

March 4, 2026

**Via Email Delivery**

[RulesCommittee\\_Secretary@ao.uscourts.gov](mailto:RulesCommittee_Secretary@ao.uscourts.gov)

Carolyn A. Dubay, Secretary  
Committee on Rules of Practice and Procedure  
Administrative Office of the United States Courts  
One Columbus Circle, NE, Room 7-300  
Washington, D.C. 20544

Re: Proposal to Clarify the Rule 23(b)(3) Superiority Requirement.

Dear Ms. Dubay,

I write to urge the Advisory Committee on Civil Rules to take up for consideration the suggestion to amend Rule 23(b)(3)'s superiority requirement to give trial courts the discretion to consider out-of-court resolutions. I enclose my forthcoming law review article on the topic, titled "Catch 23: Putting Superior Back Into the Superiority Prong of Rule 23(b)(3)," 38 *Loyola Consumer Law Review* 1 (2026) (the "Article").

In the Article, I trace the history of Rule 23(b)(3)'s superiority prong to show that the rule drafters *always* intended that the courts have the discretion to consider out-of-court remedies as part of the superiority analysis. The Article confirms that rule drafters Benjamin Kaplin, Charles Alan Wright, Judge Weinstein, and Sherman Cohn, believed that other methods of "disposing" of a controversy—including out-of-court remedies—were part of the relevant considerations for a trial court judge. *See id.* at 7-10. These views were presented to and accepted by Justices Fortas and Brennan, without controversy. *Id.* at 10 (citing Abraham L. Freedman, Proceedings of the Twenty-Ninth Annual Judicial Conference Third Judicial Circuit of the United States, 42 F.R.D. 437, 564(1967)). At least one judge specifically requested that this Committee provide clarity on the Rule 23(b)(3), urging that the drafters clarify the rule to allow courts to consider out-of-court relief. *See In re Hannaford Bros. Co. Consumer Data Sec. Breach Litig.*, 293 F.R.D. 21, 34-35 (D. Me. 2013) (alteration in original).

The Article examines Oregon's class-action rule to provide real-world evidence that a clarification to this prong of Rule 23(b)(3) is modest and achievable. The Oregon rule requires that, before a class action for damages may proceed, the plaintiff must make a request for relief and, if the defendant provides an adequate remedy, then class treatment is not superior. The cases in Oregon confirm that adding this tool to the trial-court judge's consideration is beneficial to all

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involved. Such consideration is not a get-out-of-jail free card for defendants—courts have held that unilateral but insufficient relief does not defeat superiority. But it does save time and judicial resources so as to permit the court to weigh whether class treatment is in fact superior.

Many trial court judges assume they already have the ability to consider out-of-court remedies in determining whether a class action is superior. Indeed, the Advisory Committee notes to the 1966 amendment to Rule 23 expressly state that the listed factors were “listed, *non-exhaustively*, as pertinent to the findings” for superiority. *See* Amendments to Rules of Civil Procedure, Supplemental Rules for Certain Admiralty and Maritime Claims, Rules of Criminal Procedure, 39 F.R.D. 69, 104 (1966) (emphasis added); *see also Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 615–16 (1997) (“Rule 23(b)(3) includes a non-exhaustive list of factors pertinent to a court’s ‘close look’ at the predominance and superiority criteria”).

If the Committee take this issue up, it would find that trial court judges are well equipped to handle this type of analysis. It is no greater task that trial court judges currently undertake when considering preliminary injunctions and temporary restraining orders, or weighing of evidence and experts at class certification. Thus, contrary to the suggestion in the Committee’s October 1, 2025, memorandum (Tab 13 in the Agenda Book for the last meeting), this revision is not “a significant project, and potentially a significant change” to Rule 23(b)(3). It is in fact simply clarifying the rule drafters’ original intent.

In addition to restoring judges’ ability to learn about existing remedies at the certification stage, clarifying the superiority requirement would also help solve the current Catch-22 problem that defendants often face when considering affirmative measures to mitigate potential claims. If a defendant settles with the government or preemptively offers even a 100% refund to affected consumers, it is virtually certain to be rewarded with a follow-on class action. This can make defendants reluctant to settle with the government or to provide complete relief, knowing that it may need to hold back some additional amount of recovery for the inevitable class action (and likely settlement) that will follow doing the right thing.

The Civil Rules should not deter defendants from doing the right thing either through a consent agreement or through voluntary refunds or recalls. And simply restoring the rule to its original intent to allow courts to consider of out-of-court remedies, does no injustice to existing case law, the rules, or any party. (The lack of class treatment does not bar even those who have obtained relief from bringing their own action, if dissatisfied.) Courts are more than capable of determining whether, in light of all relevant factors, a class action is superior (not just as good as, or worse than) other means of resolving the dispute. For these reasons, and for the reasons outlined in the Article, I urge the Committee to consider taking up this potential rule clarification.

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Sincerely,

A handwritten signature in blue ink, appearing to read "Fred Burnside", is enclosed in a light blue rectangular box.

Fred Burnside

Enclosure  
Fred B. Burnside, *Catch 23: Putting Superior Back Into the Superiority Prong of Rule 23(b)(3)*, 38 Loyola Consumer Law Review 1 (2026).

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**Catch 23: Putting Superior Back Into the Superiority Prong of  
Rule 23(b)(3)**

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*Catch 23*

## **Putting the “Superior” Back Into Superiority: A Modest Proposal for Rule 23(b)(3).<sup>1</sup>**

Fred Burnside

### **I. INTRODUCTION**

To determine whether to certify a damages class action under Federal Rule of Civil Procedure 23(b)(3), federal courts must assess whether class treatment is “superior to other available methods for the fair and efficient adjudication of the controversy.”<sup>2</sup> (Courts and practitioners often refer to provision as the “superiority” prong of Rule 23(b)(3).) Rule 23(b)(3) lists factors courts should consider in examining superiority, including “(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; [and] (D) the difficulties likely to be encountered in the management of a class action.”<sup>3</sup> The purpose of the superiority analysis is to “determine[e] ... whether the class action is superior to, and not just as good as, other available methods for handling the controversy; such a determination lies in an area where the trial court’s discretion is paramount.”<sup>4</sup>

Courts differ in assessing whether a class action is superior where the defendant has reached resolution with the government (e.g., a consent decree or stipulated judgment) or instituted a voluntary recall or refund program. In such cases, the affected putative class may have already received an adequate remedy, precluding the need for further judicial proceedings or splitting of any remedy with class counsel. If affected putative class members have already received relief, allowing a class action to proceed defeats judicial economy, is contrary to Federal Rule of Civil Procedure 1, and will discourage voluntary recalls or the willingness of companies to resolve disputes with the government for fear of additional liability. Allowing tag-along class actions where a class has already been offered (or even received) an

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<sup>1</sup> Fred B. Burnside, Partner, Davis Wright Tremaine LLP. A portion of this article’s analysis of Oregon Rule of Civil Procedure 32 was originally drafted and included in the Oregon Chapter of the ABA’s Survey of State Class Action Law, which appears as a supplement to Newberg and Rubenstein on Class Actions.

<sup>2</sup> Fed. R. Civ. P. 23(b)(3).

<sup>3</sup> *Id.*

<sup>4</sup> *Rutledge v. Electric Hose & Rubber Co.*, 511 F.2d 668, 673 (9th Cir. 1975).

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adequate remedy is not superior. But because Rule 23(b)(3) uses the word “adjudication” in reference to the superiority analysis, some judges feel obligated to ignore non-court-based alternative remedies that may provide greater relief to affected putative class members. The history of Rule 23, the policies behind Rule 23, and real-world examples from a jurisdiction that not only allows but requires this consideration, confirm that courts can and should consider out-of-court remedies as part of the superiority analysis.

This article proposes a modest reform to Rule 23(b)(3)’s superiority factors, to allow courts to consider the nature and extent of available remedies in determining whether class treatment is superior. This proposal is tethered to the desire of Rule 23(b)(3)’s drafters to weigh the procedural device of the class action against other methods for “disposing” of litigation, and is modeled on the success of a similar set of rules Oregon adopted decades ago. Under the Oregon rule, courts may avoid duplicative class actions where the defendant has already offered or provided an adequate remedy.<sup>5</sup> Adopting a similar discretionary factor for consideration under Rule 23(b)(3)’s superiority prong will further judicial economy, encourage prompt resolution of disputes, and facilitate greater and quicker relief to potentially affected putative class members. Trial courts should conduct a rigorous—not restrained—class-certification analysis. Trial courts are in the best position to use their discretion to determine whether the class-action device is superior to other alternatives and the Rules Advisory Committee should amend Rule 23 to ensure that courts have this discretion.

## I. ANALYSIS

### A. Why Some Courts Do Not Consider Extra-Judicial Remedies Under Rule 23(b)(3).

The text of Rule 23(b)(3) requires comparison of the class-action device against other “methods for the fair and efficient *adjudication* of the controversy.”<sup>6</sup> The Seventh Circuit’s *Aqua Dots* decision is the leading case to reject extra-judicial remedies as “adjudication” under the superiority prong, holding that “a district court’s conclusion that it has a better idea does not justify disregarding the text of Rule 23.”<sup>7</sup> But many other courts have

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<sup>5</sup>See Or. R. Civ. P. 32H-32J.

<sup>6</sup>Fed. R. Civ. P. 23(b)(3) (emphasis added).

<sup>7</sup>*In re Aqua Dots Products Liab. Litig.*, 654 F.3d 748, 751 (7th Cir. 2011).

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grappled with the issue and held that considerations outside of adjudication were improper under Rule 23(b)(3).<sup>8</sup> In fact, one court suggested the thesis of this article, by advocating that the Rules Advisory Committee consider an amendment make explicit the ability to consider out-of-court options when assessing superiority under Rule 23(b)(3):

[As] much as I too favor parties being able to resolve their controversies without expensive litigation, I observe that Rule 23(b)(3) does not address superiority as a matter of abstract economic choice analysis, but asks if a class action is “superior to other available methods for fairly and efficiently adjudicating the controversy” —i.e., other possible adjudication methods such as individual lawsuits or a consolidated lawsuit .... [Defendant] Hannaford may or may not have a good program to satisfy aggrieved customers, but [ ] the Hannaford program is not relevant to my superiority determination under the class certification decision.<sup>9</sup>

... [T]he recovery of generous fees for plaintiffs’ attorneys and large cy pres awards with little money going to actual class members call[s] into question the integrity of the class action process for resolving

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<sup>8</sup> See, e.g., *Amalgamated Workers Union of Virgin Islands v. Hess Oil Virgin Islands Corp.*, 478 F.2d 540, 543 (3d Cir. 1973) (“Rule 23(b)(3) superiority requirement “focus[es] on the question whether one suit is preferable to several,” and that “the rule was not intended to weigh the superiority of a class action against possible administrative relief... We find no suggestion in the language of Rule 23, or in the committee notes, that the value of a class suit as a superior form of action was to be weighed against the advantages of an administrative remedy” (alteration in original)); *de Lacour v. Colgate-Palmolive Co.*, 338 F.R.D. 324, 346 (S.D.N.Y. 2021) (“Rule 23 ... was drafted ‘with the legal understanding of ‘adjudication’ in mind: the subsection poses the question whether a single suit would handle the dispute better than multiple suits.” (alteration in original) (quoting *In re Scotts EZ Seed Litig.* 304 F.R.D. at 415)); *In re Scotts EZ Seed Litig.*, 304 F.R.D. 397, 415 (S.D.N.Y. 2015) (“[a]s an initial matter, the Court is not convinced non-adjudicative forms of redress may even be considered under Rule 23(b)(3)’s superiority analysis,” citing “adjudication” (alteration in original)). See also *Dukich v. IKEA USA Retail LLC*, 343 F.R.D. 296, 309 (E.D. Pa. 2022) (“the question of whether administrative remedies should be considered in a Rule 23(b)(3) analysis remains unanswered.”); *Rojas v. Bosch Solar Energy Corp.*, No. 18-cv-05841, 2022 WL 717567, at \*16 (S.D. Cal. 2022) (“District courts within the Ninth Circuit are split as to whether private processes should be considered when determining whether a class action is the superior method for adjudicating a controversy.”).

<sup>9</sup> *In re Hannaford Bros. Co. Consumer Data Sec. Breach Litig.*, 293 F.R.D. 21, 34-35 (D. Me. 2013) (alteration in original).

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lawsuits. ... [M]y concern here that this is a de minimis class action where virtually no one will bother to make a claim and that any recovery will serve solely the lawyers (and perhaps some modest measure of corporate deterrence) **present[s] questions for those who write the class action rules and for Congress, not for this individual judge**

**applying the language of the Rule.** ... Although reasonable people can certainly maintain that as a matter of policy other solutions are preferable to litigation, I do not see how that argument has a place in the class certification decision under the current Rule.<sup>10</sup>

In *Hannaford Bros.* (a data breach case), the defendant “created a refund program for fees related to credit card replacement arising out of the data theft.”<sup>11</sup> The refund program did not require “proof of causation or even loss” to recover, and provided putative class members “a comparable or even better remedy than they could hope to achieve in court.”<sup>12</sup> This existing out-of-court program gave the Court concern “that if this case proceeds as a class action, few class members will ultimately be interested in taking the time to file the paperwork necessary to obtain the very small amount of money that may be available if there is a recovery.”<sup>13</sup> This prospect of “recovery of generous fees for plaintiffs’ attorneys and large *cy pres* awards with little money going to actual class members call into question the integrity of the class action process for resolving lawsuits.”<sup>14</sup> Despite these risks, the trial court felt bound to ignore out-of-court options, holding that “those are policy issues for Congress **or for the Federal Rules drafters.**”<sup>15</sup> Feeling bound by the word “adjudicate” in Rule 23(b)(3), the court in *Hannaford Bros.* recognized that “reasonable people can certainly maintain that as a matter of policy other solutions are preferable to litigation,” but did not believe the Court could consider those alternative solutions “under the current Rule.”<sup>16</sup>

<sup>10</sup> *Id.* at 26 (alteration in original) (emphasis added).

<sup>11</sup> *Id.*

<sup>12</sup> *Id.* at 34 (alteration in original).

<sup>13</sup> *Id.* at 26.

<sup>14</sup> *See also id.*

<sup>15</sup> *Id.* (emphasis added); *see also id.* (noting that the concern over “a de minimis class action where virtually no one will bother to make a claim and that any recovery will serve solely the lawyers (and perhaps some modest measure of corporate deterrence) **present questions for those who write the class action rules and for Congress**”) (emphasis added).

<sup>16</sup> *Id.* at 29.

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A leading class-action treatise (Newberg and Rubenstein on Class Actions) offers five core arguments against consideration of extra-judicial remedies as part of the superiority analysis:

- The text of Rule 23(b)(3) references “adjudication,” such that examining a remedy that does not involve an in-court “adjudication” is improper;
- Settlement negotiations are considered inadmissible evidence, such that asking a court to consider a settlement offer outside the adjudicatory process is in tension with other rules (*e.g.*, Federal Rule of Evidence 408);
- A judge’s review of a settlement offer at the outset of the case may bias the judge;
- Weighing the value of a settlement offer made before litigation is commenced is “procedurally, if not constitutionally problematic”; and
- Allowing a defendant to avoid class action litigation by offering an out-of-court resolution gives defendants too much control over class action litigation.<sup>17</sup>

With all due respect to Professor Rubenstein, aside from the textual argument, these points are overwrought, lack support, and other prominent treatises appropriately reject them.<sup>18</sup> For example, settlement negotiations are inadmissible to establish liability, but not for other purposes.<sup>19</sup> Indeed, existing federal rules already allow the court to consider settlement offers in related contexts.<sup>20</sup> For example, if a defendant makes an offer of judgment for everything a plaintiff can obtain, and the plaintiff refuses that offer, the defendant can submit it to the court and

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<sup>17</sup> William B. Rubenstein, *Newberg and Rubenstein on Class Actions*, (6th ed. 2024).

<sup>18</sup> *See, e.g.*, Mary Kay Kane & Robert Klonoff, *Federal Practice and Procedure (Wright & Miller)*, (3d ed., June 2024 Supp.) (“The court need not confine itself to other available ‘judicial’ methods of handling the controversy in deciding the superiority of the class action.”) (citations omitted); Joseph M. McLaughlin, *McLaughlin on Class Actions Scope Information*, (21st ed. Oct. 2024 Supp.) (“the majority of courts to consider the question have held that a defendant-administered refund program may be found superior to a class action, and denied certification on that basis”) (citations omitted).

<sup>19</sup> *See* Fed. R. Evid. 408.

<sup>20</sup> *See* Fed. R. Civ. P. 68.

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demand entry of judgment to end the litigation and cut off accrual of additional attorneys' fees (if the claim allows for such fees).<sup>21</sup> Likewise, the idea that the mere offer of a competing method of resolution would "bias" a judge strains credulity. Judges are more than capable of remaining unbiased. They often weigh the likelihood of success on the merits at the outset of a case, *e.g.*, where temporary restraining order or preliminary injunction is sought, and nobody contends that doing so impermissibly biases the judge thereafter.<sup>22</sup> Moreover, there is no case, statute, or other explanation offered for how weighing a settlement offer made before litigation is commenced offends procedure or raises constitutional issues. As to the final objection over control, the authors appear to assume that an out-of-court refund acts as *res judicata* for every customer who is given an offer (or even takes one). Not so. An out-of-court refund offer, whether accepted or rejected, does not prevent that consumer from bringing his or her claim individually to the extent any potential claim remains, it just means that consumer cannot represent others because a class action is not superior.<sup>23</sup> An out-of-court offer is simply relevant to whether the procedural device of the class action is worth the time and energy of the courts, counsel, and the public; in other words, whether it is superior. That class counsel may not obtain one-third of a remedy they did nothing to bring about is a reason to deny class certification, not grant it.

### **B. The History of Superiority Under Rule 23(b)(3).**

The modern version of Rule 23 was adopted in 1966 after years of consideration, revisions, comments, and analysis. The primary reporter of the 1966 amendments to Rule 23 was Benjamin Kaplan, along with Professor Charles Alan Wright. The available materials from that era confirm that, as drafted, Rule 23(b)(3)'s superiority analysis was designed to address whether a class action was the superior method to "dispose" of the controversy, not necessarily adjudicate the controversy. It appears Kaplan and Wright adopted the "adjudicate" nomenclature based on some comments from Judge Weinstein about other ways to manage complex cases, not as a talismanic requirement that all options must occur in court.

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<sup>21</sup> See, *e.g.*, *Greisz v. Household Bank*, 176 F.3d 1012, 1015 (7th Cir. 1999) ("You cannot persist in suing after you've won. ... Once a party has won his suit and obtained the attorney's fees that were reasonably expended on winning, additional attorney's fees would not be reasonably incurred." (alteration in original) (emphasis in original)).

<sup>22</sup> See *Winter v. Nat'l Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008).

<sup>23</sup> See, *e.g.*, *Stewart v. Albertsons*, 308 Or. App 464, 487 n.16 (2021) (rejecting argument that out-of-court remedy sufficient to defeat superiority of class action affects constitutional right because loss of procedural right does not alter merits of substantive claims).

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Specifically, Kaplan explained the modern Rule 23 amendments in a 1967 article as requiring a Court to find that “a class action is ‘superior’ to other means of *disposing* of the particular set of quarrels.”<sup>24</sup> The “adjudication” language appears to have arisen in context from the next sentence in Kaplan’s article, where he cites an article by Judge Weinstein addressing other in-court methods of resolving disputes: “...procedural alternatives are hardly confined to the class action, on the one side, and individual uncoordinated lawsuits, on the other; there are often other possibilities ranging from use of a model action to consolidation or coordination of the numerous individual actions for all or selected purposes.”<sup>25</sup> There are no materials cited or otherwise referenced suggesting that non-procedural alternatives (*e.g.*, government resolutions, recalls, or refund programs) were prevalent at that time. But the context of the amendments and surrounding dialogue strongly suggest that the analysis was intended to consider *any* methods for disposing of litigation that might otherwise take up valuable judicial resources.<sup>26</sup>

Indeed, the very article by Judge Weinstein that Professor Kaplan references as a basis for the 1966 Rule 23 amendments regarding superiority emphasizes that class actions are superior *if* they fill a gap in administrative enforcement.<sup>27</sup> Judge Weinstein examined *Kovarsky v. Brooklyn Union Gas Co.*—a case involving a gas company imposing improper service charges and where the Public Service Commission failed to provide an administrative remedy.<sup>28</sup> Judge Weinstein described this case as an “excellent example of a situation where a class action was appropriate,” but *only* because of “the **absence of an effective administrative remedy**” in that case.<sup>29</sup> By contrast to *Kovarsky*, Judge Weinstein references another case, where a class action was *not* superior, precisely because the defendant already provides an adequate remedy:

... the court appeared to have been justified in denying a judgment in favor of a class, **since the**

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<sup>24</sup> Benjamin Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I)*, 81 Harv. L. Rev. 356, 390 (1967) (emphasis added).

<sup>25</sup> *Id.* at 390-91

<sup>26</sup> See W. W. H. Jr., *Proposed Rule 23: Class Actions Reclassified*, 51(4) Va. L. Rev. 629, 643-44 (1965) (describing proposed Rule 23 and noting that under proposed Rule 23(b)(3), “the judge must determine that the class action is superior to other ways of adjudicating the controversy,” including whether, among other things, an “extrajudicial procedure may be a more appropriate solution.”).

<sup>27</sup> See Jack B. Weinstein, *Revision of Procedure: Some Problems in Class Actions*, 9 BUFF L. REV. 433, 461 (Spring 1960).

<sup>28</sup> *Id.* (citing 279 N.Y. 304, 18 N.E.2d 287 (1938)).

<sup>29</sup> *Id.* (emphasis added).

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***telephone company had always provided a method approved by the Public Service Commission for making proper adjustments on an individual basis all that could be accomplished by the suit.*** To issue an order incorporating this practice would accomplish nothing of any practical benefit to the class and would result solely in a benefit in the way of a fee to plaintiff's attorney.<sup>30</sup>

Thus, the drafters of Rule 23 understood that the class-action device was superior only where there was an absence of a ready out-of-court remedy, not in spite of one.

Likewise, another author who was involved in the rule drafting process described the superiority provision as follows:

For a (b)(3) action, the court must make an affirmative finding that the class action device is superior to ***other available methods of disposing of the controversy***; this is reminiscent of the equitable origin of the class action in that it may be barred if an adequate remedy at law exists.<sup>31</sup>

This explanation is notable, not just because it referenced other methods of “disposing” of a controversy, but because it talked about consideration of “other available methods,” which suggests an openness to any methods of resolution, not merely court proceedings. This view is confirmed by Professor Wright, who confirmed that courts should consider out-of-court options. “Just six years after the 1966 amendment was enacted, [he] explained in the first edition of his seminal treatise that a court “need not confine itself to other available ‘judicial’ methods of handling the controversy in deciding the superiority of the class action.”<sup>32</sup> He reiterated that the superiority amendment meant that

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<sup>30</sup> *Id.* at 462 (emphasis added); see also Jack B. Weinstein, *Some Reflections on the “Abusiveness” of Class Actions*, 58 F.R.D. 299, 303 (1973) (“One aspect that I think the judges ought to consider is whether there is available a public administrative body capable and willing to grant relief. . . . Sometimes the matter can be handled on a cooperative basis.”)

<sup>31</sup> Sherman L. Cohn, *The New Federal Rules Of Civil Procedure*, 54 GEO. L. J. 1204, 1216 (Summer 1966) (emphasis added).

<sup>32</sup> Eric P. Voigt, *A Company's Voluntary Refund Program For Consumers Can Be A Fair And Efficient Alternative To A Class Action*, 31 Rev. Litig. 617, 626-27 (2012) (citing 7A Charles Alan Wright et al., *Federal Practice and Procedure* §1779 (1972)); see also *id.* at 627 (quoting Wright, § 1779 (“Since the purpose of the superiority requirement is to assure that the class action is the most efficient and effective means of settling the controversy, it seems consistent with that purpose to determine whether any administrative methods of settling the dispute exist.”)).

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superiority should be in reference to “all other means of disposing of the controversy,” rather than solely adjudication.<sup>33</sup>

Moreover, in the Proceedings Of The Twenty-Ninth Annual Judicial Conference Third Judicial Circuit Of The United States, Professor Wright is quoted in the Rule 23 discussion with Supreme Court Justices Brennan and Fortas (among other participants), as follows:

Under Rule (b)(3) you may now have a class action if the questions of law or fact common to the members of the class predominate over the questions which are individual, and ***a class action is superior to all other means of disposing of the controversy.***<sup>34</sup>

Again, the repeated use of the word “disposing,” suggests that the drafters of Rule 23(b)(3)’s superiority prong did not have solely court proceedings (or adjudication) in mind. Indeed, the Advisory Committee notes to the 1966 amendments expressly observed that the factors under 23(b)(3)(A)–(D) were “listed, ***non-exhaustively***, as pertinent to the findings” for superiority.<sup>35</sup> This is further confirmed by the Rules Advisory Committee comments in 1966, which confirm that a damages class action under Rule 23(b)(3) is “not as clearly called for” as one for injunctive relief, “but it may nevertheless be convenient and desirable depending upon the particular facts,” where allowing class treatment “would achieve economies of time, effort, and expense, and promote uniformity of decision as to persons similarly situated, without sacrificing procedural fairness or bringing about other undesirable results.”<sup>36</sup> Considering out-of-court remedies is precisely the type of “particular facts” that bear on “economies of time, effort, and expense,” as well as “undesirable results,” that the rule drafters envisioned.

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<sup>33</sup> Charles Allen Wright, Recent Changes in the Federal Rules of Procedure, Address Before the 29th Annual Judicial Conference of the Third Circuit (Sept. 19, 1966), 42 F.R.D. 437, 564 (1967-68).

<sup>34</sup> Abraham L. Freedman, *Proceedings of the Twenty-Ninth Annual Judicial Conference Third Judicial Circuit of the United States*, 42 F.R.D. 437, 564 (1967),

<sup>35</sup> Amendments to Rules of Civil Procedure, Supplemental Rules for Certain Admiralty and Maritime Claims, Rules of Criminal Procedure, 39 F.R.D. 69, 104 (1966) (emphasis added); see also *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 615–16 (1997) (“Rule 23(b)(3) includes a *non-exhaustive* list of factors pertinent to a court’s ‘close look’ at the predominance and superiority criteria”) (emphasis added).

<sup>36</sup> Amendments to Rules of Civil Procedure, Supplemental Rules for Certain Admiralty and Maritime Claims, Rules of Criminal Procedure, 39 F.R.D. 69, 102–03 (1966).

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Early analysis of Rule 23 echoed these sentiments. Professor Homburger, who was Chairman of the Committee to Advise and Consult with the Judicial Conference of the State of New York on Civil Practice Law and Rules—and who later almost singlehandedly drafted New York’s version of Rule 23—commented on Federal Rule 23 in an influential law review article in 1971.<sup>37</sup> After review of all committee materials, articles, and submissions relating to the 1966 Federal Rule 23 amendments, he observed as to superiority that “if adequate relief is available through administrative agencies, a class action is unnecessary and, indeed, undesirable under any subdivision of the rule.”<sup>38</sup> This analysis again confirms the view that Rule 23’s superiority analysis is not limited to consideration of court proceedings.

Finally, later analysis from those on the Rules Advisory Committee in 1966 confirms that courts need not limit superiority considerations to other litigation. William T. Coleman provided a statement to the Rules Advisory Committee thirty years later, in 1996, on proposed Rule 23 amendments. He called for clarification of Rule 23(b)(3)’s superiority prong, noting how it has been interpreted in a manner contrary to the intent of the drafters:

Rule 23(b)(3)’s superiority requirement should be clarified. Unfortunately, some counsel file class actions that simply piggy-back inquiries launched by federal or state agencies. For example, if the Consumer Product Safety Commission announces that it is examining the safety of a particular product, you can bet that the next day, multiple class actions will be filed on behalf of the product’s owners. This is more than wasteful; the lawsuits often interfere with the administrative process and make a mockery of the class action device. ....

To stop such abuse, Rule 23’s superiority requirement should make clear that where the claims asserted could be resolved through federal or state administrative processes, class certification usually should be denied. ***The rule really says that now, but since some courts arguably have***

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<sup>37</sup> See Adolf Homburger, *State Class Actions and the Federal Rule*, 71 COLUM. L. REV. 609 (1971).

<sup>38</sup> *Id.* at 636.

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***construed the rule differently, the point should be clarified.***<sup>39</sup>

These materials confirm that Rule 23’s superiority prong needs clarification to confirm the intent of the authors, the purpose of the rule, and to ensure that the class action devise is consistent with Rule 1.

Indeed, in one of the first class actions filed after the 1966 amendments, *Berley v. Dreyfus & Co.*, the court expressly rejected class certification based on the fact that the defendant had already provided a remedy before the plaintiff initiated the putative class action.<sup>40</sup> In *Berley*, the defendant promoted a stock for sale that was later suspended from trading because it was not properly registered.<sup>41</sup> The plaintiff filed a putative class action almost immediately and the defendant quickly offered a refund to all purchasers of the stock, causing the plaintiff to seek an injunction against the defendant to prevent elimination of the class action.<sup>42</sup> The court examined Rule 23’s superiority prong in connection with pending motions and held that, despite the fact that a refund was not an “adjudication,” a class action was not superior in light of the immediate refund:

Although Dreyfus & Co.’s offer to refund the purchase price to its customers is not quite ‘another method for the fair and efficient *adjudication* of the *controversy*,’ we think that subparagraph (b)(3) read as a whole reflects a broad policy of economy in the use of society’s difference-settling machinery. One method of achieving such economy is to avoid creating lawsuits where none previously existed.

This is in part why ‘the extent and nature of any litigation... already commenced’ is pertinent to the required finding. If a class of interested litigants is not already in existence the court should not go out of its way to create one without good reason.

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<sup>39</sup> See William T. Coleman, Statement On the Proposed Amendments to Fed. R. Civ. P. 23, at 1, 7-8, Before the Civil Rules Advisory Committee, in Working Papers of the Advisory Committee at 449, 456 (Administrative Office of the United States Courts Vol. 4, 1997) (emphasis added) (citation omitted), available at <https://www.uscourts.gov/rules-policies/records-rules-committees/fjc-studies-and-related-publications>.

<sup>40</sup> *Berley v. Dreyfus & Co.*, 43 FRD 397, 399 (S.D.N.Y. 1967).

<sup>41</sup> *Id.* at 397–98.

<sup>42</sup> *Id.* at 398.

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Dreyfus appears to have amicably settled its differences (if indeed there were any) with most of its customers. The plaintiffs would have us enjoin any further such settlements and give notice of this litigation to all of Dreyfus' customers and certain others. In our view, this would needlessly replace a simple, amicable settlement procedure with complicated, protracted litigation. In addition, such an injunction would serve no useful purpose. The settlement forms that Dreyfus mailed to its customers along with its refund offer do not purport to release Dreyfus from any liability whatsoever. Dreyfus has thus left these people with the best of both worlds. They can have their money back now, and still be free to bring an action for further damages if the present suit is successful. To enjoin Dreyfus from paying these customers their money would be manifestly unfair to them.<sup>43</sup>

From the outset, then, courts understood the superiority analysis was holistic, and whether class treatment was superior was not limited to comparison against in-court remedies and procedures.

**C. Courts Can (And Should) Consider Extra-Judicial Remedies In Connection With any Superiority Analysis.**

Class action complaints often follow public government investigations. State and local government actions are designed to provide relief to the public at large, without lawyers taking a portion of those proceeds. Particularly where evidence of current damages is speculative—*e.g.*, a data breach with no evidence that stolen material has been seen or used—a government settlement requiring certain measures or providing certain remedies (*e.g.*, credit monitoring) may provide the relief the putative class could want, so that a class action is no longer the “superior” method of resolution. Where a defendant has already provided the majority of relief that a class could hope to obtain, a class action is unnecessary and not superior, as the only people benefitting from the case at that point are class counsel, not class members. Indeed, a class action Complaint that merely parrots a government action

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<sup>43</sup> *Id.* at 398-99 (emphasis in original).

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likely violates Rule 11.<sup>44</sup> “Class actions can ... be inefficient, costly, and unnecessary, particularly if government law enforcement has solved or is likely to solve the problem the proposed class putatively addresses.”<sup>45</sup>

For example, a few courts have recognized that where there has already been a governmental investigation and resolution on behalf of the public, class treatment is unsuitable.

Proceedings by the state, whether in a judicial or an administrative forum, are presumably taken with the best interests of state residents in mind. Reasonable settlement by the accused should be encouraged. Indeed, potential class members will often recover more than they would in a private action when costs and attorneys’ fees are factored in. However, if courts consistently allow parallel or subsequent class actions in spite of state action, the state’s ability to obtain the best settlement for its residents may be impacted, since the accused may not wish to settle with the state only to have the state settlement operate as a floor on liability or otherwise be used against it.”<sup>46</sup>

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<sup>44</sup> See, e.g., *In re Connecticut Corp. Sec. Litig.*, 542 F. Supp.2d 996, 1004-06 (N.D. Cal. 2008) (striking allegations from Complaint based entirely on SEC Complaint as inconsistent with Rule 11 obligations); *Johns v. Bayer Corp.*, 2010 WL 476688, at \*2–\*3 (S.D. Cal. 2010) (striking allegations based on separate consent decree as violating Rule 11); *Fraker v. Bayer Corp.*, 2009 WL 586587 (E.D. Cal. 2009) (striking allegations based on FTC action as violating Rule 11); *Veal v. LendingClub Corp.*, 423 F. Supp. 3d 785, 812 (N.D. Cal. 2019) (plaintiffs “may not rely on facts alleged in [an] FTC Action without providing any independent corroboration”); see also *In re Razorfish Inc. Sec. Litig.*, 143 F. Supp.2d 304, 306 n.1 (S.D.N.Y. 2001) (“One can only wonder whether the edicts of Rule 11 ... were followed in the investigation and drafting of these copycat complaints.”).

<sup>45</sup> D. Bruce Hoffman, To Certify or Not: A Modest Proposal for Evaluating the “Superiority” of a Class Action in the Presence of Government Enforcement, 18 *Geo. J. LEGAL ETHICS* 1383, 1392–93 (2005).

<sup>46</sup> See, e.g., *Thornton v. State Farm Mut. Auto Ins. Co.*, 2006 WL 3359482, at \*2–\*3 (N.D. Ohio 2006) (citing *Brown v. Blue Cross & Blue Shield of Mich., Inc.*, 167 F.R.D. 40, 46 (E.D.Mich..1996) (citing *Kamm v. Cal. City Dev. Co.*, 509 F.2d 205 (9th Cir. 1975) and denying a motion for class certification where “[t]he agreement entered into by the State and defendant covers all members of the proposed class ... and provides full co-pay relief on all but de minimis claims”); *Ostrof v. State Farm Mut. Auto. Ins. Co.*, 200 F.R.D. 521, 532 (D. Md. 2001) (explaining that the Maryland Insurance Agency had investigated the accused practices and that “[i]n any event, as a supplement to administrative proceedings, the small claims courts” are perfectly adequate); *Wechsler v. Southeastern Properties, Inc.*, 63 F.R.D. 13, 16–17 (S.D.N.Y.1974) (finding that

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This same logic has convinced some courts to dispose of class allegations when the defendant, through an agreement with regulatory authorities or otherwise, provides relief to the putative class that is adequate under the circumstances.<sup>47</sup> Indeed, where an

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an action in state court by the attorney general justified dismissal of class action); *Freeman Indus. LLC v. Eastman Chem. Co.*, 2004 WL 1102435, at \*9 (Tenn. App. May 18, 2004) (holding that the “involvement of the attorneys general and the undesirability of concentrating the class litigation in Tennessee is enough to destroy predominance and superiority”), *rev’d in part on other grounds*, 172 S.W.3d 512 (Tenn. 2005); D. Bruce Hoffman, *To Certify or Not: A Modest Proposal for Evaluating the ‘Superiority’ of a Class Action in the Presence of Government Enforcement*, 18 GEO. J. Legal Ethics 1383, 1387 (2005).

<sup>47</sup> See, e.g., *Kamm v. Cal. City Dev. Co.*, 509 F.2d 205 (9th Cir. 1975); *Wechsler v. SE Props., Inc.*, 63 FRD 13, 15-17 (S.D. N.Y. 1974) (where attorney general’s action resulted in notice to class members and return of stock proceeds to 97% of the class, private class action was not superior and therefore could not be certified); *Brown v. Blue Cross & Blue Shield of Mich.*, 167 F.R.D. 40 (E.D. Mich. 1996); *In re PPA Prods. Liab. Litig.*, 214 F.R.D. 614, 622 (W.D. Wash. 2003) (no superiority because of product refund program); *Pagan v. Abbott Labs, Inc.*, 287 F.R.D. 139, 141 (E.D.N.Y. 2012) (class action not superior where voluntary recall and refund program was better suited to provide relief); *Webb v. Carter’s Inc.*, 272 F.R.D. 489, 504-05 (C.D. Cal. 2011) (“a class action is not superior because Carter’s is already offering the very relief that Plaintiffs seek”); *Turcios v. Carma Laboratories, Inc.*, 296 F.R.D. 638, 648-49 (C.D. Cal. 2014). (“The Court is unconvinced that a class action is superior in this case” because “Defendant already offers consumers a full refund of the amount paid for the product for any reason”); *Harvey v. Centene Mgmt. Co. LLC*, 2020 WL 2411510, at \*4 (E.D. Wash. 2020) (no superiority “where a defendant itself offers a mechanism by which putative class members may obtain relief”); *Johnson v. Harley-Davidson Motor Co. Group, LLC*, 285 F.R.D. 573, 584 (E.D. Cal. 2012) (class action not superior where allegedly defective motorcycles were subject to the NHTSA, allowing the buyer to petition NHTSA to investigate the alleged safety issues, and requiring NHTSA to order a recall of the motorcycles and fix the defects, if any); *Rowden v. Pacific Parking Systems, Inc.*, 282 F.R.D. 581, 586-87 (C.D. Cal. 2012) (class action not superior method for resolving a dispute regarding whether the city parking lot violated FACTA by printing parking receipts containing the expiration date of credit cards; individual remedies were sufficient and administrative process was capable of quickly processing claims); *Ramirez v. Dollar Phone Corp.*, 668 F. Supp. 2d 448, 467-68 (E.D.N.Y. 2009) (class action was not superior to national regulation and enforcement of the calling-card industry by FTC or other agency; final injunctive or declaratory relief would engage court in inappropriate detailed continuing supervision); *Waller v. Hewlett-Packard Co.*, 295 F.R.D. 472, 488-89 (S.D. Cal. 2013) (class action is not a superior remedy because plaintiff was pursuing a remedy that was already available: “recall or refund programs kill superiority”); *Ford Motor Co. v. Magill*, 698 So.2d 1244, 1245-46 (Fla. App. 3 Dist. 1997) (reversing class certification order as to a recall and economic injury subclass based on fact that the NHTSA had negotiated recall mandates and extended warranties with Ford); *Daigle v. Ford Motor Co.*, 2012

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administrative resolution providing complete relief exits, the court may need to dismiss the class action as prudentially moot.<sup>48</sup> Where an executive-branch agency has resolved a dispute with a defendant in a class action over the same conduct, “Congress and the Executive have committed to ensure [Plaintiff] precisely the relief she seeks.”<sup>49</sup> Allowing a class action to proceed “might duplicate [agency and defendant] efforts and waste finite public resources in the process.”<sup>50</sup> This “would... surely add new transaction costs for [the defendant] and perhaps reduce the incentive manufacturers have to initiate recalls... all while offering not even a sliver of additional relief for [Plaintiff] and members of the class she seeks to represent.”<sup>51</sup> In such cases, plaintiffs’ “lawyers would benefit if this would-be class action labored on through certification, summary judgment, and beyond,” but “it’s hard to see how anyone else could.”<sup>52</sup>

In the Ninth Circuit, *Kamm* provides a useful example. There, investors claimed that land promoters did not properly describe and disclose the property and its risks. Before class certification, the California Attorney General negotiated a settlement for restitution, entry of injunction, and “best efforts” to resolve future claims.<sup>53</sup> The trial court held that relief provided through the Attorney General was adequate, and that a class action was not superior, noting that “[s]uperiority must be looked at from the point of view of (1) the judicial system, (2) the potential class members, (3) the present plaintiff, (4) the attorneys for the litigants, (5) the public at large and (6) the defendant.”<sup>54</sup> The Court noted that a class action would require needless “expenditure of judicial time which would largely duplicate and possibly to some extent negate the work on the state level,” that individual

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WL 3113854, at \*5–\*6 (D.Minn. 2012) (class action not superior because recall and refund program); *Patton v. Topps Meat Co., LLC*, 2010 WL 9432381, at \*10 (W.D.N.Y. 2010) (refund program defeats superiority); *Farno v. Ansure Mortuaries of Ind., LLC*, 953 N.E.2d 1253, 1272–76 (Ind. App. 2011) (court can consider extra-judicial remedies in determining superiority); *Appalachian Land Co. v. Equitable Production Co.*, 2018 WL 3097318, at \*11 (E.D. Ky. 2018) (denying class certification in part because majority of customers accepted reimbursement and thus “they have received what was previously deducted without losing a cut to the class action mechanism,” so class certification is not necessary for their redress, and “inclusion in the class action at this point would simply subject them to protracted and unnecessary litigation”; allowing certification of class members who refused reimbursement).

<sup>48</sup> See, e.g., *Winzler v. Toyota Motor Sales USA, Inc.*, 681 F.3d 1208, 1210-12 (10th Cir. 2012).

<sup>49</sup> *Id.* at 1211.

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

<sup>53</sup> *Kamm*, 509 F.2d at 208.

<sup>54</sup> *Id.* at 212.

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Plaintiffs could still bring claims if they believed the relief was inadequate, and that forcing defendants to re-litigate the issues would duplicate the time spent working on a resolution with the state.<sup>55</sup> Although the Attorney General did not protect “all members of the class” or “recover an amount ... even close to that sought in the class action,” the Court held that “[a] class action would require a substantial expenditure of judicial time which would largely duplicate and possibly to some extent negate the work” done by the Attorney General.<sup>56</sup> On these facts, the district court in *Kamm* held “the class action was not a superior method of resolving the controversy.” *Id.* The *Kamm* decision is well reasoned. If any defendant that enters a consent decree will face duplicate liability in a civil action, defendants will be less likely to settle government claims, which will result in increased costs and burden to the legal system.<sup>57</sup>

Other courts have reached similar conclusions on similar facts.<sup>58</sup> “Class actions can ... be inefficient, costly, and

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<sup>55</sup> *Id.*

<sup>56</sup> *Id.* at 211–12.

<sup>57</sup> See also *Pattillo v. Schlesinger*, 625 F.2d 262, 265 (9th Cir. 1980) (“any claims paid through the class action procedures would be reduced by the costs of suit and attorneys’ fees that plaintiffs sought. The ... court cannot be unaware of the fact that the principal beneficiaries of the class action would be plaintiffs’ attorneys.”); *Hahn v. Breed*, 606 F. Supp. 1557, 1563 (S.D.N.Y. 1985) (“an action [should not] be permitted to proceed as a class action, despite the desirability of providing small claimants with a forum in which to seek redress, when it is unlikely to benefit anyone but the lawyers who bring it”).

<sup>58</sup> See *Conde v. Sensa*, 2019 WL 4277414, \*9-11 (S.D. Cal. 2019) (applying *Kamm* in context of an FTC settlement); *Imber-Gluck v. Google Inc.*, 2015 WL 1522076, at \*2–3 (N.D. Cal. 2015) (denying certification in light of FTC settlement); *In re PPA Prods. Liab. Litig.*, 214 F.R.D. 614, 622 (W.D. Wash. 2003) (no superiority because of product refund program); *Lohse v. Dairy Comm’n of the State of Nev.*, 1977 WL 1523, \*7 (D. Nev. 1977) (no superiority in light of Nevada Attorney General action; “This kind of state action is much preferred to a punitive treble damage antitrust private civil remedy the proceeds from which will only slightly benefit any individual plaintiff.”); *Cortez v. State Farm Mut. Auto. Ins. Co.*, 2007 WL 9710571, \*5–6 (W.D. Tex. 2007) (attorney general’s assurance of voluntary compliance defeated superiority; “The potential availability of treble damages or even compensatory damages higher than the payout offered under the AVC does not, as Plaintiffs argue, make the AVC inadequate.”); *Chin v. Chrysler Corp.*, 182 F.R.D. 448, 462–65 (D. N.J. 1998) (refusing to certify class action based on lack of superiority where reimbursement was available through recall program and administrative remedy); *Berley v. Dreyfus & Co.*, 43 F.R.D. 397, 399 (S.D.N.Y. 1967) (where the defendant “amicably settled its differences (if indeed there were any) with most of its customers,” the court refused to certify a class action seeking injunctive relief and damages, holding that a class action “would needlessly replace a simple, amicable settlement procedure with complicated, protracted

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unnecessary, particularly if government law enforcement has solved or is likely to solve the problem the proposed class putatively addresses.”<sup>59</sup>

Because Rule 23(b)(3)’s superiority analysis references other methods of “adjudication,” however, some courts refuse to consider alternative refund or recall remedies under 23(b)(3). This is because those remedies are not, strictly speaking, part of an “adjudication.” Nonetheless, creative courts have considered such remedies under Rule 23(a)(4)’s adequacy prong. For example, the Seventh Circuit relied on a refund program in affirming a denial of class certification in *In re Aqua Dots Products Liability Litigation*.<sup>60</sup> But because that case involved a voluntary refund program, rather than an adjudicatory proceeding, the Seventh Circuit found the district court should not have assessed the issue under the rubric of superiority. Instead, the Court found plaintiffs failed to establish Rule 23’s adequacy requirement: “Plaintiffs want relief that duplicates a remedy that most buyers already have received [through the refund program], and that remains available to all members of the putative class. A representative who proposes that high transaction costs (notice and attorneys’ fees) be incurred at the class members’ expense to obtain a refund that already is on offer is not adequately protecting the class members’ interests.”<sup>61</sup> This analysis confirms that courts can and do consider the utility of class actions in light of existing options, but struggle to fit the square peg of existing relief into the round hole that is Rule 23’s expressly enumerated (but not exhaustive) existing factors.

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litigation”); *Holland v. Goodyear Tire & Rubber Co.*, 75 F.R.D. 743, 748 (N.D. Ohio 1975) (“Whenever the principal, if not the only, beneficiaries to the class action are to be the attorneys for the plaintiffs and not the individual class members, a costly and time-consuming class action is hardly the superior method for resolving the dispute”); *In re Conagra Peanut Butter Prod. Liab. Litig.*, 251 F.R.D. 689, 699–700 (N.D. Ga. 2008) (finding Defendant’s voluntary refund program superior to class certification).

<sup>59</sup> D. Bruce Hoffman, To Certify or Not: A Modest Proposal for Evaluating the “Superiority” of a Class Action in the Presence of Government Enforcement, 18 *Geo. J. Legal Ethics* 1383, 1392–93 (2005).

<sup>60</sup> *In re Aqua Dots Prods. Liab. Litig.*, 654 F.3d 748 (7th Cir. 2011).

<sup>61</sup> *Id.* at 752.

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## **D. An Alternate Approach: Borrowing From ORCP 32**

### **1. Oregon’s Evolving Class Action Process.**

Oregon has allowed representative claims for 140 years.<sup>62</sup> Oregon courts were historically reluctant to grant class certification, agreeing with other courts that “class actions should be closely scrutinized and should be permitted only in clear cases.”<sup>63</sup> Indeed, until 1973, class actions were limited to equitable claims.<sup>64</sup> That changed when the Legislative Assembly enacted a class action statute allowing for damages.<sup>65</sup> In 1978, Oregon’s class-action statute was converted into its present form as a procedural rule when the Oregon Council on Court Procedures (CCP) promulgated ORCP 32.

Oregon’s class action rule was revised to address perceived class action abuses. As originally proposed, Oregon’s class action statute was an exact duplicate of Federal Rule of Civil Procedure 23.<sup>66</sup> In response to management concerns perceived to be

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<sup>62</sup> *Trustees of the M.E. Protestant Church v. Adams*, 4 Or. 76, 88 (1870) (holding that “where the parties are very numerous, and it may be impracticable to bring them all before the court, one or more may sue or defend for the benefit of the whole”).

<sup>63</sup> *Lonsford v. Bailey*, 200 Or. 497, 508, 267 P.2d 208, 214 (1954).

<sup>64</sup> *Am. Timber & Trading Co. v. First Nat’l Bank*, 263 Or. 1, 500 P.2d 1204 (1972)

<sup>65</sup> *Bernard v. First Nat’l Bank of Or.*, 275 Or. 145, 149-50, 550 P.2d 1203, 1207–08 (discussing enactment of O.R.S. § 13.220 et seq.). In drafting the bill that would become Oregon’s class-action statute, the legislature heard testimony that “the best type of consumer remedy would be one which is efficient in providing relief to the damaged consumer (at a low cost), is effective in preventing wrongs and is speedy...” Minutes, Senate Consumer and Business Affairs Committee, SB 163, February 1, 1973, 3 (testimony of Ron Loew). Mr. Loew also argued “that rather than adopt [Federal] Rule 23, it would be better to write the type of class action that would avoid the problems encountered under that Rule.” Minutes, Senate Consumer and Business Affairs Committee, SB 163, February 13, 1973, 5 (testimony of Ron Loew). The ultimate compromise, which later became ORCP 32H & ORCP 32 I, was that the bill “would get rid of virtually all the abuse in class actions” by “allow[ing] the defendant to change their procedures” and thereby avoid defending a class action where it could provide an immediate remedy. Minutes, House Committee on Judiciary, SB 163, June 13, 1973, 2 (testimony of Sen. Keith Burns). Laird Kirkpatrick summarized the final version of the law as follows: “It gives a meaningful class action remedy to consumers while at the same time providing substantial protections to honest businessmen.” House Judiciary Committee Archive, SB 163, Statement of Laird Kirkpatrick.).

<sup>66</sup> *Bernard*, 275 Or. at 150–51, 550 P.2d at 1208; *Pearson v. Philip Morris, Inc.*, 208 Or. App. 501, 504, 145 P.3d 299, 300 (2006), *rev’d on other grounds*, 257 Or. App. 106 (2013), *rev’d on other grounds*, 358 Or. 88 (2015).

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inherent to the Federal Rule however, the Oregon Senate Judiciary Committee requested that the proponents and opponents together draft amendments. These amendments were ultimately incorporated into the bill.<sup>67</sup> Reviewing this history, the Oregon Supreme Court emphasized that there “can be no doubt that the purpose of these amendments was to prevent abuses perceived under Rule 23,” and that the Oregon rule “was intended to be circumscribed to a greater extent than is the case under ... Rule 23.”<sup>68</sup> Oregon’s class action rule further departed from its federal counterpart in 1992, when the CCP discarded the three categories of class actions, instead adopting a unitary form of class action.<sup>69</sup> Under the new rule, the previous requirements corresponding to Federal Rules 23(b)(1), (b)(2), and (b)(3), are now only “matters pertinent” to the court’s required finding that “a class action is superior to other available methods of the fair and efficient adjudication of the controversy.”<sup>70</sup> The CCP believed the distinctions between the types of classes were causing confusion and unnecessary procedural obstacles, and that strict adherence to the requirements of each category was “unduly rigid.”<sup>71</sup>

The 1992 amendments to ORCP 32 adopting a unitary class action mechanism were intended to avoid arguments concerning the category of class action for which the plaintiff should be seeking certification. Instead, the class certification process now adheres to the spirit of what Federal Rule 23 sought to achieve—a determination as to whether “a class action would achieve economies of time, effort, and expense, and promote uniformity of decisions as to persons similarly situated, without sacrificing procedural fairness or bringing about undesirable results.”<sup>72</sup> The post-1992 version of ORCP 32B provides eight factors “pertinent” to the superiority analysis.<sup>73</sup> These factors are not a checklist<sup>74</sup> and courts do not count them mechanistically as “for” or “against” certification; rather courts weigh these factors in exercising discretion.<sup>75</sup> This flexibility is at the heart of Oregon’s less-rigid class-action device.

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<sup>67</sup> *Bernard*, 275 Or. at 150–51.

<sup>68</sup> *Id.* at 152, 550 P.2d at 1208–09.

<sup>69</sup> See ORCP 32B.

<sup>70</sup> *Id.*

<sup>71</sup> See Amendments to Oregon Rules of Civil Procedure, Council on Court Procedures, at 17 Staff Comment (1992), available at [https://counciloncourtprocedures.org/Content/Promulgations/1992\\_promulgations.pdf](https://counciloncourtprocedures.org/Content/Promulgations/1992_promulgations.pdf).

<sup>72</sup> *Bernard*, 275 Or. at 152 n.3, 550 P.2d at 1208 n.3 (quoting Fed. R. Civ. P. 23 Advisory Committee Notes, 39 F.R.D. 69, 102–03 (1966)).

<sup>73</sup> ORCP 32B(1)–(8).

<sup>74</sup> *Shea v. Chicago Pneumatic Tool Co.*, 164 Or. App. 198, 207, 990 P.2d 912 (1999).

<sup>75</sup> *Pearson*, 2006 WL 663004, at \*9.

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Trusting in the discretion of trial courts, ORCP 32 permits certification if the class representatives (a) establish all requirements of ORCP 32A, (b) show that under ORCP 32B a class action is superior to other available methods for the fair and efficient adjudication of the controversy (considering eight different discretionary factors), and (c) in damages actions, satisfy the pre-suit remedy and notice requirements of ORCP 32H.<sup>76</sup>

The concern over whether a class-action is superior undergirds the entirety of ORCP 32. Indeed, ORCP 32B(8) requires the court to examine whether the class members' claims are too small (taking into consideration the complexities of the issues and expenses of the litigation) and to provide any significant relief to the class members (in light of the costs and burdens involved).<sup>77</sup> There is no expressly analogous provision in the Federal Rules, although Federal Rule of Civil Procedure 1 embodies this core theme. The original statutory version of ORCP 32B(8) was taken "verbatim" from American College of Trial Lawyers, Report and Recommendations of the Special Committee on Rule 23 of the Federal Rules of Civil Procedure (1972) (ACTL Report), which was "highly critical of class actions as they have been conducted under Rule 23."<sup>78</sup> The recommendations from that report provide the best analysis of what ORCP 32B(8) seeks to achieve in assessing superiority of class actions. The superiority analysis was intended to prevent class actions from going forward where the amount of recovery for the class members was minimal when compared with the interests involved, and where the main beneficiaries of the action would be class counsel. The ACTL Report's recommendation (adopted in ORCP 32B(8)) was that Federal Rule 23 "be revised to clearly indicate that not every wrong committed in our society should be the subject of a class action."<sup>79</sup> The ACTL Report observed that many small-value class actions "primarily benefit the attorneys who initiate them," and that "the public interest issue may well be so in-significant that the redress of the nine-dollar wrong should from a policy viewpoint be left to the realm of private ordering," because "scarce" judicial resources "cannot be allocated on the vindication of every individual wrong however slight."<sup>80</sup>

This skepticism toward the superiority of small-dollar class action claims was recognized by the Oregon Supreme Court in

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<sup>76</sup> See ORCP 32A, 32B, 32H-32I.

<sup>77</sup> See ORCP 32B(8).

<sup>78</sup> See *Bernard*, 275 Or. at 151, 550 P.2d 1208 (citing American College of Trial Lawyers, Report and Recommendations of the Special Committee on Rule 23 of the Federal Rules of Civil Procedure (1972) ("ACTL Report")).

<sup>79</sup> ACTL Report, at 27-28.

<sup>80</sup> *Id.*

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*Bernard*, where the Court noted that although Oregon’s rule allows aggregation of small value claims, it does so only where a class action was otherwise clearly called for.<sup>81</sup> The basis for this skepticism is that experience under the Federal Rule showed that courts too often sacrifice the procedural safeguards established by the Constitution, congressional statutes, and the Federal Rules of Civil Procedure “to make the class action manageable where it presently is not.”<sup>82</sup> The result of that approach was “almost always confusion of thought and irrational, emotional, and unsound decisions” by “those whose intentions may be above reproach.”<sup>83</sup>

It is the pre-suit remedy and notice requirements that bear most relevance to this article’s proposal for amending Rule 23(b)(3) to allow for consideration of such remedies in determining whether a class action is the superior method of resolution.

## **2. ORCP Pre-Suit Notice Requirement For Damages Class Actions.**

Oregon’s primary departure from the federal class action rules was the addition of rules that are now labeled ORCP 32H, ORCP 32I, and ORCP 32J. Those rules require that, at least 30 days before a plaintiff may bring a class action seeking damages, he or she must give written notice to the defendant of the claims and demand correction of the alleged wrong.<sup>84</sup> In response, if the defendant later provides an appropriate remedy (which need not be the same remedy demanded), then the plaintiff may not bring a damages class action.<sup>85</sup>

Compliance with this notice process also bears on the ORCP 32A requirements, which largely mirror Federal Rule of Civil Procedure 23(a). But as an additional obligation for the class representative, the plaintiff must show compliance with ORCP 32A(5) which mandates that in any class action for damages, the named plaintiff must provide proof of satisfaction of the prelitigation notice requirement contained in ORCP 32H.<sup>86</sup>

As drafted, ORCP 32H, 32I, and 32J create a specific process for evaluating whether it is “worth it” to allow a class action for damages to proceed. These rules were an intentional departure from Federal Rule 23 to give the court more flexibility in

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<sup>81</sup> *Bernard*, 275 Or. at 152 & n.3, 550 P.2d at 1208–09 & n.3.

<sup>82</sup> *Id.* at 159–60 & n.5, 550 P.2d 1213 & n.5 (citations omitted).

<sup>83</sup> *Id.*

<sup>84</sup> ORCP 32H(1)-(2).

<sup>85</sup> ORCP 32I.

<sup>86</sup> ORCP 32A(5).

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handling class actions.<sup>87</sup> Under ORCP 32H, then, before a plaintiff may bring a class action for damages, he must first give the defendant 30 days' notice (via certified or registered mail) of the claims that plaintiff intends to bring and a demand that the defendant correct or rectify the alleged wrong.<sup>88</sup> More important than the 30 days' notice requirement (which other states have adopted for specific claims),<sup>89</sup> ORCP 32I bars a plaintiff from maintaining a class action for damages if the defendant has ceased engaging in the allegedly improper activity, identified the putative class members and offered to remedy the alleged wrong upon request.<sup>90</sup> The full text of those provisions is here:

H. Notice and demand required prior to commencement of action for damages.

(1) Thirty days or more prior to the commencement of an action for damages pursuant to the provisions of sections A and B of this rule, the potential plaintiffs' class representative shall:

(a) Notify the potential defendant of the particular alleged cause of action; and

(b) Demand that such person correct or rectify the alleged wrong.

(2) Such notice shall be in writing and shall be sent by certified or registered mail, return receipt requested, to the place where the transaction occurred, such person's principal place of business within this state, or, in the case of a corporation or limited partnership not authorized to transact business in this state, to the principal office or place of business of the corporation or limited partnership, and to any address the use of which the class representative knows, or on the basis of reasonable inquiry, has reason to believe is most likely to result in actual notice.

I. Limitation on maintenance of class actions for damages.  
No action for damages may be maintained under the

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<sup>87</sup> See Don S. Willner, *More Justice Under Law*, 55 Or. L. Rev. 183, 191 (1976) (Oregon's 30-day notice requirement is a "fundamental difference[]" between Federal Rule 23 and the Oregon class action rule).

<sup>88</sup> ORCP 32H.

<sup>89</sup> See Cal. Civ. Code § 1782(a).

<sup>90</sup> ORCP 32I.

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provisions of sections A and B of this rule upon a showing by a defendant that all of the following exist:

- (1) All potential class members similarly situated have been identified, or a reasonable effort to identify such other people has been made;
- (2) All potential class members so identified have been notified that upon their request the defendant will make the appropriate compensation, correction, or remedy of the alleged wrong;
- (3) Such compensation, correction, or remedy has been, or, in a reasonable time, will be, given; and
- (4) Such person has ceased from engaging in, or if immediate cessation is impossible or unreasonably expensive under the circumstances, such person will, within a reasonable time, cease to engage in such methods, acts, or practices alleged to be violative of the rights of potential class members.<sup>91</sup>

The purpose of the prelitigation notice is to allow the defendant an opportunity to remedy the alleged wrong and avoid the negative publicity and expense associated with class actions complaint for damages.<sup>92</sup>

### **3. Interpretation of Oregon’s Pre-Litigation Notice and Remedy Requirements.**

Until 2021, no appellate cases addressed ORCP 32I, but the language of the rule, trial court decisions, and its legislative history confirm that courts should (and do) strictly apply the rule to deny certification where a defendant “has voluntarily addressed the alleged wrong with regard to all class members.”<sup>93</sup> In the trial

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<sup>91</sup> ORCP 32H, 32I.

<sup>92</sup> See Laird Kirkpatrick, *Procedural Reform in Oregon*, 56 Or. L. Rev. 539, 547 n.48 (1977) (one of the “[m]ost significant differences” between the federal rule and Oregon’s rule is that the “Oregon Act provides that, prior to filing a class action for damages, a plaintiff must send a thirty-day pre-litigation notice that *allows the defendant to avoid the adverse publicity of a class action by voluntarily redressing the alleged wrong with regard to all class members*”) (emphasis added).

<sup>93</sup> *Kirkpatrick, supra*, n.89, 56 Or. L. Rev. at 547 n.48; *Gibson v. Providence Health Sys. Or.*, 2007 WL 3339229, \*1 (Or. Cir. 2007) (striking class allegations as a result of ORCP 32I remedy provided), *aff’d on other grounds sub nom.*, 237 Or. App. 584, 240 P.3d 1110 (2010), *aff’d*, 351 Or. 587, 273 P.3d 106 (2012); *Bravo v. Taco Bell Corp.*, 1997 WL 34650259 (Or. Cir. 1997) (staying

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courts, the pre-suit remedy process has been effective. In one case—an alleged data breach—the trial court struck the class allegations after the defendant agreed to provide relief requested and entered into an Assurance of Voluntary Compliance with the Attorney General’s Office providing all of the relief that plaintiff’s counsel had sought.<sup>94</sup> In another case, the trial court stayed the case to allow the defendant enough time to complete the proposed class-wide remedy.<sup>95</sup> But ORCP is not a “get-out-of-jail-free” card. In another case, the trial court rejected as insufficient a defendant’s attempt to strike class allegations where it failed to show that it provided adequate relief and where the defendant provided limited relief without context, merely stating that it has discovered an “error” and was providing a “small amount of back pay.”<sup>96</sup> Because ORCP requires the defendant to provide notice of the “alleged wrong”—not merely defendant’s characterization of an “error”—and to make a “showing” that it provided appropriate relief, the failure to explain the nature of claims or substantiate the relief provided was insufficient.<sup>97</sup>

In 2021, the Oregon Court of Appeals conducted a lengthy analysis of ORCP 32I in *Stewart v. Albertson’s Inc.*<sup>98</sup> After an exhaustive review of the history and text of the Rule, the court examined both the process for evaluating offers under ORCP 32I as well as the varying standards of review involved. As to process, the Court held:

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discovery to permit opportunity to complete ORCP 32I cure); Berne & Wright, CCP, *supra*, Ch. 16 at 5–6 (1994) (Oregon rule stops “unnecessary litigation” by giving defendant the chance to give appropriate [class] relief”).

<sup>94</sup> *Gibson v. Providence Health Sys. Or.*, 2007 WL 3339229, \*1 (Or. Cir. 2007) (striking class allegations as a result of ORCP 32I remedy provided), *aff’d on other grounds sub nom.*, 237 Or. App. 584, 240 P.3d 1110 (2010), *aff’d*, 351 Or. 587, 273 P.3d 106 (2012); *see also Paul v. Providence Health Sys. Or.*, Respondent’s Brief and Supp. Excerpts of Record, 2008 WL 8156935, \*34–\*36 & n.18 (Or. App. Aug. 2008) (summarizing remedies provided under ORCP 32I).

<sup>95</sup> *Bravo v. Taco Bell Corp.*, No. 9708-06832, 1997 WL 34650259, at 1-2 (Or. Cir. Ct. Dec. 4, 1997) (staying discovery to permit opportunity to complete ORCP 32I cure).

<sup>96</sup> *See Allison v. Dolich*, No. 14CV07294, 2021 WL 9699444, at 7-8 (Or. Cir. Ct. Oct. 16, 2021) (denying the motion to strike class allegations based on inadequate explanation or context).

<sup>97</sup> *See id.* at 3, 7-8 (“Defendants have not supplied the Court with sufficient evidence that documents full payment (or a showing that such payment will be given in a reasonable time) to all employees of the putative Minimum Wage Class, including sufficient documentation of payment of penalty wages under either of the penalty provisions of § 652.150.”).

<sup>98</sup> *Stewart v. Albertson’s, Inc.*, 481 P.3d 978 (Or. Ct. App. 2021).

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When a trial court is called upon to evaluate a defendant's showing under ORCP 32 I, the court must make a series of determinations. It must consider the pleadings to determine the alleged wrong and the extent of available remedies under the substantive law that applies to that wrong. It must consider the defendant's evidentiary showing about the remedy offered, including resolving any factual disputes in that regard. And then it must determine whether, in light of what the substantive law treats as available and just relief, the defendant's proposed cure is the appropriate compensation, correction, or remedy under the circumstances.<sup>99</sup>

As to the standard of review, the Court acknowledged differing standards depending on the nature of the challenge to the use of ORCP 32I, including review of the decisions about the out-of-court remedies available:

We review the court's ultimate determination that a proposed cure provides the appropriate compensation, correction, or remedy for an abuse of discretion; however, to the extent that the court's exercise of discretion is predicated on conclusions about what a plaintiff has alleged and the available remedies for the alleged wrong, we review for errors of law; and to the extent that the ruling is predicated on factual findings about a defendant's showing as to the proposed cure, we review for any evidence in the record to support them.<sup>100</sup>

Finally, the court in *Stewart* also held that the 30-day notice provision of ORCP 32I does not require that the defendant actually provide the proposed cure or remedy during the 30-day window between notice and the filing of a damages action, and that a defendant may make an offer under ORCP 32I even after plaintiff brings a class action for damages.<sup>101</sup>

#### **4. Oregon's Superiority Approach Makes Sense for All Sides.**

*Stewart* confirms the appropriate consideration of non-court remedies as bearing on class certification and the superiority of class treatment. The decision confirms that a defendant must make a "showing"—not merely a representation—that it has provided an

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<sup>99</sup> *Id.* at 991.

<sup>100</sup> *Id.* at 991-92.

<sup>101</sup> *Id.* at 983-85.

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appropriate class-wide remedy. Courts are well equipped to determine, based on evidentiary submissions, whether a proposed resolution is “fair, adequate, and reasonable” in the class settlement context.<sup>102</sup> This task is likely easier outside the settlement context because, rather than having both sides urging for approval of a resolution, only the defendant is doing so where it seeks to strike the class allegations otherwise oppose class certification. This adversarial process is more likely to allow the court to make an informed decision as to the relative merits of the proposed resolution. Courts are well-equipped to review the evidence and make a “judgment call ... about what is suitable, fit, or proper, taking into account the facts and applicable legal principles” in a given case.<sup>103</sup>

This balanced approach prevents either side from dictating the final result. Just as a defendant cannot provide an inadequate remedy and walk away, the plaintiff cannot insist on an unavailable remedy simply to prevent the defendant from providing an adequate one: “[M]ore than one remedy can be ‘appropriate’ for the same alleged wrong,” because the rule addresses “the terms ‘correction’ and ‘remedy,’” indicating that “a solution other than damages (‘compensation’) can also be the appropriate means of redress for that same wrong.”<sup>104</sup> That said, the court in *Stewart* reversed the trial court’s decision to strike the class allegations because the defendant’s remedy did not include mandatory statutory damages of \$200 per class member for reckless or knowing (as opposed to merely willful) violations as sought by the plaintiff.<sup>105</sup> Thus, a defendant cannot unilaterally ignore a remedy that is mandatory under a given statutory scheme and still obtain the benefit of striking class claims.<sup>106</sup> Any “remedial action must be suited to what has been alleged to be wrong—not what the potential defendant, after receiving the notice, might believe to be the actual wrong,” because class certification is not the place to litigate the merits of “liability for the ‘alleged wrong,’” only to show that it “has provided or will provide an appropriate remedy for the particular wrong that has been alleged.”<sup>107</sup> This is a significant protection for plaintiffs because “substantive law, not a procedural mechanism like [a class action], is the place that courts look to determine the nature of the

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<sup>102</sup> Fed. R. Civ. P. 23(e)(2).

<sup>103</sup> *Stewart*, 481 P.3d at 988.

<sup>104</sup> *Id.* at 989.

<sup>105</sup> *Id.* at 994.

<sup>106</sup> Because a defendant can provide a proposed cure during the litigation and before class certification, a defendant can, in theory, litigate such an issue—*e.g.*, willfulness versus recklessness—and then make an offer to cure in the lesser amount, if the court rules in its favor. This approach is complicated, however, because such a showing may need to be made in connection with a motion for summary judgment in whole or part.

<sup>107</sup> *Stewart*, 481 P.3d at 989.

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harm and legally permissible or required remedies,” and the relevant remedy cannot “be untethered from the legally available relief for an alleged wrong under the applicable substantive law.”<sup>108</sup>

**E. The Rules Advisory Committee Should Amend Rule 23(b)(3) to Allow Trial Courts to Expressly Consider Any Appropriate Resolution in Deciding Whether Class Treatment is Superior.**

The history, application, and interpretation of Oregon’s novel class action rule shows that in determining whether a class action is “superior” to other methods of resolution, examination of out-of-court remedies promotes the efficiency and judicial discretion at the heart of Rule 23. The Rules Advisory Committee need not adopt a whole-sale rule change similar to Oregon’s rule. Rather, the Rules Advisory Committee should give trial courts the discretion the rule drafters originally contemplated to examine whether, under the facts of a given case, a class action is necessary (*i.e.*, superior). Nothing in the history or Rule 23 suggests that the word “adjudication” was essential to the drafting or interpretation of Rule 23(b)(3) and that the goal was to make a common-sense determination as to whether the procedural device of the class action would achieve necessary economies. If an available remedy already does so, there is no need for a class action.

The Oregon experience supports adding a factor to (or revising) Rule 23(b)(3)’s superiority prong to expressly allow courts to consider whether there is an existing remedy already available or provided in determining whether a class action is superior. There is no evidence that the Oregon rule has been difficult for courts to implement, and indeed, the cases suggest that the rule has been effective, efficient, and appropriate.

**II. CONCLUSION**

The rationale for limiting in-court adjudications as the basis for determining whether a class action is superior does not withstand scrutiny either as a matter of historical context, logic, or efficiency. Using Oregon’s class-action rules as a model and case study confirms that a rule modification to allow alternative remedies beyond court proceedings can work and achieve the efficiencies Rule 23 was designed to achieve.

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<sup>108</sup> *Id.* (“[N]othing in the text suggests that the ‘appropriate’ remedial action can be partial or less than complete compensation, correction, or remedy for the alleged wrong.”) (citation omitted).