RULE 23. CLASS ACTIONS

(a) Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if (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.

(b) Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

(1) the prosecution of separate actions by or against individual members of the class would create a risk of

(A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or

(B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests, or

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include:

(A) the interest of members of the class in individually controlling the prosecution or defense of separate actions;

(B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class;

(C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum;

(D) the difficulties likely to be encountered in the management of a class action.

(c) Determination by Order Whether Class Action to Be Maintained; Notice; Judgment; Actions Conducted Partially as Class Actions.

(1) As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. An order under this subdivision may be conditional, and may be altered or amended before the decision on the merits.

(2) In any class action maintained under subdivision (b)(3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice shall advise each member that (A) the court will exclude the member from the class if the member so requests by a specified date; (B) the judgment, whether favorable or not, will include all members who do not request exclusion; and (C) any member who does not request exclusion may, if the member desires, enter an appearance through his counsel.

(3) The judgment in an action maintained as a class action under subdivision (b)(1) or (b)(2), whether or not favorable to the class, shall include and describe those whom the court finds to be members of the class. The judgment in an action maintained as a class action under subdivision (b)(3), whether or not favorable to the class, shall include and specify or describe those to whom the notice provided in subdivision (c)(2) was directed, and who have not requested exclusion, and whom the court finds to be members of the class.

(4) When appropriate (A) an action may be brought or maintained as a class action with respect to particular issues, or (B) a class may be divided into subclasses and each subclass treated as a class, and the provisions of this rule shall then be construed and applied accordingly.

(d) Orders in Conduct of Actions. In the conduct of actions to which this rule applies, the court may make appropriate orders: (1) determining the course of proceedings or prescribing measures to prevent undue repetition or complication in the presentation of evidence or argument; (2) requiring, for the protection of the

members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members of any step in the action, or of the proposed extent of the judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise to come into the action; (3) imposing conditions on the representative parties or on intervenors; (4) requiring that the pleadings be amended to eliminate therefrom allegations as to representation of absent persons, and that the action proceed accordingly; and (5) dealing with similar procedural matters. The orders may be combined with an order under Rule 16, and may be altered or amended as may be desirable from time to time.

(e) Dismissal or Compromise. A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs.

(f) Payment of Residual Funds.

(1) "Residual funds" are those funds, if any, that remain after reasonable efforts to pay approved class member claims and make other approved disbursements, including any return of funds to the settling defendant, called for by a settlement agreement approved under subdivision (e) of this Rule.

(2) The parties may agree that residual funds be paid to an entity whose interests reasonably approximate those being pursued by the class. When it is not clear that there is such a recipient, unless otherwise required by governing law, the settlement agreement should provide that residual fees, if any, be paid to the Maine Bar Foundation to be distributed in the same manner as funds received from interest on lawyers trust accounts pursuant to M. Bar R. 6(a)(2)-(5).

Advisory Notes – January 2013

When settlements of class actions result in payments to class members, especially by mail, often some payments will not be claimed, leaving "residual" funds that are not allocated to class members because the cost of distribution will equal or exceed the amounts involved. Anticipating such a possibility, the parties to a class action settlement often seek court approval to distribute the residual funds to a third party in what is sometimes analogized to cy pres distributions under trust law. *See generally* 2 J. McLaughlin, *McLaughlin on Class Actions,*

Law and Practice § 8:15 (7th ed. 2011). Practice and reason counsel that, when possible, the parties choose a third party whose interests reasonably approximate those being pursued by the class members. *See* Principles of the Law of Aggregate Litigation § 3.07(c) (2010). Often, though, the nature of the suit or the class members will be such that there is not an obvious third party recipient whose interests reasonably approximate those of the class members.

Against this background, this new Rule 23(f) accomplishes two aims. First, it confirms the appropriateness of the generally recognized practice of providing for distributions of residual funds to third parties. Second, it specifies that when it is not clear that there is a third party whose interests reasonably approximate those being pursued by the class, the Maine Bar Foundation, which manages and distributes IOLTA funds, should be the recipient.

Specifying the selection of the Maine Bar Foundation in such circumstances has two advantages. First, it eliminates any possibility that a recipient is being chosen to benefit or garner credit for the defendant, for plaintiffs' counsel, or for the court. Second, the principal aim of the Maine Bar Foundation—to support efforts to widen access to justice for those who cannot afford it—aligns with a basic aim of Rule 23 itself. *See Buford v. H&R Block, Inc.*, 168 F.R.D. 340, 345-46 (S.D. Ga. 1996), *aff'd without op.*, 117 F.3d 1433 (11th Cir. 1997) (stating that one of the purposes of class action lawsuits is "to provide a feasible means for asserting the rights of those who 'would have no realistic day in court if a class action were not available'" (quoting *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 809 (1985))). As the Supreme Court has observed, in adopting Rule 23 of the federal rules, "the Advisory Committee had dominantly in mind vindication of 'the rights of groups of people who individually would be without effective strength to bring their opponents into court at all.'" *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 617 (1997) (citing Benjamin Kaplan, *A Prefatory Note*, 10 B.C. Indus. & Com. L. Rev. 497, 497 (1969)).

This Rule should not be viewed as affecting or commenting on issues other than the distribution of residual funds arising from voluntary settlement agreements approved under Rule 23(e).

Advisory Committee's Notes
January 1, 2001

P.L. 1999, Chapter 731, §§ZZZ-2 *et seq*. unified the Superior Court and the District Court civil jurisdiction, with certain stated exceptions. Rule 23 is amended

to delete the reference to the Superior Court, since class actions may now also be brought in the District Court.

Advisory Committee's Notes
1981

Rule 23 is amended by substituting for the present Maine rule the verbatim text of Federal Rule 23.

When the Maine Rules were first promulgated in 1959, Federal Rule 23 as it then stood was adopted virtually verbatim. The present federal rule was promulgated in 1966, but the Maine rule was not changed to follow suit, because Maine's experience with class actions had been limited and it seemed wisest to allow time for local development. Nevertheless, the more detailed and specific provisions of the new federal rule were viewed as appropriate guidelines for class action practice in Maine. *See* 1 Field, McKusick, and Wroth, *Maine Civil Practice* § 23.1 (2d ed., 1970). Since 1966 there has been an increasing number of class actions in the Maine courts, and it has become clear that a more specific and authoritative procedural provision for such actions is necessary.

The present federal rule is adopted for three reasons: (1) It codifies in general the pattern previously followed in Maine and it has over the years been the subject of a substantial body of interpretation in the federal courts which is available as further guidance to the Maine practitioner. *See* 1 Field, McKusick, and Wroth, *supra*, §§ 23.1-23.6; 7 and 7A Wright and Miller, *Federal Practice and Procedure* §§ 1751-1803 (1972; Supp., 1981); (2) The Maine practice has not yet become systematized enough to provide the basis for a rule reflecting significant local variation from the federal model; and (3) The only alternative, the Uniform Class Actions [Act] [Rule], adopted by the National Conference of Commissioners on Uniform State Laws in 1976, 12 *Uniform Laws Annotated* 20 (Supp. 1981), is admirable drafting but deals with a range of complex problems which have not yet arisen, and may never arise, in Maine.

Promulgation of the rule marks a new departure in class actions for Maine. It is to be expected that experience with the more systematic procedure afforded by the rule will lead to amendments designed to adapt its provisions to the specific conditions and needs of Maine practice.

Reporter's Notes
December 1, 1959

This rule is based upon Federal Rule 23, but with significant departures. Rule 23(a) is much simpler than the corresponding federal rule and takes into account some serious criticisms which have been made of that rule. The language is taken from a recommendation made by Professor Chafee. Chafee, *Some Problems of Equity*, Chap. 7.

Class actions brought by or against representatives of a class so numerous as to make it impracticable to bring them all before the court were well known in classical equity practice. Whitehouse, *Equity Practice* §§ 162-165. The principal types of cases in which this principle of representation was applied were creditors' bills, stockholders' bills, and bills of peace. *See, by way of illustration, Mason v. York & Cumberland Ry. Co.*, 52 Me. 82, 107ff. (1861); *Carlton v. Newman,* 77 Me. 408 (1885). The innovation in Rule 23 is to make this device applicable to all actions, legal as well as equitable.

Rule 23(b) deals specifically with shareholders' derivative actions. The requirement for verification of the complaint is one of the few instances where the rules require verification. Federal Rule 23(b) contains the requirement that the complaint shall aver that the plaintiff was a shareholder at the time of the transaction complained of. That requirement is not included in this rule because of the belief that it calls for a policy judgment which ought not to be effected by rule even if it is thought to be within the rule-making power. There appears to be no Maine decision either imposing or rejecting this requirement, and the omission from the rule is not to be taken as an expression of any view as to whether or not the requirement exists.

Rule 23(c) is designed to protect absent members against unfair dismissal or compromise.