

Alabama Rules of Civil Procedure

IV. PARTIES

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) At an early practicable time, consistent with Alabama statutory law, the court shall determine by order whether an action brought as a class action is to be so maintained. An order that grants or denies class certification may be altered or amended before final judgment.

(2) For any class certified under Rule 23(b)(1) or (b)(2), the court may direct appropriate notice to the class. For any class certified under Rule 23(b)(3) -- or upon ordering notice under Rule 23(e) to a class proposed to be certified for purposes of settlement under Rule 23(b)(3) -- the court must direct to class members the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice may be by one or more of the following: United States mail, electronic means, or other appropriate means. 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 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; (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) *Settlement, voluntary dismissal or compromise.* The claims, issues, or defenses of a certified class -- or a class proposed to be certified for purposes of settlement -- may be settled, voluntarily dismissed, or compromised only with the court's approval, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs.

(dc) *District court rule.* Rule 23 does not apply in the district courts.

[Amended eff.10-1-95; Amended 3-31-2021, eff 5-1-2021.]

Committee Comments on 1973 Adoption

This rule is a substantial restatement of a practice which developed in equity, but the procedure is here clearly defined and made available in all actions, whether legal or equitable. It does not deal directly with shareholders actions (see Rule 23.1) and actions by or against unincorporated associations (see Rule 23.2). Older concepts of "true," "hybrid" and "spurious" often criticized as being more appropriate in the lecture hall rather than the courtroom, are scrapped in favor of more practical criteria.

Rule 23(a) catalogues four prerequisites. The class must be so numerous as to preclude joinder. Common questions of law or fact must be present. The claims or defenses of the representatives must be typical of the contentions of

the class. Finally, the representatives themselves must be capable of adequate representation.

Rule 23(b) expands upon the prerequisites subject to the fundamentals noted above. It contains a series of additional ingredients, any one of which can serve as the essential fifth ingredient when taken in conjunction with the four ingredients required in Rule 23(a). Of course, it is possible for more than one Rule 23(b) alternative to be applicable. This becomes important for purposes of the appropriate type of notice discussed below.

Rule 23(b)(1) offers two sets of circumstances, either one of which is capable of serving as the required fifth ingredient. If there is risk of inconsistent results leaving the party opposing the class in a quandary as to how he should govern himself or, on the other hand, adjudication on an individual basis might be injurious to contentions of other individuals although not necessarily as devastating as a defense of *res judicata*, Rule 23(b)(1) suffices.

Rule 23(b)(2) can be resorted to in the event Rule 23(b)(1) does not yield the needed extra ingredient. Therein, an opposing party has acted or refused to act on grounds generally applicable to the class as a whole, making appropriate final injunctive or declaratory relief as to the class as a whole. This provision has had particular applicability in federal civil rights litigation. Finally, Rule 23(b)(3) applies upon a judicial finding that the community of questions prevails over the diversity and that a class action is simply the superior method of adjudication. This catch-all provision offers flexibility sorely needed and missing in earlier efforts to regulate class proceedings.

Rule 23 (c) provides for a determination by the court as to compliance with Rule 23(a) and (b). Such determination must identify just which of the "fifth ingredient" criteria is present because provision for notice to the class varies depending upon which ingredient under Rule 23(b) is relied upon. For example, if Rule 23(b)(3) is found applicable, the best notice under the circumstances goes from the Clerk's office in a form agreed upon by the parties or upon order of the court, advising the members of the class of the pendency of the action. Failure to opt out by a date certain, automatically includes the member within the class. Further, any member not requesting exclusion may appear through his counsel.

As to class actions fitting the outlines of Rule 23(b)(1) or (2), no such notice procedure is required but the final judgment shall contain a finding as to whom the court has concluded to be in the class. Under Rule 23(d), the court has discretion as to requiring actual notice, but members cannot opt out as such action would defeat the very purpose of obtaining a judgment binding the class

covered by Rule 23(b)(1) and (2). As to a Rule 23(b)(3) class action, the final judgment must contain a list of those who were notified and failed to request exclusion, thereby becoming members of the class. Of course, the binding effect of such a judgment is beyond the scope of the rule and depends upon the sufficiency of notice in a given case and independent application of the doctrine of res judicata. Also, Rule 23(c) empowers the court to carry only a portion of the case along as a class action and permits creation of subclasses where appropriate.

Rule 23(d) is a housekeeping provision in that it permits orders during the course of the action for protection, simplification and other procedural matters.

Rule 23(e) contains stock protection against unjust class action compromises.

Committee Comments to October 1, 1995, Amendment to Rule 23

The amendment is technical. No substantive change is intended.

Committee Comments Adopted February 13, 2004, to Rule 23

Rule 23(c)(1) should be read in conjunction with Act No. 99-250, Ala. Acts 1999, effective May 25, 1999, which is codified at §§ 6-5-640 through 642, Code of Alabama 1975. Although the act works few changes in Rule 23 as the Alabama Supreme Court has already interpreted it, § 6-5-641 does supplement the discretionary provisions of Rule 23(c)(1). The net effect of this supplementation is to provide for nondiscretionary hearing and documentation requirements in the circuit court. In addition, § 6-5-642 makes orders granting or denying class certification immediately appealable and provides for stays pending appeal.

Committee Comments to Amendment to Rule 23 Effective May 1, 2021

The amendments are intended to bring Rule 23 into conformance with current practice and with §§ 6-5-640 through -642, Ala. Code 1975. Those statutes should be read carefully because they include provisions that govern important procedures for class actions in Alabama, including: (1) certain deadlines, (2) a planning conference, (3) potential stays of certain types of discovery, (4) requirements for any class-certification order, and (5) appeals.

The change to Rule 23(c)(1) is intended to make clear that the deadlines in Ala. Code 1975, § 6-5-641, govern rather than the previous admonition in the rule to decide class certification "as soon as practicable."

Further, Rule 23(c)(1) is amended to eliminate the reference to a "conditional" certification. Any certification must meet the full requirements of Rule 23 and Ala. Code 1975, § 6-5-641.

Additionally, the amendments update the notice provisions of Rule 23(c)(2) to (1) make clear that the trial court has the discretion to require notice in actions under Rule 23(b)(1) or (b)(2), as it determines is appropriate, and (2) to recognize the possibility of using notice methods other than traditional mail. Since the United States Supreme Court, in *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974), interpreted the individual-notice requirement for class members in Rule 23(b)(3) class actions, many courts have read the rule to require notice by first-class mail in every case. But technological change has introduced other means of communication that may sometimes provide a reliable additional or alternative method for giving notice. Although first-class mail may often be the preferred primary method of giving notice, courts and counsel have begun to employ new technology to make notice more effective. Because there is no reason to expect that technological change will cease, when selecting a method or methods of giving notice courts should consider the capacity and limits of current technology, including class members' likely access to such technology.

Finally, Rule 23(e) is amended to clarify that court approval is required for dismissal only after a class has been certified, consistent with current practice and the amendments to the Federal Rules of Civil Procedure. The amendment is not intended to affect or displace any provision of the Alabama Code.

District Court Committee Comments

The complexities of class actions and the jurisdictional limitations of the district court make it necessary to withhold applicability of Rule 23.

Note from the reporter of decisions: The order adopting the Committee Comments to Rules 5, 15, 21, 23, 24, and 42, Alabama Rules of Civil Procedure, effective February 13, 2004, is published in that volume of *Alabama Reporter* that contains Alabama cases from 865 So.2d.

Note from the reporter of decisions: The order amending Rule 23(c)(1), Rule 23(c)(2), and Rule 23(e), adopting the Committee Comments thereto, and

amending the District Court Committee Comments to Rule 23, effective May 1, 2021, is published in that volume of *Alabama Reporter* that contains Alabama cases from ___ So. 3d.