

### C. Maintenance

A lawsuit may be maintained as a class action if the prerequisites of Rule 23(a) are satisfied and in addition either of the following factors is fulfilled:

- Risk of Inconsistency

The prosecution of separate actions by or against members of the class would create a risk of inconsistency or **varying adjudications**; or

- Class Questions Predominate

Questions of law or fact **common to the members** of the class predominate over any questions affecting only individual members. A class action is superior to other available methods for the fair and efficient adjudication of the controversy.

## VIII. TRIALS

### A. Right to a Jury Trial

#### ★★ 1) GENERAL - ACTIONS AT LAW

Rule 38 provides that, pursuant to Alaska Const. art. 1, § 16 or state law, parties possess a right to a jury trial in all **actions at law (for damages)**. In equity cases (actions seeking equitable remedies), the parties do not have a right to a jury trial. A party may possess both legal and equitable claims in one action. Rule 38(b)-(c) provides that a party should serve a written demand for a trial by jury on all other parties.

#### 2) EQUITABLE CLAIMS

**In Alaska, no right to a jury trial exists for equitable claims.** Alaska Const. art. I, § 16, follows its federal counterpart in preserving a right to jury trial only on claims that would have had such a right at common law, that is, in 1791. *See generally* Local No. 391 v. Terry, 110 S. Ct. 1339, 1344 (1990); State v. First National Bank of Anchorage, 660 P.2d 406, 423-4 (Alaska 1982); 9 Wright & Miller, Federal Practice & Procedure: Civil 2d § 2302. For instance, a claim for injunctive relief is purely equitable, and comes with no jury trial right. Wright & Miller, supra, § 2308 at 80 (“no constitutional right to a jury trial on a claim for an injunction”), § 2309 (specific performance is equitable relief; no jury trial right). The fact that the complaint contains one equitable claim (for injunctive relief) and one legal claim (for damages on a tort theory) does not render the injunctive claim triable to a jury. Wright & Miller, supra, § 2305 at 70.

Even if there were a right to trial by jury, a decision on a motion for preliminary injunction is not the trial of the case. However, a court does have discretion to advance trial on the merits so as to consolidate it with a hearing on the preliminary injunction, and in that event the court would

have to so structure the trial that any claims to which a party had a right to a jury trial would be so tried. Rule 65(a)(2) states:

*Consolidation of Hearing With Trial on Merits.* Before or after the commencement of the hearing of an application for a preliminary injunction, the court may order the trial of the action on the merits to be advanced and consolidated with the hearing of the application. Even when this consolidation is not ordered, any evidence received upon an application for a preliminary injunction which would be admissible upon the trial on the merits becomes part of the record on the trial and need not be repeated upon the trial. This subdivision (a) (2) shall be so construed and applied as to save the parties any rights they may have to trial by jury.

★★ 3) WAIVER OF RIGHT TO JURY TRIAL

A jury trial must be demanded within **ten days** of the filing of the last pleading directed to the issue for which the basis for a right to a jury trial exists. Otherwise, the right is waived. In other words, to obtain a jury trial on issues triable to a jury, a defendant needs to file and serve a separate, written demand for jury trial no more than ten days after serving his answer. Rule 38(b). Failure to submit a demand in accordance with Rule 38(b) “constitutes a waiver by the party of trial by jury.” Rule 38(d); Hollembaek v. Alaska Rural Rehabilitation Corp., 447 P.2d 67, 68 (Alaska 1968). Rule 38(d) states:

*Waiver.* The failure of a party to serve a demand as required by this rule and to file it as required by Rule 5(d) constitutes a waiver by the party of trial by jury. A demand for trial by jury made as herein provided may not be withdrawn without the consent of the parties. A party's consent to withdraw the jury trial demand may be implied by a failure to appear at trial.

★★ B. **Number of Jurors & Verdict**

A minimum of six and a maximum of twelve jurors shall participate in the verdict. Unless the parties otherwise stipulate, (1) the verdict shall be unanimous and (2) no verdict shall be taken from a jury reduced in size to fewer than six members.

C. **Judicial Findings and Conclusions**

In a bench trial, the judge is the finder of fact and decides questions of law. In a jury trial, the jury is the finder of fact and the judge decides questions of law.

D. **Jury Instructions**

1) GENERAL