s enactment of Rule 1-023 is recent, with the first published decision interpreting the class certification provisions of the rule occurring in 2003.<sup>42</sup>

More recently, the Court of Appeals of New Mexico, in the case of *Rivera-Platte v. First Colony Life Ins. Co.*, set out the fairness criteria to be applied in evaluating a proposed class settlement, which include (1) an examination of the settlement process along with the adequacy of discovery, (2) the fairness of the process afforded objectors, (3) the fairness and honesty of the negotiations, (4) the risks of litigation including the merits and complexities of the parties’ claims and the potential duration and cost of trial, (5) the reasonableness of the settlement in light of the risks of litigation and the possible recovery at trial, and (6) the class members’ reaction to the settlement.<sup>43</sup>

On September 16, 2008, the Supreme Court of New Mexico reversed the court of appeals in the *Rivera-Platte* decision, holding that “[t]he Court of Appeals’ Opinion reversing the district court[’s] [grant of class certification] shall be without any force or effect.”<sup>44</sup> In doing so, the Supreme Court of New Mexico left limited guidance on how the settlement provisions of Rule 1-023 are to be interpreted. Notably, the court held that “[i]n a class action settlement, the district court is the protector of the unnamed class members’ rights and acts on the level of a fiduciary.”<sup>45</sup> The New Mexico Supreme Court also set out an “abuse of discretion” standard for review of class settlement approvals by a district court, explaining that “we ascribe the authority to approve a class settlement agreement to the sound discretion of the district court.”<sup>46</sup> Unfortunately, the New Mexico Supreme Court did not explain whether the court of appeals’ “fairness” test for evaluating a class action settlement remained valid.

<sup>39</sup> *Bayhille*, 146 P.3d at 861.

<sup>40</sup> N.M. R. CIV. PRO. 1-023(F) (2008).

<sup>41</sup> *Id.*

<sup>42</sup> *See Salcido v. Farmers Ins. Exchange*, 83 P.3d 968 (N.M. App. 2003). However, *Salcido* did not address the class settlement provisions of Rule 1-023.

<sup>43</sup> *Rivera-Platte v. First Colony Life Ins. Co.*, 173 P.3d 765, 781-82 (N.M. App. 2007).

<sup>44</sup> *Platte v. First Colony Life Ins. Co.*, No. 30,691, 2008 WL 4568051, at \*2 (N.M. Sept. 16, 2008).

<sup>45</sup> *Id.* at \*2

<sup>46</sup> *Id.*

#### 4. Texas

Texas’s approach to class action settlements closely resembles that of the federal courts. Like the previous three states, Texas requires court approval of the settlement as well as notification to all party members.<sup>47</sup> However, Texas has additional requirements that closely mirror those of the Federal Rules of Civil Procedure. Notice of the material terms of the settlement as well as an explanation of when and how members may elect to be excluded from the class must be given to all members.<sup>48</sup> If the class action was certified under Rule 42(b)(3), which maintains a class on the basis of predominance of common issues over individual ones, then the court must afford class members an opportunity to request exclusion.<sup>49</sup> The court must hold a hearing in which it finds that the settlement is fair, reasonable, and adequate.<sup>50</sup> If any agreement between the parties was made in connection with the settlement, it must be identified by filing a statement with the court.<sup>51</sup> Finally, any class member may object to a settlement proposal and an objection may only be withdrawn with court approval.<sup>52</sup>

In determining whether to approve a settlement proposal, Texas courts consider factors such as (1) whether the settlement was negotiated at arm’s length, (2) the complexity, expense, and likely duration of the litigation, (3) the stage of the proceedings, (4) any factual or legal obstacles to the plaintiffs’ prevailing on the merits, (5) the range of recovery and certainty of damages, and (6) the opinions of parties to the litigation.<sup>53</sup> With respect to pure settlement classes, Texas courts have looked to the decision of the Supreme Court in *Amchem*, holding that “in deciding whether to certify a settlement-only class, class-action criteria designed to protect absent class members demand heightened scrutiny.”<sup>54</sup> According to the Texas Supreme Court, “settlement does not eliminate the need for a rigorous inquiry into the class action’s propriety.”<sup>55</sup> As a result, Texas courts are obligated to apply the full criteria of Rule 42(a) and (b) in certifying a settlement class. As explained by the Texas Supreme Court, “[a] fairness hearing is not a substitute for rigorous adherence to Rule 42’s class action criteria.”<sup>56</sup>

### III. What to File in Support of the Request for Approval

Generally, “[t]he court may consider briefs, declarations, affidavits and the arguments of counsel” in determining whether a proposed settlement meets the criteria of Rule 23 (or its state equivalent) and whether it is fair and adequate.<sup>57</sup> Filings and evidence vary from one

<sup>47</sup> See TEX. R. CIV. PRO. 42(e) (2008).

<sup>48</sup> See TEX. R. CIV. PRO. 42(e)(1)(B).

<sup>49</sup> See TEX. R. CIV. PRO. 42(e)(3).

<sup>50</sup> See TEX. R. CIV. PRO. 42(e)(1)(c).

<sup>51</sup> See TEX. R. CIV. PRO. 42(e)(2).

<sup>52</sup> See TEX. R. CIV. PRO. 42(e)(4)(a), (b).

<sup>53</sup> See *In re Guardianship of DeLuna*, No. 13-06-541-CV, 2008 WL 1747581, at \*3 (Tex. App. — Corpus Christi April 17, 2008) (quoting *General Motors Corp. v. Bloyed*, 916 S.W.2d 949, 955 (Tex. 1996)).

<sup>54</sup> See *McAllen Med. Cent. v. Cortez*, 66 S.W.3d 227, 232 (Tex. 2001).

<sup>55</sup> *Id.*

<sup>56</sup> *Id.* at 234.

<sup>57</sup> *IUE-CWA v. General Motors Corp.*, 238 F.R.D. 584, 594 (E.D. Mich. 2006).

case to the next, but the typical filings made in support of a request for approval include a motion for preliminary approval and conditional certification (with the settlement agreement and form of class notice attached as exhibits), evidence to support the request for approval (often in the form of expert affidavits), and a final motion for approval. Each of these is discussed briefly below.

**A. Motion for Preliminary Approval of Settlement and Conditional Certification of Settlement Class**

Courts apply a two-step process for reviewing proposed class action settlements under Rule 23(e). As noted by the Seventh Circuit in *Armstrong v. Board of School Directors*,

The first step is a preliminary, pre-notification hearing to determine whether the proposed settlement is “within the range of possible approval.” This hearing is not a fairness hearing; its purpose, rather, is to ascertain whether there is any reason to notify the class members of the proposed settlement and to proceed to a fairness hearing. *Manual for Complex Litigation*, § 1.46 at 53-55 (West. 1977). If the...court finds a settlement proposal “within the range of possible approval,” it then proceeds to the second step in the review process, the fairness hearing.<sup>58</sup>

The first step of the process is generally triggered by the parties’ filing of a motion for preliminary approval. The motion, which is typically filed shortly after the parties’ execution of the settlement agreement, seeks preliminary approval of the settlement, conditional certification of the settlement class, approval of the form of class notice, and approval to distribute class notice to the proposed class. The motion also seeks to establish a deadline for the filing of opt-out requests and a date for the final settlement approval hearing. As required by federal law and the law of states such as Texas, the settlement agreement should be attached as an exhibit to the motion for preliminary approval. The form of class notice is also submitted as an exhibit for the court’s approval.

The purpose of the motion for preliminary approval is to gain conditional certification of the settlement class and to demonstrate that the settlement is “within the range of possible approval” such that notice of the settlement should be sent to class members in advance of a fairness hearing. To accomplish this, the motion should address the class certification requirements of Rule 23(a) and (b) (or the state equivalents) and demonstrate that the requirements are satisfied. The motion should demonstrate that the parties have thoroughly investigated the claims and defenses in the case and that the settlement negotiations were arm’s-length and without collusion or fraud. With respect to the settlement, the motion should detail the terms of the settlement and contain sufficient support for the court to determine that the settlement is “within the range of possible approval.” Typically, expert affidavits to support the fairness of the settlement –

<sup>58</sup> *Armstrong v. Board of School Directors*, 616 F.2d 305, 314 (7th Cir. 1980), overruled on other grounds, *Felzen v. Andreas*, 134 F.3d 873 (7th Cir. 1997); see also *Horton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 855 F. Supp. 825, 827 (E.D.N.C. 1994) (in deciding whether to grant preliminary approval of a class settlement, the court need only consider “whether there is ‘probable cause’ to notify the class of the proposed settlement.”).



through discussion and analysis of the claims and defenses in the case, the range of recovery under the claims and defenses, and demonstration that the settlement value is at a reasonable point within the range of recovery – are submitted after preliminary approval is granted and before the fairness hearing. Finally, as noted above, the motion for preliminary approval should seek approval of the form of class notice, approval to distribute the class notice, and dates for opt-out filings and for the fairness hearing.

### ***B. Expert Affidavits and Other Evidence and Motion for Final Approval***

Affidavits from experts can be particularly helpful in demonstrating the fairness of a class royalty settlement under Rule 23(e). Petroleum engineers, geoscientists, economists, and other experts can provide valuable evidence and testimony concerning the nature of technical development claims or claims for underpayment of royalties. For example, testimony from a petroleum engineer or economist concerning the value of plaintiffs’ royalty claims (both under plaintiffs’ theory of the case and under defendants’ theories) can help demonstrate that the value of the settlement is fair and reasonable and within the range of possible outcomes. Similarly, expert testimony concerning plaintiffs’ chances for success and the merits of the defendants’ defenses can prove valuable. For example, in a post-production costs case, testimony from a petroleum engineer concerning differences among the provisions of class members’ leases, assignments, and division orders and whether they permit deductions for transportation, gathering, and compression can help demonstrate the uncertainty of plaintiffs’ prevailing at trial. Testimony from a geoscientist in a development case can play a similar role.

Evidence and testimony concerning the class certification requirements of Rule 23(a) and (b) also play an important role. For example, evidence concerning the number of owners in the class, the named class representatives’ interests, the defendant’s payment and accounting records, and the qualifications and experience of class counsel can help in establishing the class certification requirements.

After the court has granted the motion for preliminary approval, a motion for final approval and briefing in support of the motion should be filed. The expert affidavits and other evidence are often submitted as exhibits to the final motion and briefing in support. The motion for final approval and supporting briefing should provide further support for the request for certification of the settlement class and approval of the class settlement.

## **IV. Class Notice**

As noted above, the form of class notice should be submitted as an exhibit to the motion for preliminary approval. “When a class is certified and a settlement is proposed, the parties are required to provide class members with the ‘best notice practicable under the circumstances.’”<sup>59</sup> Rule 23(e) requires that the court “direct notice in a reasonable manner to all class members who would be bound by the proposal.” The applicable standard for such notice to comply with Rule 23(e) and the requirements of due process is that it “must fairly

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<sup>59</sup> *Pigford v. Veneman*, 355 F. Supp. 2d 148, 162 (D.D.C. 2005) (quoting Fed. R. Civ. P. 23(c)(2)).

apprise the class members of the terms of the proposed settlement and of their options.”<sup>60</sup> With respect to the terms of the settlement, there need only be “very general descriptions of the proposed settlement” in the notice.<sup>61</sup> The court noted in *Gottlieb v. Wiles* that “Rule 23(e) requires only notice of the proposed dismissal or compromise, not a tutorial on the Rules of Civil Procedure.”<sup>62</sup> Some courts have determined that “[i]ndividual notice is not required when there is no reasonable way to sufficient identify the class members.”<sup>63</sup>

The typical notice, often styled “Notice of Conditional Certification and Settlement of Class Action,” notifies the class member of the pending lawsuit and the settlement, informs the class member that he may be eligible to receive proceeds from the settlement, and provides summary detail of the lawsuit and the proposed settlement, including the consideration under the settlement and the release of claims. The notice identifies class counsel, informs the class member that he may contact class counsel with questions, and may also discuss class counsel’s application for fees and costs. The notice should also provide information concerning the class member’s options (*i.e.*, “do nothing” and participate in the settlement, submit objections to the settlement or enter an appearance through separate counsel, or opt out of the settlement). Finally, the notice should clearly state the deadline by which the class member must opt out and provide information concerning the date, time, and location of the fairness hearing.

A settlement administrator (a third party selected by the parties and approved by the court to distribute class notice, to manage the escrow account into which the settlement fund is placed, and to distribute the settlement fund) often handles the mailing of class notice. In some instances, class counsel handles the issuance of class notice. Notice should be provided to all class members at their last known address (based on the address information in the defendant’s files and records). Notice should also be provided by publication in newspapers in the geographic area covered by the lawsuit.

## V. Necessity of Excluding Certain Owners from the Settlement Class

While royalty class actions by their very nature typically encompass a broad array of named and unnamed plaintiffs, counsel for both sides may have strong reasons to exclude certain royalty interest owners from the settlement class. Many owners are excluded from the outset of the case as a result of the class definition; these owners are similarly excluded from the settlement. Commonly excluded royalty interest owners include the federal government, state governments, and federal and state agencies. These entities often have unique valuation rules that apply to their interests, and they require complex, detailed steps to represent their interests (e.g., representation of the federal government under the False Claims Act). In many cases, these entities institute their own actions to address royalty payments, such as claims by

<sup>60</sup> *In re Integra Realty Resources, Inc.*, 2001 WL 951332, \*15 (10th Cir. 2001) (quoting *Gottlieb v. Wiles*, 11 F.3d 1004, 1013 (10th Cir. 1993), abrogated on other grounds in *Devlin v. Scardelletti*, 536 U.S. 1 (2002)); see also *Weinberger v. Kendrick*, 698 F.2d 61, 73 (2d Cir. 1982).

<sup>61</sup> *Weinberger*, 698 F.2d at 73; see also *Gottlieb*, 11 F.3d at 1013 (“Rule 23(e) requires only notice of the proposed dismissal or compromise, not a tutorial on the Rules of Civil Procedure.”).

<sup>62</sup> *Gottlieb*, 11 F.3d at 1013.

<sup>63</sup> *DeHoyos*, 240 F.R.D. at 296.



the federal government (through the Minerals Management Service) for underpayment of federal royalties.<sup>64</sup> Whatever the reason, governmental entities are often excluded from royalty class actions and settlement classes.

Besides governments and government agencies, owners such as publicly-traded oil and gas companies who hold overriding royalty interests in the fields or units at issue are commonly excluded from royalty class actions, including settlement classes. The decision to exclude “big oil” often makes sense from all sides. These companies often calculate royalties the same way the defendant does, making them an unattractive class member from class counsel’s perspective and unlikely participants in a class settlement. Even if included in the class definition, these companies often opt out because their interests are aligned with the interests of other industry participants more so than private royalty owners. For these same reasons, defendants are typically unwilling to assign any settlement value to the claims of these companies or to include their interests in the benchmark decimal used to value the settlement payment.

It is often necessary to exclude from the settlement class owners who have their own litigation pending against the defendant. Also, in class actions filed against multiple defendants and relating to a field or unit that encompasses multiple wells and leases, the defendants themselves are often excluded from the settlement class to the extent they hold overriding royalty interests in leases within the field or unit. In some cases, overriding royalty interest owners as a group are excluded from the class definition at the outset of the case.

Regardless of the specific groups excluded from the class definition or carved out from the settlement class, the key is to clearly define and identify the excluded groups. This is important both in terms of the settlement itself and in avoiding any confusion or uncertainty that could undermine approval of the settlement or lead to challenges of the court’s final approval.

## **VI. Handling Opt-Outs and Objections, Including Competing Lawsuits**

### ***A. Opt-Outs***

As noted in Section II above, Rule 23(e) (and some state’s equivalents) provide that if the class action was previously certified on the basis that questions of common law or fact predominated, “the court may refuse to approve a settlement unless it affords a new opportunity to request exclusion to individual class members who had an earlier opportunity to request exclusion but did not do so.”<sup>65</sup>

Opt-outs are common in a class royalty settlement. Many owners opt-out to preserve their right to pursue their claims individually. Some opt out based on their view that the settlement does not fairly compensate the class. As noted above, others, such as oil and gas companies

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<sup>64</sup> See, e.g., 30 C.F.R. § 290.103, § 290.105 (2008).

<sup>65</sup> FED. R. CIV. PRO. 23(e)(4).

or other lessees, may opt out because they calculate and pay their royalty obligations similar to the way defendants in the lawsuit have calculated and paid. Regardless of the reason, opt-outs play an important role and can impact the final value of the settlement or, in some instances, whether the settlement becomes effective.

Some courts view few opt-outs as a mark of a successful settlement, as “[s]ome judges treat the silence of class members as a conscious, informed decision to express their approval of the proposed settlement by remaining silent.”<sup>66</sup> However, to deal with the issue of opt-outs, the typical class royalty settlement agreement includes a provision that states that the settlement is contingent on a certain percentage of the total ownership decimal interest represented by the class (often 90 percent) remaining in the class. This “subscription rate” provision typically provides that if opt-outs result in a participating class decimal that is less than the specified percentage, the defendant shall have the right, but not the obligation, to enforce and consummate the settlement. Thus, all parties have an interest in ensuring a sufficient subscription percentage among class members.

### ***B. Objections and Competing Lawsuits***

As noted above, Rule 23(e)(5) (and some state’s equivalents) provides that any class member may object to the proposed settlement and that objections may be withdrawn only with the court’s approval. The United States Supreme Court, in *Devlin v. Scardelletti*, held that “nonnamed class members...[who] have objected in a timely manner to approval of the settlement at the fairness hearing have the power to bring an appeal without first intervening.”<sup>67</sup>

Objections to class settlements are not uncommon and often attack the fairness of the settlement. Common objections include objections to the amount paid under the settlement, future relief under the settlement, allocation of the settlement among the class, attorney’s fees to be awarded to class counsel, alleged conflicts of interest by class counsel, and alleged “collusion” in the settlement negotiations. Objections are often supported by evidence in the form of an affidavit or expert report.<sup>68</sup> In some jurisdictions, “attorney fees may be awarded to objectors whose objections result in meaningful benefit to the settlement class[.]”<sup>69</sup>

In some cases, objections are the result of a competing royalty class action filed by different plaintiffs’ counsel and different class representatives. In these cases, certain class members (sometimes one of the named representatives in the competing action)

<sup>66</sup> Christopher R. Leslie, *The Significance of Silence: Collective Action Problems and Class Action Settlements*, 59 Fla. L. Rev. 71, 91 (2007).

<sup>67</sup> *Devlin v. Scardelletti*, 536 U.S. 1, 14 (2002). *But see* Kern, *Approval of a Class Action Settlement Under C.R.C.P. 23(E)* (citing *Gottlieb*, 43 F.3d at 474); *Highley*, 920 P.2d at 889.

<sup>68</sup> *See Dehoyos*, 240 F.R.D. at 293-94 (faulting class members’ objections to proposed class settlement for failure to supply “affidavits ... which challenge any of the settlement benefits or the substance of the settlement benefits.”).

<sup>69</sup> *UFCW Local 880-Retail Food Employers Joint Pension Fund v. Newmont Mining Corp.*, 05-cv-01100-MSK-CBS, 2008 WL 113901, at \*1 n.2 (D. Colo. Jan. 9, 2008).

object to the proposed settlement and settlement class, with the intention of appealing the court's approval. The objectors, often represented by class counsel in the competing class action, may seek permission from the court to conduct discovery in support of their objections, permission to file extensive briefing and evidence in support of their objections, the right to present argument and evidence at the fairness hearing, and the right to cross-examine witnesses at the fairness hearing. The objectors may seek to undermine the proposed settlement class by emphasizing the defendant's prior opposition to class certification, arguing that this same defendant argued prior to the settlement that the required elements of numerosity, commonality, etc. are not met. The court in *Rutter & Wilbanks Co. v. Shell Oil Co.*<sup>70</sup> addressed such a situation and found that prior opposition to class certification was not inconsistent with a request for certification of a settlement class. The court rejected the objectors' argument, holding that "it was not inconsistent to oppose class certification in the *CO<sub>2</sub> Claims Coalition* case, when all types of interests were involved with no differentiation between the different sub-groups, but to support it when each sub-group was separated into its own class with its own class representative."<sup>71</sup>

While objectors have a right under Rule 23(e) to present objections, courts generally have broad discretion in limiting an objectors' right to discovery and to present evidence and argument at the fairness hearing. This is not surprising given the "abuse of discretion" standard that is used to review courts' approval of a class settlement.<sup>72</sup>

## VII. Owners-in-Suspense

Owners-in-suspense are a common issue in class action royalty settlements.<sup>73</sup> Like other participating class members, these owners and the associated royalty interests should be included in the settlement class unless the owners opt out. When the settlement fund is allocated and distributed among the class members, these owners' share of the settlement fund should remain in escrow pending resolution of their title issues. In most cases, the settlement administrator will continue to hold the suspended amounts in escrow pending resolution of the title issues.

Depending on the laws of the forum, escheat or similar rules may ultimately apply and permit, with court approval, distribution of the settlement amount attributable to owners-in-suspense to other parties, such as the state or selected funds or beneficiaries identified under the state's laws. Important differences in this area can exist depending

<sup>70</sup> 314 F.3d at 1189 n.5.

<sup>71</sup> *Id.* See also *In re General Motors Corp. Pick-Up Truck Fuel Tank Products Liability Litigation*, 55 F.3d at 768, 786 (3d Cir. 1995) (noting that "[a] settlement class is a device whereby the court postpones the formal certification procedure until the parties have successfully negotiated a settlement, thus allowing a defendant to explore settlement without conceding any of its arguments against certification.").

<sup>72</sup> See, e.g., *Dehoyos*, 240 F.R.D. at 285.

<sup>73</sup> State laws can protect operators in circumstances where the owner of a royalty interest is unknown or in dispute. For example, Texas law provides that royalty interest payments "may be withheld without interest...when there is: (1) a dispute concerning title that would affect distribution of payments; (2) reasonable doubt that the payee: (A) has sold or authorized the sale of its share of the oil or gas to the purchaser of such production; or (B) has clear title to the interest in the proceeds of production." Tex. Nat. Res. Code § 91.402 (2008).

on whether a class action settlement has been recognized under state or federal law. For example, Texas state courts have soundly rejected a settlement plan which provided for unclaimed settlement proceeds to automatically escheat to the State of Texas, where the parties to the settlement failed to fulfill the unclaimed property requirements of the Texas Property Code.<sup>74</sup> However, the Southern District of Texas in the *In re Lease Oil Antitrust Litigation (No. II)* rejected the applicability of *Snell* to federal proceedings, holding that “the disposition of unclaimed funds in a class action settlement in federal court is a procedural matter committed to the discretion of the district court under Federal Rule of Civil Procedure 23, and thus is unconstrained by state unclaimed property laws.”<sup>75</sup> Based on the broad discretion available to federal courts in this area, other federal courts have distributed unclaimed funds based on the *cy pres* doctrine, which “permits undistributed damage or settlement funds to be distributed to the next best class when the plaintiffs cannot be compensated individually.”<sup>76</sup>

To ensure that the issue of owners-in-suspense is managed effectively, the parties should be vigilant in keeping the court informed of the status of settlement funds attributable to owners-in-suspense. As noted above, it is essential that the court approve any actions taken with respect to these settlement funds.

### VIII. Escrowing Settlement Funds

As part of the settlement agreement, the parties must decide what to do with the settlement proceeds pending the court’s review. Typically, the parties have strong incentives to escrow the settlement amount. Plaintiffs press to have the settlement amount escrowed so that the funds are paid into an interest bearing account for the class’s benefit. Defendants benefit from escrowing the settlement funds because the funds are placed in an interest bearing account (meaning defendants are not responsible for the accrual of interest) and can be returned to the defendants if the settlement is not approved.

Defendants may choose to escrow the funds in advance of approval of the settlement or, alternatively, to escrow the funds within a specified period of the settlement becoming final (*i.e.*, all appeals have either lapsed or been denied). In the latter scenario, the plaintiff is likely to push for an additional payment by defendant for interest accrued since the date of execution of the settlement agreement.

<sup>74</sup> See *Texas v. Snell*, 950 S.W.2d 108, 112 (Tex. App.—El Paso 1997, writ denied) (stating “[t]he disposition of unclaimed property in the State of Texas is not left to the whim of the private citizens or the courts, and rightfully so.”). But see *Wilson v. Mass. Mutual Life Ins. Co.*, 90 P.3d 525, 533 (N.M. App. 2004) (holding that New Mexico’s Uniform Unclaimed Property Act (N.M.S. § 7-8A-1, which applies only to property “held, issued, or owed in the course of a holder’s business,” did not apply to certificates issued by insurer as part of a nation-wide class settlement, as such certificates were not “held, issued, or owed” in the ordinary course of business of the insurer.); *Northrup v. Southwestern Bell Telephone*, 72 S.W.3d 16, 22 (Tex. App.—Corpus Christi 2002, *rev. granted, dismissed as improperly granted*).

<sup>75</sup> 2007 WL 4377835 at \*13 (S.D. Tex. Dec. 12, 2007) (unpublished).

<sup>76</sup> 26B C.J.S. *Deposits in Court* § 33 (2008). See, e.g., *Cook v. Rockwell Int’l Corp.*, 564 F. Supp. 2d 1189, 1222 (D. Colo. 2008) (stating “I have determined that the portion of the Net Class Award allocable to the Non-Prospective Damages Class will be distributed to the indirect benefit of the Class in accordance with *cy pres* principles.”).



The parties' agreement concerning escrowing the settlement fund should be included as part of the settlement agreement, either in the body of the agreement or as an exhibit to the settlement. The parties often appoint the settlement administrator to act as the escrow agent. Settlements often provide that the funds shall be deposited into investment accounts (often AAA-rated) to be agreed upon by the parties' counsel or, alternatively, to be specified by the court. The parties typically specify that the accounts are to be opened in the name of the settlement administrator, who is charged with regularly notifying the court of the status of the escrowed funds. Alternatively, the parties may opt to list both the class and the defendant on the name of the accounts. No matter the name on the accounts, the parties should provide that no withdrawal or distribution shall be made except in accordance with the settlement agreement or by order of the court.

### **IX. Binding Successors and Assigns**

Settlement of a royalty class action is usually intended to bind not only the parties to the lawsuit and the absent class members, but also those parties' successors and assigns. Both sides' interests are served by including successors and assigns within the scope of the settlement. The defendant buys peace in the settlement for the claims asserted in the lawsuit, both as to the current owners as well as future owners. Defendant also desires that the release it bargained for in the settlement run in favor of the named defendant and its successors and assigns. From the plaintiffs' perspective, they want to ensure that the defendant's obligations under the settlement are binding on the defendant's successors and assigns.

The key to binding successors and assigns is to be clear and explicit in the settlement agreement. Defined terms in the settlement such as "Plaintiffs," "Class Members," "Defendants," and "Releasees" should contain express language to the effect that "heirs, successors, successors in interest, and assigns" are subsumed within the defined terms. Clearly expressing the intent to bind successors and assigns will help prevent future disputes concerning the binding effect of the settlement on future parties.

### **X. Settling for and Obtaining Contribution from Non-Operators on Whose Behalf the Defendant Paid Royalties**

The effect of class action royalty settlements carries beyond royalty interest owners and operators to non-operators. When an operator is sued in a royalty class action and settles the case for its own royalty obligations as well as those of its co-working interest owners, the operator understandably expects contribution from those working interest owners whose royalty burdens were included in the settlement.

Under the typical joint operating agreement (JOA), the operator's ability to settle actions without the consent of its co-working interest owners is limited. A typical JOA (based on the 1982 A.A.P.L. Form 610 (the Model Form Operating Agreement)) provides that:

Operator may settle any single uninsured third party damage claim or suit arising from operations hereunder if the expenditure does not exceed Fifty Thousand Dollars



(\$50,000.00) and if the payment is in complete settlement of such claim or suit. If the amount required for settlement exceeds the above amount, the parties hereto shall assume and take over the further handling of the claim or suit, unless such authority is delegated to Operator.<sup>77</sup>

Given that royalty class actions often come at a significant cost to the operator, whatever settlement cap exists under the JOA is frequently surpassed, thus triggering the provision that requires the non-operators to take over the further handling of the claim or suit unless such authority is delegated to the operator.

To enhance the likelihood of contribution from co-working interest owners, the operator must follow the provisions of the JOA to avoid claims by the non-operators that the operator failed to provide the notice required by the JOA or failed secure an express delegation of authority from the non-operator. JOA disputes between operators and non-operators concerning royalty settlements often turn on these issues. In order to minimize these issues, the operator should provide notice of the settlement to the non-operators and request that the non-operators delegate settlement authority to the operator or take over the handling of the claim relating to their royalty burdens. In later disputes concerning contribution, the operator's position will be enhanced if it can demonstrate that it kept the non-operator informed of the suit and potential settlement and followed the provisions of the JOA.

## **XI. Conclusion**

Pursuing a royalty class action to settlement, much less trial, can be a grueling experience marked by great expense for both sides. While there is no fixed definition of what makes for a successful settlement of a royalty class action, doubtless such a definition would include a final disposition of the claims by the plaintiffs against the defendants offering the defendants some measure of repose, and the plaintiffs some measure of compensation. Although there are few royalty class actions that are either "easy" to litigate or settle, parties may effect a swift and final settlement by adhering closely to the applicable rules for the settlement of such class actions, and understanding the practical considerations that guide the settlement approval process.

*For further information on this topic, please contact [Mark Rodriguez](#), [Justin Marlles](#), or [Tifani Jones](#). Visit our website to learn more about [Vinson & Elkins' Litigation practice](#).*

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<sup>77</sup> Amer. Assoc. of Petroleum Landmen, THE MODERN OPERATING AGREEMENT 59 (1983).