

RULE 23A. DERIVATIVE ACTIONS BY SHAREHOLDERS

In a derivative action brought in the Superior Court by one or more shareholders to enforce a right of a corporation, the corporation having failed to enforce a right which may properly be asserted by it, the complaint shall be verified and shall allege that the plaintiff was a shareholder at the time of the transaction of which the plaintiff complains or that the plaintiff's share thereafter devolved on the plaintiff by operation of law. The complaint shall also allege with particularity that the plaintiff has made a written demand upon the corporation to take the suitable action. The derivative action may not be maintained if it appears that the plaintiff does not fairly and adequately represent the interests of the corporation in enforcing the right of the corporation. The action shall not be dismissed or settled without the approval of the court, and notice of the proposed dismissal or compromise shall be given to shareholders or members in such manner as the court directs if the court determines that a proposed discontinuance or settlement substantially affects the interests of a corporation's shareholders or a class of shareholders.

Advisory Committee's Notes 2004

See Advisory Committee's Notes below Rule 23B for an explanation of this amendment.

Advisory Committee's Notes 1981

Rule 23A is taken with only minor changes from Federal Rule 23.1. The new rule is added simultaneously with the promulgation of new Rule 23, also based on the comparable federal rule. The new Rule 23A is similar in basic effect to the original Maine Rule 23(b) as promulgated in 1959 and now withdrawn. Principal differences are inclusion in the new rule of requirements that the complaint allege that the plaintiff was a member or shareholder at the time of the transaction complained of and that the plaintiff be an adequate representative of the interests of others similarly situated. The former point, though previously an open question in Maine, was resolved for corporations at least by legislative adoption in 1971 of 13-A M.R.S.A. § 627(1) (A), making similar provisions. The requirement of representation was found in original Rule 23(a) and was in any event inherent in the practice. *See* 1 Field, McKusick, and Wroth, *Maine Civil Practice* § 23.2 (2d ed., 1970; Supp. 1981).

In other respects also, the rule is consistent with 13-A M.R.S.A. § 627, respecting actions by shareholders of foreign or domestic corporations. In actions subject to that provision, however, the plaintiff must allege specifically that he gave written notice of his action to the corporation or board of directors at least ten days before bringing action. Also, by virtue of the last sentence of the statute, it will be “necessary” under the rule to allege or prove demand upon the shareholders only in the case of a close corporation.