

RULE 23B. DERIVATIVE ACTIONS BY MEMBERS OF UNINCORPORATED ASSOCIATIONS

In a derivative action brought in the Superior Court by one or more members to enforce a right of an unincorporated association, the association 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 member at the time of the transaction of which the plaintiff complains or that the plaintiff's membership thereafter devolved on the plaintiff by operation of law. The complaint shall also allege with particularity the efforts, if any, made by the plaintiff to obtain the action the plaintiff desires from the directors or comparable authority and, if necessary, from the members, and the reasons for the plaintiff's failure to obtain the action or for not making the effort. The derivative action may not be maintained if it appears that the plaintiff does not fairly and adequately represent the interests of the members similarly situated in enforcing the right of the association. The 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 members in such manner as the court directs.

Advisory Committee's Notes 2004

Rule 23A has been amended to eliminate conflicts between the Rule and the provisions governing derivative actions by shareholders in the revised Maine Business Corporation Act (the "Act" or "new Act"), which the Legislature adopted effective July 1, 2003. P.L. 2001, ch. 640; P.L. 2003, ch. 344.

To conform to the new Act, Rule 23A has been divided into two separate rules: a revised Rule 23A, "Derivative Actions by Shareholders" and a new Rule 23B, "Derivative Actions by Members of Unincorporated Associations." The revised Rule 23A reflects, and changes are made solely to reflect, the requirements of the new Act with respect to derivative actions by shareholders of business corporations. New Rule 23B carries forward without change the provisions of former Rule 23A with respect to unincorporated associations. No substantive changes have been made in rules for derivative actions in unincorporated associations because the new Act has not made any change in the law applicable to such associations.

The changes to Rule 23A to reflect new requirements of the new Act are as follows:

1. The amended Rule requires the complaint to allege with particularity that the plaintiff has made a written demand upon the corporation to take suitable action. The requirement is in the words of 13-C M.R.S.A. § 753(1), which requires that the demand be made upon the corporation *in all cases*. This “universal demand” completely replaces and supersedes Rule 23A’s former requirement of a particularized allegation of the plaintiff’s “efforts, if any, to obtain the action the plaintiff desires.” The revised Rule also eliminates the further language of the former Rule that required “the reasons for the plaintiff’s failure to obtain the action or for not making the effort.” By requiring that demand be made in all cases, § 753 eliminates the possibility that the demand requirement may be excused if the plaintiff can prove that making the demand would have been futile.

2. The requirement in former Rule 23A that the plaintiff make an effort “if necessary” to obtain the desired action from shareholders or members has been deleted because under the new Act no such effort is “necessary.” Former Section 627(1)(C) of the 1971 Maine Business Corporation Act provided that if the corporation is a close corporation, the plaintiff must allege with particularity “his efforts to secure from the shareholders such action as he desires (or allege) with particularity the reason why such efforts would have been futile.” Section 627 went on to state expressly that when the subject corporation is not a close corporation, it is not necessary for the plaintiff to allege or prove a demand upon the other shareholders. That express provision abrogated the rule of prior case law, which had held that for all corporations a demand upon shareholders, as well as upon the board of directors, was required before a plaintiff could properly assert a derivative action.¹ The Advisory Committee’s Notes to Rule 23A as previously in effect made clear that a demand was required on shareholders only in the case of a close corporation.² Section 753 in the new Act contains no requirement for close corporations that the plaintiff make (or allege) any efforts made to secure from shareholders the action he desires. Given the statutory history, the Rule has been revised to reflect the absence of any such requirement from the new statute.

¹ See, e.g., *Ulmer v. Maine Real Estate Co.*, 93 Me. 324, 327, 45 A. 40, 41 (1899).

² Advisory Committee’s Notes to Rule 23A contained in 428-433 A.2d (1981) at LII.

3. In keeping with 13-C M.R.S.A. § 752(2), revised Rule 23A makes the focus of the required fair and adequate representation by the plaintiff the interests of “the corporation” and not “the shareholders . . . similarly situated,” as the former Rule provided. New Section 752 requires that the plaintiff “fairly and adequately represent the interests of the corporation in enforcing the right of the corporation.” That new requirement of Section 752 is intended to better reflect the nature of a derivative action, where the plaintiff stands in the shoes of the corporation and not the shoes of other shareholders. Rule 23A has been revised accordingly.

4. The final sentence of Rule 23A has been revised to track closely the language of 13-C M.R.S.A. § 756 pertaining to court approval of discontinuance or settlement of derivative actions and to notice to shareholders of the same.

Section 756 of the new Act provides:

A derivative proceeding may not be discontinued or settled without the court’s approval. If the court determines that a proposed discontinuance or settlement substantially affects the interest of the corporation’s shareholders or a class of shareholders, the court shall direct that notice be given to the shareholders affected.

Former Rule 23A provided, like Section 756, that a shareholder derivative action “shall not be dismissed or compromised without the approval of the court,” but it also declared that notice of the proposed dismissal or compromise shall be given to shareholders or members in such manner as the court directs.” Former Rule 23A did not require personal notice to all shareholders, but it did require some form of shareholder notice in all cases. Section 756 now specifies that notice to all shareholders (or a particular class of shareholders) is required only if the court determines in its discretion that the proposed discontinuance or settlement will substantially affect the interests of those shareholders. The Rule has been modified to match the requirement of new Section 756.