

Abuse of Discretion and the Sliding Scale of Deference: Restoring the Balance of Power Between Circuit Courts and District Courts for Rule 23 Class Certification Decisions in Oil and Gas Royalty Litigation

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ABSTRACT: Certifying a class is the first and most important step in bringing a claim as a class action. For certain plaintiffs, especially those suing on the basis of a contract like royalty owners of oil and gas leases, the class action is the only practical means of bringing a claim against the oil and gas production companies. In the past few years, the Supreme Court has raised the standard for Rule 23 class certification requirements. Over the same timeframe, circuits like the Fifth Circuit have reversed numerous orders certifying classes. Royalty owners are especially susceptible to unfavorable review because a reviewing court can point to minute differences within leases as the reason why the class fails to satisfy Rule 23. Rather than focus on the requirements of Rule 23, this Note examines the relationship between the circuit and district courts and the standard of review that should govern the circuit courts' review of a certification order. There is a consensus that the abuse-of-discretion standard applies to review of certification orders, but the ambiguous definition of abuse of discretion has allowed circuit courts free reign when reviewing classes. To maintain the class action as a managerial tool for the district court, this Note proposes two solutions. First, the Note explains that codifying the abuse-of-discretion standard in Rule 23 will prevent circuit courts from circumventing the standard and push circuit courts to treat abuse of discretion as an independent standard. Second, the Note argues that each issue within the certification order falls somewhere

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along the abuse-of-discretion spectrum, and the Note provides examples from royalty litigation to illustrate how the spectrum should operate. These steps remedy the current imbalance of power between circuit and district courts regarding the decision to certify a class.

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I. INTRODUCTION

*“Drill, baby, drill.”*¹

In recent years, domestic oil drilling has evoked strong opinions on both sides of the issue, with the arguments stemming from environmental, economic, or other reasons.² No matter the position taken on the issues

1. Former Md. Lieutenant Governor Michael S. Steele, Speech at the 2008 Republican National Convention (Sept. 3, 2008).

2. See, e.g., Jim Angle, *Domestic Drilling Advocates Warn of Increased Global Demand for Oil, Dwindling Supply*, FOX NEWS (Mar. 26, 2012), <http://www.foxnews.com/politics/2012/03/26/domestic-drilling-advocates-warn-increased-global-demand-for-oil-dwindling.html> (explaining the immediate

underlying domestic drilling, domestic drilling is a significant portion of our economy.³ In fact, during the summer of 2014, the United States was the “world’s largest oil producer.”⁴

The more domestic production of oil and gas, the more relationships form between oil and gas production companies and the landowners where the drilling takes place.⁵ The oil and gas companies compensate these landowners through leases that pay royalties.⁶ While this contractual relationship might seem straightforward, “underpayments are widespread,” and “[t]housands of landowners . . . are receiving far less than they expected based on the sales value of gas or oil produced on their property.”⁷ Royalty owners have “few . . . protective mechanisms” to combat this practice by the production company.⁸

The class action is an essential litigation technique for royalty owners because it allows them “to pursue a number of small claims that could not economically be pursued on an individual basis.”⁹ To proceed as a class, royalty owners must satisfy Federal Rule of Civil Procedure 23, which lays out the requirements that district courts follow when deciding whether to certify a class or not.¹⁰ Convincing a district court to certify a class of royalty owners is far from a guarantee, but even if certified, a class typically must survive review by the circuit court on interlocutory appeal.¹¹ The jurisdictions where most oil and gas production occurs, the Fifth Circuit, and more specifically

need for domestic drilling); Jack Healy, *North Dakota Oil Pipeline Battle: Who’s Fighting and Why*, N.Y. TIMES (Dec. 2, 2016), <https://www.nytimes.com/2016/11/02/us/north-dakota-oil-pipeline-battle-whos-fighting-and-why.html> (explaining the dispute behind the proposed Dakota Access pipeline that would run from North Dakota to Illinois); Alec MacGillis, *How Obama Let Big Oil Drill in the Pristine Alaska Wilderness*, POLITICO (Dec. 21, 2015), <http://www.politico.com/magazine/story/2015/12/alaska-oil-drilling-lobbying-obama-213442> (explaining how ConocoPhillips obtained the right to drill more extensively in Alaska in the National Petroleum Reserve despite previous efforts to protect the environment).

3. See Chris Isidore, *The Obama Oil Boom*, CNN MONEY (Jan. 28, 2015, 4:32 PM), <http://money.cnn.com/2015/01/28/news/economy/obama-oil-boom> (describing how oil production steadily increased under President Obama’s administration).

4. *Id.*

5. See Abraham Lustgarten, *Unfair Share: How Oil and Gas Drillers Avoid Paying Royalties*, PROPUBLICA (Aug. 13, 2013, 10:20 AM), <https://www.propublica.org/article/unfair-share-how-oil-and-gas-drillers-avoid-paying-royalties> (“Like every landowner who signs a lease agreement to allow a drilling company to take resources off his land, Feusner is owed a cut of what is produced, called a royalty.”).

6. *Id.*

7. *Id.*

8. *Id.*

9. Craig A. Haynes & Amanda Catlin, *Special Royalty Litigation Issues: Class Actions, in PRIVATE OIL & GAS ROYALTIES* 15-1, 15-1 (Rocky Mountain Mineral Law Found., Mineral Law Ser. No. 1, 2003).

10. See *infra* Part II.A.

11. See FED. R. CIV. P. 23(f) (allowing either party to petition the circuit court for review of an order granting or denying certification within 14 days of the order).

Texas, are notably suspicious of class actions.¹² In these jurisdictions, a royalty class must survive two layers of “rigorous analysis” on the certification question before proceeding to try its case on the merits.¹³ This “rigorous analysis” leaves royalty owners without an effective remedy against production companies because they cannot rely on the class action.

In light of this problem, this Note addresses the current framework for the review of class certification by circuit courts and argues that the circuit courts lack a standard of review that consistently allows the district court the appropriate amount of discretion in certifying a proposed class.¹⁴ Although this problem pervades all types of class actions, this Note uses the oil and gas problem as a case study for the larger problem in class actions. First, this Note provides the relevant background for class action procedure, the standards of review used by appellate courts, and the basic workings of oil and gas leases. Second, this Note explains the problems in class certification procedure: (1) the difficulty a certified class faces in surviving review in certain circuits like the Fifth Circuit; (2) the lack of clarity between the circuits regarding the supposedly applicable standard of review (abuse of discretion) for certification orders; and (3) the tenuous justifications reviewing courts rely upon to decertify classes of royalty owners. Rather than propose solutions that reinterpret oil and gas law or rework the requirements for class certification, this Note argues that the appropriate first step is to address the standard of review used by the circuit courts. The Note offers two solutions to remedy the class certification problem: (1) codify the abuse-of-discretion standard; and (2) establish a guiding framework for the abuse-of-discretion standard when reviewing class certification for royalty litigation. By implementing these two solutions, the class action will remain a viable option for plaintiffs, like royalty owners, without having to reconstruct the entire substance of the rule governing class actions.

II. RULE 23, STANDARDS OF REVIEW, AND OIL AND GAS LEASES: THE IDEAS BEHIND CERTIFICATION FOR ROYALTY OWNERS

Three areas of law serve as the background for an analysis of class actions in the context of royalty litigation: (1) Rule 23 of the Federal Rules of Civil Procedure; (2) the standards of review for appellate courts in the federal system; and (3) the basics of royalty litigation. First, Part II.A explains the two general categories of requirements for class actions under Rule 23: substantive

12. See *infra* Part III.A–C.

13. See *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 351–52 (2011) (explaining that the district court must conduct a “rigorous analysis” regarding certification and detailing why the proposed class failed to satisfy Rule 23 requirements).

14. This Note does not argue that class action procedure for states—and the standard of review for certification orders—should mirror this proposal for the federal courts. States’ procedural rules for class actions may not permit the approach that this Note proposes for the federal district courts.

and procedural. Second, Part II.B describes the three standards of review for appellate courts in the federal system and the varying levels of deference that appellate courts use under each standard. Third, Part II.C provides a basic background of royalty provisions in oil and gas leases.

A. CLASS ACTIONS AND THE REQUIREMENTS OF RULE 23

In the American legal tradition, the class action suit is the main exception to two doctrines: (1) that a court can only bind the parties actually within the proceeding to its judgment; and (2) that a party may not directly represent the rights of another.¹⁵ Although American jurisprudence has seen different formulations of the class action procedure over time,¹⁶ the modern class action originated in 1966 with the adoption of Federal Rule of Civil Procedure 23 (“Rule 23”).¹⁷ Courts were initially hesitant to use the new procedural tool, but congested dockets in the 1980s eventually caused the class action to become a helpful tool for managing mass torts.¹⁸ The Class Action Fairness Act of 2005 permitted more plaintiffs to file directly in federal court, eased the process for a single defendant to remove a case to federal court, and resulted in an even sharper rise in the filing of class actions in federal courts.¹⁹ As a result of these developments, most litigators need a basic understanding of Rule 23’s “substantive” and “procedural” requirements.

Rule 23 has numerous subsections that address two aspects of class actions: Subsections (a) and (b) lay out the substantive requirements for a class action, and subsections (c)–(f) address how a trial court should manage the class action procedurally.²⁰ This Note does not focus on the current interpretations of subsections (a) and (b), but a basic understanding of

15. 1 JOSEPH M. MCLAUGHLIN, *MCLAUGHLIN ON CLASS ACTIONS: LAW AND PRACTICE* § 1:1 (14th ed. 2017) (explaining how class actions are “the most prominent exception” to the requirements of *in personam* jurisdiction and standing).

16. See 7A CHARLES A. WRIGHT ET AL., *FEDERAL PRACTICE & PROCEDURE* § 1751 (3d ed. 2017).

17. 1 MCLAUGHLIN, *supra* note 15, § 1:1.

18. Robert H. Klonoff, *The Decline of Class Actions*, 90 WASH. U. L. REV. 729, 736–37 (2013) (tracing the rise in class actions to mass torts that involved asbestos and Agent Orange, as well as a landmark case involving an intrauterine device); see also *Jenkins v. Raymark Indus., Inc.*, 782 F.2d 468, 473 (5th Cir. 1986) (“Courts have usually avoided class actions in the mass accident or tort setting. . . . The courts are now being forced to rethink the alternatives and priorities by the current volume of litigation and more frequent mass disasters.”).

19. Howard M. Erichson, *CAFA’s Impact on Class Action Lawyers*, 156 U. PA. L. REV. 1593, 1610–11 (2008).

20. See FED. R. CIV. P. 23. The subsections concerning “prerequisites” and “types” of class actions are the more *substantive* requirements of Rule 23, whereas the other subsections represent the more *procedural* requirements of Rule 23. This Note acknowledges that categorizing the subsections of Rule 23 in such a manner is artificial. In doing so, however, the Note attempts to draw a line between the two categories to demonstrate that Rule 23 sets forth (1) the threshold requirements necessary to certify a class and (2) the relationship between the trial court and a valid class. Subsections (g) and (h) are outside the scope of this Note.

subsections (a) and (b) is necessary because appellate courts couch their decisions in these standards.²¹

1. The “Substantive” Requirements of Rule 23

Rule 23(a) sets out the four prerequisites for any class action:

- (1) the class is so numerous that joinder of all members is impracticable;
- (2) there are questions of law or fact common to the class;
- (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and
- (4) the representative parties will fairly and adequately protect the interests of the class.²²

These four prerequisites are more commonly known by the shorthand labels “numerosity,” “commonality,” “typicality,” and “adequacy of representation,” respectively.²³ The four prerequisites work together to “ensure[] that the named plaintiffs are appropriate representatives of the class whose claims they wish to litigate.”²⁴ Although there is no uniform standard across the circuits, many circuits require the plaintiff to prove these four prerequisites by a preponderance of the evidence.²⁵

All class actions must have a class that satisfies the prerequisites of subsection (a) *and* fits into one of the three “types” of class actions under subsection (b).²⁶ The first type—(b)(1)—addresses the risks associated with maintaining separate actions.²⁷ Class actions are appropriate if they would prevent: (1) “inconsistent or varying adjudications with respect to individual class members” that would require the opposing party to have to comply with

21. See *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350–51 (2011) (referencing the “rigorous analysis” that is necessary in class certification decisions before overturning certification on commonality grounds under subsection (a) (quoting *Gen. Tel. Co. of the Sw. v. Falcon*, 457 U.S. 147, 161 (1982))).

22. FED. R. CIV. P. 23(a).

23. See 1 MCLAUGHLIN, *supra* note 15, § 4:1 (providing the shorthand label for each of the subsection (a) prerequisites).

24. *Wal-Mart*, 564 U.S. at 349.

25. See, e.g., *In re Cmty. Bank of N. Va. Mortg. Lending Practices Litig.*, 795 F.3d 380, 391 (3d Cir. 2015) (“The parties seeking class certification bear the burden of establishing by a preponderance of the evidence that the requirements of Rule 23(a) have been met.”); *Levitt v. J.P. Morgan Sec., Inc.*, 710 F.3d 454, 465 (2d Cir. 2013) (“The Rule 23 requirements must be established by at least a preponderance of the evidence.” (quoting *Brown v. Kelly*, 609 F.3d 467, 476 (2d Cir. 2010))); *Alaska Elec. Pension Fund v. Flowserve Corp.*, 572 F.3d 221, 228 (5th Cir. 2009) (holding that loss causation must be proved by a preponderance of evidence even at the class-certification stage, in line with Second and Third Circuit practice); see also 1 MCLAUGHLIN, *supra* note 15, § 4.1 (“While the Supreme Court has not definitively attached a standard of proof to the Rule 23 findings, most courts apply a preponderance of the evidence standard.”).

26. FED. R. CIV. P. 23(b).

27. *Id.* R. 23(b)(1).

“incompatible standards of conduct”;²⁸ or (2) adjudications of individual class members that “would be dispositive of the interests of the other members not parties to the individual adjudications or would substantially impair or impede their ability to protect their interests.”²⁹ The first subtype of (b)(1) classes concerns instances in which the party opposing the class—typically the defendant—must treat class members the same because either the law mandates equal treatment or practical necessity requires the defendant to treat class members equally.³⁰ The second subtype involves issues in which an early judgment or judgments for some plaintiffs “might exhaust a defendant’s resources” and preclude recovery for subsequent plaintiffs.³¹

The second type of class action—(b)(2)—concerns the use of injunctive or declaratory relief because “the party opposing the class has acted or refused to act on grounds that apply generally to the class.”³² An essential prerequisite of this class action is that a single relief must apply to all class members, ensuring the court would not have to tailor the relief for each individual class member.³³

The third type of class action—(b)(3)—is the “adventurous innovation”³⁴ in Rule 23 because “[i]t allows class certification in a much wider set of circumstances but with greater procedural protections.”³⁵ A court that certifies a class under this third type of class action has greater latitude for its decision.³⁶ The court simply must “find[] that the 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.”³⁷ Unlike the

28. *Id.* R. 23(b)(1)(A).

29. *Id.* R. 23(b)(1)(B).

30. *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 614 (1997) (recognizing the two typical situations that allow for a Rule 23(b)(1)(A) class).

31. 1 *MCLAUGHLIN*, *supra* note 15, § 5:8 (referring to this subset of class actions as “limited fund class actions”).

32. FED. R. CIV. P. 23(b)(2).

33. *See Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 360 (2011) (“[Rule 23(b)(2)] does not authorize class certification when each individual class member would be entitled to a different injunction or declaratory judgment against the defendant.” (emphasis omitted)). This Note does not focus on Rule 23(b)(1) or (2), as the issues raised under this Note fall under the Rule 23(b)(3) category.

34. *Id.* at 362 (quoting *Amchem*, 521 U.S. at 614).

35. *Id.*

36. *See id.* (“[Rule 23(b)(3)] allows class certification in a much wider set of circumstances”); Tobias Barrington Wolff, *Discretion in Class Certification*, 162 U. PA. L. REV. 1897, 1898 (2014) (“The authority of district courts to make judgments about how to structure a complex proceeding—and to decide whether practical obstacles to the fair and accurate adjudication of claims on a class-wide basis make certification inappropriate—is a familiar one that enjoys an explicit textual foundation in Rule 23(b)(3) proceedings.”).

37. FED. R. CIV. P. 23(b)(3). This Note refers to this type of class action as the “predominance” type.

previous two types of class actions, Rule 23(b)(3) explicitly lays out four factors for a trial court to consider when it is deciding whether to certify under this type of class action: (1) “the class members’ interests in individually controlling” an action; (2) any existing litigation involving class members; (3) the appropriateness of the specific forum; and (4) the difficulties associated with managing a class.³⁸ Furthermore, the certifying court must provide notice (to the extent it is practical) to potential class members, and potential class members have the ability to opt out of this type of class.³⁹

In 2011, the Supreme Court provided further insight into the standards of Rule 23, specifically the commonality requirement. In *Wal-Mart Stores, Inc. v. Dukes*, the Court held that plaintiffs must not only have a common injury, but also that the injury “must be of such a nature that it is capable of classwide resolution—which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke.”⁴⁰ In effect, the Court required that a common question result in a common answer.⁴¹ In dissent, Justice Ginsburg argued that in interpreting the commonality requirement in such a way, “[t]he Court blends Rule 23(a)(2)’s threshold criterion with the more demanding criteria of Rule 23(b)(3), and thereby elevates the (a)(2) inquiry.”⁴² The difference between (a)(2) and (b)(3) remains unclear.⁴³

In *Wal-Mart*, along with other recent decisions, the Court acknowledged that as a part of the certification decision, a district court will often have to make determinations on the merits of the plaintiff’s claim to ensure that the

38. *Id.*

39. *Id.* R. 23(c)(2)(B); *see also Wal-Mart*, 564 U.S. at 362 (“And unlike (b)(1) and (b)(2) classes, the (b)(3) class is not mandatory; class members are entitled to receive ‘the best notice that is practicable under the circumstances’ and to withdraw from the class at their option.” (quoting FED. R. CIV. P. 23(c)(2)(B))).

40. *Wal-Mart*, 564 U.S. at 350.

41. *Id.*; *see also* Klonoff, *supra* note 18, at 775 (“Thus, under the *Dukes* formulation, it is not enough that the question is common; rather, the question must be essential to the outcome of the case.”); Richard A. Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U. L. REV. 97, 132 (2009) (explaining that class actions should depend upon the ability “to generate common answers apt to drive the resolution of the litigation” (emphasis omitted)). *But see* Andrew J. Trask, *Reactions to Wal-Mart v. Dukes: Litigation Strategy and Legal Change*, 62 DEPAUL L. REV. 791, 808 (2013) (explaining that the Court did not impose a new standard because “courts have always required class actions to provide common answers”).

42. *Wal-Mart*, 564 U.S. at 375 (Ginsburg, J., dissenting).

43. *See* Trask, *supra* note 41, at 792–93 (describing the confusion among circuits about the relationship between (a)(2) and (b)(3)).

class satisfies all the requirements of Rule 23.⁴⁴ A party seeking class certification cannot satisfy the Rule 23 standards through pleadings alone.⁴⁵

2. The “Procedural” Requirements of Rule 23

Rule 23’s procedural subsections highlight how the district court is the court “intimately familiar with such practical and factual intricacies of the suit.”⁴⁶ After issuing an order on certification “[a]t an early practicable time,”⁴⁷ the district court still retains the discretion to “alter[] or amend[] [the certification order] before final judgment.”⁴⁸ The district court also has broad discretion to manage the proceeding, parties, and any notice to class members, and the district court may alter or amend decisions about how to conduct the proceeding.⁴⁹ After a certification order, the circuit court may only review the certification decision if a party files a petition within 14 days of the order.⁵⁰ Although parties may pursue an interlocutory appeal on a certification order, parties still retain the right to appeal the certification decision after final judgment.⁵¹ The district court also has the ability to alter or amend the certification order even after a Rule 23(f) decision, so long as the district court does not contradict the circuit court’s decision.⁵² Although the procedural subsections of Rule 23 demonstrate that the district court maintains intimate control over the class certification process, a Rule 23(f) interlocutory appeal replaces this control with that of the circuit court.

44. *Wal-Mart*, 564 U.S. at 350–51 (holding that an analysis of the merits of a plaintiff’s claim in order to determine if Rule 23(a) has been satisfied is inevitable); *see also* *Amgen Inc. v. Conn. Ret. Plans & Tr. Funds*, 133 S. Ct. 1184, 1195 (2013) (recognizing that the district court often needs to explore the merits of the plaintiff’s claim but that the court should not evaluate merit questions that are irrelevant to the certification decision); *Comcast Corp. v. Behrend*, 133 S. Ct. 1426, 1432–33 (2013) (holding that a district court will have to examine the merits of a plaintiff’s claim in order to satisfy Rule 23(b)).

45. *Wal-Mart*, 564 U.S. at 350 (requiring courts “to probe behind the pleadings before coming to rest on the certification question” (quoting *Gen. Tel. Co. of the Sw. v. Falcon*, 457 U.S. 147, 160 (1982))).

46. *Lowery v. Circuit City Stores, Inc.*, 158 F.3d 742, 758 (4th Cir. 1998), *vacated on other grounds*, 527 U.S. 1031 (1999).

47. FED. R. CIV. P. 23(c)(1)(A).

48. *Id.* R. 23(c)(1)(C).

49. *See id.* R. 23(d) (listing the aspects of the class action that a trial court may control or amend).

50. *Id.* R. 23(f). On the other hand, courts of appeals have wide latitude in accepting appeals on the certification order. *See* FED. R. CIV. P. 23(f) advisory committee’s note to 1998 amendment. Further, the trial court does not have to certify the certification order before the appeal, and the typical standard for the issue of law that justifies an interlocutory appeal under 28 U.S.C. § 1292(b) (2012) does not apply. *Id.*

51. *See* *Molski v. Gleich*, 318 F.3d 937, 951 n.17 (9th Cir. 2003) (recognizing that Rule 23(f) provides for a “permissive interlocutory appeal” and failure to do so does not “waive[] an appeal after the final certification order”), *overruled on other grounds by* *Dukes v. Wal-Mart Stores, Inc.*, 603 F.3d 571 (9th Cir. 2010), *rev’d*, 564 U.S. 338 (2011); *see also* 2 MCLAUGHLIN, *supra* note 15, § 7:1.

52. *Gene & Gene, L.L.C. v. BioPay, L.L.C.*, 624 F.3d 698, 703–04 (5th Cir. 2010).

B. FEDERAL APPELLATE STANDARDS OF REVIEW

For practical purposes, the standard of review for an appeal in the federal system is one of the first factors that an appellate attorney should consider.⁵³ In fact, for briefs submitted to the circuit courts, the brief *must* include “the applicable standard of review” for each issue.⁵⁴ There are three broad standards of review: (1) questions of law are reviewable de novo; (2) questions of fact are reviewable for clear error; and (3) discretionary matters for the trial court are reviewable for abuse of discretion.⁵⁵

Under de novo review, the appellate court exercises independent review of the legal issues and gives no deference to the trial court’s interpretation of law.⁵⁶ Whereas trial courts must devote their attention to determining factual and evidentiary issues,⁵⁷ the appellate court’s “primary function” is serving “as an expositor of law.”⁵⁸ While appellate courts technically give no deference to a trial court’s interpretation of law, the appellate court may more readily accept the trial court’s legal determination if the trial court supports its decision with a well-reasoned opinion or if the issue involves a well-settled legal issue.⁵⁹

When reviewing a trial court’s factual findings for clear error, the appellate court may only set aside the trial court’s findings of fact when the findings are “clearly erroneous.”⁶⁰ Unlike the de novo standard, which is a product of common law,⁶¹ the Federal Rules of Civil Procedure set forth the clearly erroneous standard.⁶² An appellate court only finds clear error when it, based on all the available evidence, “is left with the definite and firm conviction that a mistake has been committed.”⁶³ So long as a trial court’s

53. See 1 STEVEN ALAN CHILDRESS & MARTHA S. DAVIS, *FEDERAL STANDARDS OF REVIEW* § 1.01 (4th ed. 2010) (acknowledging that standards of review have practical consequences and meaning beyond the words themselves); DAVID G. KNIBB, *FEDERAL COURT OF APPEALS MANUAL* § 31:1 (6th ed. 2013) (“Indeed, [the standards of review] should be one of your first considerations when deciding whether to appeal.”); Kevin Casey et al., *Standards of Appellate Review in the Federal Circuit: Substance and Semantics*, 11 *FED. CIR. B.J.* 279, 281 (2001) (“Faced with a difficult standard, the advocate might consider not appealing or, at least, not appealing just yet.”).

54. *FED. R. APP. P.* 28(a)(8)(B).

55. *Harman v. Apfel*, 211 F.3d 1172, 1175 (9th Cir. 2000).

56. See *Salve Regina Coll. v. Russell*, 499 U.S. 225, 231 (1991) (“Independent appellate review of legal issues best serves the dual goals of doctrinal coherence and economy of judicial administration.”).

57. *Id.* (describing how the trial courts must “devote much of their energy and resources to hearing witnesses and reviewing evidence”).

58. *Miller v. Fenton*, 474 U.S. 104, 114 (1985).

59. See KNIBB, *supra* note 53, § 31:3.

60. *FED. R. CIV. P.* 52(a)(6).

61. See 1 CHILDRESS & DAVIS, *supra* note 53, § 2.13, at 2-82 (“A question of law may be decided de novo. Although Federal Rule of Civil Procedure 52 does not state this maxim, it is easily inferred from Rule 52’s stated deference on facts and the historical role of appellate courts.” (footnote omitted)).

62. *FED. R. CIV. P.* 52(a)(6).

63. *United States v. U.S. Gypsum Co.*, 333 U.S. 364, 395 (1948).

factual finding is plausible, the appellate court may not substitute its judgment for that of the trial court on the basis that the appellate court would have come to a different conclusion based on the facts.⁶⁴ If both the trial and appellate courts' views are permissible, then the trial court's view will prevail.⁶⁵ The clearly erroneous standard applies to all categories of facts, including both subsidiary and ultimate facts.⁶⁶

Both of the preceding standards rely upon a clear distinction between law and fact, but the Court recognizes that there is not a formula for distinguishing law from fact and that doing so is often difficult.⁶⁷ Nevertheless, the difficulty in delineating the two does not excuse a court from distinguishing questions of fact from law.⁶⁸ Many circuits have established various approaches for determining whether certain categories of questions are law or fact.⁶⁹

The third type of appellate review is for abuse of discretion. This standard typically applies to issues that are in a middle ground between questions of law and fact—cases where it is obvious the question does not involve a fact, but *de novo* review seems inappropriate as well.⁷⁰ This middle ground most often concerns a trial court's broad discretion in its "supervision of litigation."⁷¹ When there is no "right" or "wrong" answer to an issue before the court, and the trial court acts reasonably in its decision, then the trial court is typically not thought to abuse its discretion.⁷² There is no clear, uniform standard for what the abuse-of-discretion standard entails,⁷³ but the flexibility of the standard typically involves weighing the trial court's close relationship with the proceeding against the need for a uniform legal rule or application.⁷⁴

64. *Anderson v. City of Bessemer City*, 470 U.S. 564, 573–74 (1985).

65. *Id.*

66. *Teva Pharm. USA, Inc. v. Sandoz, Inc.*, 135 S. Ct. 831, 836–37 (2015) (citing *Pullman–Standard v. Swint*, 456 U.S. 273, 287 (1982)).

67. *See Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 501 (1984) (recognizing that Federal Rule of Civil Procedure 52(a) does not establish a test for distinguishing law from fact and "the vexing nature" of trying to distinguish the two (quoting *Pullman*, 456 U.S. at 288)).

68. *See id.*

69. 1 CHILDRESS & DAVIS, *supra* note 53, § 2.21 (describing certain areas of law where circuit courts have precedent for distinguishing fact from law).

70. *See Pierce v. Underwood*, 487 U.S. 552, 558 n.1 (1988) (reasoning that Congress would not have expected the *de novo* standard to have applied to issues involving the "supervision of litigation").

71. *See id.*

72. *Wheat v. United States*, 486 U.S. 153, 164 (1988) ("Other district courts might have reached differing or opposite conclusions with equal justification, but that does not mean that one conclusion was 'right' and the other 'wrong.'"); *Delno v. Mkt. St. Ry. Co.*, 124 F.2d 965, 967 (9th Cir. 1942) ("If reasonable men could differ as to the propriety of the action taken by the trial court, then it cannot be said that the trial court abused its discretion.").

73. *See* 1 CHILDRESS & DAVIS, *supra* note 53, § 4.01 (explaining that the standard changes based on the circuit and the nature of the trial court's discretionary act).

74. Henry J. Friendly, *Indiscretion About Discretion*, 31 EMORY L.J. 747, 783–84 (1982).

Currently, the federal circuit courts apply this ambiguous standard when reviewing interlocutory appeals from district courts' certification orders.

C. *THE BASICS OF ROYALTY LITIGATION IN TEXAS OIL AND GAS LAW*

Although royalty litigation only serves as a case study for a broader issue in class certification in this Note, a brief introduction of the principles behind royalty litigation is necessary.⁷⁵ Unlike typical real-property law, oil and gas leases transfer a fee simple determinable to the lessee—typically an oil or gas production company—for all the minerals that the lessor owns within his or her land.⁷⁶ Rather than split the profits, lessors that own royalty interests receive “a certain proportion of the oil, or its value, or a certain sum per producing well in the case of gas, which is payable only in case oil or gas is produced,” thus constituting the specific event not certain to occur in the fee simple determinable.⁷⁷

These royalty-interest leases between the landowners and production companies provide for how the production company will pay the royalty interest, and there are two common methods of determining the royalty payments: market-value and proceeds.⁷⁸ Under a market-value provision, the royalty paid is “based on the prevailing market price at the time of sale.”⁷⁹ A proceeds royalty provision provides for payment to the royalty owner based on the proceeds the lessee earns from the actual sale.⁸⁰ The court will look to the plain terms of the lease to establish whether the parties formed a market-value lease or a proceeds lease.⁸¹

Beyond the text of a lease, Texas law imposes implied duties on the lessee.⁸² The implied duty to “reasonably market” focuses on the lessee’s conduct, “ask[ing] whether the lessee acted as ‘a reasonably prudent operator

75. This Note relies upon Texas oil and gas law for its case study, as Texas produces the most oil and gas domestically, and royalty litigation is frequent. *See infra* note 155 and accompanying text.

76. *Nat. Gas Pipeline Co. of Am. v. Pool*, 124 S.W.3d 188, 192 (Tex. 2003); *see also* THOMAS P. GALLANIS & LAWRENCE W. WAGGONER, *ESTATES, FUTURE INTERESTS, AND POWERS OF APPOINTMENT IN A NUTSHELL* 24 (5th ed. 2014) (“The *fee simple determinable* is a fee estate subject to a *special limitation*, which means that it automatically terminates if the specified event happens; the specified event is an event not certain to occur.”).

77. A.W. Walker, Jr., *Fee Simple Ownership of Oil and Gas in Texas*, 6 TEX. L. REV. 125, 136 (1928). Even in 1928, there was no market for obtaining rights in oil and gas through means other than bonuses—money paid upon the discovery of oil—and royalty interests. *Id.*

78. *See Tex. Oil & Gas Corp. v. Vela*, 429 S.W.2d 866, 871 (Tex. 1968) (“It is clear then that the parties knew how to and did provide for royalties payable in kind, based upon market price or market value, and based upon the proceeds derived by the lessee from the sale of gas.”).

79. *Yzaguirre v. KCS Res., Inc.*, 53 S.W.3d 368, 372 (Tex. 2001).

80. *Id.*

81. *Id.* at 372–73.

82. *Id.* at 373.

under the same or similar facts and circumstances.”⁸³ However, courts only read in implied duties when the express terms of the lease do not cover the same subject matter as the duty.⁸⁴ Consequently, express market-value lease provisions supersede the implied duty to reasonably market,⁸⁵ and proceeds leases only contain an implied duty to reasonably market when no lease provision expressly addresses the duty to market.⁸⁶ On the basis of commonality, small differences in royalty provisions may ultimately affect royalty owners’ ability to bring a class action.⁸⁷

III. THE CIRCUIT COURTS’ UNDEFINED POWER OVER CLASS CERTIFICATION

In the name of “rigorous analysis,” circuit courts have exercised demanding oversight of district courts’ decisions to certify.⁸⁸ Although the “rigorous analysis” idea originated in 1982,⁸⁹ the circuit courts had limited means of enforcing the rigorous-analysis requirement until 1998.⁹⁰ The 1998 induction of Rule 23(f) changed the game: Circuit courts can now review certification orders through interlocutory appeal, and the circuit courts have “unfettered discretion whether to permit the appeal, akin to the discretion exercised by the Supreme Court.”⁹¹ Although the Advisory Committee attempted to analogize the scope of Rule 23(f) to the limited availability of an interlocutory appeal under 28 U.S.C. § 1292(b), the Committee admitted that the circuit court has more discretion to allow an interlocutory appeal of a certification order under Rule 23(f) than the typical vehicle of § 1292(b).⁹² The Committee believed that the circuit courts would “develop standards for

83. *Union Pac. Res. Grp., Inc. v. Hankins*, 111 S.W.3d 69, 71 (Tex. 2003) (quoting *Amoco Prod. Co. v. Alexander*, 622 S.W.2d 563, 567–68 (Tex. 1981)).

84. *Yzaguirre*, 53 S.W.3d at 373.

85. *Id.* at 374.

86. *Bowden v. Phillips Petrol. Co.*, 247 S.W.3d 690, 701 (Tex. 2008).

87. *See infra* Part III.C.

88. *See Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350–51 (2011) (justifying appellate review of the trial court’s certification order to ensure that the trial court completed a “rigorous analysis” in evaluating Rule 23(a) prerequisites); *see also Comcast Corp. v. Behrend*, 133 S. Ct. 1426, 1432 (2013) (reasoning that trial courts must use the same “rigorous analysis” in order to determine that the class satisfies Rule 23(b)).

89. *Gen. Tel. Co. of the Sw. v. Falcon*, 457 U.S. 147, 161 (1982). For all the emphasis on the “rigorous analysis” required by *Falcon* throughout the Court’s subsequent decisions, the Court only mentions the phrase once in its entire opinion. *See id.* Further, the Court concedes that it “do[es] not . . . judge the propriety of a class certification by hindsight” and that the only issue in the trial court’s certification order was that it followed an established “across-the-board rule” for the class representative requirement. *Id.* at 160.

90. *See Klonoff, supra* note 18, at 738–39 (describing how the Seventh Circuit relied upon mandamus to review a certification decision but that other circuits were unwilling to resort to mandamus).

91. FED. R. CIV. P. 23(f) advisory committee’s note to 1998 amendment.

92. *Id.*

granting review.”⁹³ Without cognizable factors limiting the circuit courts’ ability to review appeals from certification orders, the circuit courts, in their own discretion, decide how involved they will be in district courts’ certification orders.⁹⁴

While problems certainly arise when there is no standard for how circuit courts may grant appeals, these problems—associated with the adoption of Rule 23(f)—allude to the problem at the core of this Note: Circuit courts that grant Rule 23(f) appeals only change the nature of the litigation when they substitute their own determination for the district court’s determination on the certification question. Otherwise, the only burden placed on the parties is the possibility of a delay in the litigation while the circuit court hears the Rule 23(f) appeal.⁹⁵ When a circuit grants an appeal, the circuit is most likely indicating that it takes issue with the district court’s certification order;⁹⁶ however, if constrained by a standard of review, the grant of review does not necessarily spell a reversal of the certification order.⁹⁷

Unclear appellate review of certification orders has caused three troubling current trends in class action litigation. First, Part III.A presents the current statistics for circuit courts’ decisions on certification orders that potentially reflect general biases regarding certification broadly. Second, Part III.B explores some of the circuit courts’ standard-of-review language to illustrate the unclear relationship between circuit and district courts regarding the certification order. Third, Part III.C describes the reasoning behind the appellate courts’ review of certification orders in royalty litigation and the practical consequences of barring certification for a class of royalty owners.

93. *Id.*

94. See generally Michael E. Solimine & Christine Oliver Hines, *Deciding to Decide: Class Action Certification and Interlocutory Review by the United States Courts of Appeals Under Rule 23(f)*, 41 WM. & MARY L. REV. 1531 (2000) (proposing standards for when a circuit court should accept a Rule 23(f) appeal).

95. Rule 23(f) does not grant an automatic stay on the trial court proceedings. FED. R. CIV. P. 23(f). The district court or circuit court must affirmatively stay the district court proceedings. *Id.* In fact, circuit courts should not allow for Rule 23(f) to serve “as a vehicle to delay proceedings in the district court,” and neither court should stay the district court proceeding “unless the likelihood of error on the part of the district court tips the balance of hardships in favor of the party seeking the stay.” *In re Sumitomo Copper Litig.*, 262 F.3d 134, 140 (2d Cir. 2001).

96. See Klonoff, *supra* note 18, at 740–41 (describing the different considerations that circuit courts use when determining whether to grant an appeal, including: (1) the fear that the certification order will be “the death knell” for a party; (2) an opportunity to develop case law on class actions; or (3) an initial determination that the certification was manifestly erroneous).

97. Problems arise, as this Note will explain, when the circuit courts do not have a uniform standard of review. Royalty litigation demonstrates this issue. For example, in *Stirman v. Exxon Corp.*, the district court certified a class of royalty owners on the basis of a shared “implied covenant to market” in their natural gas leases. *Stirman v. Exxon Corp.*, 280 F.3d 554, 561 (5th Cir. 2002). The defendant gas company filed an interlocutory appeal under Rule 23(f), and the Fifth Circuit reversed the certification order. *Id.* at 558. The Fifth Circuit referenced the abuse-of-discretion standard, but it then emphasized how it still may rely on *de novo* review. *Id.* at 561–62.

A. CHANCES OF CERTIFICATION: THE STATISTICS BEHIND THE REVIEW OF CERTIFICATION ORDERS

On its face, Rule 23(f) allows both plaintiffs and defendants an equal opportunity to contest the district court's certification order⁹⁸: "an order granting or denying" certification is appealable.⁹⁹ In theory, Rule 23(f) is "neutral" toward the parties, prioritizing neither appeals granting nor denying certification.¹⁰⁰ However, statistics for both the circuit courts' decisions to grant or deny a Rule 23(f) appeal and the reversal rates of district courts' orders paint a different picture: "Rule 23(f) has served primarily as a device to protect defendants."¹⁰¹

Between October 31, 2006, and December 13, 2013, the circuit courts decided 889 Rule 23(f) petitions for permission to appeal.¹⁰² Of the 889 petitions decided, the circuits granted review of 204 appeals, for a grant rate of 22.9%.¹⁰³ Of Rule 23(f) petitions decided by the circuit courts, defendants accounted for 501 of the appeals, and the circuit courts granted review of 124 of the appeals by defendants—a grant rate of 24.8%.¹⁰⁴ As for plaintiffs, circuit courts decided 376 appeals by plaintiffs and granted review of 77 of these appeals—a grant rate of 20.5%.¹⁰⁵ When taken altogether, the circuit courts are granting review of more appeals by defendants, but the statistical difference does not seem overly disparate.¹⁰⁶

The Second, Seventh, and Ninth Circuits have a unique impact on these statistics. Of the 889 petitions decided, these three circuits accounted for 528 of the decisions.¹⁰⁷ Taking these three circuits together, defendants accounted for slightly more of the petitions decided by the circuits, but the

98. Although the term "certification order" might imply that the district court's order certified a class, the term, at least in this Note, refers to the order on the certification motion irrespective of the decision to grant or deny certification.

99. FED. R. CIV. P. 23(f); *see also* Klonoff, *supra* note 18, at 740 ("Under Rule 23(f), either plaintiff (upon denial of certification) or defendant (upon the grant of certification) can ask the appellate court to grant interlocutory review.").

100. Klonoff, *supra* note 18, at 740.

101. *Id.* at 741.

102. Memorandum from John H. Beisner et al., Skadden, Arps, Slate, Meagher & Flom LLP, Study Reveals US Courts of Appeal Are Less Receptive to Reviewing Class Certification Rulings app. A tbl. (Apr. 29, 2014), <https://www.skadden.com/insights/publications/2014/04/study-reveals-us-courts-of-appeal-are-less-recepti> (scroll to the bottom, open "study results").

103. *Id.*

104. *Id.*

105. *Id.*

106. Excluded from these percentages are the instances where both parties petitioned the certification order for review, but in the 889 cases decided by the circuit courts, both parties petitioned for review in only 12 of these decisions. *Id.*

107. *Id.*

plaintiffs and defendants had virtually the same success rate for their petitions.¹⁰⁸

The same trend does not hold true for every circuit, namely the circuit that encompasses Texas—the Fifth Circuit. Over the same relevant period of time, the Fifth Circuit decided 28 petitions.¹⁰⁹ Of the 14 petitions filed by plaintiffs, the Fifth Circuit granted review of 4 cases—a grant rate of 28.6%.¹¹⁰ For the 13 petitions filed by defendants, the Fifth Circuit granted review of 9 cases—a grant rate of 69.2%.¹¹¹ The Fourth Circuit was the only other circuit with a grant rate over 50% for either party. It granted 66.7% of petitions filed by plaintiffs, but it only decided three cases from petitions filed by plaintiffs over the relevant time period.¹¹²

While the decision whether to grant review under Rule 23(f) may be troublesome in itself—as granting a petition means that the circuit court is involving itself in the certification decision—a grant for review does not necessarily mean that the circuit court will reverse the district court’s certification order. The circuit courts may still ultimately agree with the district courts’ decision. The Second and Ninth Circuits prove that the decision to review a certification order is not dispositive of the ultimate decision to affirm or reverse the order. In fact, both circuits affirmed more certification orders than they reversed.¹¹³ More importantly, both circuits affirmed more orders *denying* certification than they reversed, confirming their general propensity to affirm district courts.¹¹⁴

Meanwhile, the Fifth Circuit was more likely to reverse a certification order than affirm. Of the 13 decisions it rendered, 8 reversed the district court’s certification order.¹¹⁵ More significantly, the Fifth Circuit reversed seven of eight orders when the district court *granted* certification, but it affirmed three of four orders when the district court *denied* certification.¹¹⁶ This approach by the Fifth Circuit distinguishes it from even the Seventh Circuit—which also tends to reverse certification orders more often than it

108. In these three circuits, both plaintiffs and defendants had a grant rate for petitions of approximately 22%. *Id.*

109. *Id.* Only one of these petitions involved a case where both parties petitioned. *Id.*

110. *Id.*

111. *Id.*

112. *Id.*

113. *Id.* at app. B tbl. The Second Circuit affirmed eight district court orders and reversed five. *Id.* The Ninth Circuit affirmed 16 district court orders and reversed 12. *Id.* These numbers do not reflect circuit court decisions to dismiss an appeal or cases where the disposition of the case was not clear. *See id.*

114. *Id.*

115. *Id.*

116. *Id.* The Fifth Circuit dismissed one case. *Id.*

affirms—because the Seventh Circuit is likely to reverse certification orders regardless of whether the orders granted or denied certification.¹¹⁷

At least from a purely statistical perspective, the argument that Rule 23(f) serves defendants more than plaintiffs is not necessarily clear from a national standpoint,¹¹⁸ but the theory has some weight inside the Fifth Circuit. Nevertheless, statistics cannot provide insight into the circuit courts' reasoning or illustrate the actual merits behind a specific class. A circuit court may be able to justify any idiosyncrasies regarding its decisions to grant review based on the rationale that it has "unfettered discretion" to accept an interlocutory appeal.¹¹⁹ On the other hand, once a circuit court grants review, the applicable standard of review should constrain the circuit court's ability to reverse a certification order. The next Subparts explore this issue.

B. DOES "ABUSE OF DISCRETION" HAVE ANY MEANING?

The general consensus is that appellate courts should review district court certification orders under an abuse-of-discretion standard.¹²⁰ Many appellate courts reviewing certification orders for classes of royalty owners recognize that abuse of discretion is the accepted standard, even if courts fail to apply it uniformly.¹²¹ The rationale behind this standard of review is that the district court should have broad discretion to effectively manage the litigation before it.¹²² Unlike the standard of review for factual findings,¹²³ the abuse-of-discretion standard has no textual basis in Rule 23 or any of the Federal Rules of Civil Procedure.¹²⁴

117. For appeals in which the district court granted certification, the Seventh Circuit affirmed the order 8 times and reversed it 13 times. *Id.* For appeals in which the district court denied certification, the Seventh Circuit affirmed the order one time and reversed it seven times. *Id.*

118. See *supra* note 101 and accompanying text.

119. See FED. R. CIV. P. 23(f) advisory committee's note to 1998 amendment.

120. See *Califano v. Yamasaki*, 442 U.S. 682, 706 (1979) ("[T]he *Buffington* court did not abuse its discretion in certifying a nationwide class . . ."); 2 MCLAUGHLIN, *supra* note 15, § 7:2 ("[T]he circuits will bear in mind the abuse of discretion standard under which class certification decisions are reviewed.").

121. See, e.g., *EQT Prod. Co. v. Adair*, 764 F.3d 347, 357 (4th Cir. 2014) ("A district court abuses its discretion when it materially misapplies the requirements of Rule 23."); *Wallace B. Roderick Revocable Living Tr. v. XTO Energy, Inc.*, 725 F.3d 1213, 1217 (10th Cir. 2013) ("Material misapplication of the Rule 23 factors constitutes an abuse of discretion." (citing *Shook v. El Paso Cty.*, 386 F.3d 963, 968 (10th Cir. 2004))); *Stirman v. Exxon Corp.*, 280 F.3d 554, 561–62 (5th Cir. 2002) (holding that the circuit court "review[s] the decision of a district court to certify a class for abuse of discretion" before also holding that *de novo* review applies to the legal standard behind the certification decision).

122. *Beattie v. CenturyTel, Inc.*, 511 F.3d 554, 559 (6th Cir. 2007); *Allison v. Citgo Petrol. Corp.*, 151 F.3d 402, 408 (5th Cir. 1998).

123. FED. R. CIV. P. 52(a)(6).

124. See *id.* R. 23(f) (explaining the availability of an interlocutory appeal but not setting any parameters regarding the nature of the appeal itself).

Without any textual hook, some circuits are very liberal in how they construe the abuse-of-discretion standard for a Rule 23(f) appeal. The Second Circuit explicitly stated that it is more deferential to orders granting certification than it is to orders denying certification, effectively favoring plaintiffs.¹²⁵ In one recent decision, the Eleventh Circuit held that “in the context of class actions, review for abuse of discretion often ‘does not differ greatly from review for error.’”¹²⁶ Neither of these approaches appear consistent with Rule 23(f) or the abuse-of-discretion standard. The Second Circuit appears to ignore the party-neutral aspect of Rule 23(f)¹²⁷ and presumptively favors discretion so long as the district court certifies a class. The Eleventh Circuit suggests that an entirely different standard of review (*de novo*) can apply for certain certification orders.¹²⁸

As a further issue complicating the standard of review for certification orders, circuit courts review the certification order for an abuse of discretion, but any certification order will involve issues of both law and fact.¹²⁹ The abuse-of-discretion standard can be misleading when the district court’s decision on Rule 23 “pose[s] pure issues of law reviewed *de novo* or occasionally raw fact findings that are rarely disturbed.”¹³⁰ Questions of law in the context of class certification can occur when the district court mistakenly applies the wrong “legal standard” under Rule 23.¹³¹ Questions of law also occur when the district court misinterprets the substantive law that the class relies upon to satisfy the Rule 23(a) or (b) requirements.¹³² On the other side, factual questions typically involve an inquiry into whether certain events

125. See *Roach v. T.L. Cannon Corp.*, 778 F.3d 401, 405 (2d Cir. 2015) (affording less deference to decisions denying class certification); *In re Salomon Analyst Metromedia Litig.*, 544 F.3d 474, 480 (2d Cir. 2008) (“When reviewing a grant of class certification, we accord the district court noticeably more deference than when we review a denial of class certification.”), *abrogated on other grounds by Amgen Inc. v. Conn. Ret. Plans & Tr. Funds*, 133 S. Ct. 1184 (2013). Statistics suggest that the presumption in favor of orders certifying a class does not result in a windfall for plaintiffs: The Second and Ninth Circuits affirmed and reversed an equal number of certified classes over a seven-year period. Memorandum from John H. Beisner et al., *supra* note 102.

126. *Brown v. Electrolux Home Prods., Inc.*, 817 F.3d 1225, 1233 (11th Cir. 2016) (quoting *Abrams v. Interco Inc.*, 719 F.2d 23, 28 (2d Cir. 1983)).

127. See *supra* text accompanying notes 98–100.

128. Although the Eleventh Circuit quotes *Abrams* as precedent, the *Abrams* decision came before the addition of Rule 23(f) and the resulting increase in interlocutory appeals. See generally *Abrams*, 719 F.2d 23.

129. See Wolff, *supra* note 36, at 1901–03 (explaining the need for rules of law versus the need for deference on factual issues when reviewing a certification order).

130. *Tardiff v. Knox Cty.*, 365 F.3d 1, 4 (1st Cir. 2004).

131. *Allison v. Citgo Petrol. Corp.*, 151 F.3d 402, 408, 416 (5th Cir. 1998).

132. See *Stirman v. Exxon Corp.*, 280 F.3d 554, 564–66 (5th Cir. 2002) (finding that a class of royalty owners could not satisfy the Rule 23 requirements when certain states did not recognize an implied covenant to market).

relating to the injury actually occurred.¹³³ Circuit courts will uphold such findings unless clearly erroneous.¹³⁴

The different standards for reviewing issues of law versus fact might be relatively clear for courts, but distinguishing law from fact is not.¹³⁵ If an issue appealed arguably involves questions of both law and fact, many circuits will treat the issue as a “mixed question” of law and fact and review the entire “mixed question” de novo.¹³⁶ The line between law and fact is difficult to draw, and many critics speculate that circuit courts label an issue based on their desire to review certain types of issues.¹³⁷

The tension in reviewing class certification orders stems from the uncertainty behind standards of review generally. Appellate courts are reviewing a *procedural* tool but are demanding a “rigorous analysis” that involves exploring the “merits” of the underlying action.¹³⁸ Judge Friendly’s often-cited understanding of discretion recognizes discretion as a matter of degree: less deference for matters requiring uniformity among courts, more deference “where the decision depends on first-hand observation or direct contact with the litigation.”¹³⁹ Under Judge Friendly’s approach, issues of *pure* law or fact would therefore fall on the far ends of this spectrum, and applying the traditional standards of review for a certification order with such issues (i.e., de novo and clearly erroneous) makes sense. For everything in between pure issues of law or fact, the abuse-of-discretion standard should determine the extent of the district court’s “direct contact” with the class. This Note does not attempt to create a formula for determining what “direct contact” looks like in all class actions. Rather, it considers what degree of deference might be necessary for issues in royalty owner class certification.

133. See *In re* U.S. Foodservice Inc. Pricing Litig., 729 F.3d 108, 126 (2d Cir. 2013) (upholding a finding that a party did not enforce contract provisions related to the alleged injury).

134. *Id.*

135. Pullman-Standard v. Swint, 456 U.S. 273, 288 (1982) (“The Court has previously noted the vexing nature of the distinction between questions of fact and questions of law. . . . Nor do we yet know of any other rule or principle that will unerringly distinguish a factual finding from a legal conclusion.”).

136. 1 CHILDRESS & DAVIS, *supra* note 53, § 2.18; see also Ornelas v. United States, 517 U.S. 690, 691 (1996) (finding that “ultimate questions of reasonable suspicion and probable cause” receive de novo review). The First and Seventh Circuits are the noticeable exceptions to this rule, as they at least purport to give deference to district courts’ decisions on mixed questions. 1 CHILDRESS & DAVIS, *supra* note 53, § 2.18.

137. Casey et al., *supra* note 53, at 317.

138. Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 351 (2011).

139. Friendly, *supra* note 74 (quoting United States v. Criden, 648 F.2d 814, 817 (3d Cir. 1981)); see also Wolff, *supra* note 36, at 1901 (describing Friendly’s lecture as “canonical”).

C. THE ROYALTY OWNER CLASS: IMPOSSIBLE TO CERTIFY?

Oil and gas litigation may center on a variety of issues, but the royalty provisions in the leases are a frequent basis for litigation.¹⁴⁰ Oil and gas companies consistently underpay royalty owners in relation to their lease provisions, “[i]n some cases . . . pa[y]ing virtually nothing at all,” and royalty owners have “few . . . protective mechanisms” to challenge oil and gas companies individually.¹⁴¹ In the context of royalty class action litigation, differences in lease provisions can prove dispositive in the effort to certify a class, and these differences often prevent certification in courts in states like Texas—a jurisdiction with class action procedures that mirror the federal Rule 23.¹⁴² For example, the Texas Supreme Court has found that a class does not satisfy commonality when it contains both market-value and proceeds leases.¹⁴³ A market-value royalty provision requires the court to see if the royalty paid was the market value; a proceeds provision requires the court to determine if the proceeds paid “were a fraud or a sham.”¹⁴⁴ Although in reality the royalties owed under a market-value provision and a proceeds provision may be the same in a class including both types of leases, the royalties owed for each cannot “be established through common proof” because the *means* for determining the royalty differ.¹⁴⁵ Thus, the proposed class will most likely not be certified.

More recently, the Texas Supreme Court has been skeptical of classes that have only one type of lease (i.e., market-value or proceeds) but have both express and implied duty-to-market provisions.¹⁴⁶ Therefore, a class of proceeds leases may still not be certifiable if the claim relies on the duty to

140. William F. Carr & Paul R. Owen, *Clear as Crude: Defending Oil and Gas Royalty Litigation*, 37 NAT. RESOURCES J. 695, 696 (1997).

141. Lustgarten, *supra* note 5.

142. See generally Phillips Petrol. Co. v. Yarbrough, 405 S.W.3d 70 (Tex. 2013) (remanding the case because of unaddressed potential issues of typicality and predominance); Bowden v. Phillips Petrol. Co., 247 S.W.3d 690 (Tex. 2008) (finding that issues of well-by-well analysis predominated); Union Pac. Res. Grp., Inc. v. Hankins, 111 S.W.3d 69 (Tex. 2003) (finding that the proposed class did not satisfy the commonality requirement). The Texas class action rule is almost identical to Rule 23, and there are no substantive differences between the commonality and predominance requirements for each. Compare TEX. R. CIV. P. 42, with FED. R. CIV. P. 23. Texas courts also review certification decisions under the abuse-of-discretion standard. *Bowden*, 247 S.W.3d at 696.

143. See *Union Pac.*, 111 S.W.3d at 74–75 (finding that the possibility of individual inquiries defeats commonality because the royalties owed under market-value and proceeds might be different).

144. *Id.*

145. *Id.* at 75.

146. See *Bowden*, 247 S.W.3d at 701 (recognizing that the lessee had a duty to market to all class members, “but [the lessee] owes each royalty owner either an express or an implied duty, not both”). The court noted this issue with the duty to market, but it instead found certification improper because individual damages issues would predominate. *Id.* at 701–02; see also *Yarbrough*, 405 S.W.3d at 79 (“In turn, the existence of express covenants to market in some class members’ leases, while not necessarily defeating predominance, raises a significant issue . . .” (footnote omitted)).

market and some of the prospective class members' leases have express language on the duty to market while others have no language (requiring courts to read in the implied duty to market).¹⁴⁷ While the Texas Supreme Court has raised concerns about proposed classes of this nature, it has also admitted that an express duty-to-market provision might not “in practice require different conduct from the duty in the implied covenant to market.”¹⁴⁸

Focusing on the implications of oil and gas law, Fifth Circuit courts have been reluctant to certify a class under Rule 23 for many of the same issues that Texas courts cite.¹⁴⁹ Substantive oil and gas law in Texas—more so than the procedural issues behind class certification—has prompted courts to set a high bar for certification in royalty owner class actions.¹⁵⁰

Consequently, royalty owners are in a difficult, if not impossible, position. Production companies frequently underpay royalty owners to the tune of billions of dollars nationwide.¹⁵¹ The Fifth Circuit, at least statistically, is suspicious of class actions generally.¹⁵² Because the Fifth Circuit uses Texas oil and gas law to interpret the provisions of the lease, the Texas state courts have provided various rationales for the Fifth Circuit to use in reversing orders certifying classes in royalty litigation.¹⁵³ When their class certification is denied, most royalty owners cannot practically afford to assert their claim, and royalty owners remain vulnerable to the unfair practices of production companies.¹⁵⁴

Although the majority of oil and gas production occurs in Texas and the Fifth Circuit,¹⁵⁵ their approach toward royalty owner class actions does not, at

147. See *Bowden*, 247 S.W.3d at 701 (acknowledging the potential issue but not adjudicating it).

148. *Id.*; see also *Yarbrough*, 405 S.W.3d at 79 n.8 (recognizing that *Bowden* did not foreclose classes with both express and implied duties to market entirely).

149. See generally *Stirman v. Exxon Corp.*, 280 F.3d 554 (5th Cir. 2002) (reversing the certification order based on issues of typicality, adequacy of representation, and predominance); *Dvorin v. Chesapeake Expl., LLC*, No. 3:12-CV-3728-G, 2013 WL 6003433 (N.D. Tex. Nov. 13, 2013) (refusing certification based on the plaintiffs' failure to satisfy all of Rule 23(a), as well as 23(b)(3)); *Witt v. Chesapeake Expl., LLC*, 276 F.R.D. 458 (E.D. Tex. 2011) (refusing certification based on the likelihood that individualized damages would predominate any class-wide issue).

150. See John Burritt McArthur, *A Minority of One? The Reasons to Reject the Texas Supreme Court's Recent Abandonment of the Duty to Market in Market-Value Leases*, 37 TEX. TECH. L. REV. 271, 306 (2005) (explaining how new interpretations of Texas oil and gas law negatively impacts royalty owners trying to certify a class).

151. Lustgarten, *supra* note 5.

152. See *supra* Part III.A.

153. See *supra* text accompanying notes 142–48.

154. Haynes & Catlin, *supra* note 9; see also Christine R. Fritze, *The Class Action Lawsuit in North Dakota—Does It Have Any Relevance for Royalty Owners?*, 89 N.D.L. REV. 203, 203 (2013) (describing the class action “as a bastion against the stronger and often better-financed oil company”); Klonoff, *supra* note 18, at 830 (“For small-claim cases, it provides the only vehicle for recovery, absent a public enforcement action.”).

155. In September 2017, Texas produced 107,230,000 barrels of crude oil, more than triple North Dakota's production, the next closest state. *Crude Oil Production*, U.S. ENERGY INFO. ADMIN.,

least currently, reflect the approach of other jurisdictions. Many jurisdictions are considerably more permissive of royalty owner classes.¹⁵⁶

While Texas and Fifth Circuit courts have relied upon commonality, predominance, or other “substantive” requirements to deny class certification,¹⁵⁷ it is important to remember that *appellate courts* intervened to make many of these determinations about royalty owner classes. Appellate courts invoked the substantive requirements of class actions to justify their denial of certification to prospective royalty owner classes. In doing so, however, appellate courts substitute their own determinations for the trial courts’ determinations on the suitability of the class action vehicle—a managerial tool of the trial court. In other words, the appellate courts found that the trial courts abused their discretion. Consequently, trial courts that certify classes in the Fifth Circuit or Texas must acknowledge two risks. First, without a clear definition of the abuse-of-discretion standard, the trial court cannot anticipate how much deference a given appellate court will afford it in the context of certifying class actions generally. Second, in the context of royalty owner class actions, the more the trial court analyzes the merits of a case to make an informed certification decision, the more it risks an appellate court reversing the decision based on the trial court’s findings. Without a clearer standard of review, the litigants and trial courts enter a state of unnecessary uncertainty after the trial court’s certification order. This Note proposes what a clearer standard of review might look like.

IV. RESTORING THE DISTRICT COURT’S ROLE IN CERTIFICATION BY RESTORING ABUSE OF DISCRETION

Rule 23(a) and (b) have drawn their fair share of criticism, especially in light of decisions like *Wal-Mart* that arguably raised the standard for

https://www.eia.gov/dnav/pet/pet_crd_crpdn_adc_mbbbl_m.htm (last updated Dec. 29, 2017). Likewise, Texas’s gross withdrawal of 664,916 million cubic feet of natural gas in August 2017 exceeds Pennsylvania, the next closest state, by more than 200,000 million cubic feet. *Natural Gas Gross Withdrawals and Production*, U.S. ENERGY INFO. ADMIN., https://www.eia.gov/dnav/ng/ng_prod_sum_a_EPGO_FGW_mmcf_m.htm (last updated Dec. 29, 2017).

156. See Fritze, *supra* note 154, at 203–04 (recognizing Oklahoma as a jurisdiction favoring royalty owner classes and Texas as a jurisdiction generally opposed); John F. Shepherd, *Current Trends in Class Action Procedure in Royalty Litigation*, in PRIVATE OIL AND GAS ROYALTIES: THE LATEST TRENDS, DEVELOPMENTS, AND CHALLENGES IN OIL AND GAS ROYALTY LITIGATION, at 2-1, 2-1 (Rocky Mountain Mineral Law Found., Mineral Law Ser. No. 5, 2008) (recognizing Colorado as a “liberal” jurisdiction in approving classes and Texas as a “cautious” jurisdiction); see also *Patterson v. BP Am. Prod. Co.*, 240 P.3d 456, 468 (Colo. App. 2010), *aff’d*, 263 P.3d 103 (Colo. 2011) (holding that the Colorado district court did not abuse its discretion in certifying a class of approximately 4,000 royalty owners despite the claim by the defendants that there might be individualized issues for each class member); *Bice v. Petro-Hunt, L.L.C.*, 681 N.W.2d 74, 78 (N.D. 2004) (explaining that varying language in leases would not prevent certification of a royalty owner class when the defendant’s “standardized conduct toward the royalty owners” satisfied the commonality requirement).

157. See *supra* notes 142–54 and accompanying text.

certification.¹⁵⁸ Far less attention has been given to the issue of the abuse-of-discretion standard in light of *Wal-Mart*.¹⁵⁹ Therefore, instead of attempting to remedy the “substantive” requirements of Rule 23, this Note addresses the “procedural” requirements of Rule 23.¹⁶⁰ This Note proposes two solutions to help restore some power to district courts regarding the class certification order. First, this Note proposes codifying the abuse-of-discretion standard of review in Rule 23. Second, this Note suggests a sliding scale of deference for determining when the district court’s certification order for a royalty owner class deserves more deference because the merits behind the decision “depend[] on [the district court’s] first-hand observation or direct contact with the litigation.”¹⁶¹

A. NOT NEGLECTING ABUSE OF DISCRETION: CODIFYING THE ABUSE-OF-DISCRETION STANDARD

Rather than advocate a complete overhaul of Rule 23,¹⁶² an appropriate, and measured, first step to the class certification problem is for the Supreme Court to codify the abuse-of-discretion standard by promulgating a new Rule 23(f).¹⁶³ This amendment to Rule 23(f) would add one sentence to the end of the current version of the rule: *An appeal of an order shall be reviewed for abuse of discretion by the district court.*¹⁶⁴ In adding this language, the Supreme Court would address two issues. First, the starting point for circuit courts would be

158. M.D. *ex rel.* Stukenberg v. Perry, 675 F.3d 832, 839 (5th Cir. 2012) (“[T]he *Wal-Mart* decision has heightened the standards for establishing commonality under Rule 23(a)(2)”); see, e.g., Erwin Chemerinsky, *New Limits on Class Actions*, 47 TRIAL, Nov. 2011, at 54, 56 (hypothesizing about the new level of difficulty in class certification after *Wal-Mart*); Klonoff, *supra* note 18, at 780 (“In sum, the majority turned a minimal requirement into one that could significantly impact class certification”); Trask, *supra* note 41, at 793 (“To be sure, *Dukes* has certainly had an effect, even a significant one, on class action practice.”).

159. See Chemerinsky, *supra* note 158, at 56 (“It is difficult, if not impossible, to reconcile the Court’s approach in *Wal-Mart* with an abuse-of-discretion standard of review. The district court made extensive findings as to why there was sufficient commonality to permit a class action suit, but at no point did Scalia’s majority opinion suggest the slightest deference to the trial court.”). For a comprehensive review of trial court discretion in class certification and why trial courts should have broad discretion to deny certification, see generally Wolff, *supra* note 36.

160. See *supra* Part II.A.

161. Friendly, *supra* note 74, at 783 (quoting *United States v. Criden*, 648 F.2d 814, 817 (3d Cir. 1981)).

162. See Roger H. Trangsrud, *James F. Humphreys Complex Litigation Lecture: The Adversary System and Modern Class Action Practice*, 76 GEO. WASH. L. REV. 181, 190–91 (2008) (“It is time—indeed the time is long overdue—for a top-to-bottom redrafting of the federal class action rule.”).

163. See 1 MCLAUGHLIN, *supra* note 15 (describing how the Court “sought to cure the deficiencies that had mired [Rule 23] in relative disuse” when it adopted the 1966 version).

164. Circuit courts should not read this proposed language for the rule to mean that every issue within an appealed order receives the abuse-of-discretion standard. As explained below, pure issues of law and fact would still receive de novo and clearly erroneous review, respectively. See *infra* text accompanying notes 169–70. The Advisory Committee should explain this nuance in its notes.

the abuse-of-discretion standard, thus preventing circuits from gradually modifying the standard through case law. Second, any abuse-of-discretion standard in Rule 23(f) should also include an explanation, most likely in the Advisory Committee's notes, that the abuse-of-discretion standard applies to the application of law to fact, thus limiting the *de novo* and clearly erroneous standards to pure issues of law or fact.

At the very least, adopting an abuse-of-discretion standard in Rule 23(f) would require circuits to cite the standard when deciding a Rule 23(f) appeal. By adopting the standard explicitly, the circuit courts would be less able to equivocate when applying the standard. The circuits would have to afford the abuse-of-discretion standard a similar amount of respect given to the clearly erroneous standard for factual findings mandated under Rule 52—the only rule that expressly mentions a standard of review for an appellate court.¹⁶⁵ Without more guidance on the abuse-of-discretion standard, codification of the abuse-of-discretion standard may only practically accomplish so much;¹⁶⁶ however, this small step at least prevents circuits from vacillating on—or even flat out ignoring—the abuse-of-discretion standard. For example, rather than merely referencing the abuse-of-discretion standard and then summarily replacing it with “review for error” when reviewing certification orders,¹⁶⁷ the Eleventh Circuit would have to begin with abuse of discretion and then determine why the merits of a specific certification order might make abuse of discretion look like review for error. Furthermore, the Second Circuit's presumption in favor of certification would also pose a problem under an express abuse-of-discretion standard.¹⁶⁸ Combining abuse of discretion with the party-neutral Rule 23(f) should undo Second Circuit case law that currently creates an imbalance of discretionary power by granting district courts more discretion when certifying a class than when denying certification. Codifying the abuse-of-discretion standard might not prevent circuits from circumventing the standard, but it would at least prevent circuits from blatantly disregarding the standard.

The addition of the abuse-of-discretion standard in Rule 23(f) would not require extensive language about the meaning of the standard, but the Advisory Committee should include in its notes that the standard applies to the district court's application of law to fact. In doing so, Rule 23(f) should adopt part of the Second Circuit's approach: For there to be meaningful review of a certification order, a specific standard of review should apply to

165. FED. R. CIV. P. 52(a)(6). Although not found in the Federal Rules of Civil Procedure, *de novo* review for questions of law receives a high level of respect as well because of the historical tradition of appellate courts. 1 CHILDRESS & DAVIS, *supra* note 53, § 2.13.

166. See *infra* Part IV.B.

167. *Brown v. Electrolux Home Prods., Inc.*, 817 F.3d 1225, 1233 (11th Cir. 2016) (quoting *Abrams v. Interco Inc.*, 719 F.2d 23, 28 (2d Cir. 1983)).

168. See *supra* note 125 and accompanying text.

each issue within the certification order.¹⁶⁹ The clearly erroneous standard applies to findings of fact; de novo review applies to an issue of law; “and to the extent the ruling involves an application of law to fact, [the court’s] review is for abuse of discretion.”¹⁷⁰ By explicitly stating that abuse of discretion applies to applications of law to fact, Rule 23(f) would have two effects.

First, when reviewing an appealed certification order, circuit courts would have to clearly categorize each issue reviewed as either law, fact, or application of law to fact because circuits could no longer apply de novo review solely on the grounds that the issue is a “mixed question.”¹⁷¹ Despite this large middle ground between law and fact, circuit courts could not default to de novo review by characterizing an issue so that it minimally touches law. Once an accurate interpretation of the law touches the merits of the certification order, the abuse-of-discretion standard applies and there are more well-defined limits to the appellate court’s review. The extent to which the circuit court could disturb the certification order would depend, at least partly, upon the explanation for how it categorizes each issue.

Second, a qualifier that the abuse-of-discretion standard applies to applications of law to fact would clarify that the abuse-of-discretion standard is a standalone standard. As an example of this issue, the Third Circuit has held that there is an abuse of discretion in certification decisions when the “decision rests upon a clearly erroneous finding of fact, an errant conclusion of law or an improper application of law to fact.”¹⁷² Abuse of discretion has no independent meaning under this definition; a district court abuses its discretion when it fails to satisfy any of the standards of review. By designating the abuse-of-discretion standard for applications of law to fact, circuit courts could not view orders as solely composed of discrete issues of law and fact where the certification order is necessarily right or wrong.¹⁷³ The certification decision remains an aspect of the district court’s “supervision of litigation.”¹⁷⁴

The practical impact of these effects would be notable in class action royalty litigation. If abuse of discretion becomes the standard of review for “mixed questions,” most of the responsibility in reviewing and interpreting royalty provisions would rest with the district courts.¹⁷⁵ On appeal, circuit

169. *In re Salomon Analyst Metromedia Litig.*, 544 F.3d 474, 480 (2d Cir. 2008), *abrogated on other grounds by* *Amgen Inc. v. Conn. Ret. Plans & Tr. Funds*, 568 U.S. 455 (2013).

170. *Id.*

171. *See supra* notes 135–37 and accompanying text.

172. *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305, 320 (3d Cir. 2008) (citing *In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 783 (3d Cir. 1995)); *see also* *Decker v. Apfel*, 67 F. App’x 885, 886 (6th Cir. 2003) (citing *Romstadt v. Allstate Ins. Co.*, 59 F.3d 608, 615 (6th Cir. 1995)) (defining abuse of discretion as an erroneous finding of fact or misapplication of law).

173. *See supra* note 72 and accompanying text.

174. *See supra* notes 70–71 and accompanying text.

175. Because proposed class members (lessors) can number in the hundreds of thousands, *see* Paul Monies, *Judge Finalizes \$119 Million Royalty Settlement Against Chesapeake*, NEWSOK (July 13,

courts would need to differentiate between two separate types of issues in these proposed classes: (1) issues concerning the district court's understanding of substantive oil and gas law, and (2) issues concerning the application of substantive oil and gas law to leases in the proposed class. The first type of issue calls for de novo review because it involves a mistaken understanding of oil and gas law. The second type of issue calls for the abuse-of-discretion standard because the district court may understand the underlying oil and gas law but improperly apply it. When a circuit court believes that a challenge to royalty owner class certification involves only the district court's understanding of substantive oil and gas law, the circuit court fails to consider that the challenge may actually relate to the district court's "abuse" of Rule 23 (i.e., the improper application of oil and gas law to the leases) rather than oil and gas law.¹⁷⁶

The abuse-of-discretion standard heightens the emphasis on the district court's role in the "supervision of litigation." This supervision is especially important in the context of royalty litigation because a trial may be necessary for the defendant oil and gas company to show that its conduct did not breach royalty provisions, or did not breach *certain types* of royalty provisions. Although defendants have a tendency to settle once the circuit court approves a certified class,¹⁷⁷ the certification decision does not adjudicate liability. Oil and gas companies may still argue that their conduct, specifically their payments, complied with the specific market-value and proceeds leases in the class, or at the very least, some of the leases in the class. The district court, in adjudicating whether the oil and gas company's conduct breached lease provisions, can then alter or amend the class based on its findings of fact during trial.¹⁷⁸ Finally, Rule 23 does not prevent the oil and gas company from appealing the class certification decision after final judgment.¹⁷⁹ Oil and gas

2015, 7:30 PM), <http://newsok.com/article/5433501>, giving deference to the certification decisions of district courts makes sense from a practical standpoint: District courts have more time and opportunity to review the various types of lease and royalty provisions.

176. See *infra* Part IV.B (discussing the idea of "certification facts" and why de novo review is inappropriate for interpretations of individual leases).

177. See Klonoff, *supra* note 18, at 732 ("If plaintiffs convinced the district court to certify the class, defendants generally settled prior to trial without the ability to challenge class certification on appeal.").

178. See FED. R. CIV. P. 23(c)(1)(C) (granting the district court the power to "alter[] or amend[]" the certification order "before final judgment"). This supervisory power of the district court can be extremely important when the defendant disputes whether individualized aspects of damages to each royalty owners predominate common issues of law or fact, and trial may be the only method of resolving the predominance question. See *Comcast Corp. v. Behrend*, 133 S. Ct. 1426, 1432–33 (2013) (requiring courts to at least "entertain arguments" on damages models at the class certification stage).

179. *Molski v. Gleich*, 318 F.3d 937, 951 n.17 (9th Cir. 2003) (recognizing that Rule 23(f) provides for a "permissive interlocutory appeal" and failure to appeal under Rule 23(f) does not "waive[] an appeal after the final certification order"), *overruled on other grounds* by *Dukes v.*

companies may have an even stronger argument against class certification based on the district court's findings concerning the oil and gas company's conduct or the effect of different types of leases.

An amendment to Rule 23(f) would simply cement the approach many courts have taken in certification decisions and review. For those circuits with a bias toward either plaintiffs or defendants, however, it would provide specific guidance to conform with the approach achieved in other circuits. First, abuse of discretion is already the accepted standard for reviewing certification.¹⁸⁰ Second, maintaining an abuse-of-discretion standard separate from the clearly erroneous and de novo standards is consistent with Rule 23(c)(1)(C)—the trial court's power to alter or amend the class before final judgment.¹⁸¹ Facts are “historical” and do not change over time.¹⁸² The law is also established—although in a different sense than facts—and appellate courts interpret, but do not change, the law.¹⁸³ On the other hand, *new* facts may arise throughout litigation, and therefore the application of law to fact might change. Rule 23(c)(1)(C) accounts for this possibility by affording the district court flexibility in its proceeding, and the abuse-of-discretion standard could take into account this power to amend or alter the certification order.¹⁸⁴ Third, an abuse-of-discretion standard arguably incentivizes the district court to conduct a more “rigorous analysis” of the substantive requirements of Rule 23.¹⁸⁵ If a district court knows that the circuit court will give some sort of

Wal-Mart Stores, Inc., 603 F.3d 571 (9th Cir. 2010), *rev'd*, 564 U.S. 338 (2011); *see also* 2 MCLAUGHLIN, *supra* note 15, § 7:1.

180. *Califano v. Yamasaki*, 442 U.S. 682, 703 (1979); *see also* 2 MCLAUGHLIN, *supra* note 15, § 7:15 (“The decision to grant or deny class certification is committed to the sound discretion of the district judge and will not be overturned except for abuse of discretion.”).

181. FED. R. CIV. P. 23(c)(1)(C).

182. *See* HARRY T. EDWARDS & LINDA A. ELLIOTT, FEDERAL COURTS STANDARDS OF REVIEW: APPELLATE COURT REVIEW OF DISTRICT COURT DECISIONS AND AGENCY ACTIONS 6–7 (2007) (explaining why trial courts can better infer findings of fact from evidence than appellate courts).

183. *See* *Miller v. Fenton*, 474 U.S. 104, 114 (1985) (characterizing the appellate court “as an expositor of law”).

184. In other words, the clearly erroneous and de novo standards would demand that the circuit court look at the state of the certification order “as is” when it comes before the circuit court on appeal. The inherently more flexible abuse-of-discretion standard takes into account how “close” the district court is to the appealed issue when deciding if the district court should receive more deference in deciding the matter. Similarly, Rule 23(c)(1)(C) implies that because it manages the litigation, the district court should have a right to amend or alter the class if, through the process of the proceedings, the class no longer satisfies the requirements of Rule 23.

185. *See* *Comcast Corp. v. Behrend*, 133 S. Ct. 1426, 1432 (2013) (requiring “rigorous analysis” for the predominance requirement); *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350–51 (2011) (requiring “rigorous analysis” from the district court when determining whether to certify or not (citing *Gen. Tel. Co. of the Sw. v. Falcon*, 457 U.S. 147, 161 (1982))).

deference to the district court's application of law to fact, the district court will likely explain its reasoning in greater depth.¹⁸⁶

B. *GIVING ABUSE OF DISCRETION MEANING: HOW THE STANDARD MIGHT
APPLY TO ROYALTY LITIGATION*

Establishing the abuse-of-discretion standard as an independent standard of review with a set of issues to which it applies is an important first step, but for it to have any effect, the standard needs guidelines. This Note adopts the general framework of Judge Friendly's influential approach: "[T]here is not just one standard of 'abuse of discretion,'" but rather a sliding scale that recognizes issues that (1) require a trial court's close relationship with the litigation or (2) necessitate "the need for uniformity and predictability."¹⁸⁷ The abuse-of-discretion standard is not a standard requiring the district court to evaluate issues of fact or law under their respective standards of review; it is a standard for the district court's application of law to fact.¹⁸⁸ Such determinations by the district court should "fall along a degree-of-deference continuum, ranging from non-deferential plenary review for law-dominated questions, to deferential clear-error review for fact-dominated questions."¹⁸⁹

As a result, determinations about where an issue falls on the abuse-of-discretion spectrum are inherently case-specific. This Note does not purport to offer comprehensive guidelines for appellate review of all varieties of class actions. Rather, it presents what the spectrum might look like in the context of royalty owner class actions. First, the Note differentiates between *de novo* contract interpretation and "certification facts" within the context of oil and gas leases. Second, the Note suggests where certain issues within royalty owner class certification might fall along the abuse-of-discretion spectrum.

When reviewing a proposed class that consists of various oil and gas leases, the district court is interpreting contracts to determine if the leases satisfy the substantive requirements of Rule 23. When reviewing these leases on appeal, the circuit court could very well invoke *de novo* review based on the assertion that contract interpretation is a question of law.¹⁹⁰ Conducting

186. In turn, a district court would likely include more of its interpretations of law and factual findings in its order, allowing the circuit court a better opportunity to review these components under their applicable standards as well.

187. Friendly, *supra* note 74.

188. *See supra* Part IV.A.

189. *In re PolyMedica Corp. Sec. Litig.*, 432 F.3d 1, 4 (1st Cir. 2005).

190. *See Greenwood 950, L.L.C. v. Chesapeake La., L.P.*, 683 F.3d 666, 668 (5th Cir. 2012) ("As part of that analysis, we review *de novo* the district court's interpretation of the contract . . ."); *see also* 1 CHILDRESS & DAVIS, *supra* note 53, § 2.23, at 2-154 ("It is a standard slogan that contract construction is a question of law . . ."). Characterizing all contract interpretation as a question of law is an oversimplification, as contractual interpretation might depend upon extrinsic evidence, reviewed under a clearly erroneous standard, or deal with a mixed question of law and fact. *See, e.g.,* Chaparral Res., Inc. v. Monsanto Co., 849 F.2d 1286, 1289 (10th Cir. 1988) ("Additionally, when extrinsic evidence is introduced to ascertain the meaning of contract terms,

de novo review for each individual lease is impractical though, as the circuit court might have to review thousands of leases.¹⁹¹ Circuit courts need to, and certain circuit courts arguably do, defer to the district court's findings about the content and effect of *individual* leases and instead review the district court's overarching interpretation of the groups of leases when it makes its certification order.¹⁹² Interpretations of individual leases might be best understood as "certification facts": Issues that are technically contract interpretation, but—because this interpretation is only for purposes of Rule 23 and not for adjudicating liability—should fall under the abuse-of-discretion standard rather than de novo review.¹⁹³ Applying the abuse-of-discretion standard to certification facts would not mean that these contract interpretations by the district court immediately receive the clearly erroneous standard. Interpretations of individual leases would fall on the more deferential side of the abuse-of-discretion spectrum, while interpretations that *all* leases in a class have the same legal effect would fall on the "plenary review" end of the spectrum.¹⁹⁴

Specific issues that have arisen in the context of royalty owner class actions will demonstrate where different "certification facts" might fall on the abuse-of-discretion spectrum. A class that includes leases with both proceeds and market-value royalty provisions would fall on the end of the spectrum where the circuit court would afford the district court very little deference because the obligations created by each royalty provision are "law-dominated."¹⁹⁵ Texas oil and gas law does not read in an implied duty to

as in the instant case in which Monsanto attempted to establish certain industry standards, the trial court's interpretation of the contract terms is factual and cannot be set aside unless clearly erroneous."); *Lumber & Wood Prods., Inc. v. N.H. Ins. Co.*, 807 F.2d 916, 918 (11th Cir. 1987) ("As such the clearly erroneous standard is inapplicable, but rather a *de novo* review is appropriate because a construction of this policy of insurance involves a mixed question of law and fact, and therefore we are free to substitute our judgment for that of the district court."); *Lincoln Grain, Inc. v. Aetna Cas. & Sur. Co.*, 756 F.2d 75, 78 (8th Cir. 1985) ("These are factual findings because extrinsic evidence was utilized to interpret the ambiguous contract."). For purposes of the limited scope of this Note, contract interpretation is considered a question of law.

191. For example, one Oklahoma settlement covered "more than 168,000 royalty owners." *Monies*, *supra* note 175.

192. See *Allapattah Servs., Inc. v. Exxon Corp.*, 333 F.3d 1248, 1261 (11th Cir. 2003) (finding that "the real question for the district court was" the predominance inquiry so long as the contracts were "materially similar"); *Foster v. Merit Energy Co.*, 289 F.R.D. 653, 660 n.10 (W.D. Okla. 2012) (examining lease language to determine whether language within the class is "materially indistinguishable").

193. "Certification fact" is an artificial term and does not suggest that the clearly erroneous standard should apply to such issues. Although the term might apply to issues in certification hearings outside the context of royalty owner classes, this Note limits the term to the determinations that district courts make when interpreting an individual oil or gas lease.

194. See *supra* note 189 and accompanying text.

195. See *Union Pac. Res. Grp., Inc. v. Hankins*, 111 S.W.3d 69, 74 (Tex. 2003) (holding that market-value provisions and proceeds provisions provide for different royalties that defeat commonality).

market for market-value leases, and therefore a class of both proceeds and market-value leases cannot depend upon a breach of the duty to market.¹⁹⁶ If a district court reads in the implied duty to market for a market-value lease in a certification decision, this interpretation is an error of law reviewable de novo; however, a district court that tries to certify a class with both types of leases might do so because its familiarity with the “certification facts” leads it to believe that both types of royalty provisions would result in the same amount of royalties, although through different methods.¹⁹⁷ In the latter case, the district court is applying law to certification facts—its interpretations of the effects of the individual royalty provisions in the proposed class. Abuse-of-discretion would then apply, but this situation is a law-dominated question because oil and gas law clearly states that the two types of royalty provisions create different obligations. The circuit court should be more willing to step in and decertify such a class because, while this specific class might have a common question and answer, the need for uniformity and predictability in certification weighs against classes where royalties are calculated through different methods.¹⁹⁸

On the other side of the spectrum is a class of only proceeds leases that includes leases with an express duty to market and leases with an implied duty to market.¹⁹⁹ While Texas law holds that a proceeds lease only has “an express or an implied duty, not both,” the law does not hold that the express and implied duties operate in different ways.²⁰⁰ Consequently, the express duty-to-market provisions in proceeds leases would be certification facts, and the absence of law regarding the effect of an express duty-to-market provision would weigh in favor of allowing the district court to interpret the express provisions in the class in front of it. The district court could then decide to certify the class of proceeds leases with both express and implied duty-to-market provisions if it found that the various provisions had the same effect. The abuse-of-discretion standard would encourage the district court to carefully scrutinize the leases in the class in order to defend its certification decision in a thorough certification order. Circuit courts could ensure that

196. *Yzaguirre v. KCS Res., Inc.*, 53 S.W.3d 368, 373–74 (Tex. 2001).

197. *See Union Pac.*, 111 S.W.3d at 75 (rejecting plaintiffs’ argument that the royalties owed for proceeds and market-value leases were equal in their case because it had not been proven and there was not “common proof” that could establish the royalties owed would be equal). In other words, the district court would find that the lessee’s conduct produced a “common answer” for both proceeds and market-value leases. *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 352 (2011).

198. *See supra* notes 142–45 and accompanying text.

199. *See Bowden v. Phillips Petrol. Co.*, 247 S.W.3d 690, 701 (Tex. 2008) (“Turning to the predominance issue, the court of appeals also held that Phillips would owe each royalty owner a different duty to market depending on the terms of the lease due to the existence of express provisions in some of the leases on the duty to market.”).

200. *Id.* The Texas Supreme Court admitted in *Bowden* that “it [was] not clear from the record that any of the express duty to market clauses would in practice require different conduct from the duty in the implied covenant to market.” *Id.*

the district court is carefully scrutinizing the leases by remanding the certification order when the district court fails to adequately explain the content of the leases.²⁰¹

If conceded that the district court's interpretations of individual leases are not practically reviewable under a de novo standard,²⁰² both of these examples still support the idea that applications of law to fact in certification decisions call for the abuse-of-discretion standard.²⁰³ Neither of these examples warrant the extensive or minimal deference of the clearly erroneous or de novo standards; characterizing them as pure law or fact would rob abuse of discretion of any independent meaning. On the other hand, the amount of deference afforded the district court for each example should not be identical when the former example implicates more issues of substantive law and the latter depends upon individualized lease interpretations. With this understanding, this Note's approach deviates from Judge Friendly's approach in two ways. First, at least in the context of class certification orders, applications of law to fact should not receive the same limited amount of deference as questions of law.²⁰⁴ Second, the district court's Rule 23 analysis does not fall somewhere on the abuse-of-discretion spectrum;²⁰⁵ the entire spectrum applies to the Rule 23 analysis and the district court's determinations in the certification order fall along the spectrum.

V. CONCLUSION

The average class of plaintiffs faces an uphill battle in achieving certification. Since a district court has to rigorously analyze the relevant merits of a case at the certification stage, plaintiffs have to present a comprehensive action early in the stages of litigation for the district court to certify. There are numerous obstacles that a plaintiff must overcome to persuade a district court "to allow an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only."²⁰⁶

Unrestricted review by circuit courts makes certification near impossible for certain classes, especially when the circuit is generally averse to the class action procedure. Royalty owners, who for practical reasons usually must

201. See *Neale v. Volvo Cars of N. Am., LLC*, 794 F.3d 353, 369–70 (3d Cir. 2015) (vacating and remanding an order certifying a class, rather than reversing the order, when "there was no 'readily discernible, clear, and complete list' of the claims and issues subject to class treatment" (quoting *Marcus v. BMW of N. Am., LLC*, 687 F.3d 583, 592 (3d Cir. 2012))).

202. See *supra* notes 190–94 and accompanying text.

203. See *supra* Part IV.A.

204. See Friendly, *supra* note 74, at 784 (characterizing "formulations of law" and "application of law to the facts" as similar and deserving of review that "scarcely differs from the definition of [review for] error").

205. See *id.* at 768–71 (explaining that certain Federal Rules of Civil Procedure need more guidance regarding what the abuse-of-discretion standard means for each of the rules so that the trial court might know how much latitude it has under each rule).

206. *Califano v. Yamasaki*, 442 U.S. 682, 700–01 (1979).

assert their claims through a class action, always risk a circuit court revisiting the merits of certification and reversing the district court's order certifying a class, especially when royalty owners' claims depend upon lease interpretation.

The first step to ensure that the class action remains a viable option in royalty litigation is to restore the balance of power between the district court and circuit court. Codification of the abuse-of-discretion standard ensures that circuit courts do not dilute the standard so much that it effectively becomes *de novo*. Understanding abuse of discretion as a range of permissible choices that depend upon the specific certification issue in front of the district court allows for the class certification mechanism to remain a managerial tool for district courts. Through limiting the oversight of circuit courts, classes like royalty owners still have a realistic chance to prove to the district court that their specific class satisfies Rule 23. While the Fifth Circuit has not firmly established itself as opposed to the royalty owner class, the more it relies upon Texas oil and gas law as its basis for decertifying classes, the more likely it distorts its dynamic with the district courts.²⁰⁷ Rather than ask *what* circuit courts have done to the substantive requirements of Rule 23, it is time to analyze *how* the circuits have managed to reach those requirements.

207. See *Stirman v. Exxon Corp.*, 280 F.3d 554, 564–65 (5th Cir. 2002) (looking to oil and gas law in numerous states to determine that the district court failed to satisfy the commonality and predominance requirements). This Note anticipates difficulty for royalty owners seeking class certification because the Fifth Circuit is skeptical of class actions generally and the Fifth Circuit can justify reaching into the details of leases based on Texas oil and gas law. See *supra* Parts III.A, III.C.