**RULES SUGGESTION**
**to the**
**ADVISORY COMMITTEE ON CIVIL RULES**

# RULE 23's "SUPERIORITY" PROBLEM IS ACUTE, AND THE REMEDY IS NOT COMPLICATED

March 23, 2023

Lawyers for Civil Justice ("LCJ")[1] respectfully submits this Rules Suggestion to the Advisory Committee on Civil Rules ("Committee") related to docket 22-CV-L.

## I. INTRODUCTION

Although the Committee's March 28, 2023, agenda book[2] suggests that fixing Rule 23's "superiority" problem is "not ripe for immediate action"[3] and "may present challenges,"[4] the need for a rule amendment is acute and the remedy is much more straightforward than perceived.

## II. RULE 23's FAILURE TO ALLOW CONSIDERATION OF NON-JUDICIAL MASS REMEDIES FREQUENTLY *INVITES* INEFFECTIVE FOLLOW-ON CLASS ACTION FILINGS THAT WASTE JUDICIAL RESOURCES.

Today's class action docket is replete with cases that will provide no meaningful remedy to class members despite consuming significant judicial resources. This is happening because Rule 23 is interpreted to bar judicial consideration of non-"adjudicative" remedies in determining the appropriateness of class certification.[5]

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[1] Lawyers for Civil Justice ("LCJ") is a national coalition of corporations, law firms, and defense trial lawyer organizations that promotes excellence and fairness in the civil justice system to secure the just, speedy, and inexpensive determination of civil cases. For over 35 years, LCJ has been closely engaged in reforming federal procedural rules in order to: (1) promote balance and fairness in the civil justice system; (2) reduce costs and burdens associated with litigation; and (3) advance predictability and efficiency in litigation.

[2] Advisory Committee on Civil Rules, *Agenda Book, Mar. 28, 2023*, *available at:* https://www.uscourts.gov/sites/default/files/2023-03_civil_rules_committee_agenda_book_final_0.pdf

[3] *Id*. at 264.

[4] *Id*. at 262.

[5] *See* Lawyers for Civil Justice, *A Superior Definition of Superiority: Removing Rule 23(B)(3)'s Ban Against Considering Non-Litigation Solutions When Deciding Whether A Class Action Is "Superior To Other Available Methods,"* Sept. 2, 2022, *available at* https://www.uscourts.gov/sites/default/files/22-cv-l_suggestion_from_lcj_-

Recalls, refunds, and similar remedies are widely used and effective means of making consumers whole. When a recall or a refund is not already available to a wronged claimant, class action plaintiffs will often request such relief in their lawsuits.[6] In rare cases where a class action is filed before a planned product recall occurs, the litigation may serve as appropriate grounds for a class-wide settlement program.[7] But what we see most frequently is a business-instituted recall or refund taking place before any litigation. Indeed, this is what policymakers should *want* businesses to do—to make their customers whole in an effective and efficient manner without a need for judicial intervention.

However, even the most robust recalls and refund programs—even if prompted by the wish to avoid class-action litigation[8]—are typically not considered when evaluating whether a class action is superior to other forms of adjudication. The result is that these programs—which policy interests have aligned to promote—are often treated as easy targets for follow-on class litigation because the remedy typically sought (an admission of defect, recall, or reimbursement) has already been announced by the defendant. Follow-on class actions of various types are common; LCJ member Ford Motor Company has asserted in LCJ meetings attended by this Committee's representatives that the most numerous type of class action it now faces is recall follow-on class actions. Just since the beginning of the 2020s, numerous class actions have followed in the wake of government or private action to ameliorate customer issues. For example, there have been at least 21 active class actions following product recalls,[9] three class actions following software

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[6] *See, e.g., Krommenhock v. Post Foods, LLC*, 334 F.R.D. 552, 577–78 (N.D. Cal. 2020) (seeking refund for product purchased); *Bodle v. Johnson & Johnson, Inc.*, 2022 WL 18495043, at *1 (N.D. Cal. Feb. 24, 2022) (requesting recall of sunscreen products as relief); *Diesel v. Procter & Gamble Co.*, 2022 WL 16948290, at *3 (E.D. Mo. Nov. 15, 2022) (requesting full refund for allegedly mislabeled product); *Vargas v. Ford Motor Co*., 2020 WL 1164066, at *3 (C.D. Cal. Mar. 5, 2020) (refund part of class settlement relief).

[7] *In re Samsung Top-Load Washing Machine Mkgt., Sales Pracs. & Prods. Liab. Litig.*, 2020 WL 2616711, at *2 (W.D. Okla. May 22, 2020) ("Negotiation of the Settlement Agreement followed a recall of the same washing machines at the center of this litigation.") (cleaned up).

[8] *See* P. 263 ("One might speculate that the prospect of a class action might have been one stimulus behind defendant's aggressive efforts to satisfy potential class members by alternative means.")

[9] *See Cherry v. Dometic Corp*., 986 F.3d 1296, 1300 (11th Cir. 2021) (plaintiff filed class action following product recall arguing recall was not broad enough); *Flynn v. FCA US LLC*, 39 F.4th 946, 949 (7th Cir. 2022) (noting class action filed following government-supervised recall where "[f]ederal regulators supervising the recall determined that the patch eliminated the vulnerability"); *Adewol v. Frickenschmidt Foods LLC*, 2022 WL 4130789, at *1 (E.D. Mo. Sep. 12, 2022) (class action filed six days after Department of Agriculture recall of 5,795 pounds of beef due to alleged misbranding); *Cho v. Hyundai Motor Co., Ltd*., --- F. Supp. 3d ----, 2022 WL 16966537, *9 (C.D. Cal. 2022) (class action challenging excessive oil consumption following engine recall); *Cohen v. Subaru of Am., Inc*., 2022 WL 721307, at *1–3 (D.N.J. Mar. 10, 2022) (class action filed following series of fuel pump recalls); *Dukich v. IKEA US Retail, LLC*, 2022 WL 17823684, at *9 (E.D. Pa. Dec. 20, 2022); *Hickman v. Subaru of Am., Inc*., 2022 WL 11021043, at *5 (D.N.J. Oct. 19, 2022) (class action filed following recall); *In re ARC Airbag Inflators Prods. Liab. Litig*., 2022 WL 17843061, at *1 (J.P.M.L. 2022) (consolidating six class actions filed following recall); *In re Chantix (Varenicline) Mktg., Sales Practs. & Prods. Liab. Litig*., 2022 WL 1783104, at *1 (J.P.M.L. Dec. 22, 2022) ("These putative class actions preset common factual questions arising out of allegations that Pfizer voluntarily recalled the smoking cessation drug Chantix in 2021"); *In re Chevrolet Bolt EV Battery Litig*., --- F. Supp. 3d ----, 2022 WL 4686974, at *4–5 (E.D. Mich. 2022) (class action filed following product recalls); *In re FCA US LLC Monostable Elec. Gearshift Lit*g., 2022 WL 4211149, at *5 (E.D. Mich. Sep. 12, 2022) (refusing to decertify class action filed following product recall); *In re Zantac (Ranitidine) Prods. Liab. Litig*., 2022 WL 17480906, at *1 (S.D. Fla. Dec. 6, 2022) (class actions filed following FDA-ordered recall); *Johanneson v. Polaris Indus., Inc*., 450 F. Supp. 3d 931, 982 (class action filed following product recall); *Kaupelis v. Harbor Freight Tools USA, Inc*., 2020 WL 5901116, at *11 (C.D. Cal. Sep. 23, 2020) (certifying class action filed following product recall); *Laroe v. FCA*

patches,[10] two class actions following voluntary financial remediations,[11] two following environmental remediations,[12] one following a stated policy change,[13] and seven following established customer satisfaction programs that included a refund of the purchase price.[14]

Class actions may also follow government agency investigations where in-house experts examine an alleged problem but conclude that a corrective action (or further correction action) is not necessary.[15] In certain types of class actions (like those against automotive manufacturers), cases are often filed in the wake of customer satisfaction or improvement efforts, like after an automotive company issues a Technical Service Bulletin recommending a repair for a newly discovered issue.[16]

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*US LLC*, 2020 WL 1043564, at *1 (D. Kan. Mar. 4, 2020) (class action filed following automotive recall); *Myslivecek v. FCA US LLC*, 2022 WL 17904526, at *1 (E.D. Mich. Dec. 23, 2022) (class action filed following automotive recall); *Rife v. Newell Brands, Inc*., --- F. Supp. 3d ----, 2022 WL 4598666, at *5 (S.D. Fla. 2022) (class action filed following CPSC investigation and subsequent recall); *Rojas v. Bosch Solar Energy Corp*., 2022 WL 717567, at *2 (N.D. Cal. Mar. 9, 2022) (class action filed following recall); *Rose v. Ferrari N. Am.*, 2022 WL 14558880, at *2 (D.N.J. Oct. 25, 2022) (class action filed following recall); *Sharp v. FCA US LLC*, --- F.Supp.3d ----, 2022 WL 14721245, at *7 (E.D. Mich. Oct. 25, 2022) ("Plaintiffs filed this lawsuit within days of FCA and NHTSA initiating investigations of the subject Ram trucks. Within two weeks of the lawsuit being filed, FCA announced a voluntary recall …"); *Weidman v. Ford Motor Co.*, 2022 WL 1071289, at *2 (E.D. Mich. Apr. 8, 2022) (class action filed following recall).

[10] *Hoffman v. Ford Motor Co.*, 2021 WL 3265010, at *8 (C.D. Cal. Mar. 31, 2021) (class action filed following software patch and technical service bulletin); *In re Apple Processor Litig*., 2022 WL 2064975, at *1 (N.D. Cal. Jun. 8, 2022) (class action filed following software patch); *In re Intel Corp. CPU Mktg., Sales Pracs. & Prods. Liab. Litig.*, --- F. Supp. 3d ----, 2022 WL 2528305 (D. Or. 2022) (class action filed following software patch).

[11] *Dawson v. Great Lakes Educ. Loan Servs., Inc.,* 2021 WL 1174726, at *14 (W.D. Wisc. Mar. 29, 2021) (class action filed following financial remediation); *Outzen v. Kapsch TrafficCom USA, Inc.,* 2021 WL 4454112, at *2 (S.D. Ind. Sep. 29, 2021) (class action filed following financial remediation for toll overcharges)

[12] *Morr v. Plains All Am. Pipeline, L.P*., 2021 WL 4554659, at *3 (S.D. Ill. Oct. 5, 2021) (class action filed following environmental remediation); *Mount v. Pulte Home Co.*, *LLC,* 2022 WL 3446217, at *4 (M.D. Fla. Aug. 17, 2022) (class action filed following stormwater remediation).

[13] *Lohman v. United States,* 154 Fed. Cl. 355, 355 (Ct. Fed. Cl. 2021) (class action filed after Army Board for Correction of Military Records' decision announcing certain soldiers eligible for back pay).

[14] *Franco v. Ford Motor Co*., 2022 WL 17726303, at *2–3 (C.D. Cal. Dec. 6, 2022) (class action filed following customer satisfaction campaigns); *Gilbert v. Lands' End, Inc*., 2021 WL 3662448, at *3–4 (W.D. Wis. Aug. 18, 2021) (class action filed despite full refund policy); *Laurens v. Volvo Car USA, LLC*, 2020 WL 10223641, at *8 (D.N.J. 2020) (class action filed despite availability of full refund); *Singh v. Google LLC*, 2022 WL 94985, at *14 (N.D. Cal. Jan. 10, 2022) (class action filed despite presence of refund policy); *Van v. LLR, Inc.*, 2020 WL 4810102, at *7 (D. Alaska Aug. 18, 2020) (class action filed despite presence of refund); *Weinrich v. Toyota Motor Sales, U.S.A., Inc.*, 2023 WL 155610, at *1 (D.S.C. Jan. 11, 2023) (class action filed despite acknowledged "customer support program for corrosion issues"); *Womick v. Kroger Co.*, 2022 WL 1266630, at *5 (S.D. Ill. Apr. 28, 2022) (class action filed despite presence of standard refund offer).

[15] *See, e.g., Flynn,* 39 F.4th at 949 (noting class action filed following government-supervised recall where "[f]ederal regulators supervising the recall determined that the patch eliminated the vulnerability"); *Franco,* 2022 WL 17726303 at *2–3 (class action filed following NHTSA investigation); *Kondahl v. Kia Motors Am.,* 2020 WL 5816228, at *2 (S.D. Ohio Sep. 30, 2020) (class action filed despite NHTSA investigation resulting in no recall action).

[16] *See,e .g., Cashatt v. Ford Motor Co.*, 2020 WL 1987077, at *1 (W.D. Wash. Apr. 27, 2020) (class action filed following Ford Technical Service Bulletins); *Cho*, 2022 WL 16966537 at *9 (class action challenging excessive oil consumption following TSBs); *Cunningham v. Ford Motor Co*., --- F. Supp. 3d ----, 2022 WL 17069563, at *4 (E.D. Mich. Nov. 17, 2022).

How do class actions proceed when a remedy already exists? Post-remedy plaintiffs will usually allege that the recall or customer service effort is not sufficient to provide the relief they seek.[17] Occasionally they will allege that the remedy was deceptive,[18] or negligently performed.[19] Courts may dismiss claims that straightforwardly allege a "negligent recall."[20] But other claims challenging the legitimacy or scope of the remedial action may survive a motion to dismiss.[21] The end result of these kinds of filings are class-action lawsuits that explicitly compare themselves to government-supervised or voluntary mass remedies.

Despite the fact that these mass remedies already exist outside of the court system, courts find that the Rule 23(b)(3) superiority requirement is met and certify a damages class without comparing it to any such mass remedy because they believe Rule 23 does not permit them to do so.[22] At the extreme edge of this practice, some courts—because Rule 23 does not require them to consider whether a government investigation is superior to a jury trial—have expressly held that a jury may overrule a government agency's finding that an alleged defect was not a threat to safety.[23] It is, of course, entirely possible that some mass remedies are not effective, or even deceptively implemented, and therefore inferior to a given class action. It is also possible that a government agency may explicitly invite private litigation to supplement its enforcement efforts.[24] But it is very difficult for a court to determine that a class action is superior to these mass remedies if it does not—or cannot—consider them at the time it evaluates the propriety of

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[17] *Cherry*, 986 F.3d 1300 (plaintiff filed class action following product recall arguing recall was not broad enough); *Cohen*, 2022 WL 721307 at *3 ("According to Plaintiffs, these recalls do not capture all Subaru vehicles affected by the Defect."); *Van*, 2020 WL 4810102 at *8 (refund policy would not provide statutory damages).

[18] *Weidman*, 2022 WL 1071289 at *3 ("It is Plaintiffs' contention that the 2016 Recall was not a 'fix' as represented by Ford, but an effort to conceal the full scope and nature of the Brake System Defect …"); *Rose*, 2022 WL 14558880 at *3 ("Plaintiff alleges that Defendants knew of the brake defect since 2015 but failed to disclose the defect to consumers, including Plaintiff, until the NHTSA recall.").

[19] *Cohen,* 2022 WL 721307 at *40.

[20] *Id.* (dismissing negligent recall claim as prudentially mooted).

[21] *See In re Chevrolet Bolt EV Battery Litig.,* 2022 WL 4686974 at *10 (deferring question of whether plaintiffs have standing given product recalls); *Rife*, 2022 WL 4598666 at *5 ("And (the Plaintiffs contend) the Defendants' recall and quick fixes were too little, too late."); *Dukich,* 2022 WL 17823684 at *9 (noting plaintiff sought broader relief than existing recall, and sought "interest and delay damages" in addition to existing full refund offer); *Hickman,* 2022 WL 11021043 at *5 ("Because Plaintiffs have stated claims on the face of their Amended Complaint that go beyond the Recall, the Court will not dismiss the Amended Complaint on that basis."); *Rose*, 2022 WL 14558880 at *3 (declining to dismiss on prudential mootness grounds because "here, Plaintiff seeks more than equitable relief. Plaintiff asserts legal claims, including claims for fraud and an alleged NJCFA violation, and seeks actual, treble, and punitive damages and attorney's fees.").

[22] *Dukich,* 2022 WL 17823684 at *9 (denying certification but finding superiority because "the question of whether administrative remedies should be considered in a Rule 23(b)(3) analysis remains unanswered"); *see also Rojas,* 2022 WL 717567 at *16 (certifying class, noting "[d]istrict 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 of adjudicating a controversy").

[23] *Johnson v. Nissan N. Am., Inc.,* 2022 WL 2869528, at *11 (N.D. Cal. Jul. 21, 2022) (certifying class despite NHTSA investigation finding no defect, holding that plaintiff's proposed safety expert "has reasonably articulated the basis for his opinions; Nissan is free to pair them off against NHTSA's, but balancing those potentially competing concerns is a matter for the jury"). *Compare* P. 264 ("Trying to guess whether government action would be a suitable substitute for a class action could pose another major challenge for the judge.").

[24] *See* P. 264 ("Suppose, for example, that the governmental enforcement agency potentially involved told the court 'We favor allowing the class action go forward.' Is the judge to disregard that governmental view?") As we hope this comment makes clear, the judge should *not* disregard that view: it should rigorously evaluate whether any possible alternatives are superior, and the government's express view would be part of that analysis.

the class action and its effectiveness.

## III. LCJ's PROPOSED RULE 23(b)(3) AMENDMENT WOULD RESTORE THE ORIGINAL AND APPROPRIATE UNDERSTANDING THAT SUPERIORITY INQUIRIES DO NOT EXCLUDE NON-JUDICIAL RELIEF.

When evaluating superiority, most courts today look primarily (if not exclusively) at whether a class action would be more efficient than multiple small-claim suits. But historically the Rule 23 superiority inquiry has not been exclusively efficiency-driven. Rule 23(b)(3) includes an inquiry into the fairness of the class action procedure as well as its efficiency. Early in the history of class actions, courts would focus equally on the fairness and efficiency prongs when considering superiority.[25] As the Third Circuit held in 1974,

> The superiority finding requires at a minimum (1) an informed consideration of alternative available methods of adjudication of each issue, (2) a comparison of the fairness to all whose interests may be involved between such alternative methods and a class action, and (3) a comparison of the efficiency of adjudication of each method.[26]

It also held that these issues should not be looked at only from the point of view of the potential class members. Instead,

> Superiority must be looked at from the point of view (1) of the judicial system, (2) of the potential class members, (3) of the present plaintiff, (4) of the attorneys for the litigants, (5) of the public at large and (6) of the defendant. The listing is not necessarily in order of importance of the respective interests. Superiority must also be looked at from the point of view of the issues.[27]

As this shows, courts were more concerned with whether a proposed class action was superior to other remedies as a whole (even those outside the judicial system), justifying the time and money the defendant would spend defending the case and the court would spend overseeing it. This concern has not disappeared. Indeed, some modern legal scholars have expressed concern that piecemeal class-action litigation may actually disrupt government efforts at mass remedies or

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[25] *See, e.g., Katz v. Carte Blanche Corp.,* 496 F.2d 747, 757 (3d Cir. 1974) ("if … the district court has in rejecting alternative available methods of adjudication disregarded possible unfairness of the class action to a particular defendant, its determination is not entitled to such deference"); *Cotchett v. Avis Rent A Car Sys., Inc.,* 56 F.R.D. 549, 553 (S.D.N.Y. 1972) (pro-superiority factors "must be weighed, along with all other benefits to the class, against the costs of such an action, in terms of convenience and fairness to all involved"); *Graybeal v. American Savings & Loan Ass'n*, 59 F.R.D. 7, 16 (D.D.C. 1973) ("The problems of 'judicial economy and fairness to the parties' are certainly present in the case at bar.").

[26] *Katz*, 496 F.2d at 757; *see also* Jay Tidmarsh, *Superiority as Unity*, 107 NW. U. L. REV. 565, 578 (2013) ("'Superiority' is inherently a comparative inquiry: the class action must be compared to other options that a government has established to resolve disputes over legal rights.").

[27] *Katz*, 496 F.2d at 767.

regulatory enforcement.[28]

Early rulings from the Ninth Circuit provide further evidence that, when the Rule took effect, courts believed "that subparagraph (b)(3) read as a whole reflects a broad policy of economy in the use of society's difference settling machinery."[29] To that end, when determining "fairness" as part of the superiority analysis, courts would look into whether the class action provided benefits to the defendant (such as the closure of active claims or lawsuits) as well as the class members.[30] The inquiry, historically, would also focus on whether or not a class trial before a jury was superior to non-jury methods of adjudicating the controversy.[31]

Cases that disagreed with this approach tended to do so on the grounds that Rule 23 "'assumes a bona fide grievance shared to some degree by a group of persons interested in prosecuting their claims,' so that it is not permissible to suggest simply that it would be superior to have no litigation at all."[32] But there is nothing in the text or intent of Rule 23 that embodies that assumption. In fact, the various factors courts must consider under Rule 23 are all aimed at *testing* whether a group of people actually shares the same grievance. If they do, a class may be certified. If not, it cannot, even if the alternative is no litigation at all.

As a result, since as early as 1966, the Ninth Circuit has considered whether administrative relief in the form of agency regulation or government investigation (or other relief like previously-existing consent decrees) might provide the best remedy for potential class-action claimants.[33] So has the Seventh Circuit.[34] Other federal appellate courts, like the Third Circuit, however, have

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[28] David Freeman Engstrom, *Agencies as Litigation Gatekeepers*, 123 YALE L.J. 616, 621 (2013) ("the piecemeal and unyielding nature of profit-motivated private enforcement will deprive regulatory regimes of needed 'coherence' by, among other things, disrupting the subtle cooperative relationships that arise between regulators and regulatory targets"), 637 (discussing "powerful incentives for private enforcers and regulatory targets to trade a larger settlement pot for an unduly wide liability release, compromising future enforcement efforts").

[29] *In re Hotel Telephone Charges*, 500 F.2d 86, 91 (9th Cir. 1974) (quoting *Berley v. Dreyfus Co*., 43 F.R.D. 397, 398 (S.D.N.Y. 1967)).

[30] *See, e.g., Berger v. Purolator Prods., Inc.,* 41 F.R.D. 542 (S.D.N.Y. 1966) (no superiority where "despite the pendency of this litigation for almost three years, [counsel] have received no communication or other inquiries from any other shareholder"); *Shields v. First Nat. Bank of Ariz*., 56 F.R.D. 442, 446 (D. Ariz. 1972) ("the superiority of a class action under these circumstances is inappropriate where the plaintiff can show no damage and the defendant's gain is questionable").

[31] *See, e.g., Cotchett,* 56 F.R.D. at 553 (weighing superiority of jury trial against other methods).

[32] *See In re Tetracycline Cases*, 107 F.R.D. 719, 732 (W.D. Mo. 1985) (quoting 3B MOORE'S FEDERAL PRACTICE 23-339 (1984)).

[33] *Kamm*, 509 F.2d at 211 ("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.') (quoting WRIGHT & MILLER, FEDERAL PRACTICE & PROCEDURE: CIVIL§ 1779 (1973 Supp. at 17)); *Doninger v. Pac. Nw. Bell, Inc.*, 564 F.2d 1304, 1314 (9th Cir. 1977) (consent decree superior).

[34] *In re Bridgestone/Firestone, Inc*., 288 F.3d 1012, 1019 (7th Cir. 2002) ("Regulation by the NHTSA, coupled with tort litigation by persons suffering physical injury, is far superior to a suit by millions of uninjured buyers for dealing with products that are said to be failure-prone."). The Seventh Circuit limits this consideration of non-adjudicative relief, however, to government action, not private commercial remedies. *In re Aqua Dots Prods. Liab. Litig*., 654 F.3d 748, 752 (7th Cir. 2011)

ruled that administrative relief may not be part of the superiority inquiry based on the text of Rule 23.[35]

## IV. ALLOWING COURTS TO CONSIDER NON-JUDICIAL RELIEF IN THE SUPERIORITY INQUIRY IS AN UNCOMPLICATED FIX THAT ALLOWS FOR LESS EXPENSIVE AND FAIRER OUTCOMES.

In light of the historical treatment of Rule 23(b)(3), fixing the ambiguity surrounding the term "adjudication" is a straightforward way to allow courts to stop limiting their inquiry into the superiority of a given class action as compared only to other *judicial* remedies. For example, the Seventh Circuit has held that voluntary action by a defendant may not be considered in the superiority inquiry, even when it provides all the relief asked for at less cost to the claimants, because such relief is not an "adjudication."[36] Other courts have since held similarly.[37]

The unintended consequence of the "adjudication" limitation is that it restricts courts from considering all of the available methods of making the plaintiffs whole, along with their attendant costs and benefits. It also places the judicial system in unintended conflict with the successful work of the administrative state and private industry, rather than limiting the judicial role to adjudicating real disputes. As various appellate courts have recognized, in a class action, the trial court serves as a fiduciary for the potential class at those times (like settlement) when class counsel cannot be trusted to watch out for the class's interest at the expense of their own.[38] Even in an adversarial certification, the superiority determination, like the settlement approval process, is a time when class counsel has little incentive to scrutinize alternative methods of providing relief at lower cost. Therefore, it makes no sense to restrict the court from looking at best practical methods of providing class members with relief. If a pre-existing government or voluntary action exists, then including it in the analysis redounds to the benefit of the class members as well as the defendant. Courts should be able to consider whether the alternative relief is superior in scope, timing, or cost-effectiveness. If the alternative relief is *not* superior, then a court may comfortably certify the class as the best possible relief. In either direction, Rule 23(b)(3) should allow the court to consider all alternatives.

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[35] *See Amalgamated Workers Union of Virgin Islands v. Hess Oil Virgin Islands Corp.,* 478 F.2d 540, (3d Cir. 1973) (rejecting possible relief from Department of Labor: "As we view it, it would appear that the rule was not intended to weigh the superiority of a class action against possible administrative relief.").

[36] *In re Aqua Dots Prods. Liab. Litig.,* 654 F.3d 748, 751 (7th Cir. 2011). The court still denied certification on the grounds that a plaintiff that would seek a duplicative remedy was not an adequate representative. *Id.* Other courts have largely declined to follow suit.

[37] *See, e.g., Kaupelis*, 2020 WL 5901116 at *10 (certifying class despite evidence that plaintiffs would receive nothing not already offered by existing product recall); *Dean v. Colgate-Palmolive Co*., 2018 WL 6265003, at *10 (C.D Cal. Mar. 8, 2018) (in "close issue," finding superiority despite corporate return policy because definition of "'adjudication'... does not include non-legal forms of adjudication such as a recall campaign, or presumably, a money-back guarantee"), *aff'd*, 772 F. App'x 561 (9th Cir. 2018); *Korolshteyn v. Costco Wholesale Corp*., 2017 WL 1020391, at *8 (S.D. Cal. Mar. 16, 2017) (finding superiority because preexisting refund program was not "adjudication"); *Melgar v. Zicam LLC*, 2016 WL 1267870, at *6 (E.D. Cal. Mar. 31, 2016) (finding defendants' refund program not superior because "it does not comport with the plain language of Rule 23"); *Jovel v. Boiron Inc*., 2013 WL 12162440, at *5 (C.D. Cal. Mar. 28, 2013) ("[T]he Court shares Plaintiff's doubt that such a private refund program even constitutes an alternative form of 'adjudication.'").

[38] *See Med. & Chiropractic Clinic, Inc. v. Oppenheim*, 981 F.3d 983, 992 (11th Cir. 2020); *In re Comm. Bank of N. Va.*, 418 F.3d 277, 318 (3d Cir. 2005); *Culver v. City of Milwaukee*, 277 F.3d 908, 914 (7th Cir. 2002).

## V. CONCLUSION

Today's "superiority" problem is widespread, and it causes serious burdens on judicial resources and parties. The language of Rule 23(b)(3) is the cause. Amending the rule is necessary because allowing courts to consider the presence of alternative remedies in their superiority analysis will empower judges to understand, at an early practicable time, whether the case is worth the burdens, while of course preserving the court's discretion to conclude that a class action is appropriate.[39] The Advisory Committee should take up this topic to explore an amendment that will help judges ensure that class actions are well-considered.

[39] *See, e.g., Rojas,* 2022 WL 717567 at *16 ("Assuming without deciding that Bosch's voluntary recall appropriately can be considered when evaluating the Rule 23(b)(3) superiority requirement, the court cannot conclude on this record that the recall is the superior method for adjudicating the claims of class members."); *Van*, 2020 WL 4810102 at *8 (denying motion to strike class allegations; "[a]t this point, the court cannot conclude that the proposed class action is not a superior method of adjudicating the controversy").