STATE OF MAINE
SUPREME JUDICIAL COURT
AMENDMENTS TO
THE MAINE RULES OF CIVIL PROCEDURE

Effective: March 1, 2013

2013 Me. Rules 01

All of the Justices concurring therein, the following amendments to the Maine Rules of Civil Procedure are adopted to be effective on the date indicated above. The specific amendments are stated below. To aid in understanding of the amendments, an Advisory Note appears after the text of each amendment. The Advisory Note states the reason for recommending the amendment, but the Advisory Note is not part of the amendment adopted by the Court.

1. Rule 23 of the Maine Rules of Civil Procedure is amended to add subsection (f), to read as follows:

(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).

2. Rule 64(c) of the Maine Rules of Civil Procedure is amended to read as follows:

(c) Same: Service. No writ of replevin shall be executed unless both it and the amount of the replevin bond are approved by order of the court. Except as provided in subdivision (h) of this rule, the order of approval may be entered only after notice to the defendant and hearing and upon a finding by the court that it is more likely than not that the plaintiff will prevail in the replevin action and that the amount of the replevin bond is twice the reasonable value of the goods and chattels to be replevied.

A replevin action may be commenced only by filing the complaint with the court, together with a motion for approval of the writ of replevin and the amount of the replevin bond. The motion shall be supported by affidavit or affidavits setting forth specific facts sufficient to warrant the required finding and shall be upon the affiant's own knowledge, information and belief; and, so far as upon information and belief, shall state that the affiant believes this information to be true. Except as provided in subdivision (h) of this rule, the motion and affidavit~~s~~ or affidavits with notice of hearing thereon shall be served upon the defendant in the manner provided in Rule 4 at the same time the summons and complaint are served upon that defendant.

. . . .

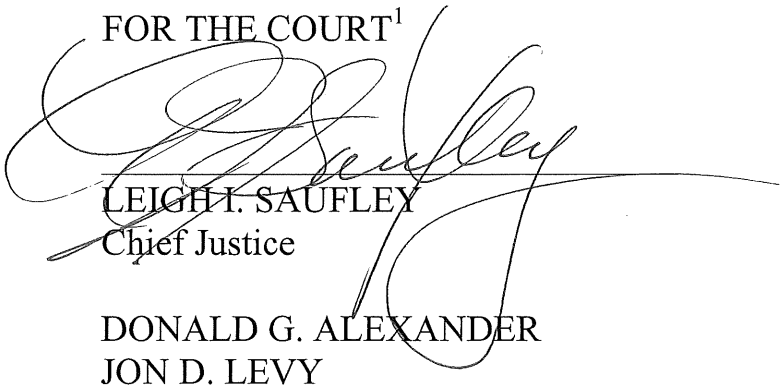
Advisory Notes – January 2013

The third sentence of the second paragraph in subsection (c) is amended to correct a typographical error. The rule is revised to read, "affidavit or affidavits" instead of, "affidavits or affidavits."

3. These amendments shall be effective March 1, 2013.

Dated: January 31, 2013

FOR THE COURT[1]



LEIGH I. SAUFLEY
Chief Justice

DONALD G. ALEXANDER
JON D. LEVY
WARREN M. SILVER
ANDREW M. MEAD
ELLEN A. GORMAN
JOSEPH M. JABAR
Associate Justices

[1] This Rules Amendment Order is approved after conference of the Court, all Justices concurring therein.