A Company’s Voluntary Refund Program for Consumers Can Be a Fair and Efficient Alternative to a Class Action

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I. INTRODUCTION

When a defective product is sold to consumers and they incur nominal out-of-pocket expenses, a class action is often initiated to recover damages. A private—and better—alternative to a class action may exist in such circumstances to warrant the denial of class certification. Seeking to preserve customer relationships (especially after selling a potentially defective product), companies in consumer industries have been establishing internal refund programs to voluntarily compensate consumers for damages allegedly caused by their products. These voluntary refunds may be a better remedy because class actions are expensive and time consuming, typically resulting in years of litigation before achieving any compensation for the injured consumers.

The first claim of this Article is that Federal Rule of Civil Procedure 23(b)(3) requires federal courts to compare the superiority of a class action not only to other judicial procedures but also to any voluntary refund program. The second claim is that a court must deny class certification once it concludes that a refund program is a fair and efficient alternative to the class mechanism. The Article concludes by explaining what features a refund program must have to be fair and efficient. Only a few courts and one scholarly article have addressed whether a refund program should be relevant to class certification.1 Surprisingly, though, no federal court or scholar has analyzed the historical meaning of Rule 23(b)(3) as it applies to a voluntary refund program.

A class action is “an exception to the usual rule that litigation is conducted by and on behalf of the individual named

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1. That article argues that courts should not consider voluntary refunds, but most courts that have addressed this issue have compared the proposed classes to a refund program. See Andrea Joy Parker, Note, Dare to Compare: Determining What “Other Available Methods” Can Be Considered Under Federal Rule 23(b)(3)’s Superiority Requirement, 44 GA. L. REV. 581 (2010) [hereinafter Dare to Compare]; see infra note 13 and accompanying text.
parties only.”

Class actions enable individuals who have small claims to aggregate their claims with others. This aggregation makes lawsuits involving small recoveries attractive to an attorney, whereas an individual lawsuit might not be worth its cost and time.

Nonetheless, a class action may be a poor option for consumers. Class actions often benefit the class attorneys at the expense of class members, even though the attorneys are not the parties with the legal injuries. Class counsel receives average fees totaling about one-third of the value of a settlement or award. Despite high fees, consumers commonly receive small recoveries in class actions not involving any personal injuries.

In one shocking


3. See Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 617 (1997) (“The policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights.”) (quoting Mace v. Van Ru Credit Corp., 109 F.3d 338, 344 (1997)).

4. The United States Supreme Court, several federal courts of appeals, and commentators have all recognized the inherent conflict between class counsel and class members: class members want the largest recovery, but class counsel has an incentive to settle quickly with defendants to secure his or her contingency fee rather than to risk a loss at trial and have no recovery. See Ortiz v. Fibreboard Corp., 527 U.S. 815, 852 n.30 (1999) (“In a strictly rational world, plaintiffs’ counsel would always press for the limit of what the defense would pay. But with an already enormous fee within counsel’s grasp, zeal for the client may relax sooner than it would in a case brought on behalf of one claimant.”); Louis W. Hensler III, Class Counsel, Self-Interest and Other People’s Money, 35 U. MEM. L. REV. 53, 69 (2004) (“Class counsel arguably can avoid substantial risk and maximize [counsel’s] hourly return by settling early. If counsel takes the case all the way to trial and does not recover, they receive no fee. Fear of no recovery and the need to maximize hourly return can lead counsel to settle essentially all claims, including very strong ones, before trial and at a significant ‘discount’ if need be, regardless of the merits of the claim.”).

5. 4 ALBA CONTE & HERBERT B. NEWBERG, NEWBERG ON CLASS ACTIONS § 14:6 (4th ed. 2002) (noting, though, that fees are lower as a percentage in billion dollar “mega-fund” class actions).

6. See, e.g., Parker v. Time Warner Entm’t Co., L.P., 631 F. Supp. 2d 242, 268–69, 277 (E.D.N.Y. 2009) (approving class settlement where fee award was over $3.3 million while the recovery for most of the class was about “$6.75 per claimant”); O’Keefe v. Mercedes-Benz USA, LLC, 214 F.R.D. 266, 303–04, 307 (E.D. Pa. 2003) (approving class settlement providing $4.8 million to class counsel where each class member received a $35 voucher for future vehicle maintenance service and an extended warranty valued at $48 per vehicle).
case in which a bank over-collected escrow money from homeowners, many class members had a net economic loss as a result of the class settlement. Those class members received an interest payment up to $8.76, but members paid class counsel’s fee of $8.5 million directly from their escrow accounts, and the fee deduction per class member was often more than the amount of refunded interest.

Even when class members receive sufficient compensation, it comes at the cost of delay. Federal class actions are complex and subject to a two-phased court approval process for class settlements (preliminary and final approval). As a result, the average time between the filing of a class action and final approval of a class settlement is over three years. In addition, the federal dockets are overcrowded. The average number of civil lawsuits pending per federal judge is almost 400 cases, making it difficult for judges to resolve class actions efficiently.

A potentially better alternative to a class action that could provide consumers with full and timely payment is a voluntary refund program. If courts denied class certification when a refund program was fair and efficient (i.e., the company notifies consumers about the refunds and fully and timely compensates them), then

8. Id. The settlement was approved by an Alabama state court and was challenged in federal court. Id. Rule 23 of the Alabama Rules of Civil Procedure is patterned after its federal counterpart. Compare ALA. R. CIV. P. 23 (governing the procedure for class actions in Alabama), with FED. R. CIV. P. 23 (governing the procedure for federal class actions).
10. Brian T. Fitzpatrick, An Empirical Study of Class Action Settlements and Their Fee Awards, 7 J. EMPIRICAL LEGAL STUDIES 811, 812, 816–17, 820–21 (2010) (examining 688 class action settlements approved in 2006 and 2007 and finding the average time taken to reach settlement was 1,196 days). Because about 90% of class actions settle, nearly all members of a certified class receive compensation through a class settlement. See infra note 166 (discussing empirical evidence regarding prevalence of class action settlements).
11. Samuel Issacharoff & Robert H. Klonoff, Against Settlement: Twenty-Five Years Later: The Public Value of Settlement, 78 FORDHAM L. REV. 1177, 1200 (2009) (“Even under the current system, in which few cases reach trial, the courts are clogged.”).
12. Id. at 1200–01 (from September 2007 to September 2008, there were about 267,250 new civil cases filed in federal district courts and 678 authorized judgeships, which averages 394 civil cases per judge).
companies would be incentivized to establish reimbursement policies in the future.\textsuperscript{13} As a result, consumers would receive compensation without any court intervention. Further, establishing a voluntary refund program without court action would likely increase revenues, as consumers are likely to do business with a company that takes responsibility for its mistake and initiates a solution.\textsuperscript{14} On the other hand, if a refund program is irrelevant to class certification, then companies would have an incentive to withhold voluntary refunds until class certification is addressed.\textsuperscript{15} Although the focus of this Article is consumer products, refund programs could be established for various disputes, including disputes between an insurer and its insured and between an employer and its employees.

Parts II and III of this Article analyze damage classes under Rule 23(b)(3) and the requirement that a class action be “superior to [all] other available methods for fairly and efficiently adjudicating the controversy” (known as the superiority requirement).\textsuperscript{16} In Part


\textsuperscript{14} See, e.g., Sally Roberts, Mattel Recalling Dolls to Patch Up Image, BUS. INS. (Jan. 1, 1997, 6:00 AM), http://www.businessinsurance.com/article/19970112/ISSUE01/10006849 (explaining the public relations benefits from recalling the dolls).


\textsuperscript{16} This Article addresses refund programs only under Federal Rule of Civil Procedure 23(b)(3). Lawsuits involving small monetary damages are generally
III, the Article argues that Rule 23(b)(3)’s “other available methods” language directs courts to compare a class action not only to judicial procedures but also to non-judicial methods. A refund program is one available method that courts must evaluate in determining the superiority of a proposed class. This claim is strongly supported by the Advisory Committee Notes to the 1966 amendment to Rule 23, as well as commentary by two former members of the Committee, the original purpose of the superiority requirement, and courts’ initial interpretations of the 1966 amendment.\textsuperscript{17} The three federal courts that limited the superiority requirement to a consideration of only judicial procedures were wrong: they failed to examine the history and purpose of Rule 23(b)(3) and did not recognize that a non-judicial method can be a fair and efficient alternative to a class action.\textsuperscript{18}

Part IV explains the relevance of a voluntary refund program to the denial or grant of class certification. This Part contends that courts must analyze all available alternatives to the proposed class—especially any voluntary refund program at issue—to determine whether the class action is the superior method. Class certification must be denied when a refund program (or another non-judicial method) is fairly and efficiently resolving the legal dispute. The denial may be based solely on the refund program because Rule 23(b)(3) authorizes courts to rely exclusively on the superiority requirement in denying class certification.

Last, Part V discusses what features a voluntary refund program should have for it to qualify as a fair and efficient alternative to a class action. This issue has not been addressed by courts or scholars. The fairness prong requires companies to (1) replace the product at issue or reimburse consumers for out-of-pocket expenses, such as the product’s purchase price and any property damages caused by the product; and (2) notify most affected consumers about the refund program so that the program is a real, not illusory, remedy. Notice requirements will depend on the

certified as a (b)(3) class and not a (b)(1) or (b)(2) class. See Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2545 (2011) (stating that “individualized monetary claims belong in Rule 23(b)(3)'`).

\textsuperscript{17} See infra Parts III.A & III.B. (discussing historical support for requiring courts to consider refund programs as alternatives to class actions).

\textsuperscript{18} See infra Part III.C. (discussing the failures of a district court and the Seventh and Third Circuits to examine non-judicial alternatives to the proposed classes).
circumstances. Notifying consumers individually should not be necessary, but notifying them by print publication would be required in a few situations. In most circumstances, a company should post notice about the refunds at the point of sale. The efficiency prong requires the refund program to timely compensate consumers in a manner that saves judicial resources, as compared to a class action. If a refund program complies with these requirements, then a class action would not be superior to—or even as good as—the voluntary refunds.

II. BASIC REQUIREMENTS FOR THE CERTIFICATION OF A CLASS ACTION UNDER FEDERAL RULE CIVIL PROCEDURE 23(b)(3)

Under Federal Rule of Civil Procedure 23, the party seeking class certification has the burden to prove that the four prerequisites of Rule 23(a) (numerousity, commonality, typicality, and adequacy of representation)\(^{19}\) are satisfied and that the proposed class falls within one of the three categories of Rule 23(b).\(^{20}\) To certify a damages class under the third category, Rule 23(b)(3), a plaintiff must also prove that common issues predominate (predominance requirement) and that the proposed class action is superior to other available methods (superiority requirement).\(^{21}\) A court must conduct a “‘rigorous analysis’” before finding that the predominance and

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19. The four prerequisites are

(1) the class is so numerous that joinder of all members is impracticable;
(2) there are questions of law or fact common to the class;
(3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and
(4) the representative parties will fairly and adequately protect the interests of the class.


20. Wal-Mart Stores, 131 S. Ct. at 2548.

21. For the predominance requirement, “questions of law or fact common to class members [must] predominate over any questions affecting only individual members.” Fed. R. Civ. P. 23(b)(3). See Robinson v. Tex. Auto. Dealers Ass’n, 387 F.3d 416, 421 (5th Cir. 2004) (stating that the “party seeking certification bears the burden of demonstrating” that the requirements of Rule 23 are met).
superiority requirements are met. 22  Rule 23(b)(3) identifies four nonexhaustive factors that are relevant to those two requirements. 23

This Article analyzes only the superiority requirement of subsection (b)(3) of Rule 23, which applies to actions seeking to recover monetary damages. 24  The superiority prong requires courts to determine that “a class action is superior to other available methods for fairly and efficiently adjudicating the controversy.” 25  To be the superior method, the class mechanism must be more than “just as good as” the other available methods; 26  the class action should be the “best” available method to resolve the dispute. 27  A defendant does not have to prove the reverse—that another available

23. Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 615–16 (1997). The factors include

(A) the class members’ interests in individually controlling the prosecution or defense of separate actions;
(B) the extent and nature of any litigation concerning the controversy already begun by or against class members;
(C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and
(D) the likely difficulties in managing a class action.

24. See Wal-Mart Stores, 131 S. Ct. at 2545 (stating that “individualized monetary claims belong in Rule 23(b)(3)’’); Kartman v. State Farm Mut. Auto. Ins. Co., 634 F.3d 883, 889 n.4 (7th Cir. 2011), cert. denied, 132 S. Ct. 242 (2011) (“Because the notice and opt-out procedural safeguards automatically attach to all classes certified under Rule 23(b)(3), damages actions are generally certified under this subdivision.”); 7A CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 1805 (3d ed. 2005) (“Rule 23(b)(3), which typically is utilized for damage actions, appears to be the most appropriate subdivision under which to certify product-liability class actions.”).
25. FED. R. CIV. P. 23(b)(3).
26. See Erica P. John Fund, Inc. v. Halliburton Co., 131 S. Ct. 2179, 2184 (2011) (explaining these requirements under Rule 23(b)(3)).
27. Johnston v. HBO Film Mgmt., Inc., 265 F.3d 178, 194–95 (3d Cir. 2001) (affirming denial of class certification, in part, because a class action was not the “best” method to resolve the dispute). See also Gregory v. Finova Capital Corp., 442 F.3d 188, 191 n.3 (4th Cir. 2006) (“Thus, a class cannot be certified under Rule 23(b)(3) if there is a method to which the class action is not superior.”).
method, such as a refund program, is superior to the class action. 28

Next, this Article examines the history and purpose of the superiority requirement.

III. THE 1966 AMENDMENT TO RULE 23 REQUIRES COURTS TO COMPARE CLASS ACTIONS TO VOLUNTARY REFUND PROGRAMS AND OTHER NON-JUDICIAL METHODS

This Part demonstrates that a company’s voluntary refund program falls within the “other available methods” language of Rule 23(b)(3); thus, a court must evaluate such a refund program in determining whether a class action is the superior method to resolve the dispute. This claim is supported by the Advisory Committee Notes to the 1966 amendment to Rule 23, commentary by two members of the Committee, the original purpose of the superiority requirement, and early interpretations of the superiority requirement.

A. The History and Purpose of the 1966 Amendment to Rule 23

Rule 23 was amended in 1966 to include for the first time, among other things, the superiority requirement. 29 The Advisory Committee on Civil Rules that drafted the 1966 superiority requirement did not intend to restrict courts to comparing a class action only to judicial procedures. The Advisory Committee Notes to the 1966 amendment show that the phrase, “other available methods for the fair and efficient adjudication of the controversy,” encompasses non-judicial procedures, and the “Committee Notes provide a reliable source of insight into the meaning of a rule.” 30 According to the Advisory Committee, the superiority requirement addresses whether “another method of handling the litigious situation [is] . . . available which has greater practical advantages” than a class action. 31 The Committee also directs courts to “assess the relative

28. See Robinson v. Tex. Auto. Dealers Ass’n, 387 F.3d 416, 421 (5th Cir. 2004) (reversing class certification and stating that named plaintiffs have the burden to prove that “‘class resolution is superior to alternative methods of adjudication of the controversy’” (quoting Bell Atlantic Corp. v. AT&T Corp, 339 F.3d 294, 297 (5th Cir. 2003))).
advantages of alternative procedures for handling the total controversy” and to determine whether the class “procedure is ‘superior’ to the others in the particular circumstances.”

Nowhere in its Notes does the Committee require courts to compare a class action only to another judicial proceeding.

Further, Professor Charles Alan Wright, a member of the Advisory Committee authoring the phrases, “other available methods” and “adjudication of the controversy,” has stated that courts should consider non-judicial methods. Just six years after the 1966 amendment was enacted, Professor Wright explained in the first edition of his seminal treatise that a court “need not confine itself to other available ‘judicial’ methods of handling the

29. FED. R. CIV. P. 23(b)(3) advisory comm. note, 39 F.R.D. 69, 102–04 (1966). The pre-1966 version of Rule 23 did not have any superiority requirement; it allowed for three categories of classes:

(1) joint, or common, or secondary in the sense that the owner of a primary right refuses to enforce that right and a member of the class thereby becomes entitled to enforce it; (2) several, and the object of the action is the adjudication of claims which do or may affect specific property involved in the action; or (3) several, and there is a common question of law or fact affecting the several rights and a common relief is sought.


30. United States v. Vonn, 535 U.S. 55, 64 n.6 (2002). Rule 23(b)(3) has not been amended since 1966 other than one non-substantive amendment in 2007. FED. R. CIV. P. 23(b)(3) advisory comm. note to 2007 amendment (noting that the amendment was “stylistic only”). The 2007 amendment changed “fair and efficient” to “fairly and efficiently” and changed “adjudication of the controversy” to “adjudicating the controversy.” Id.


32. Id.

33. See Proceedings of the Twenty-Ninth Annual Judicial Conference Third Judicial Circuit of the United States, 42 F.R.D. 437, 556–57 (1966) (stating that Professor Wright “was appointed originally [as] a member of the Advisory Committee on Civil Rules of the Judicial Conference, working on these civil rules,” and that he later became a member of the Standing Committee on Rules of Practice and Procedure). See also Rabiej, supra note 29, at 390 (discussing how Professor Wright identified two themes of Rule 23 that are relevant today—class actions can implicate substantive rights and a judge’s discretion can impact class action suits).
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controversy in deciding the superiority of the class action.” In fact, he expressly agreed with a district court that had relied on a company’s refund program—a non-judicial method—in denying class certification under the 1966 amendment. Professor Wright also described the amendment as requiring “a class action [to be] superior to all other means of disposing of the controversy.” Like the Advisory Committee, he has not limited the superiority requirement to judicial procedures.

If the Committee and Professor Wright wanted to limit the superiority requirement to judicial proceedings, then they could have specifically done so; they did not. Instead, the Advisory Committee wanted courts to evaluate various “alternative procedures” that may have “practical advantages” over the class mechanism. A voluntary refund program—one alternative procedure—can have many practical advantages over a class action, including lower costs to parties, potentially better and quicker remedies to consumers, and the saving of judicial resources. Thus, based on the Committee Notes and Professor Wright’s statements, the “other available methods” language encompasses refund programs, and the “adjudication of the controversy” phrase means the resolution of the dispute.


35. WRIGHT ET AL., supra note 34, at § 1779; see infra notes 44–45 and accompanying text (discussing that district court case).


37. FED. R. CIV. P. 23(b)(3) advisory comm. note, 39 F.R.D. 69, 103. Further, in the Advisory Committee’s Report to the Standing Committee, the Committee further defined the superiority requirement: “Subdivision (b)(3) directs attention to the question, Is the class action device superior to other procedural possibilities for this particular state of facts?, and only when the court makes findings in the affirmative does a class action lie.” Statement on Behalf of the Advisory Comm. on Civil Rules 8 (June 10, 1965) [hereinafter Committee Statement] (emphasis in original), available at http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Reports/CV06-1965.pdf.

38. See infra Part IV. (explaining advantages of refund programs).
The consideration of non-judicial methods is also supported by the original purpose of the 1966 amendment to Rule 23. As explained by Professor Wright, “[t]he purpose of the superiority requirement is to assure that the class action is the most efficient and effective means of settling the controversy.”\(^{39}\) The purpose was not to give an injured party the right to bring a lawsuit in federal court. To determine whether a class action is the most efficient and effective method, a court should consider alternatives to judicial procedures because such alternatives may be the most efficient and effective means to resolve a particular dispute.\(^{40}\) Professor Wright further explained that one alternative to a class action consistent with the purpose of the superiority requirement is a governmental administrative proceeding.\(^{41}\) A class action, therefore, would not be the “most efficient and effective” procedure if a non-judicial method, such as an administrative remedy or a voluntary refund program, exists that is resolving the claims of most consumers.\(^{42}\)

B. Initial Understanding of the Superiority Requirement of the 1966 Amendment

Immediately after the 1966 amendment to Rule 23 was enacted, courts and commentators interpreted the phrase “other

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39. WRIGHT ET AL., supra note 34, at § 1779. The Ninth Circuit has adopted Professor Wright’s position. See Wolin v. Jaguar Land Rover N. Am., 617 F.3d 1168, 1175 (9th Cir. 2010) (following § 1779); Kamm v. Cal. City Dev. Co., 509 F.2d 205, 211 (9th Cir. 1975) (following § 1779).

40. See Norman Sabbey, Comment, Rule 23: Categories of Subsection (b), 10 B.C. INDUS. & COM. L. REV. 539, 553 (1968–69) (“If an alternate procedure offers a more expeditious disposition of the suit, the request for a class action should be denied.”).

41. WRIGHT ET AL., supra note 34, at § 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.”).

42. See In re Aqua Dots Prods. Liab. Litig., 270 F.R.D. 377, 385 (N.D. Ill. 2010), aff’d on other grounds, 654 F.3d 748 (7th Cir. 2011) (holding that class action was not superior to voluntary refund program and explaining that consumers received “a comparable or even better remedy” than class members “could hope to achieve in court”); Drimmer v. WD-40 Co., No. 06-CV-900, 2007 U.S. Dist. LEXIS 62582, at *15–17 (S.D. Cal. Aug. 24, 2007) (comparing voluntary refund program to class action and stating that class action did not “serve[] the interests of fairness or efficiency better than the alternatives”).
available methods for the . . . adjudication of the controversy”\footnote{FED. R. CIV. P. 23(b)(3) (1966) (amended for stylistic purposes on Dec. 1, 2007).} to include a consideration of both judicial and non-judicial procedures before a class could be certified. In the 1960s, two federal courts evaluated non-judicial methods in determining whether the superiority requirement was satisfied. The District Court for the Southern District of New York denied class certification after comparing the proposed securities class to a voluntary refund program, concluding that “adjudication” reflects a “broad policy of economy in the use of society’s difference-settling machinery.”\footnote{Berley v. Dreyfus & Co., 43 F.R.D. 397, 398 (S.D.N.Y. 1967) (noting, though, that defendant’s “offer to refund the purchase price to its customers [was] not quite” a method of adjudication).} Professor Wright expressly agreed with that decision.\footnote{WRIGHT ET AL., supra note 34, at § 1779 (citing Berley to support the proposition that a court “need not confine itself to other available ‘judicial’ methods of handling the controversy”). See Sabbey, supra note 40, at 555 (agreeing with the consideration of a refund program in Berley).} Then, in \textit{Dolgow v. Anderson}, United States District Court Judge Weinstein analyzed the 1966 amendment and explained that the “[a]dministrative process often provides the best alternative to a class action.”\footnote{43 F.R.D. 472, 482–83 (E.D.N.Y. 1968) (concluding that class action was superior to administrative enforcement by the Securities and Exchange Commission because the Commission could not remedy investors’ injuries), rev’d on other grounds, 438 F.2d 825 (2d Cir. 1970).} The Advisory Committee’s reporter, Professor Benjamin Kaplan, designated \textit{Dolgow} as an “imaginative and important opinion.”\footnote{Benjamin Kaplan, \textit{A Prefatory Note}, 10 B.C. INDUS. & COM. L. REV. 497, 499 (1968). Professor Kaplan was a reporter to the Advisory Committee from 1960 to 1966. \textit{Id.} at 497.}

In addition, early commentators construed “adjudication of the controversy” broadly. Two commentators agreed that the 1966 amendment required a class action to be superior to “any other form of settlement.”\footnote{Sabbey, supra note 40, at 548–49 (stating that “new” Rule 23(b)(3) requires class action to be “superior in fairness and efficiency to any other form of settlement,” and noting that an “administrative agency could also supply relief”); Ronald E. Young, Note, \textit{Federal Rules of Civil Procedure: Rule 23, The Class Action Device and Its Utilization}, 22 U. FLA. L. REV. 631, 637 (1970) (“Under
procedure may be a more appropriate solution” than a class action. Those three commentators must have believed that “adjudication” did not literally refer only to a judicial procedure because they relied solely on the text of Rule 23(b)(3) to support their interpretations. Further, many scholars opined in the 1960s and early 1970s that the superiority requirement allows for a consideration of remedies provided outside of court by administrative agencies. Commentators have also explained that a class action involving monetary damages should not proceed unless “other methods of redress are unavailable.” Nowhere did those commentators indicate that the other available methods must be litigation proceedings.

Recently, courts have expressly interpreted the phrase “other available methods for the . . . adjudication of the controversy” to include the consideration of non-judicial methods. Over the past fifteen years, nine federal district courts have directly addressed whether a class action may be compared to a refund program and

(b)(3), the court must specifically find that . . . a class action is superior to any other form of settlement.”


50. See, e.g., Roger D. Feldman, Class Actions Under Amended Rule 23: Three Years of Judicial Interpretation, 49 B.U. L. REV. 682, 699 (1969) (identifying “administrative procedures” as one alternative to a class action); Sabbey, supra note 40, at 553 (directing courts to consider remedies through administrative agencies); P.D.M., supra note 49, at 328–29 (arguing that the Third Circuit was incorrect in not considering administrative relief available to a putative class); Comment, Recovery of Damages in Class Actions, 32 U. CHI. L. REV. 768, 785 (1965) [hereinafter Recovery of Damages] (explaining that a class action may proceed if “no aid from an administrative agency is available”); Note, State Class Action Statutes: A Comparative Analysis, 60 IOWA L. REV. 93, 114 (1974) (listing “administrative procedures” as one alternative to a class action).

51. Recovery of Damages, supra note 50, at 785. See also Sherman L. Cohn, New Federal Rules of Civil Procedure, 54 GEO. L.J. 1216, 1216 (1966) (“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 . . . .”).
have concluded that such a comparison is appropriate. The nine courts denied class certification under Rule 23(b)(3), holding that the superiority requirement was not met because the defendants had established refund programs under which consumers received full compensation for their claimed injuries. Further, although not in the context of refund programs, federal appellate courts have implied that “other available methods” are not limited to litigation proceedings. Courts have also concluded that the existence of a governmental administrative remedy, a non-judicial method, is relevant to a superiority analysis.

In short, those early commentators and the nine federal courts have correctly interpreted the phrase “adjudication of the controversy” to encompass non-judicial methods that are available to resolve the legal dispute. Those cases are consistent with the Advisory Committee Notes and Professor Wright’s understanding

52. See supra note 13 (listing nine district court cases in which courts have correctly applied Rule 23(b)(3) to consumer class actions involving monetary damages).

53. See infra Part V.A. (discussing the nine cases in more detail).

54. See, e.g., Hanlon v. Chrysler Corp., 150 F.3d 1011, 1023 (9th Cir. 1998) (stating that superiority requirement “involves a comparative evaluation of alternative mechanisms of dispute resolution”); Kamm v. Cal. City Dev. Co., 509 F.2d 205, 211, 213 (9th Cir. 1975) (affirming district court’s ruling that class action was not superior to action filed by California state officials). See also Gregory v. Finova Capital Corp., 442 F.3d 188, 191 n.3 (4th Cir. 2006) (“A necessary condition to certification under Rule 23(b)(3) is the class action’s superiority to all other methods for the fair and efficient adjudication of the controversy.”).

that the superiority requirement of the 1966 amendment does not “confine” courts to judicial procedures.\footnote{56}{See supra note 34 and accompanying text.} Because a class action must be superior to “other available methods” and because a voluntary refund program falls within that language, such a program is relevant to class certification.

**C. The Three Federal Courts Limiting the Superiority Requirement to Judicial Procedures Were Incorrect**

Three federal courts (the Third and Seventh Circuits and one district court) have limited the phrase “other available methods for the . . . adjudication of the controversy” to include only judicial procedures. Those decisions contain one main flaw: they did not analyze the historical meaning and purpose of the superiority requirement. Specifically, all three courts misinterpreted the Advisory Committee Notes and ignored Professor Wright’s commentary, and two of those courts failed to recognize that a non-judicial method can fairly and efficiently resolve a legal dispute.

The Third Circuit was the first appellate court to address whether only judicial alternatives to a class action could be considered under the 1966 amendment. In *Amalgamated Workers Union v. Hess Oil Virgin Islands Corp.*, the Third Circuit stated in dicta that a governmental administrative remedy is irrelevant to the superiority requirement.\footnote{57}{478 F.2d 540, 547 (3d Cir. 1973).} The Third Circuit explained that the superiority requirement “was not intended to weigh the superiority of a class action against possible administrative relief,” but rather was intended to compare a class action with individual actions.\footnote{58}{Id. (noting that “this question [is] . . . for disposition in an appropriate case”).} *Hess Oil* emphasized that the Advisory Committee Notes “focus on the question whether one suit is preferable to several.”\footnote{59}{Id. Accord Dare to Compare, supra note 1, at 598–99 (arguing that courts are limited to considering judicial procedures under Rule 23(b)(3) and contending that the Committee Notes “provide support for the argument that only litigation alternatives should be considered in that they focus on the question of whether one suit is better than several suits and do not mention possibility of out-of-court alternatives”).}

Over thirty years later, the Seventh Circuit relied on *Hess Oil* in concluding that, based on the Advisory Committee Notes, only
alternative judicial procedures are relevant to a superiority analysis. Judge Easterbrook wrote for the majority: “[T]he advisory committee’s notes demonstrate that Rule 23(b)(3) 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.” According to the Seventh Circuit, the Advisory Committee did not use the term *adjudication* to mean “all ways to redress injuries.” The court determined that the voluntary refund program was not “a form of ‘adjudication’ under the committee note.”

The Third and Seventh Circuits are incorrect because they misunderstood the history and original purpose of the 1966 amendment. In mentioning a few judicial procedures in its Notes to the 1966 amendment, the Committee was simply providing a few examples of procedures that could have “greater practical advantages” than a class action. Neither the examples listed in the Committee Notes nor the four factors identified in the text of Rule 23(b)(3) were intended to be exhaustive. To illustrate, a member of the Committee, Professor Wright, stated that a class action may be

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60. *In re Aqua Dots Prods. Liab. Litig.*, 654 F.3d 748, 752 (7th Cir. 2011), *rehearing en banc denied* (Sept. 15, 2011). The Seventh Circuit is the first appellate court to address whether a class action may be compared to a company’s voluntary refund program. *Id.*

61. *Id.* (citing *Hess Oil*, 478 F.2d at 543).

62. *Id.*

63. *Id.* (“It is not as if the Supreme Court and other participants in the rulemaking process . . . used the word ‘adjudication’ loosely to mean all ways to redress injuries.”). The Seventh Circuit, however, affirmed the denial of class certification based on Rule 23(a)(4) not being satisfied. *Id.* at 752. The court explained: “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.” *Id.*

64. See *Fed. R. Civ. P.* 23(b)(3) advisory comm. note, 39 F.R.D. 69, 103 (1966) (noting that two alternatives to a class action could be test model lawsuits and consolidated actions).

65. See *id.* at 104 (explaining that factors (A) through (D) constitute a non-exhaustive list pertinent to predominance and superiority findings). *Cf.* William W. Schwarzer, *Structuring Multiclaim Litigation: Should Rule 23 Be Revised?*, 94 *Mich. L. Rev.* 1250, 1264–65 (1996) (discussing the purpose of the 1966 amendment based on comments by Advisory Committee’s reporter and proposing “creative” alternatives to class actions, even though they were not listed in the Advisory Committee Notes).
compared to a governmental administrative proceeding, although such a procedure is not expressly mentioned in the Committee Notes. Professor Wright even criticized *Hess Oil* for construing “other available methods” and “adjudication” too narrowly. The Third and Seventh Circuits did not point to any statements by the Advisory Committee or its members that directly support their narrow construction of the phrase “other available methods for the . . . adjudication of the controversy.”

The one district court that refused to compare a class action to a voluntary refund program was also incorrect. The oil company in *Turner v. Murphy Oil USA, Inc.* established a settlement program soon after its oil spill damaged the class members’ land and homes. *Turner* certified the class and rejected the oil company’s argument that its “private settlement program [was] a superior method of resolving this dispute.” The court explained that Rule 23(b)(3) requires a comparison between a class action and “other methods of adjudication” and precludes considering “whether a class action is superior to an out-of-court, private settlement program.”

Like the Third and Seventh Circuits, the district court’s interpretation of the superiority requirement is wrong. *Turner* disregarded the Advisory Committee Notes to Rule 23 and failed to address all the cases where courts have compared class actions to

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66. WRIGHT ET AL., supra note 34, at § 1779.

67. Id. (expressly disagreeing with *Hess Oil* and explaining that its interpretation of Rule 23(b)(3) was “overly restrictive”; stating that courts should consider administrative proceedings). *See* Kamm v. Cal. City Dev. Co., 509 F.2d 205, 211 (9th Cir. 1975) (disagreeing with *Hess Oil* and agreeing with WRIGHT); Chin v. Chrysler Corp., 182 F.R.D. 448, 465 (D.N.J. 1998) (declining to follow the dicta in *Hess Oil*). *See also* CONTE & NEWBERG, supra note 5, at § 4.27 (agreeing with WRIGHT that *Hess Oil* construed Rule 23(b)(3) too restrictively).

68. FED. R. CIV. P. 23(b)(3) (1966) (amended Dec. 1, 2007). *See generally* In re Aqua Dots Prods. Liab. Litig., 654 F.3d 748, 752 (7th Cir. 2011), *rehearing en banc denied* (Sept. 15, 2011) (concluding that a “recall campaign is not a form of ‘adjudication’ under the committee note” but failing to point to any Advisory Committee statement supporting the court’s conclusion); Amalgamated Workers Union v. Hess Oil Virgin Islands Corp., 478 F.2d 540, 547 (3d Cir. 1973).


70. Id. at 601–02.

71. Id. at 610 (holding that class action was “superior to consolidation of individual cases”).

72. Id.
refund programs and administrative remedies. Additionally, the district court (as well as the Third Circuit in *Hess Oil*) did not consider the fairness or efficiency of the voluntary settlements. The court should have analyzed whether potential class members were receiving full and timely compensation from the oil company’s settlement program. In its zeal to certify the class, *Turner* did not even mention the defendant’s proof that it had “settled with over 5,388 individuals . . . for more than $50 million.”

Last, the district court stated inaccurately that the “pressures on the Defendant [to settle] created by class certification would not be extreme in this case” because it was “already conducting an extensive settlement program with residents.” Such a conclusion ignores the reality that settling claims of a certified class is more costly and time consuming than settling individual claims. Class settlements, for instance, involve the extra expense of class counsel’s fees. *Turner* should have considered how plaintiffs’ request for punitive damages could have pressured the oil company into a quick class settlement with a large fee to class counsel to avoid risking punitive damages at a class trial.

As demonstrated above, the use of the phrase “adjudication of the controversy” in Rule 23(b)(3) does not limit courts to consider only judicial alternatives to a class action. Although *adjudication* refers to “the process of judicially deciding a case,” it has been interpreted by Professor Wright, scholars, and courts as having a broader meaning in the context of the 1966 amendment. The Advisory Committee and Professor Wright used the phrase “adjudication of the controversy” to mean the *resolution* of the legal dispute. Because a refund program is one possible means to resolve

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73. The defendant described its reimbursement policy in its brief. Def.’s Opp’n to Pls.’ Mot. for Class Certification at 29–30, 234 F.R.D. 597 (E.D. La. 2006) (No. 05-04206), 2006 WL 4099384, ECF No. 188.
75. *See In re Aqua Dots Prods. Liab. Litig.*, 270 F.R.D. 377, 384 (N.D. Ill. 2010), aff’d on other grounds, 654 F.3d 748 (7th Cir. 2011) (explaining that class counsel must be “paid out of the damage award”).
76. *BLACK’S LAW DICTIONARY* 47 (9th ed. 2009).
77. The word *adjudication* is also used in federal statutes to mean non-judicial procedures. *See, e.g.*, 5 U.S.C. § 551(7) (2006) (defining *adjudication* under the Administrative Procedure Act as an “agency process for the formulation of an order”).
a dispute under Rule 23(b)(3), it must be evaluated in determining the superiority of a class action.

IV. A VOLUNTARY REFUND PROGRAM THAT IS BOTH FAIR AND EFFICIENT MAY BE THE SOLE BASIS FOR DENYING CLASS CERTIFICATION

As established in the previous section, the 1966 amendment to Federal Rule of Civil Procedure 23 not only allows but requires courts to evaluate any non-judicial method in determining whether the proposed class action is “superior to other available methods for the . . . adjudication of the controversy.” The next inquiry is whether courts may deny class certification based solely on a finding that a class action is not superior to a voluntary refund program. The short answer is yes. Under Rule 23(b)(3), a court may not certify a class action unless the superiority requirement is satisfied, even if the other requirements of Rule 23 are met. And a class action is not the superior method when a reimbursement policy is fairly and efficiently resolving the dispute.

Although often overlooked by courts, determining whether a class action is the superior method involves two important steps. First, courts must evaluate all “available methods” raised by the parties. The Fourth Circuit has explained that “[a]s long as the class action is not superior to one method, it makes no difference whatsoever that the class action is superior to other methods.” A court faced with class certification may not simply examine one

79. See Wilcox v. Com. Bank of Kan. City, 474 F.2d 336, 345 (10th Cir. 1973) (upholding finding that superiority requirement was not satisfied and rejecting argument that district court also had to address the predominance requirement of Rule 23(b)(3)); In re Alstom SA Sec. Litig., 253 F.R.D. 266, 285 (S.D.N.Y. 2008) (denying certification as to certain potential class members solely because superiority requirement was not met).
80. Gregory v. Finova Capital Corp., 442 F.3d 188, 190 n.3 (4th Cir. 2006) (“A necessary condition to certification under Rule 23(b)(3) is the class action’s superiority to all other methods for the fair and efficient adjudication of the controversy.”). See FED. R. CIV. P. 23(b)(3) (directing courts to determine that “a class action is superior to other available methods”); In re Motor Fuel Temperature Sales Practices Litig., 258 F.R.D. 671, 680 (D. Kan. 2009) (“The superiority requirement insures that no other available method of handling the claims has greater practical advantages.”).
alternative to the class mechanism when others, such as a refund program, are at issue. Further, the Advisory Committee authoring the 1966 amendment consistently used the plural form in discussing alternatives to the class action. The Committee explained that courts should compare a class action to “alternative procedures,”\textsuperscript{81} “others in the particular circumstances,”\textsuperscript{82} and “other procedural possibilities.”\textsuperscript{83} Professor Wright, a member of the Committee, explained in 1966 that the amendment directs courts to evaluate “all other means of disposing of the controversy.”\textsuperscript{84}

Second, courts must determine whether at least one of the “available methods” would resolve the dispute both “fairly and efficiently.”\textsuperscript{85} The Advisory Committee stated that the superiority requirement “encompasses those cases in which a class action would achieve economies of time, effort, and expense . . . without sacrificing procedural fairness or bringing about other undesirable results.”\textsuperscript{86} Thus, if at least one alternative method raised by the parties is both fair and efficient, then a court must deny class certification and may do so for that sole reason.\textsuperscript{87} If, however, the alternative method is not fair or efficient, then a Rule 23(b)(3) class may be certified (assuming that the other requirements are met).\textsuperscript{88}

\begin{footnotesize}
\begin{enumerate}
\item \textit{Id.}
\item Committee Statement, \textit{supra} note 37, at 8.
\item Wright, \textit{Recent Changes, supra} note 36, at 564.
\item See \textit{Fed. R. Civ. P. 23(b)(3)} (requiring a class action to be “superior to other available methods for fairly and efficiently adjudicating the controversy”); Georgine v. Amchem Prods., Inc., 83 F.3d 610, 632 (3d Cir. 1996) (stating that Rule 23(b)(3) “asks us to balance, in terms of fairness and efficiency, the merits of a class action against those of ‘alternative available methods of adjudication’”), aff’d, Amchem Prods., Inc. v. Windsor, 521 U.S. 591 (1997).
\item See Gregory v. Finova Capital Corp., 442 F.3d 188, 190–92 (4th Cir. 2006) (reversing class certification for sole reason that the class action was “not superior” to another available method).
\item See Klay v. Humana, Inc., 382 F.3d 1241, 1271–73 (11th Cir. 2004) (upholding class certification and concluding that most plaintiffs would not pursue small claims individually and that class action was better than “clogging the federal courts with innumerable individual suits litigating the same issues repeatedly”); Hanlon v. Chrysler Corp., 150 F.3d 1011, 1023, 1030 (9th Cir. 1998) (affirming class certification and explaining that the alternative method of
\end{enumerate}
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This means that a company’s mere establishment of a refund program—one alternative to a class action—does not guarantee the denial of class certification under Rule 23(b)(3). The refund program, like other alternative methods, must be fair and efficient to warrant the denial of certification. But once a court concludes that such a program is fair and efficient, the court may deny class certification on that sole basis because the proposed class would not be the “superior” or “best” method to resolve the dispute. The voluntary refunds, however, do not have to be superior to a class action. Even if a class action would provide relief similar to the remedy obtainable under a reimbursement policy, the class action is not superior and certification must be denied.

At least two courts have correctly denied class certification based solely on voluntary refund programs. In one of the first

individual claims would “unnecessarily burden the judiciary” and would be “uneconomical”).

89. See Gregory, 442 F.3d at 191–92 (holding that the district court should have considered whether a class action was superior to bankruptcy adversary proceeding but not addressing superiority of bankruptcy proceeding). Cf. Robinson v. Tex. Auto. Dealers Ass’n, 387 F.3d 416, 421, 426 (5th Cir. 2004) (stating that the named plaintiffs have “the burden” to prove that “the class resolution is superior to alternative methods of adjudication of the controversy”). Although some courts evaluating reimbursement policies have concluded that the policies were superior to the class action, such a finding is not required. See, e.g., In re Aqua Dots Prods. Liab. Litig., 270 F.R.D. 377, 383 (N.D. Ill. 2010), aff’d on other grounds, 654 F.3d 748 (7th Cir. 2011) (determining that the refunds provided a “better remedy” than what consumers could receive in court).

90. See Johnston v. HBO Film Mgmt., Inc., 265 F.3d 178, 194–95 (3d Cir. 2001) (affirming denial of class certification, in part, because a class action was not the “best” method to resolve the dispute); Coleman v. Cannon Oil Co., 141 F.R.D. 516, 529 (M.D. Ala. 1991) (“In deciding whether to certify the class, ‘a primary determination to be made is whether the class action is superior to, and not just as good as, other available methods for handling the controversy . . . .’” (emphasis added) (quoting Rutledge v. Elec. Hose & Rubber Co., 511 F.2d 668, 673 (9th Cir. 1975))).

91. In re Aqua Dots Prods. Liab. Litig., 270 F.R.D. 377 (N.D. Ill. 2010), aff’d on other grounds, 654 F.3d 748 (7th Cir. 2011); Berley v. Dreyfus & Co., 43 F.R.D. 397 (S.D.N.Y. 1967). A third district court appears to have concluded that the superiority requirement was not satisfied for the sole reason that defendants offered full refunds. Patton v. Topps Meat Co., No. 07-cv-654(S(M), 2009 WL 2027106, at *1–2, *20–21 (W.D.N.Y. May 27, 2010) (denying certification under Rule 23(b)(3) because defendants were fully refunding the purchase price of the recalled meat to consumers, and holding that “defendants’ refund program
cases to construe the 1966 amendment, the District Court for the Southern District of New York ruled that the defendant’s voluntary refunds to its customers for the purchase price of unregistered securities were, themselves, sufficient to deny the certification of a Rule 23(b)(3) class. The district court denied the plaintiffs’ request to enjoin the refund program, explaining that a class action “would needlessly replace a simple, amicable settlement procedure with complicated, protracted litigation.” In a recent case, another district court relied exclusively on a refund program in determining that the class action was not the superior procedure. The court explained that about 600,000 of defendant’s customers received reimbursement for defective bead kits and that the voluntary refunds were “a comparable or even better remedy” than class members “could hope to achieve in court.”

To conclude, under Rule 23(b)(3), a court must deny class certification when an alternative to a class action is fair and efficient. But courts have failed to analyze in any detail what features a refund program should have to qualify as a fair and efficient alternative to the class mechanism. The next part of this Article accomplishes that task.

constitute[d] a superior form of adjudication” compared to plaintiffs’ proposed class), adopted by July 7, 2010 Text Order by District Judge William M. Skretny.

92. Berley, 43 F.R.D. at 398–99, 399 n.4 (concluding that class action was not superior to voluntary refunds where defendant returned to almost all customers the entire amount they had paid to it).

93. Id. at 399.


95. Id. On appeal, the Seventh Circuit agreed with the district court that class certification should have been denied in light of the voluntary refunds, but disagreed with its reasoning. See In re Aqua Dots Prods. Liab. Litig., 654 F.3d 748, 752 (7th Cir. 2011), rehearing en banc denied (Sept. 15, 2011). The Seventh Circuit explained that the district court should have relied on Rule 23(a)(4), not Rule 23(b)(3), because the superiority requirement precludes courts from evaluating non-judicial alternatives to a class action. Id. (determining that a “recall campaign is not a form of ‘adjudication’ under the committee note”). The Seventh Circuit, however, misunderstood the historical meaning and purpose of the superiority requirement. See supra notes 60–63 and accompanying text (discussing the Seventh Circuit’s narrow definition of “adjudication” in Aqua Dots).

96. For example, in Aqua Dots, the recall notice published by the distributor of the toy beads did not specifically inform consumers that they could receive cash refunds (it mentioned only product replacement). Opposition Brief of Defendants-
V. THE FEATURES OF A VOLUNTARY REFUND PROGRAM THAT MAKE IT BOTH FAIR AND EFFICIENT

As established in Part IV above, courts must evaluate any refund program at issue and must determine that the program is both fair and efficient before denying class certification.97 This Part explains how voluntary refunds would satisfy those two requirements.

As to the fairness requirement, the reimbursement policy should have two primary features. First, the policy should fully compensate consumers for actual injuries caused by the product. The policy, for instance, should reimburse consumers for all out-of-pocket expenses (e.g., the product’s purchase price and any property damage) or replace the product for free. Second, the availability of the refunds should be announced to most affected consumers using the “best notice that is practicable under the circumstances,” in accordance with Rule 23(c), 98 although direct mailings and other individual notice should not be necessary. As to the efficiency requirement, the refund program must timely compensate consumers and do so in a way that conserves judicial resources. If the fairness and efficiency requirements are satisfied, then class certification should be denied.

A. Fairness Requires Full Compensation to Consumers

The fairness of a refund program should not depend on the type of injury or claim. A program could fairly resolve a dispute involving economic loss (e.g., product’s purchase price), personal injuries (e.g., skin rash), or property damages (e.g., destroyed household item). A company could reimburse all of those damages. Thus, the main inquiry should be whether the program fully compensates consumers for their actual damages—whatever their form. If yes, then the voluntary payments may be a fair alternative to a class action. When consumers have an alternative method to

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97. An analysis of all the ways a refund program can be fair and efficient is outside the scope of this Article.
98. FED. R. CIV. P. 23(c)(2)(B).
remedy their harm, the class mechanism is unnecessary to enable “small people with small claims to vindicate their rights.”

Additionally, the remedies provided to consumers through a refund program do not have to be identical to those available in a class action. In fact, a refund program is likely to offer better—not worse—remedies than a class action. A refund program does not have the high transaction costs associated with a certified class action, which include attorneys’ fees and administrative expenses. Such transaction costs likely reduce the amount a defendant is willing to pay consumers through a class settlement. Thus, consumers could receive better and faster compensation from a refund program than a class settlement because the voluntary compensation would not be reduced by any fees or expenses.

The companies in the cases discussed below established reimbursement policies for various types of injuries. In determining that the proposed class actions were not the superior procedures, the courts correctly focused on whether the companies had fully compensated the consumers for their actual damages caused by the products.

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99. See Rabiej, supra note 29, at 336–37 (explaining that one “‘expressed purpose’ of the 1966 amendment was ‘enabling small people with small claims to vindicate their rights when they could not otherwise do so’” (quoting Memorandum from the Advisory Committee on Civil Rules to the Chairman and Members of the Standing Committee on Practice and Procedure of the Judicial Conference of the United States, Summary Statement of the Civil Rules Amendments Recommended for Adoption (June 10, 1965) (on file with the Rules Comm. Support Office, Administrative Office of the U.S. Courts)). See also Sabbey, supra note 40, at 545 (stating that “sympathy for the small claimant” is one reason for amended subsection (b)(3)).

100. Cf. Gregory v. Finova Capital Corp., 442 F.3d 188, 190–92 (4th Cir. 2006) (holding that class action was not superior to bankruptcy proceeding, even though “the relief sought in the two actions differ[ed] slightly”).

101. See, e.g., CONTE & NEWBERG, supra note 5, at § 14:6 (stating that fees for class counsel average about one-third of the value of class settlements or awards).

102. See In re Aqua Dots Prods. Liab. Litig., 654 F.3d 748, 752 (7th Cir. 2011), rehearing en banc denied (Sept. 15, 2011) (“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.”).

103. See infra Parts V.A.1–3.
1. Compensation for Economic Loss

When consumers have incurred only economic loss, a refund program is fair when consumers request and receive a refund for the product’s purchase price or obtain a product replacement. For instance, in In re Conagra Peanut Butter Products Liability Litigation, the manufacturer recalled millions of jars of contaminated peanut butter.\(^{104}\) Before class certification was addressed, the manufacturer had voluntarily refunded nearly $3 million directly to consumers and about $30 million directly to retailers for inventory and products returned by consumers.\(^{105}\) Consumers received refunds for the purchase price of the peanut butter, even without proof of purchase or consumption.\(^{106}\) The district court held that a Rule 23(b)(3) class was not superior to the voluntary refunds because consumers were being fully compensated through the ongoing program.\(^{107}\) The court reasoned that the class mechanism was “unnecessary to afford the class members redress”\(^^{108}\) and that “the important policy concern that individuals . . . will not be able to recover because of small individual recoveries” was not implicated.\(^{109}\)

The court in In re Conagra relied on In re Phenylpropanolamine Products Liability Litigation, another case involving voluntary reimbursement for a product's purchase price.\(^{110}\) Plaintiffs sought to certify a nationwide class under Rule 23(b)(3) and sought an average refund of $3.00 per product, claiming that the medications contained an unsafe ingredient and valuing the unused medication “in the tens of millions of dollars.”\(^{111}\) By the time class certification was sought, defendants had refunded the purchase price

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105. Id.
108. Id. (quoting In re Phenylpropanolamine (PPA) Prod. Liab. Litig., 214 F.R.D. 614, 622 (W.D. Wash. 2003)).
109. Id.
111. Id. at 615.
to retailers and about 47,000 consumers. In denying class certification, the district court emphasized that potential class members had an alternative remedy through the refund program. It reasoned: “It makes little sense to certify a class where a class mechanism is unnecessary to afford the class members redress.”

The voluntary payments in both cases were fair because they covered the customers’ actual damages. But a refund program would be unfair if consumers received only the purchase price when they also incurred property or other damages.

2. Compensation for Property Damages and Personal Injuries

A company could establish a fair reimbursement policy where property damages are at issue. The policy would have to compensate consumers for any out-of-pocket expenses incurred to repair or replace personal property harmed by the product. In Drimmer v. WD-40 Co., for instance, plaintiff alleged that the chemicals in defendant’s toilet bowel cleaners corroded toilets. Before class certification, the defendant voluntarily reimbursed its customers for the cleaners (about $3.00 each) and their plumbing expenses (ranging from $50 to over $500). The district court denied certification of the proposed nationwide and California classes, explaining that “a class action would not be superior to

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112. Id. at 622.
113. Id. at 622–23.
114. Id. at 622. Accord Berley v. Dreyfus & Co., 43 F.R.D. 397, 399 n.4 (S.D.N.Y. 1967) (denying class certification where defendant had voluntarily refunded purchase price of unregistered securities to all original purchasers who lost money from securities, including original plaintiffs).
116. The court did not discuss the details of the refund program, but the defendant did in the declaration of its Vice President of Corporate and Investor Relations. Declaration of Maria Mitchell in Support of WD-40 Company’s Opposition to Class Certification, at ¶¶ 7–9, Drimmer v. WD-40 Co., No. 06-CV-900, 2007 U.S. Dist. LEXIS 62582 (S.D. Cal. Aug. 24, 2007), ECF No. 46. Defendant reimbursed “most” consumers who sought under $50. Id. at ¶ 8. For claims needing further investigation or claims over $500, the defendant hired a third-party administrator, who was “very successful” in resolving consumers’ complaints. Id. at ¶ 9.
[defendant’s] internal system.”[117] Drimmer reasoned that the defendant’s "internal process has worked for at least some purchasers (even those with extensive consequential damages),” so devoting “resources to a class action that could spawn a second round of litigation” would be useless.[118]

In another case involving property damages, Jones v. Allercare, Inc., the court refused to certify a national class where customers claimed that their furniture and carpets were harmed as a result of the defendant’s defective dust mite spray.[119] Customers who contacted the defendant with “reasonable” claims were reimbursed for expenses associated with replacing damaged furniture and carpeting.[120] Jones held that a class action was not the “superior method of adjudicating plaintiffs’ claims,” emphasizing that the defendants had “already resolved the claims of many of those people plaintiffs [sought] to include in the proposed class.”[121]

A reimbursement policy may be fair even when personal injuries are at issue. The one district court to address a refund program involving personal injuries has held that the class action was not the superior procedure. In Webb v. Carter’s Inc., parents complained to the manufacturer that its new clothing line with tagless labels (labels printed directly on the fabric) irritated their children’s skin.[122] Before the class action was filed, the manufacturer established a refund policy for the clothing line with tagless labels.[123] Customers without proof of purchase who reported skin irritation received a refund “at the full Manufacturer’s Suggested Retail Price” and reimbursement for out-of-pocket medical costs.[124] Proof of medical expenses was necessary only if the expenses exceeded $250.[125] Customers without receipts who did

[117] Drimmer, 2007 U.S. Dist. LEXIS 62582, at *13 (concluding that “a class action will not likely be a fair, efficient, or superior method of adjudication”).
[118] Id. at *16. Drimmer should have considered the number of consumers who requested refunds and did not receive them. The court stated that the internal program “worked for at least some purchasers,” but it failed to examine what percentage of consumers were reimbursed. Id.
[120] Id. at 305–06.
[121] Id. at 307–08.
[123] Id.
[124] Id.
[125] Id.
not report any skin irritations could obtain a refund at the highest price charged at the manufacturer’s outlet stores.\textsuperscript{126} The district court relied solely on the refund program in holding that the proposed class was not the superior procedure.\textsuperscript{127} It explained that the manufacturer’s program was “already offering the very relief that Plaintiffs seek.”\textsuperscript{128}

3. Compensation When Aggregate Class Damages Are Substantial

A refund program may also be fair when class damages are large. District courts have relied on refund programs in determining that the proposed classes were not superior to the programs, even though the aggregate economic harm to the classes was substantial. For example, in Chin v. Chrysler Corp., the court denied certification where the automobile manufacturer agreed to pay its customers for out-of-pocket expenses related to its defective braking system.\textsuperscript{129} The manufacturer, in connection with the National Highway Traffic Safety Administration (NHTSA), recalled roughly 300,000 vehicles with defective braking systems.\textsuperscript{130} The manufacturer voluntarily replaced the owners’ braking systems, reimbursed owners for expenses relating to the brakes, and extended the warranties.\textsuperscript{131} The district court evaluated the manufacturer’s reimbursement policy as to its anti-lock braking systems and held that the superiority requirement was not met.\textsuperscript{132}

\textsuperscript{126} Id. at 496.
\textsuperscript{127} Id. at 504–05.
\textsuperscript{128} Id. at 504. Accord Ostrof v. State Farm Mut. Auto. Ins. Co., 200 F.R.D. 521, 523, 532 (D. Md. 2001) (finding class action was not superior to remedies available to consumers through the Maryland Insurance Administration because the Administration could require insurers to pay for the putative class’s medical expenses).
\textsuperscript{130} Id. at 452–53.
\textsuperscript{131} Id. at 452, 463.
\textsuperscript{132} Id. at 463–64. In two other cases where the aggregate damages to the class were substantial, the courts held that the proposed classes were not superior to the voluntary refunds. See, e.g., Webb v. Carter’s Inc., 272 F.R.D. 489, 504–05 (C.D. Cal. 2011) (denying class certification where manufacturer had refunded over $2 million to customers who returned a total of 158,128 garments (the $2 million amount was noted in Opposition of Carter’s, Inc. to Pls.’ Mot. for Class
4. Summary of Reimbursable Damages

Neither the type of harm incurred by a consumer nor the aggregate amount of class damages should determine the fairness of a refund program. Rather, courts should analyze whether the voluntary payments fully compensate consumers for their actual damages. If yes, then the reimbursement policy is fairly resolving the dispute. What is more, if the injuries are remedied through a refund program, then the primary purpose of a class action—making small claims marketable—133—is not implicated.134

B. Fairness Requires Sufficient Notice of a Refund Program

In addition to compensating consumers for actual damages, a company must sufficiently notify consumers of the availability of a refund program for it to be a fair alternative to a class action. One main purpose of class actions is to provide a remedy to injured parties with “small recoveries.”135 Parties and attorneys have few incentives to bring individual actions when damages are small. Without the class mechanism, those parties may have an illusory remedy of an individual lawsuit.136 A reimbursement policy that is

Certification at 34, Webb v. Carter, 272 F.R.D. 489 (C.D. Cal. 2011) (No. 08-CV-07367)); In re Conagra Peanut Butter Prods. Liab. Litig., 251 F.R.D. 689, 691 (N.D. Ga. 2008) (denying class certification where defendant had refunded nearly $3 million directly to consumers and about $30 million directly to retailers). 133. See Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 617 (1997) (“The policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights.”).

134. Refund programs would not fully compensate consumers entitled to punitive or treble damages. Some courts, however, have held that punitive damages cannot be a class-wide remedy. E.g., Nelson v. Wal-Mart Stores, Inc., 245 F.R.D. 358, 376 (E.D. Ark. 2007). See also Sheila B. Scheuerman, Two Worlds Collide: How the Supreme Court’s Recent Punitive Damages Decisions Affect Class Actions, 60 BAYLOR L. REV. 880, 884 (2008) (concluding that “where harm to the class is individualized, punitive damages cannot be pursued as a class-wide remedy”). Courts allowing punitive damages could “sever the issue of punitive damages under Rule 23(c)(4)(A)” and then deny class certification for the class seeking only compensatory damages. Id. at 912.

135. Amchem Prods., 521 U.S. at 617.

unknown to consumers also would be an illusory remedy. Unfortunately, courts comparing class actions to refund programs have not analyzed in any detail the sufficiency of notice.\textsuperscript{137}

In analyzing the fairness of voluntary refunds, courts should examine how consumers were notified about their availability. To determine the sufficiency of notice, Rule 23’s requirements for class notice should guide, but not bind, courts. For notice of a certified Rule 23(b)(3) class to be sufficient, a court must direct “individual notice to all members who can be identified through reasonable effort,” but may use the “best notice that is practicable under the circumstances” for members who cannot be identified.\textsuperscript{138} When the names and addresses of class members are known, notice must be individually sent to each member.\textsuperscript{139} Such individual notice is necessary because class members who do not affirmatively opt out of a Rule 23(b)(3) class join it through their silence and are bound by any subsequent judgment, which implicates due process.\textsuperscript{140}

In contrast, individual notice to consumers about the existence of a refund program should not be required for two reasons. First, unlike a certified class action, a refund program does not implicate due process because no consumer is bound by a

\begin{itemize}
\item framework of a multiplicity of small individual suits for damages, aggrieved persons may be without any effective redress unless they may employ the class-action device.”).
\item 137. See, e.g., Webb v. Carter’s Inc., 272 F.R.D. 489, 504–05 (C.D. Cal. 2011) (concluding that a class action was not the superior method, even though defendant did not announce its refund program in any newspapers or magazines, at any retail stores, or through any governmental agency); Drimmer v. WD-40 Co., No. 06-CV-900, 2007 U.S. Dist. LEXIS 62582, at *1–2 (S.D. Cal. Aug. 24, 2007) (relying on the refund program in part to deny class certification, despite defendant’s apparent lack of an active campaign to inform consumers of its refunds).
\item 139. See Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 175–76 (1974) (requiring notice to be mailed to over two million members whose names and addresses were known and could be “ascertained through reasonable effort”).
\item 140. See Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2559 (2011) (“In the context of a class action predominantly for money damages we have held that absence of notice and opt-out violates due process.”); 5 James Wm. Moore et al., Moore’s Federal Practice § 23.101 (3d ed. 1999) (explaining that “notice of certification and opt-out rights to members of classes certified under Rule 23(b)(3) is required” to satisfy due process and to bind class members to any judgment).
\end{itemize}
program that is unknown or not used. If a consumer is not compensated by a defendant, then the consumer may bring an individual lawsuit or even a class action to be made whole. If a consumer is compensated but misled into releasing a claim, then the settlement may be voided.¹⁴¹ Second, individual notice of a refund program is not necessary because notice does not have to reach all consumers for the refunds to be a fair remedy. Notice should be sufficient if it reaches most consumers who purchased or used the product in dispute.¹⁴² Notice of a refund program, like notice for certified classes, may be sufficient even when five to thirty percent of consumers do not receive the notice.¹⁴³ The burden and expense of individual notice required for Rule 23(b)(3) classes, therefore, should not apply to refund programs.

Instead of requiring individual notice, the guiding standard for refund programs should be the standard for all Rule 23(b)(3) classes: the “best notice that is practicable under the circumstances.”¹⁴⁴ An analysis of whether notice is the best under the circumstances should consider, like notice for certified classes, whether the notice is “reasonably calculated” to reach most affected consumers.¹⁴⁵ This standard does not require that all potential class members actually receive notice of the voluntary refunds.¹⁴⁶

¹⁴¹ See Smith v. Amedisys Inc., 298 F.3d 434, 441 (5th Cir. 2002) (stating that a release is invalid if it is the result of “fraud, duress, [or] material mistake”).
¹⁴² The number of refunds issued could be some evidence of how many consumers received notice, but courts should not rely solely on that figure. The number of refunds could underestimate the number of consumers who actually received notice. For instance, if many consumers were satisfied with a product, then they would not seek a refund, and the number of refunds issued would not account for the satisfied consumers who received the notice but did not seek a refund.
¹⁴³ See MOORE ET AL., supra note 140, at § 23.102 (stating that Rule 23(c)(2)(B) “does not require that each and every class member actually receive notice”); BARBARA J. ROTHSTEIN & THOMAS E. WILLING, FED. JUDICIAL CTR., MANAGING CLASS ACTION LITIGATION: A POCKET GUIDE FOR JUDGES 28 (3d ed. 2010) (stating that the “norm” for notice of a Rule 23(b)(3) class is “in the 70–95% range”).
¹⁴⁵ Cf. MOORE ET AL., supra note 140, at § 23.102 (“The relevant question is not whether every absent class member actually receives notice, but whether the
especially because due process is not implicated. A reasonable calculation would account for the characteristics and demographics of the consumer, the type of product sold, and the locations where the product was generally sold and used.\textsuperscript{147} If substantially all affected consumers reside in one location, or if a product was generally purchased in one geographic region, for example, then notice should be concentrated there.\textsuperscript{148} In addition, a reasonable calculation would consider whether the affected and dissatisfied consumers are likely to review internet sites, visit retail stores, or read particular newspapers or magazines.\textsuperscript{149} If a group of affected consumers is unlikely to read the \textit{Wall Street Journal}, for instance, then notice of the refund program should not be published in that newspaper.\textsuperscript{150}

When a consumer product company has an ongoing satisfaction-guaranteed policy, additional notice of a refund program to potential class members would usually be unnecessary to comply with the best practicable notice standard. Under satisfaction-guaranteed policies, companies usually promise to fully refund the product’s purchase price or replace the product for any reason (but not reimburse other out-of-pocket expenses). These policies are generally posted on a company’s website and printed on the packaging of the product with instructions on how to obtain a refund notice that the court orders is reasonably calculated to reach the absent members.”).

\textsuperscript{147} See \textit{In re Warfarin Sodium Antitrust Litig.}, 391 F.3d 516, 526 (3d Cir. 2004) (approving notice of class settlement that was published in \textit{USA Today}, \textit{Parade Magazine}, \textit{Modern Maturity}, and \textit{Readers Digest} because the prescription drug at issue was used mainly by persons over age of fifty and those publications had high readership in the targeted age group).

\textsuperscript{148} See Dillard v. City of Foley, 926 F. Supp. 1053, 1059, 1063 (M.D. Ala. 1995) (finding notice of class settlement that was published in two local newspapers sufficient when class was comprised of residents of only one city).

\textsuperscript{149} Cf. \textit{In re Warfarin}, 391 F.3d at 526 (approving notice of class settlement published in targeted newspapers and magazines).

\textsuperscript{150} Todd E. Hilsee, Shannon R. Wheatman, & Gina M. Intrepido, \textit{Do You Really Want Me to Know My Rights? The Ethics Behind Due Process in Class Action Notice Is More Than Just Plain Language: A Desire to Actually Inform}, 18 GEO. J. LEGAL ETHICS 1359, 1375 (2005) (explaining that class notice “using the \textit{Wall Street Journal} to reach a class of lower income adults would be suspect”).
or replacement. A consumer unhappy with a product would, or at least should, take the simple step of reviewing the product packaging or the manufacturer’s or seller’s website to learn how to be reimbursed.

If a company with a satisfaction-guaranteed policy offers additional reimbursement for property damages or personal injuries in response to a threatened or actual class action, however, the company should affirmatively announce the expanded policy to customers on its and its retailers’ websites, and on receipts and signage at the point of sale. Neither individual notice nor print notice should be required because consumers dissatisfied with a product most likely would visit the relevant website for refund instructions or would return the product to a retail store where they would learn about the expanded policy. Some affected consumers may seek a refund or product replacement by calling a toll-free telephone number listed on the product instead of visiting a relevant website or returning to the retailer. The company should require its customer representatives to inform those consumers about the expanded reimbursement policy. Only a small percentage of customers would likely mail the product directly to the manufacturer. For those customers, the manufacturer could use customer contact information provided with the returned product to personally inform dissatisfied customers about its expanded policy. In short, publishing notice of an expanded reimbursement policy on relevant websites and at the point of sale would be reasonably calculated to reach the consumers who purchased a product subject to a satisfaction-guaranteed policy.

On the other hand, companies with no satisfaction-guaranteed policies may have a higher notice burden. At a minimum, they should post notice of a refund program on receipts and signage at the point of sale and on websites of the sellers of the product. Such notice would provide consumers with several means to discover the reimbursement policy and would be inexpensive relative to the cost of defending a class action. In some circumstances, notice should be published in national print media for the program to be a fair

151. The Iams Dog Food Company, for instance, has a 100% Satisfaction Guaranteed Policy: “If you are not satisfied with your Iams product, simply save the unused portion, together with the original sales receipt and UPC, and call us. We will gladly replace the product or refund your money.” About Us, IAMS, http://www.iams.com/about-us/satisfaction-guarantee (last visited Feb. 1, 2012).
alternative to a class action. Nonetheless, notice published on internet sites could substitute for print notice in certain situations because “internet notification is often more likely than hard-copy notice to reach the targeted populations.” For instance, if the affected consumers are more likely to review cable news websites or consumer websites (such as the consumer section of www.usa.gov) than read national print media, then internet notice on those websites, coupled with postings at the point of sale, should be sufficient.

A few examples will illustrate this proposed notice standard for companies with no ongoing satisfaction-guaranteed policy. Assume that voluntary refunds are offered for a common food product sold nationally. The program should be announced on the websites of the Food and Drug Administration, the manufacturer, and retailers, and notice of the refunds should be posted on receipts and signage at major grocery store chains (for example, Wal-Mart and Publix). Incurring the high expense of publishing notice in national newspapers and magazines should not be necessary because at least one member of an affected household would probably visit a grocery store with the posted notice. Notice of the refund program on relevant websites and at the point of sale, therefore, would be reasonably calculated to reach most affected consumers, satisfying the notice requirement. Now suppose that the disputed product is

152. Cf. In re Warfarin, 391 F.3d at 526, 536–37 (approving notice of class certification and settlement that was published in newspapers and magazines as best notice practicable, even though notice was not mailed directly to class members); Manual for Complex Litigation, supra note 138, at § 21.311 (recognizing that publication of notice “is especially useful” in consumer class actions because individual notice can be “difficult”).

153. Robert H. Klonoff et al., Making Class Actions Work: The Untapped Potential of the Internet, 69 U. Pitt. L. Rev. 727, 731, 748–51 (2008) (arguing that the internet is a “preferable substitute notice mechanism” to individual notice in small-claim class actions and stating that “courts are beginning to embrace the belief that internet notice may be preferable to traditional methods of publication notice”). See Mirfasihi v. Fleet Mortg. Corp., 356 F.3d 781, 786 (7th Cir. 2004) (“The World Wide Web is an increasingly important method of communication, and, of particular pertinence here, an increasingly important substitute for newspapers.”).

sold by retailers that customers are unlikely to visit again in the near future, such as the purchase of designer jewelry for a wedding anniversary. Under those circumstances, the reimbursement policy should likely be announced in relevant newspapers and magazines, as well as posted on relevant websites. Now assume that mostly women purchased a defective product. Notice that is posted at retailers visited by many women and published in periodicals with a high female readership would reasonably reach the affected consumers.

To conclude, notice of a voluntary refund program does not have to reach all affected consumers for the program to be a fair alternative to a class action. Indeed, as explained above, notice of a certified Rule 23(b)(3) class is generally sufficient even though five to thirty percent of class members fail to receive the notice. Notice of a refund program that does not reach a similar percentage of affected consumers—where no consumer is involuntarily bound—should also be sufficient.

In addition to ensuring that most consumers receive notice of a refund program, a company should ensure that the content of its notice to a putative class is proper. Although class counsel and a putative class have no client–attorney relationship, courts are suspicious of pre-certification communications from a defendant to potential class members and may restrict such communications. Some courts restrict only communications that are false, misleading, or intimidating. Other courts, however, require defendants to specifically inform the putative class about the pending litigation before the class members may release their claims. Any

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155. ROTHSTEIN & WILLGING, supra note 143, at 27.
156. Id. at 26.
157. See, e.g., Kleiner v. First Nat’l Bank of Atlanta, 751 F.2d 1193, 1202 (11th Cir. 1985) (stating that unsupervised communications are “rife with potential for coercion”). See also Douglas R. Richmond, Class Actions & Ex Parte Communications: Can We Talk?, 68 Mo. L. Rev. 813, 826–28 (2003) (explaining different legal bases for restricting ex parte communications).
158. See MANUAL FOR COMPLEX LITIGATION, supra note 138, at § 21.12 (discussing conditions under which defendants and their counsel may communicate with potential class members).
restriction must be narrowly tailored to protect a defendant’s First Amendment rights.\textsuperscript{160}

Before communicating with potential class members, companies implementing refund programs in response to a class action should learn whether courts in the relevant jurisdiction restrict pre-certification communications and then draft them accordingly. If a court rules that a company’s communications are improper, the court may invalidate any attempted release of claims.\textsuperscript{161} A communication that is not misleading or coercive, identifies the pending class action, and informs class members that they may decline the refund and seek redress through judicial means would likely be permissible. Alternatively, a company could seek court approval of a communication before disseminating it.

\textit{C. Fairness May Require Proof of Purchase}

Consumers may have a fair opportunity to participate in a refund program even if the company requires the submission of one form of proof of purchase or use. Requiring such proof for voluntary refunds would not be more burdensome than the proof necessary to recover through the class mechanism. Membership in Rule 23(b)(3) classes must be ascertainable through “objective criteria”\textsuperscript{162} because the class definition determines who is entitled to relief and who should receive notice and the opportunity to opt out.\textsuperscript{163} Proof of

\begin{footnotesize}
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\item See Gulf Oil Co. v. Bernard, 452 U.S. 89, 103–04 (1981) (holding that district court abused its discretion in prohibiting “all” communications between the putative class and parties or class counsel, because the “order involved serious restraints on expression”); \textit{In re Sch. Asbestos Litig.}, 842 F.2d 671, 675, 679–80 (3d Cir. 1988) (vacating order prohibiting defendants from distributing non-misleading booklet that informed proposed class about low risk of asbestos).
\item See, \textit{e.g., In re Currency Conversion Fee Antitrust Litig.}, 361 F. Supp. 2d 237, 260–65 (S.D.N.Y. 2005) (invalidating potential class members’ waiver of their claims because defendants did not notify them about pending class action).
\item ROTHSTEIN & WILLGING, supra note 143, at 7.
\end{itemize}
\end{footnotesize}
purchase or use is an objective criterion that is used to identify injured class members in products liability actions.\textsuperscript{164} If a class member cannot prove use or purchase of the good at issue, then the member cannot benefit from the class action.\textsuperscript{165}

Similarly, a consumer should not benefit from a refund program if he or she did not purchase or use the product in dispute. Acceptable types of proof should include a copy of the receipt, an itemized credit card statement, the product’s UPC code, or part of the product packaging containing an identifying mark, such as the product code. But those forms of proof will not always be available because consumers may not discover a problem with a product until they have discarded the receipt and product. In lieu of those forms of proof, a company should accept a sworn affidavit that a consumer used or purchased the good.

\textbf{D. Fairness Does Not Require Judicial Intervention}

Judicial involvement in a refund program is not necessary for the program to be a fair alternative to a class action. A fair refund program does not transform into an unfair one simply because a judge or another neutral party did not micro-manage it before litigation commenced. Almost all class actions settle.\textsuperscript{166} After settlement, the process of paying consumers is similar to a refund program. Although a company has some financial incentive to limit the amount it pays consumers through its reimbursement policy, so does a company administering a claims process under a class


\textsuperscript{165} See \textit{In re Hotel Tel. Charges}, 500 F.2d 86, 89–92 (9th Cir. 1974) (“[E]ach member of the class seeking recovery would then be required to prove that he patronized the hotel while the surcharge was in effect and that he absorbed the cost of the surcharge.”).

\textsuperscript{166} See \textsc{Thomas E. Willging \\ & Shannon R. Wheatman}, \textsc{Fed. Judicial Ctr., An Empirical Examination of Attorneys’ Choice of Forum in Class Action Litigation} 50 tbl. 19 (2005) (studying class actions terminating between 1999 and 2002 and finding that 89\% of certified classes settled); \textsc{Charles B. Casper}, \textit{The Class Action Fairness Act’s Impact on Settlements}, 20 \textsc{Antitrust} 26, 26 (2005) (summarizing four studies and concluding that the studies “suggest that nearly 90 percent of certified class actions . . . settle”).
settlement (such as making the process cumbersome to discourage participation). Yet, the administration of a class settlement is not usually scrutinized until a party affirmatively seeks judicial enforcement; in fact, after approving a class settlement, a court has no duty to oversee the claims process. 167 When no litigation is pending, if consumers believe that a reimbursement policy is under-compensating them, then they may challenge it through an individual or class action. When litigation is pending and a refund program is ongoing, a district court could deny class certification but allow plaintiffs the opportunity to renew their motion for class certification upon proof that the voluntary refunds are no longer a fair alternative to a class action.

The only published law review article to address refund programs and class actions incorrectly assumes that court action is necessary for an injured party to be made whole. It argues that the “fairness requirement” of Rule 23(b)(3) prohibits courts from denying class certification based on “an out-of-court private refund option.” 168 The article fails to recognize that consumers could—and often do—receive full compensation pursuant to a voluntary reimbursement policy, making litigation unnecessary. Rule 23 does not give consumers an absolute “right” to bring a class action, 169 but rather provides a means to obtain a remedy when a fair alternative otherwise would not exist. 170 The proper inquiry is whether a particular refund program sufficiently remedies the actual injuries at issue. If the refunds do, then judicial resources are unnecessary to obtain remedies that are available directly from the private program.

E. A Refund Program Must Be Efficient

In addition to being fair, the refund program must be efficient under the superiority requirement of Rule 23. 171 The efficiency prong will be easier to satisfy than the fairness requirement. An

167. MOORE ET AL., supra note 140, at § 23.170 (stating that courts may not retain jurisdiction to enforce an approved class settlement).
168. Dare to Compare, supra note 1, at 601–02, 605.
170. See supra note 99 and accompanying text (explaining that this rule is intended to protect claimants with small damages).
171. Fed. R. Ctv. P. 23(b)(3) (stating that the class action must be “superior to other available methods for fairly and efficiently adjudicating the controversy”).
efficient refund program is one that *timely* compensates consumers for their injuries and that conserves judicial resources.\(^172\) Nonetheless, most courts have failed to examine whether the alternative methods would provide a timely remedy to potential class members. Instead, courts applying Rule 23(b)(3) have usually focused on the amount of judicial resources that would be used by the alternative procedures.\(^173\)

A reimbursement policy should compensate consumers in a period no longer than the time a class member would be reimbursed via a class action settlement—the means by which substantially all class members are compensated.\(^174\) The average time between the filing of a class action and a district court’s approval of a class settlement is a little more than three years (1,196 days), and the median time is just under three years (1,068 days).\(^175\) Any appeal would further lengthen the recovery period. If consumers receive compensation directly from a company before three years or by the time class certification is addressed, then they would be compensated more quickly than if the consumers proceeded with a class action. A

\(^172\) Fed. R. Ctv. P. 23(b)(3) advisory comm. note, 39 F.R.D. 69, 102 (1966) ("Subdivision (b)(3) encompasses those cases in which a class action would achieve economies of time, effort, and expense . . . ."); Jack B. Weinstein, *Some Reflections on the “Abusiveness” of Class Actions*, 58 F.R.D. 299, 300 (1973) (explaining that class actions should “expedite the disposition of otherwise unredressable legally cognizable grievances” (emphasis added)).

\(^173\) See *In re Aqua Dots Prods. Liab. Litig.*, 270 F.R.D. 377, 380, 382–83 (N.D. Ill. 2010) ("[W]hen a defendant is already offering an effective remedy for putative class members through out-of-court channels, a class action threatens to consume substantial resources to no good end."); Hoffman Elec., Inc. v. Emerson Elec. Co., 754 F. Supp. 1070, 1079 (W.D. Pa. 1991) (ruling that class action was superior procedure where putative class was comprised of over 100 members because “separate lawsuits would waste judicial resources, limit judicial access to the courts, and create a problem of inconsistent judgments”).

\(^174\) About 90% of certified class actions settle. *Willging & Wheatman*, supra note 166, at 50 tbl. 19 (2005) (studying class actions terminating between 1999 and 2002 and finding that 89% of certified classes settled); Casper, * supra* note 166, at 26 (summarizing four studies and concluding that the studies “suggest that nearly 90 percent of certified class actions . . . settle”). See Fitzpatrick, * supra* note 10, at 812 (explaining that class action settlements were used “as the basis of the study because, even more so than individual litigation, virtually all cases certified as class actions and not dismissed before trial end in settlement”).

\(^175\) Fitzpatrick, * supra* note 10, at 812, 816–17, 820–21 (examining 688 class action settlements approved in 2006 and 2007 in both reported and unreported opinions). The average time for consumer class actions to reach settlement was 963 days. *Id.* at 820.
refund program reimbursing consumers in either time period would be efficient under the superiority requirement (assuming that notice of the program was sufficient). Indeed, courts comparing class actions to refund programs have denied class certification where substantially all consumers who requested compensation were reimbursed either within three years or by the time the court addressed class certification.\footnote{176}

Further, a refund program should require the use of fewer judicial resources than a class action for it to be an efficient alternative.\footnote{177} A refund program will generally result in the use of little, if any, court resources. In fact, judicial resources would be wasted if used to settle or try a class action when a company has already agreed to compensate consumers for the same injuries involved in the class action.\footnote{178} Courts should not create a need for judicial intervention when the need previously did not exist.\footnote{179}

\footnote{176. See, e.g., Webb v. Carter’s Inc., 272 F.R.D. 489, 496–97, 505 (C.D. Cal. 2011) (denying class certification based in part on voluntary refund program where, within two years of defendant receiving 259 reports of rashes (based on 2.4 million garments being in circulation), 9,828 consumers had received refunds for defendant’s clothing); In re Aqua Dots, 270 F.R.D. at 380, 385 (holding that class action was not superior in part because almost 600,000 consumers obtained refunds or replacements and because evidence showed that the manufacturer never “denied a cash refund to a consumer who asked for one”; explaining that consumers received compensation in “much less time” than they would have via class action without the “expenditure of substantial judicial resources”); Berley v. Dreyfus & Co., 43 F.R.D. 397, 399 n.4 (S.D.N.Y. 1967) (noting that at time of the class certification decision defendant had reimbursed all original purchasers who bought defendant’s unregistered securities).}

\footnote{177. Cf. Klay v. Humana, Inc., 382 F.3d 1241, 1273 (11th Cir. 2004) (focusing superiority analysis on whether the class action “will create relatively more management problems than any of the alternatives,” including 600,000 separate lawsuits); Hoffman Elec., 754 F. Supp. at 1079 (ruling that class action was superior procedure where putative class was comprised of over 100 members because “separate lawsuits would waste judicial resources, limit judicial access to the courts, and create a problem of inconsistent judgments”).}

\footnote{178. See In re Aqua Dots Prods., 270 F.R.D. at 382 (stating that “a class action threatens to consume substantial judicial resources to no good end” because effective refund program existed).}

\footnote{179. See id. (stating that creating lawsuits where they had not previously existed “is very nearly the reverse of Rule 23’s intended effect”); Berley, 43 F.R.D. at 398 (“One method of achieving such economy is to avoid creating lawsuits where none previously existed.”).}
Of course, when consumers challenge a company’s refund program, judicial resources would be needed to determine the fairness and efficiency of the program and to address other class requirements. But courts have to do a similar analysis under Rule 23(b)(3) when comparing a class action to litigation procedures. The judicial resources needed to compare a class action to a refund program would not be more than the resources necessary to compare a proposed class action to other litigation procedures. Thus, certifying a class in the face of an efficient refund program would not “achieve economies of time, effort, and expense,” as intended by the Advisory Committee to the 1966 amendment.180

When a refund program exists and a class action is pending, a company could take affirmative steps to limit the amount of judicial involvement. It could request the court to limit initial class discovery to information relating to the fairness and efficiency of the refund program. After relevant discovery has been produced or after the discovery cut-off date, the company could also affirmatively challenge the proposed class by filing a motion to strike the class allegations or a motion to deny class certification.181 Companies with fair and efficient programs could limit the issue to whether the proposed classes are superior to the voluntary payments. A properly timed motion to strike or motion to deny class certification would achieve additional economies of time and effort.182


181. See Pilgrim v. Universal Health Card, LLC, 660 F.3d 943, 949–50 (6th Cir. 2011) (affirming the grant of defendant’s motion to strike class allegations filed before plaintiff filed motion for class certification and explaining that the motion to strike was not premature); Vinole v. Countrywide Home Loans, Inc., 571 F.3d 935, 937 (9th Cir. 2009) (holding that “no rule or decisional authority prohibited [defendant] from filing its motion to deny certification before Plaintiffs filed their motion to certify” the Rule 23(b)(3) class); Richard Marcus, Reviving Judicial Gatekeeping of Aggregation: Scrutinizing the Merits on Class Certification, 79 Geo. Wash. L. Rev. 324, 358 (2011) (“Defendants may also steal a march on plaintiffs and move for determination of the class certification issue before plaintiffs do.”).

182. A court should deny a motion to strike if further discovery will produce information necessary to determine the appropriateness of a class action. See, e.g., Rios v. State Farm Fire & Cas. Co., 469 F. Supp. 2d 727, 741 (S.D. Iowa 2007) (ruling that motion to strike class allegations was premature in class action suit where further discovery was needed to determine extent of conflict of law issues).
In sum, a company’s voluntary refund program is efficient under Rule 23 when it timely compensates consumers for actual damages and conserves judicial resources. And if the program is both fair and efficient, then a class action is not superior to the refund program and certification should be denied.

VI. CONCLUSION

When hundreds or thousands of consumers purchase a defective product and incur small out-of-pocket expenses, they often join a class action to seek a remedy. But consumers may have a better remedy available—namely, a voluntary refund program from a consumer product company. When a company has established such a program, courts cannot ignore it in determining whether a proposed class action is superior to “other available methods” for resolving the dispute. The Advisory Committee that drafted the 1966 amendment to Rule 23, which included a prominent civil procedure scholar, Professor Wright, authorized courts to evaluate both judicial and non-judicial methods. Indeed, Professor Wright stated 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.”

By comparing a class action to a refund program, courts would be construing the phrase, “other available methods,” in accordance with its historical meaning and purpose. Nine district courts have ruled that the proposed classes were not the superior methods because the refund programs at issue had sufficiently compensated consumers. Although only two courts have done so, class certification may be denied based solely on the existence of a refund program. The program, though, must be a fair and efficient alternative to a class action.

183. See FED. R. CIV. P. 23(b)(3).