Class Actions: A Survey and Comparison of Federal Law and Maine State Law

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This article surveys the growing body of Maine class action case law, with a particular eye to its similarities and differences to First Circuit case law interpreting Fed. R. Civ. P. 23.

Nationally, class actions are a major legal issue. In a survey of Fortune 1000 companies, 54% reported facing class actions in 2019. See CARLTON FIELDS, 4, 8 (2019). Class action spending reached $2.46 billion in 2018 and was projected to rise in 2019. See Carlton Fields at 4, 6.

The prevalence of class actions has led to a steady stream of U.S. Supreme Court decisions in recent years addressing class action procedure under Fed. R. Civ. P. 23. Between the 2010 and 2018 terms, the Supreme Court decided between five and ten cases per term that were filed as class actions. See Adam Feldman (last visited Jan. 2, 2020). The trend of high-profile class cases before the Supreme Court shows no signs of slowing down.

In Maine, the story thus far has been different. Class actions have been less prevalent and case law regarding M.R. Civ. P. 23 has been sparse. As Justice Silver noted in 2009, Maine's Law Court has "very little precedent on class action certification." McKinnon v. Honeywell Intern., Inc., 2009 ME 69, ¶ 27, 977 A.2d 420, 428 (2009). This may be changing, however. Since 2000, Maine courts have more frequently addressed class action issues. That trend could accelerate, given that plaintiffs may increasingly seek recourse to state courts if the Supreme Court is perceived to be taking a more hostile view of class actions. If this trend continues, Maine law regarding Rule 23 will continue to become more robust. It is likely that Maine law will continue to track federal class action law to some extent, though it has diverged—and may continue to diverge—to some extent as well.

Rule 23 – Similarities and Differences between State and Federal Law

As promulgated in 1981, Maine's rule closely tracked the Fed. R. Civ. P. 23. At the time, it was expected that the "substantial body of interpretation in the federal courts" would provide "guidance to the Maine practitioner." M.R. Civ. P. 23, 1981 committee note. It was also anticipated that the Maine rule might be amended "to adapt its provisions to the specific conditions and needs of Maine practice." Id. To date, while Maine practitioners have looked to federal law for guidance, there have been no amendments significantly differentiating Maine's rule from the federal version.

With the passage of time, however, Maine's rule has diverged from the federal through inaction. It has not been altered to reflect the substantial federal amendments that have occurred after 1981, including those adopted in 1998, 2003, and 2018.

The 1998 amendments to the federal rule introduced permissive interlocutory appeal. See Fed. R. Civ. P. 23, 1998 committee note. Interlocutory review ordinarily is not

available under Maine law, and, thus, an order denying a motion for class certification is not immediately appealable. See Millett v. Atl. Richfield Co., 2000 ME 178, ¶¶ 15, 17, 760 A.2d 250, 256 (2000).

The 2003 amendments to the federal rule altered, among other things:

- The language regarding the timing of certification decisions
- The court's authority to direct notice of certification –and–
- The process of reviewing proposed class action settlements
- See Fed. R. Civ. P. 23, 2003 committee note.

The 2018 amendments made further changes, largely relating to issues relating to settlement. See Fed. R. Civ. P. 23, 2018 committee note. The fact that the Maine rule has not been amended in these ways may suggest that practice under the Maine rule should differ from current practice under the federal rule.

Nevertheless, the basic structure of Maine's rule still tracks its federal counterpart:

- Subsection (a) sets out requirements that every class action must meet.
- Subsection (b) then identifies further prerequisites that apply to each of three types of class actions.

Rule 23 – The Searching Inquiry Required under State and Federal Law

Under Maine law, "[t]he party seeking certification bears the burden of demonstrating under a 'strict burden of proof' that all of the requirements of Rule 23 are clearly met." Millett v. Atl. Richfield Co., 2000 Me. Super. LEXIS 39, at *17 (Me. Sup. Ct. Mar. 2, 2000). This strict burden reflects the fact that certification "dramatically affects the litigation by increasing the stakes for the defendants" by:

- "[I]nflating potential damage awards" –and–
- "[C]reating insurmountable pressure on defendants to settle"

Smart v. R.C. Moore, Inc., 2002 Me. Super. LEXIS 237, at *3 (Me. Sup. Ct. Jan. 15, 2002). Thus, plaintiffs must show "by a preponderance of the evidence" that certification is appropriate in light of the criteria set forth in Rule 23. Karofsky v. Abbott Labs., 1997 Me. Super. LEXIS 316, at *12 (Me. Sup. Ct. Oct. 15, 1997) (Saufley, J.); see Mazerolle v. Daimlerchrysler Corp., No. CV-01-581, at *2 (Me. Sup. Ct. May 24, 2005). The state standard reflects the parallel federal rule that the plaintiff bears the burden of proving that the prerequisites of Rule 23 have been satisfied. See Smilow v. Sw. Bell Mobile Sys., Inc., 323 F.3d 32, 38 (1st Cir. 2003).

Maine courts, like federal courts in the First Circuit, must conduct a "'rigorous analysis' of the Rule 23 prerequisites . . . before a proposed class can be certified." Millett, 2000 Me. Super. LEXIS 39, at *17; see In re New Motor Vehicles Canadian Exp. Antitrust Litig., 522 F.3d 6, 25 (1st Cir. 2008). In conducting this analysis, a state court—as with a federal court—"certainly may look past the pleadings to determine whether the requirements of Rule 23 have been met." Millett, 2000 Me. Super. LEXIS 39, at *19 (internal quotation marks omitted); see In re New Motor Vehicles Canadian Exp. Antitrust Litig., 522 F.3d at 17.

Indeed, probing beyond the pleadings is necessary to make a meaningful determination of the certification issues, as a court must understand the "claims, defenses, relevant facts, and applicable substantive law in order to make a meaningful determination of the certification issues." See Millett, 2000 Me. Super. LEXIS 39, at *19 (internal quotation marks omitted).

This means that a court "must look beyond the bald allegations of the complaint and review the facts procured through discovery." Karofsky, 1997 Me. Super. LEXIS 316, at *11. This will allow the court to "have an understanding of the evidence which goes to the Rule's requirements." Burton v. Merrill, 1999 Me. Super. LEXIS 276, at *10 (Me. Sup. Ct. Oct. 15, 1999). This analysis may lead a court to "consider evidence which goes to the requirements of Rule 23 even though that same evidence relates to the merits of the plaintiff's claims." Karofsky, 1997 Me. Super. LEXIS 316, at *12. A court may not, however, "evaluate or decide the merits of plaintiffs' claims" at the class certification stage. Id.

Rule 23(a) – Universal Prerequisites under Federal and State Law

The following class action prerequisites are universal under both federal and state law.

Numerosity

Under Maine Rule 23(a)(1), a plaintiff must show that the class "is so numerous that joinder of all members is impracticable." M.R. Civ. P. 23(a)(1). Plaintiffs must provide

"some evidence of or reasonably estimate the number of class members." Flippo v. L.L. Bean, 2002 Me. Super. LEXIS 81, at *6 (Me. Sup. Ct. Apr. 9, 2002). However, the numerosity requirement also encompasses nonnumerical considerations. The plaintiff must show that joinder is impracticable given factors such as the:

- Geographical location of the class members
- Ease of identifying those members
- Nature of the action –and–
- Size of each member's claim

See Smart, 2002 Me. Super. LEXIS 237, at *5.

"Where joinder is impracticable, a class of 50 to 60 members has been determined to be sufficiently numerous to warrant class certification." Smart, 2002 Me. Super. LEXIS 237, at *6. There is, however, no "absolute minimum or maximum number of parties that satisfies the numerosity requirement." Id. The numerosity standard under the state rule closely tracks that applied by the First Circuit. See Garcia-Rubiera v. Calderon, 570 F.3d 443, 450 (1st Cir. 2009); Andrews v. Bechtel Power Corp., 780 F.2d 124, 131–32 (1st Cir. 1985).

Commonality

Pursuant to Maine Rule 23(a)(2), a plaintiff must demonstrate that "there are questions of law or fact common to the class." M.R. Civ. P. 23(a)(2). Maine courts have characterized this requirement as not "demanding." Millett, 2000 Me. Super. LEXIS 39, at *22 (internal quotation marks omitted). The plaintiff need not show that all questions of law or fact are identical. See Millett, 2000 Me. Super. LEXIS 39, at *23 (internal quotation marks omitted). Instead, the plaintiff must simply show that the "grievances share a common question of law or of fact." Flippo, 2002 Me. Super. LEXIS 81, at *8 (internal quotation marks omitted).

Notably, Maine courts have not considered the Supreme Court's commonality standard from *Wal-Mart Stores, Inc. v. Dukes*, which demands that a class-wide proceeding "generate common answers apt to drive the resolution of the litigation" by resolving "an issue that is central to the validity of each one of the claims in one stroke." Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 350 (2011) (internal quotation marks omitted). This marks a substantial divergence from federal law. Application of *Dukes* would heighten Maine's commonality standard as Dukes created a stricter test. See Raposo v. Garelick Farms, LLC, 293 F.R.D. 52, 55 (D. Mass 2013); Puerto Rico College of Dental Surgeons v. Triple S Mgmt. Inc., 290 F.R.D. 19, 26 (D. P.R. 2013). It is possible that Maine courts will adopt the Dukes standard, but they have not yet confronted that issue.

Typicality

Under Maine Rule 23(a)(3), the representative's claims or defenses must be "typical of the claims or defenses of the class." M.R. Civ. P. 23(a)(3). This requirement obligates the plaintiff to prove that "the action can be efficiently maintained as a class" and that the "named plaintiffs have incentives that align with those of absent class members so as to assure that the absentees' interest will be fairly represented." Millett, 2000 Me. Super. LEXIS 39, at *24 (internal quotation marks omitted). The relevant question is "whether the claims of all class members arise out of the same events and require the same legal arguments to establish liability." Olfene v. Bd. of Trustees, No. CV-08-155 (Me. Sup. Ct. June 8, 2009) ; see Everest v. Leviton Mfg. Co., 2007 Me. Super. LEXIS 111 (Me. Sup. Ct. June 5, 2007).

Typicality is absent "if the class representative's claim is subject to one or more unique defenses that threaten to become the focus of the litigation" because such defenses would "preoccupy" the named plaintiff "to the detriment of the interests of absent class members." Flippo, 2002 Me. Super. LEXIS 81, at *17 (internal quotation marks omitted); see Millett, 2000 Me. Super. LEXIS 39, at *30. This test is largely consistent with federal law regarding the typicality requirement. Under federal law, "[t]he primary focus of the typicality analysis is the functional question of whether the putative class representative can fairly and adequately pursue the interest of the absent class members without being sidetracked by her own particular concerns." In re Credit Suisse-AOL Sec. Litig., 253 F.R.D. 17, 23 (D. Mass. 2008) (internal quotation marks omitted).

Adequacy

Maine Rule 23(a)(4) requires a plaintiff to show that "the representative parties will fairly and adequately protect the interests of the class." M.R. Civ. P. 23(a)(4). The adequacy requirement is designed to ensure that "the representative parties put up a genuine fight." Everest, 2007 Me. Super. LEXIS 111, at *8 (internal quotation marks omitted). As under federal law, there are two prongs to this requirement in Maine (Smart, 2002 Me. Super. LEXIS 237, at *9–10; see Andrews, 780 F.2d at 130):

- First, the plaintiff must show that "class counsel is qualified, experienced and generally able to conduct the litigation." Flippo, 2002 Me. Super. LEXIS 81, at *19 (internal quotation marks omitted).
- Second, the plaintiff must show that there is "no conflict of interest between the named plaintiffs and other members of the plaintiff class." Flippo, 2002 Me. Super. LEXIS 81, at *19 (internal quotation marks omitted). However, "only a conflict which goes to the very subject

matter of the litigation will defeat a party's claim to representative status." Olfene, No. CV-08-155, at n.10 (internal quotation marks omitted).

The interests of the representative must be "sufficiently similar to those of the class that it is unlikely that their goals and viewpoints will diverge." Melnick v. Microsoft Corp., 2001 Me. Super. LEXIS 293, at *3 (Me. Sup. Ct. Aug. 24, 2001). This conflict of interest standard has similarities to the standard in the First Circuit, which also recognizes that the adequacy prong is not satisfied where there is a substantial intra-class conflict. See Matamoros v. Starbucks Corp., 699 F.3d 129, 138 (1st Cir. 2012).

Rule 23(b) – Additional Specific Prerequisites under Federal and State Law

Federal and state law impose the following additional prerequisites to maintain a class action.

Rule 23(b)(1)

Under the Maine Rules of Civil Procedure, "Rule 23(b)(1) authorizes the use of the class action device when necessary to prevent possible adverse effects . . . that might result if separate actions had to be brought." 7AA Fed. Prac. & Proc. Civ. § 1772 (3d ed.). Under (b)(1)(A), a class action can be maintained if "inconsistent or varying adjudications . . . would establish incompatible standards of conduct." M.R. Civ. P. 23(b)(1)(A). Certification under (b)(1)(A) is designed "to protect the interest of the party opposing the class," and is only available if it would be impossible to comply with two differing judgments. Everest, 2007 Me. Super. LEXIS 111, at *11 (internal quotation marks omitted). The Maine rule thus generally tracks First Circuit law on this point, though neither have developed a definitive framework under (b)(1)(A). See Kent v. SunAmerica Life Ins. Co., 190 F.R.D. 271, 280 (D. Mass. 2000).

Under (b)(1)(B), a class action can be maintained if an adjudication "would as a practical matter be dispositive of the interests" of nonparty class members or would "substantially impair or impede their ability to protect their interests." M.R. Civ. P. 23(b)(1)(B). There is no developed Maine jurisprudence under Section (b)(1)(B). It is therefore open to question whether Maine law will follow federal law, which recognizes that this provision generally applies to cases "in which class members are seeking to recover against a common fund with insufficient assets to satisfy all possible claimants" or where "disposition of an individual action by one class member could substantially impair the ability of absent class members to recover on their claims." In re Tyco Int'l, Ltd., 2006 U.S. Dist. LEXIS 58278, at *29 (D.N.H. Aug. 15, 2006). These standards are likely to apply in state court as well.

Rule 23(b)(2)

Rule 23(b)(2) allows for a class action when "the party opposing the class has acted or refused to act on grounds generally applicable to the class" and the representatives are seeking "final injunctive relief or corresponding declaratory relief." M.R. Civ. P. 23(b)(2). To be certified under (b)(2), a class must be "homogeneous without any conflicting interests between the members of the class." Millett, 2000 Me. Super. LEXIS 39, at *82. Further, "certification under Rule 23(b)(2) is not appropriate where . . . final relief relates predominately to money damages." Mazerolle, No. CV-01-581, at *3. Any claim for money damages "must be merely incidental to the claim for injunctive relief"—such as when damages would be "automatically" available "as part of a uniform group remedy." Mazerolle, No. CV-01-581, at *4, *5. Creative pleading will not permit a plaintiff to circumvent this rule; a court will closely examine the proposed remedies and the "realities of the litigation" (Millett, 2000 Me. Super. LEXIS 39, at *81) to ensure that the claims are not "essentially monetary in nature." Mazerolle, No. CV-01-581, at *4.

Courts in the First Circuit have recognized similar limits (see In re Nexium Antitrust Litig., 296 F.R.D. 168, 174 (D. Mass. 2013)), while fleshing out a three-step inquiry to certify an injunctive (b)(2) class:

- First, that the defendant acted on grounds applicable to the whole class
- Second, that final injunctive relief is appropriate –and–
- Third, that relief is appropriate for the whole class

See Donovan v. Philip Morris USA, Inc., 268 F.R.D. 1, 11 (D. Mass. 2010).

Rule 23(b)(3)

Under Rule 23(b)(3), a plaintiff must prove both that:

"[Q]uestions of law or fact common to the members of the class predominate over any questions affecting only individual members" –and–

A class action would be "superior to other available methods" of adjudication

M.R. Civ. P. 23(b)(3). Rule 23(b)(3) is intended to promote "economies of time, effort, and expense . . . without sacrificing procedural fairness." Mazerrolle, No. CV-01-581, at *5.

In order to demonstrate predominance under the Maine rule, a plaintiff must show that "common questions [are] central to all the claims." Everest, 2007 Me. Super. LEXIS 111, at *13 (internal quotation marks and alterations omitted). This requirement is "far more demanding" than the commonality requirement. Millett, 2000 Me. Super. LEXIS 39, at *38. "To predominate, it is not enough that the claims arise out of a common nucleus of operative fact. Instead, the common questions must be central to all the claims. Common issues are predominant only if their resolution would provide a definite signal of the beginning of the end." Id (internal quotation marks and alterations omitted).

The predominance inquiry requires the court to consider what the plaintiff "will be required to prove at trial." Everest, 2007 Me. Super. LEXIS 111, at *14. If evidence on individual issues would "so overwhelm the common issues as to bog down the proceeding," then certification is not appropriate. Mazerolle, No. CV-01-581, at *5. Accordingly, under Maine law—as under the federal rule—the predominance inquiry "involves an individualized, pragmatic evaluation of the relationship between and the relative significance of the common and individualized issues." Puerto Rico College of Dental Surgeons, 290 F.R.D. at 29.

Maine courts have and will engage in a rigorous predominance analysis. The need for individualized proof of reliance and causation will often preclude certification. See Mazerolle, No. CV-01-581, at *6–8; Millett, 2000 Me. Super. LEXIS 39, at *44–45. Affirmative defenses that raise individual issues may also preclude certification. See Millett, 2000 Me. Super. LEXIS 39, at *52, fn. 29. The same is true of damages issues, at least if there will be need for individualized proof on liability (see Millett, 2000 Me. Super. LEXIS 39, at *54–55), where calculating damages is not "virtually a mechanical task." Melnick, 2001 Me. Super. LEXIS 293, at *24; see Smart, 2002 Me. Super. LEXIS 237, at *12–13.

Further, to show superiority under the Maine rule, a court must "balance, in terms of fairness and efficiency, the merits of a class action against those of alternative available methods of adjudication." Millett, 2000 Me. Super. LEXIS 39, at *66 (internal quotation marks omitted). Maine law is largely consistent with the superiority requirement under federal law, which, as courts have observed, is intended to ensure that certification "would achieve economies of time, effort, and expense" without sacrificing procedural fairness or bringing about other undesirable results. Van West v. Midland Nat'l Life Ins. Co., 199 F.R.D. 448, 454 (D.R.I. 2001).

A class action "must be better than, not merely as good as," alternative methods of adjudication. Flippo, 2002 Me. Super. LEXIS 81, at *25. If a class action would "reduce litigation costs and promote greater efficiency" or if "no realistic alternative exists," then it is likely superior. Millett, 2000 Me. Super. LEXIS 39, at *66. If the case is likely to devolve into a series of mini-trials (Millett, 2000 Me. Super. LEXIS 39, at *69), or if there are feasible alternatives (see Mazerolle, No. CV-01-581, at *9; Millett, 2000 Me. Super. LEXIS 39, at *69–70), then a class action is likely not superior. Accordingly, the general federal rule that the superiority element may be satisfied if most claims would not be brought except for the class action mechanism likely also applies in Maine. See Tardiff v. Knox County, 365 F.3d 1, 4 (1st Cir. 2004).

Other Issues under State and Federal Law

Maine courts have also addressed other important Rule 23 issues, while leaving open other issues that have been addressed under federal law. The Law Court has addressed some of the mootness issues in the class context. It has held that "a class action does not become moot so long as a controversy exists between the defendant and any member of the certified class," even if the named plaintiff's case has become moot after class certification. LeGrand v. York Cty. Judge of Probate, 2017 ME 167, ¶ 26, 168 A.3d 783, 791 (2017). Generally, however, named plaintiffs must have a live claim at the time the case is brought and at the time of class certification. See Olfene, No. CV-08-155.

A superior court justice has acknowledged, in dicta, concerns with "fail-safe" classes (i.e., classes that are defined so as to make membership in the class depend on whether the person has a valid claim) (see Sabina v. JP Morgan Chase Bank, 2015 Me. Bus. & Consumer LEXIS 18, at *2 (Me. B.C.D. Apr. 13, 2015)), but this issue has not been squarely addressed. The issues surrounding the implied ascertainability requirement more broadly also remain unaddressed, unlike in the First Circuit. See Matamoros, 699 F.3d at 139; Donovan, 268 F.R.D. at 9.

Nor have Maine courts closely scrutinized the ongoing issues surrounding certification of classes that include uninjured class members—an issue that the First Circuit has addressed, but which remains an area of debate. See In re Asacol Antitrust Litig., 907 F.3d 42, 52–53, 58 (1st Cir. 2018). Tolling issues also have not been addressed by Maine courts, unlike in federal courts. See In re Celexa and Lexapro Mktg. & Sales Practices Litig., 915 F.3d 1, 16–17 (1st Cir. 2019). Standing also remains an issue to be

considered in Maine class cases. Cf. Plumbers' Union Local No. 12 Pension Fund v. Nomura Asset Acceptance Corp., 632 F.3d 762, 769–70 (1st Cir. 2011); Pruell v. Caritas Christi, 645 F.3d 81, 83–84 (1st Cir. 2011).

Given these unresolved issues, federal law is likely to remain a source of guidance as Maine class action law continues to develop.

Conclusion

Though Maine case law on Rule 23 is still relatively scarce, state courts have outlined the basic class action requirements. This framework will doubtless continue to be fleshed out in future years as Maine courts have further opportunities to consider class cases. As the drafters of the Maine rule foresaw, federal case law will likely continue to influence Maine class action law, while the rule will no doubt also continue to be adapted to the needs of Maine practice.

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