Missouri Law Review

Volume 74
Issue 1 *Winter 2009*

Article 4

Winter 2009

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I. INTRODUCTION

"A billion here and a billion there,
and pretty soon you're talking about real money."[1]

In the past several years, the due process limits on punitive damages have garnered a great deal of attention from courts,[2] scholars,[3] and practitioners.[4] While punitive damages have been under the analytical microscope, statutory damages – civil penalty amounts prescribed by legislatures for

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* Associate Professor of Law, Charleston School of Law. I would like to thank Anthony Franze, Christopher J. Robinette, and Anthony J. Sebok for their helpful comments on earlier drafts of this Article. I also would like to thank Tony Sebok, Myriam Gilles, and the students in their Mass Litigation & Settlement seminar for workshopping this Article. In addition, I am grateful to Charleston School of Law librarian William R. Gaskill for his invaluable research assistance. Finally, I would like to thank Erica Bedenbaugh McElreath for her research and citation assistance. Errors and omissions are mine alone.

1. Parker v. Time Warner Entm't Co., 331 F.3d 13, 26 n.3 (2d Cir. 2003) (Newman, J., concurring) (quoting THE NEW INTERNATIONAL DICTIONARY OF QUOTATIONS 184 (Hugh Rawson & Margaret Miner eds., 1986) (statement of Senator Everett Dirksen)).

2. *E.g.*, Philip Morris USA v. Williams, 549 U.S. 346, 351-55 (2007); State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 416 (2003).

3. *E.g.*, Thomas B. Colby, *Clearing the Smoke from* Philip Morris v. Williams: *The Past, Present, and Future of Punitive Damages*, 118 YALE L.J. 392 (2008); Doug Rendleman, *A Plea To Reject The United States Supreme Court's Due-Process Review of Punitive Damages*, *in* THE LAW OF REMEDIES: NEW DIRECTIONS IN THE COMMON LAW (Jeff Berryman & Rick Bigwood eds., forthcoming 2008), *available at* http://ssrn.com/abstract=1146465; Michael L. Rustad, *The Uncert-Worthiness of The Court's Unmaking of Punitive Damages*, 2 CHARLESTON L. REV. 459 (2008); F. Patrick Hubbard, *Substantive Due Process Limits on Punitive Damages Awards: "Morals Without Technique"?*, 60 FLA. L. REV. 349 (2008); A. Benjamin Spencer, *Due Process and Punitive Damages: The Error of Federal Excessiveness Jurisprudence*, 79 S. CAL. L. REV. 1085 (2006); Anthony J. Sebok, *Deterrence or Disgorgement? Reading* Ciarolo *After* Campbell, 64 MD. L. REV. 541 (2005); Catherine M. Sharkey, *Punitive Damages as Societal Damages*, 113 YALE L.J. 347 (2003).

4. *E.g.*, Elizabeth J. Cabraser & Robert J. Nelson, *Class Action Treatment of Punitive Damages Issues After* Philip Morris v. Williams: *We Can Get There From Here*, 2 CHARLESTON L. REV. 407 (2008).

violations of particular statutes[5] – have been all but forgotten. When combined with the procedural device of the class action, aggregated statutory damages claims can result in absurd liability exposure in the hundreds of millions – or even billions – of dollars on behalf of a class whose actual damages are often nonexistent.

Despite presenting the risk of grossly excessive punishment that prompted the development of due process limits on punitive damages, courts have yet to uniformly apply the now familiar punitive damages due process framework to aggregated statutory damages.[6] Indeed, most courts confronted with the issue of grossly excessive statutory damages sought in class actions have engaged in a quintessential judicial punt: declining to consider any due process limit until after the class has been certified and a verdict entered. As a practical matter, this means that the court will never reach the due process issue. That is, once a class is certified, a statutory damages defendant faces a bet-the-company proposition and likely will settle rather than risk shareholder reaction to theoretical billions in exposure even if the company believes the claim lacks merit.

A recent example of this phenomenon is the so-called FACTA class action[7] – class litigation under the Fair and Accurate Credit Transactions Act

5. For examples of federal statues imposing statutory damages, see Fair Credit Reporting Act, 15 U.S.C. § 1681n(a)(1)(A) (2006) (allowing statutory damages of $100 to $1,000); Telephone Consumer Protection Act, 47 U.S.C. § 227(b)(3)(B) (2000) (allowing statutory damages of the greater of actual monetary loss or $500); Cable Communications Policy Act, 47 U.S.C. § 551(f)(2)(A) (2000) (allowing statutory damages of $100 per day of a violation to $1,000, whichever is greater). In addition, many state consumer fraud statutes authorize minimum statutory damages awards ranging from $100 to $2,000. *E.g.*, ALA. CODE § 8-19-10(a)(1) (2002) (allowing minimum statutory damages of $100); D.C. CODE ANN. § 28-3905(k)(1) (LexisNexis 2007) (allowing minimum statutory damages of $1,500); UTAH CODE ANN. § 13-11-19 (2001) (allowing minimum statutory damages of $2,000).

6. *See infra* Part III.B.

7. *E.g.*, Cicilline v. Jewel Food Stores, Inc., 542 F. Supp. 2d 831 (N.D. Ill. 2008); Meehan v. Buffalo Wild Wings, Inc., 249 F.R.D. 284 (N.D. Ill. 2008); Kesler v. Ikea U.S. Inc., No. SACV 07-568 JVS (RNBx), 2008 WL 413268 (C.D. Cal. Feb. 4, 2008), *superseded by statute*, Credit and Debit Card Receipt Clarification Act of 2007, Pub. L. No. 110-241, 122 Stat. 1565 (2008), *as recognized in* Bateman v. Am. Multi-Cinema, Inc., 252 F.R.D. 647 (C.D. Cal. 2008); Blanco v. CEC Entm't Concepts L.P., No. CV 07-0559 GPS (JWJx), 2008 WL 239658 (C.D. Cal. Jan. 10, 2008); Serna v. Costco Wholesale Corp., No. CV 07-1491 AHM (JWJx), 2008 WL 234197 (C.D. Cal. Jan. 3, 2008); Price v. Lucky Strike Entm't, Inc., No. CV 07-960-ODW (MANx), 2007 WL 4812281 (C.D. Cal. Aug. 31, 2007); Azoiani v. Love's Travel Stops & Country Stores, Inc., No. EDCV 07-90 ODW (OPx), 2007 WL 4811627 (C.D. Cal. Dec. 18, 2007); Halperin v. Interpark, Inc., No. 07 C 2161, 2007 WL 4219419 (N.D. Ill. Nov. 29, 2007); Vartanian v. Estyle, Inc., No. CV 07-0307 DSF (RCx), 2007 WL 4812286 (C.D. Cal. Nov. 26, 2007); Saunders v. Louise's Trattoria, No. CV 07-1060 SJO (PJWx), 2007 WL 4812287 (C.D. Cal. Oct. 23, 2007); Medrano v. WCG Holdings, Inc., No. SACV 07-0506 JVS (RNBx), 2007 WL 4592113 (C.D.

(FACTA),[8] which requires retailers to redact all but the last five digits of a credit card number as well as the expiration date from a printed receipt.[9] Under FACTA, a plaintiff can seek actual damages or statutory damages of "not less than $100 and not more than $1,000."[10] When pursued as a nationwide or statewide class action, the statutory damages create devastating liability that would put the defendant out of business simply for failing to redact information from a retail receipt.[11] For instance, in a recent class action in

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Cal. Oct. 15, 2007); Reynoso v. S. County Concepts, No. SACV 07-373-JVS (RCx), 2007 WL 4592119 (C.D. Cal. Oct. 15, 2007); Vasquez-Torres v. McGrath's Publick Fish House, Inc., No. CV 07-1332 AHM (CWx), 2007 WL 4812289 (C.D. Cal. Oct. 12, 2007); Evans v. U-Haul Co. of Cal., No. CV 07-2097-JFW (JCx), 2007 U.S. Dist. LEXIS 82026 (C.D. Cal. Aug. 14, 2007); Torossian v. Vitamin Shoppe Indus., No. CV 07-960-ODW (SSx), 2007 U.S. Dist. LEXIS 81961 (C.D. Cal. Aug. 7, 2007); Papazian v. Burberry Ltd., No. CV 07-1479 GPS (RZx), 2007 WL 4812280 (C.D. Cal. Aug. 3, 2007); Lopez v. KB Toys Retail, Inc., No. CV 07-144-JFW (CWx), 2007 U.S. Dist. LEXIS 82025 (C.D. Cal. July 17, 2007); Najarian v. Charlotte Russe, Inc., No. CV 07-501-RGK (CTx), 2007 U.S. Dist. LEXIS 59879 (C.D. Cal. June 12, 2007); Soualian v. Int'l Coffee & Tea LLC, No. CV 07-502-RGK (JCx), 2007 WL 4877902 (C.D. Cal. June 11, 2007); Spikings v. Cost Plus, Inc., No. CV 06-8125-JFW (AJWx), 2007 U.S. Dist. LEXIS 44214 (C.D. Cal. May 29, 2007); Legge v. Nextel Commc'ns Inc., No. CV 02-8676DSF (VNKX), 2004 WL 5235587 (C.D. Cal. June 25, 2004).

8. Fair and Accurate Credit Transactions Act of 2003, Pub. L. No. 108-159, 117 Stat. 1952.

9. 15 U.S.C. § 1681c(g)(1) (2006). FACTA's receipt truncation requirements do not apply to handwritten receipts. *Id.* § 1681c(g)(2).

10. 15 U.S.C. § 1681n(a)(1)(A).

11. In June 2008, Congress amended FACTA by creating a grace period between December 4, 2004, and June 3, 2008, in which a defendant does not "willfully" violate the Act if it redacts a consumer's credit card number but prints the expiration date on a receipt. Credit and Debit Card Receipt Clarification Act of 2007, Pub. L. No. 110-241, § 3, 122 Stat. 1565, 1566 (2008). Because only "willful" violations subject a defendant to statutory damages, *see* 15 U.S.C. § 1681n(a), this change insulates retailers from some suits. A party's willfulness, however, is a merits issue that traditionally is addressed after class certification. *See, e.g.*, Edwards v. Toys "R" Us, 527 F. Supp. 2d 1197, 1210 (C.D. Cal. 2007) (noting that willfulness "is generally a question of fact for the jury"). Further, the grace period amendment applies only to a limited time period and does not prevent the aggregated statutory damages problem from reoccurring. Moreover, the grace period does not apply to receipts that failed to truncate the credit card number, and numerous "credit card number" suits remain pending. *See* John Pacenti, *Attorneys Slam 'Bailout Plan' for Businesses*, DAILY BUS. REV., May 29, 2008, *available at* http://www.law.com/jsp/article.jsp?id=1202421752973 (noting at least 30 lawsuits filed by one plaintiffs' firm remain unaffected by the new legislation). Since the passage of the Credit and Debit Card Receipt Clarification Act in June 2008, FACTA class actions continue to be filed against retailers. *See, e.g.*, Bill Lodge, *BR Woman Sues Albertsons*, ADVOCATE, July 27, 2008, *available at* http://www.2theadvocate.com/news/25951984.html (discussing

California district court, the potential minimum statutory damages award was nearly half of the defendant's net worth.[12] Similarly, in a FACTA class action against Cost Plus, Inc., the court noted that "even the minimum statutory damages of $340 million would put Defendant out of business."[13] A nationwide FACTA class action against Chuck E. Cheese sought $1.9 billion, even though the company's net income the prior year was only $68 million.[14] A FACTA class suit against the Vitamin Shoppe sought between $22.7 million and $227 million in statutory damages, though the company's securities filings reflected only $31 million in equity and $161 million in total assets.[15] And a FACTA class action against clothing retailer Charlotte Russe sought statutory damages of $220 million to $2.2 billion, despite that the company's total stock equity was only $206 million.[16] As the court there noted, "an award of even the minimum statutory damages . . . would destroy [d]efendant's business."[17]

Although a few scholars have identified the potential due process implications of statutory damages, no one has thoroughly examined the question.[18]

FACTA class action filed in July against Albertsons for its alleged printing of six digits of a credit card number).

12. *Price*, 2007 WL 4812281, at *5.

13. Spikings v. Cost Plus, Inc., No. CV 06-8125-JFW (AJWx), 2007 U.S. Dist. LEXIS 44214, at *12 (C.D. Cal. May 29, 2007). In *Spikings*, the proposed class included 3.4 million people nationwide. *Id.* Thus, statutory damages would range from a minimum of $340 million to a maximum of $3.4 billion. *Id.* The defendant's net worth, however was approximately $316 million. *Id.*

14. Blanco v. CEC Entm't Concepts L.P., No. CV 07-0559 GPS (JWJx), 2008 WL 239658, at *2 (C.D. Cal. Jan. 10, 2008).

15. Torossian v. Vitamin Shoppe Indus., No. CV 07-0523 ODW (SSx), 2007 U.S. Dist. LEXIS 81961, at *12-13 (C.D. Cal. Aug. 7, 2007). Similarly, the statutory damages sought against U-Haul would have put the company out of business. Evans v. U-Haul Co. of Cal., No. CV 07-2097-JFW (JCx), 2007 U.S. Dist. LEXIS 82026, at *15 (C.D. Cal. Aug. 14, 2007). In *Evans*, the statutory damages ranged from $115 million to $1.5 billion. *Id.* The company's entire net worth, however, was only $118 million. *Id.*

16. Najarian v. Charlotte Russe, Inc., No. CV 07-501-RGK (CTx), 2007 U.S. Dist. LEXIS 59879, at *7 (C.D. Cal. June 12, 2007).

17. *Id.* at *7-8; *accord* Lopez v. KB Toys Retail, Inc., No. CV 07-144-JFW (CWx), 2007 U.S. Dist. LEXIS 82025, at *14 (C.D. Cal. July 17, 2007) (noting "an award of even the minimum statutory damages would put [d]efendant out of business"). In *Lopez*, a suit against KB Toys sought statutory damages between $290 million and $2.9 billion. *Id.* The minimum statutory damages award of $290 million was "more than 600% of [d]efendant's net worth." *Id.*

18. *See* Catherine M. Sharkey, *Revisiting the Noninsurable Costs of Accidents*, 64 MD. L. REV. 409, 454 n.225 (2005) (noting that characterization of statutory damages as punitive or remedial may implicate the Supreme Court's punitive damages due process analysis). Two student notes have considered aspects of the due process question in narrower contexts. *See* Blaine Evanson, Note, *Due Process in Statutory Damages*, 3 GEO. J.L. & PUB. POL'Y 601 (2005); J. Cam Barker, Note, *Grossly*

Using the FACTA cases as a paradigm, this Article assesses the current due process jurisprudence regarding statutory damages, and proposes an analytical framework that would remain true to the intent of FACTA and similar statutory damages regimes, while giving more than mere lip service to a defendant's due process rights.

Part II examines the theoretical rationale underlying both statutory damages and class actions: making individual claims marketable. This Part explains how combining the class action with statutory damages invites overdeterrence, a fact aptly demonstrated by the FACTA class actions.

Part III describes the constitutional framework for analyzing constitutional excessiveness under the Due Process Clause. This Part shows how the modern due process standard for punitive damages – known as the *BMW* guideposts – in fact evolved from a test developed in early Supreme Court precedent analyzing the constitutional limits on statutory damages.

Part IV examines modern judicial treatment of due process challenges to aggregate statutory damages awards. First, this Part discusses how courts confronted with due process challenges to statutory damages have refused to apply the *BMW* guideposts. Second, this Part addresses the alternative method courts have taken to due process statutory damages challenges: avoidance.

Finally, Part V argues that the modern *BMW* standard should apply to aggregate statutory damages awards, and should be considered during the class certification phase of proceedings. Using the FACTA class actions as an illustration, this Part concludes that there is no principled reason to ignore the *BMW* guideposts, the history of the constitutional excessiveness standard, or the reality of modern class action litigation.

II. THE CLASS ACTION MEETS STATUTORY DAMAGES

At their cores, both statutory damages and the class action mechanism are aimed at encouraging litigation.[19] The class action makes small individual claims marketable by aggregating the claims of multiple individuals into one suit.[20] Similarly, statutory damages guarantee a minimum recovery, and

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Excessive Penalties in the Battle Against Illegal File-Sharing: The Troubling Effects of Aggregating Minimum Statutory Damages for Copyright Infringement, 83 TEX. L. REV. 525 (2004). Although I differ with their analysis and reasoning, I agree with their ultimate conclusions that the punitive damages framework applies to statutory damages. Beyond the substantive analysis, I also give equal focus to a procedural aspect of the issue: the problem of how to reconcile statutory damages with the class action mechanism.

19. Statutory provisions of attorney's fees similarly are designed to encourage individual litigation. Many statutes that provide statutory damages also allow a successful plaintiff to recover costs and attorneys' fees. *E.g.*, 15 U.S.C. § 1681n(a)(3) (2006).

20. *See infra* Part II.A.

thus make a violation that may result in nominal or no actual damages more attractive to pursue.[21] When these two litigation-inducing mechanisms are combined, however, the risk of over-deterrence arises.[22] In short, where a statute provides statutory damages as well as attorneys' fees, the class action is unnecessary to render the suit marketable.

A. Litigation Incentives of the Class Action

As the Supreme Court has observed, "'[t]he 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.'"[23] Simply put, "'[a] class action solves this problem by aggregating the relatively paltry potential recoveries into something worth someone's (usually an attorney's) labor.'"[24] As Professor Richard Epstein has explained, three conditions underlie the litigation incentive theory of the class action:

> The first of these is that the number of individuals similarly situated with respect to a common defendant is very large. The second is that the loss sustained by each individual is relatively

21. *See infra* Part II.B.

22. *See infra* Part II.C.

23. Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 617 (1997) (quoting Mace v. Van Ru Credit Corp., 109 F.3d 338, 344 (7th Cir. 1997)); *accord* Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 809 (1985) (noting that class action permits "the plaintiffs to pool claims which would be uneconomical to litigate individually"); Thorogood v. Sears, Roebuck & Co., 547 F.3d 742, 744 (7th Cir. 2008) (Posner, J.) ("The class action is an ingenious device for economizing on the expense of litigation and enabling small claims to be litigated."); *see also* DEBORAH R. HENSLER ET AL., RAND INST. FOR CIVIL JUSTICE, CLASS ACTION DILEMMAS: PURSUING PUBLIC GOALS FOR PRIVATE GAIN 69 (2000); 5 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE ¶ 23.02 (3d ed. 2005). This justification for class actions can be traced back to the 1941 scholarship of Professors Kalven and Rosenfield. STEPHEN C. YEAZELL, FROM MEDIEVAL GROUP LITIGATION TO THE MODERN CLASS ACTION 232 (1987); *see also* Harry Kalven, Jr. & Maurice Rosenfield, *The Contemporary Function of the Class Suit*, 8 U. CHI. L. REV. 684, 686 (1941). For a discussion of deterrence theory in class actions, see Sheila B. Scheuerman, *Two Worlds Collide: How the Supreme Court's Recent Punitive Damages Decisions Affect Class Actions*, 60 BAYLOR L. REV. 880 (2008).

24. *Amchem*, 521 U.S. at 617 (quoting *Mace*, 109 F.3d at 344); *see also* Richard A. Epstein, *Class Actions: Aggregation, Amplification, and Distortion*, 2003 U. CHI. LEGAL F. 475, 475 ("Class actions are, at their root, an aggregation device for separate claims . . . ."); Kenneth W. Dam, *Class Actions: Efficiency, Compensation, Deterrence, and Conflict of Interest*, 4 J. LEGAL STUD. 47, 49 (1975) ("A key feature of the class action is that it holds the potential for making feasible the compensation of the victims of mass wrongs even though each victim has a loss that is too small to justify an individual action.").

> small. The third is that the administrative costs of individual suits turn out to be quite high. In these circumstances, we can now see the consequences of a rule that allows each aggrieved individual to bring his own suit. Quite simply, he will not accept this invitation if the costs of litigation exceed the level of recovery, which could easily happen with the high price of lawyers.[25]

Thus, the "addition effect"[26] of the class action brings together what would otherwise be unmarketable individual claims. "This concept . . . has become a leading justification for the modern class action."[27]

By making these claims marketable, the class action serves a deterrent function[28] in two ways. First, the class action uncovers wrongdoing that otherwise would escape detection.[29] Second, it requires the "wrongdoers to give up their ill-gotten gains."[30] Class actions thus provide an incentive to sue that would not exist if the plaintiffs had to proceed individually.[31]

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25. Epstein, *supra* note 24, at 485.

26. Richard A. Nagareda, *Aggregation and Its Discontents: Class Settlement Pressure, Class-Wide Arbitration, and CAFA*, 106 COLUM. L. REV. 1872, 1881 (2006). Professor Richard A. Nagareda distinguishes between the "addition effect" and the "amplification effect" of class adjudication. *Id.* at 1881-82. The addition effect simply refers to the pooling of claims against the defendant. *Id.* at 1881. The amplification effect, on the other hand, refers to the "projection of the probability of plaintiff success in an individual case over the entire nationwide class." *Id.* In other words, the class action distorts the statistical probabilities inherent in litigation; instead of a defendant facing a risk of loss of one in ten cases, the eleventh jury now gets to decide the entire controversy. In the context of statutory damages, Nagareda contends that the "addition effect" works "an amendment of the underlying remedial scheme through means other than reform legislation itself." *Id.* at 1888.

27. *See* YEAZELL, *supra* note 23, at 232. Of course, scholars have advocated additional rationales to justify class actions. *E.g.*, Myriam Gilles & Gary B. Friedman, *Exploding the Class Action Agency Costs Myth: The Social Utility of Entrepreneurial Lawyers*, 155 U. PA. L. REV. 103, 108-31 (2006) (describing compensation justification for class actions).

28. Kalven & Rosenfield, *supra* note 23, at 686-88; Thomas C. Galligan, Jr., *The Risks of and Reactions to Underdeterrence in Torts*, 70 MO. L. REV. 691, 704 (2005).

29. YEAZELL, *supra* note 23, at 232. *But see* Samuel M. Hill, *Small Claimant Class Actions: Deterrence and Due Process Examined*, 19 AM. J. TRIAL ADVOC. 147 (1995) (criticizing deterrence rationale of small claims class actions).

30. YEAZELL, *supra* note 23, at 232.

31. *But see* Martin H. Redish, *Class Actions and the Democratic Difficulty: Rethinking the Intersection of Private Litigation and Public Goals*, 2003 U. CHI. LEGAL F. 71, 77-80 (noting "most members of the class never make a conscious choice to seek judicial enforcement of their substantive right to pursue [individual] private damages").

B. Litigation Incentives of Statutory Damages

Like the class action,[32] statutory damages are intended to make individual litigation marketable.[33] Statutory damages allow a plaintiff to recover a prescribed sum in lieu of[34] – or sometimes in addition to[35] – actual damages. Thus, statutory damages provide an incentive to pursue a lawsuit where actual damages are "small or difficult to ascertain."[36] For instance, Congress included the statutory damages provisions of the Truth in Lending Act (TILA) because "it is difficult to prove any actual monetary damage arising out of a disclosure violation."[37] Thus, TILA's statutory damages provision was enacted "to make it worthwhile for an individual to bring an enforcement action even if actual damages amounted to only a few dollars."[38]

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32. *See supra* Part II.A.

33. *See, e.g.*, Parker v. Time Warner Entm't Co., 331 F.3d 13, 22 (2d Cir. 2003) (recognizing purpose of statutory damages is to "encourage the filing of individual lawsuits as a means of private enforcement of consumer protection laws"); Victor E. Schwartz & Cary Silverman, *Common-Sense Construction of Consumer Protection Acts*, 54 U. KAN. L. REV. 1, 61 (2005) ("Statutory damages were meant to provide an individual plaintiff with the ability to bring a lawsuit when the anticipated damages are otherwise too low to provide an attorney with adequate incentive to take a case."); *see also* Perrone v. Gen. Motors Acceptance Corp., 232 F.3d 433, 436 (5th Cir. 2000) (noting "statutory damages are reserved for cases in which the damages caused by a violation are small or difficult to ascertain").

34. *E.g.*, 15 U.S.C. § 1681n(a) (2006) (allowing statutory damages of $100 to $1,000 in lieu of actual damages under FCRA); 17 U.S.C. § 504(c)(1) (2006) (allowing statutory damages of $750 to $30,000 in lieu of actual damages under Copyright Act).

35. *E.g.*, 15 U.S.C. § 1640(a) (2006) (allowing statutory damages of $100 to $1,000 in addition to actual damages under the Truth in Lending Act). Under the Truth in Lending Act, actual damages are not a prerequisite to statutory damages, and thus statutory damages are often the only recovery. *See* discussion *infra* Part V.A.3.b.

36. *Perrone*, 232 F.3d at 436; *accord* Watkins v. Simmons & Clark, Inc., 618 F.2d 398, 399 (6th Cir. 1980) (noting that purpose of statutory damages under the Truth in Lending Act was "to encourage lawsuits by individual consumers"); McCoy v. Salem Mortgage Co., 74 F.R.D. 8, 12 (E.D. Mich. 1976) ("[I]t seems likely that if actual damages could be computed by a simple formula, no statutory damage provision would have been necessary."); Laughlin v. Household Bank, Ltd., 969 So. 2d 509, 513 (Fla. Dist. Ct. App. 2007) (noting statutory damages under Florida Consumer Collection Practices Act were designed "to provide a remedy for a class of injury where damages are difficult to prove" (quoting Harris v. Beneficial Fin. Co. of Jacksonville, 338 So. 2d 196, 200 (Fla. 1976))).

37. S. REP. NO. 93-278, at 14 (1973); *see also id.* at 15 (noting "[m]ost Truth In Lending violations do not involve actual damages"); *accord* 119 CONG. REC. 25,418 (1973) (statement of Sen. Proxmire) (noting "there are almost never any actual damages" under the Truth in Lending Act).

38. 119 CONG. REC. 25,416 (1973) (statement of Sen. Bennett).

Furthermore, like class actions, statutory damages act as a deterrent to wrongful conduct.[39] Statutory damages "encourage private attorneys general to police [a defendant's conduct] even where no actual damages exist."[40] The Supreme Court has recognized the deterrent function of statutory damages, noting that statutory damages are designed "to sanction and vindicate the statutory policy."[41] The very function of a minimum amount of damages is to add cost to the defendant's wrongful conduct. In the intellectual property area, for example, Congress specifically has explained that the goal of statutory damages provisions is to provide a "strong incentive" for compliance with the law.[42]

Class actions and statutory damages, then, serve a similar function: encouraging litigation by offsetting disincentives to suit where the alleged wrongdoing involves nominal financial harm.

C. *Statutory Damages + Class Action = Unintended Consequences*

Separately, statutory damages and class actions aim to respond to the risk that certain wrongs, namely those resulting in paltry financial losses, will go unaddressed. Combining the litigation incentives of statutory damages and the class action in one suit, however, creates the potential for absurd liability and over-deterrence. One of the FACTA class actions – *Kesler v. Ikea U.S. Inc.*[43] – illustrates this problem. In *Kesler*, an Ikea store provided the plaintiff with a merchandise receipt that included the expiration date of the plaintiff's credit card in violation of FACTA.[44] Less than a month after the plaintiff's purchase, Ikea corrected its credit card processing machines to comply with FACTA.[45] Nevertheless, the plaintiff brought a putative class action in federal court seeking a nationwide class action of "all consumers in the United States" who received a credit card receipt from an Ikea store that violated FACTA.[46] The potential class included 2.4 million members,[47]

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39. *E.g.*, Nintendo of Am., Inc. v. Dragon Pac. Int'l, 40 F.3d 1007, 1011 (9th Cir. 1994) (noting purpose of statutory damages under Copyright Act was "'to penalize the infringer and to deter future violations'" (quoting Chi-Boy Music v. Charlie Club, Inc., 930 F.2d 1224, 1228-29 (7th Cir. 1991))).

40. *Perrone*, 232 F.3d at 436.

41. F.W. Woolworth Co. v. Contemporary Arts, Inc., 344 U.S. 228, 233 (1952).

42. H.R. REP. NO. 106-216, at 6 (1999); *see also id.* (noting "deterrent effect of statutory damages penalties").

43. No. SACV 07-568 JVS (RNBx), 2008 WL 413268 (C.D. Cal. Feb. 4, 2008), *superseded by statute*, Credit and Debit Card Receipt Clarification Act of 2007, Pub. L. No. 110-241, 122 Stat. 1565 (2008), *as recognized in* Bateman v. Am. Multi-Cinema, Inc., 252 F.R.D. 647 (C.D. Cal. 2008).

44. *Id.* at *1.

45. *Id.* at *2, *9.

46. *Id.* at *1.

47. *Id.* at *2.

which would have resulted in a statutory damages award ranging from a minimum of $240 million to a maximum of $2.4 billion.[48]

In opposition to the plaintiff's motion for class certification, Ikea argued that the class should not be certified because the aggregate statutory damages necessarily violated due process.[49] The court, however, rejected Ikea's argument and approved the nationwide class.[50] Following Seventh Circuit precedent,[51] the court held that "concerns about the constitutionality of any damage award are better addressed at the damages phase of the litigation and not as part of class certification."[52] The court noted that denying class certification based on the size of the aggregate statutory damages "would mean that 'the greater the number of violations of the [FACTA], the less likely [it is that] a company can be held fully accountable.'"[53] The court further concluded that the class action was a superior mechanism because, on an individual basis, "the available statutory damages are minimal."[54] The court placed responsibility for the absurd suit on Congress: "'Maybe suits such as this will lead Congress to amend the [FCRA]; maybe not. While the statute remains on the books, however, it must be enforced rather than subverted.'"[55]

Kesler is just one example of these popular statutory damages class actions. Other defendants caught in FACTA's class action trap include Applebee's,[56] Jewel Supermarkets,[57] Wendy's,[58] InterPark Garages,[59] Balducci's,[60]

48. *See* 15 U.S.C. § 1681n(a)(1) (2006) (imposing statutory damages of $100 to $1,000 per consumer).

49. *Kesler*, 2008 WL 413268, at *7.

50. *Id.* at *9-10.

51. *Id.* at *8 (citing Murray v. GMAC Mortgage Corp., 434 F.3d 948, 954 (7th Cir. 2006)). For a discussion of *Murray*, see *infra* Part IV.B.

52. *Kesler*, 2008 WL 413268, at *8; *accord* Medrano v. WCG Holdings, Inc., No. SACV 0-0506 JVS (RNBx), 2007 WL 4592113, at *5 (C.D. Cal. Oct. 15, 2007); Reynoso v. S. County Concepts, No. SACV07-373-JVS (RCx), 2007 WL 4592119, at *5 (C.D. Cal. Oct. 15, 2007).

53. *Kesler*, 2008 WL 413268, at *8 (quoting White v. E-Loan, Inc., No. C 05-02080 SI, 2006 WL 2411420, at *8 n.8 (N.D. Cal. Aug. 18, 2006)).

54. *Id.* at *9; *accord* Troy v. Red Lantern Inn, Inc., No. 07 C 2418, 2007 WL 4293014, at *4 (N.D. Ill. Dec. 4, 2007); *Reynoso*, 2007 WL 4592119, at *5-6; *see also Medrano*, 2007 WL 4592113, at *6 (finding class action superior because attorney's fees plus statutory damages would not "result in enforcement of the FCRA by individual actions of a scale comparable to the potential enforcement by way of class action").

55. *Kesler*, 2008 WL 413268, at *8 (quoting *Murray*, 434 F.3d at 954).

56. Dister v. Apple-Bay E., Inc., No. C 07-01377 SBA, 2008 WL 62280, at *1 (N.D. Cal. Jan. 4, 2008) (denying class certification under FACTA without prejudice).

57. Cicilline v. Jewel Food Stores, Inc., 542 F. Supp. 2d 831, 834 (N.D. Ill. 2008) (granting class certification under the FACTA).

58. *Medrano*, 2007 WL 4592113, at *7 (granting class certification against local Wendy's franchise under FACTA).

59. Halperin v. Interpark, Inc., No. 07 C 2161, 2007 WL 4219419, at *4 (N.D. Ill. Nov. 29, 2007) (granting class certification under FACTA).

FedEx Kinko's,[61] Frederick's of Hollywood,[62] Chuck E. Cheese,[63] Avis Rent-A-Car,[64] Burberry,[65] Vitamin Shoppe,[66] U-Haul,[67] KB Toys,[68] Costco,[69] Gymboree,[70] and Toys "R" Us.[71] Statutory damages class actions under FACTA have become so numerous that the Judicial Panel on Multidistrict Litigation[72] has faced several requests to consolidate pre-trial proceedings.[73]

Beyond FACTA, plaintiffs' attorneys have combined numerous other state and federal statutory damages regimes with the class action device, including the Telephone Consumer Protection Act,[74] the Cable

60. Troy v. Red Lantern Inn, Inc., No. 07 C 2418, 2007 WL 4293014, at *5 (granting class certification under FACTA).

61. Moon v. FedEx Kinko's Office & Print Servs. Inc., No. C 06-07657-SI, 2007 WL 3022242, at *1 (N.D. Cal. Oct. 15, 2007) (denying class certification under FACTA without prejudice).

62. Hile v. Frederick's of Hollywood Stores, Inc., No. 07-0715 SC, 2007 WL 3037552, at *2 (N.D. Cal. Oct. 17, 2007) (denying class certification under FACTA without prejudice).

63. Blanco v. CEC Entm't Concepts L.P., No. CV 07-0559 GPS (JWJx), 2008 WL 239658, at *1 (C.D. Cal. Jan. 10, 2008) (denying class certification under FACTA without prejudice).

64. Najarian v. Avis Rent A Car System, No. CV 07-588-RGK (Ex), 2007 WL 4682071, at *6 (C.D. Cal. June 11, 2007) (denying class certification under FACTA).

65. Papazian v. Burberry Ltd., No. CV 07-1479 GPS (RZx), 2007 WL 4812280, at *1 (C.D. Cal. Aug. 3, 2007) (denying class certification under FACTA).

66. Torossian v. Vitamin Shoppe Indus., No. CV 07-0523 ODW (SSx), 2007 U.S. Dist. LEXIS 81961, at *16 (C.D. Cal. Aug. 8, 2007) (denying class certification under FACTA).

67. Evans v. U-Haul Co. of Cal., No. CV 07-2097-JFW (JCx), 2007 U.S. Dist. LEXIS 82026, at *22 (C.D. Cal. Aug. 14, 2007) (denying class certification under FACTA).

68. Lopez v. KB Toys Retail, Inc., No CV 07-144-JFW (CWx), 2007 U.S. Dist. LEXIS 82025, at *19 (C.D. Cal. July 17, 2007) (denying class certification under FACTA).

69. Serna v. Costco Wholesale Corp., No. CV 07-1491 AHM (JWJx), 2008 WL 234197, at *1 (C.D. Cal. Jan. 3, 2008) (denying class certification under FACTA).

70. Lopez v. Gymboree Corp., No. C 07-0087 SI, 2007 WL 1690886, at *5 (N.D. Cal. June 9, 2007) (denying motion to dismiss FACTA class action).

71. Edwards v. Toys "R" Us, 527 F. Supp. 2d 1197, 1216 (C.D. Cal. 2007) (denying motion for summary judgment in putative FACTA class action).

72. The Judicial Panel on Multidistrict Litigation ("MDL Panel") determines whether "civil actions involving one or more common questions of fact" should be "coordinated or consolidated" for pretrial proceedings. 28 U.S.C. § 1407(a) (2006). For an explanation of the MDL Panel process, see 3 ALBA CONTE & HERBERT B. NEWBERG, NEWBERG ON CLASS ACTIONS §§ 9:14-9:18 (4th ed. 2002).

73. *E.g.*, *In re* Oilily FACTA Litig., 545 F. Supp. 2d 1375 (J.P.M.L. 2008); *In re* Tex. Roadhouse FACTA Litig., 542 F. Supp. 2d 1370 (J.P.M.L. 2008).

74. 47 U.S.C. § 227(b)(3)(B) (2000). Under the Telephone Consumer Protection Act, a plaintiff can recover "actual monetary loss from such a violation, or . . . $500 in damages for each such violation, whichever is greater." *Id.* If the court finds that the

Communications Policy Act,[75] the Fair Credit Reporting Act,[76] and state consumer fraud statutes.[77] Many of these suits are lawyer-driven.[78] In one California case, for example, the class representative testified that he "'never made the decision to file suit . . . . [He] just took the [credit card] receipts to [the lawyers].'"[79] In another California FACTA case, the lawyers filed the complaint "[l]ess than four business hours" after the plaintiff made her purchase at the defendant's store.[80]

What makes these statutory damages class actions so attractive to plaintiffs' lawyers is simple mathematics: these suits multiply a minimum $100 statutory award (and potentially a maximum $1,000 award) by the number of individuals in a nationwide or statewide class. Because the statutory damages

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defendant's conduct was willful or knowing, the court can award treble statutory damages. *Id.* § 227(b)(3)(C).

75. 47 U.S.C. § 551(f) (2000). Under the Cable Communications Policy Act, a plaintiff can recover "actual damages but not less than liquidated damages computed at the rate of $100 a day for each day of violation or $1,000, whichever is higher." *Id.* § 551(f)(2)(A).

76. 15 U.S.C. § 1681n(a)(1)(A) (2006). FCRA provides an award of statutory damages of "not less than $100 and not more than $1,000" per willful violation. *Id.* Only actual damages are available for negligent violations. 15 U.S.C. § 1681o (2006).

77. For illustrative state consumer fraud class actions, see Sheila B. Scheuerman, *The Consumer Fraud Class Action: Reining in Abuse by Requiring Plaintiffs to Allege Reliance as an Essential Element*, 43 HARV. J. ON LEGIS. 1, 5-7 (2006).

78. *See* Lopez v. KB Toys Retail, Inc., No. CV 07-144-JFW (CWx), 2007 U.S. Dist. LEXIS 82025, at *18 (C.D. Cal. July 17, 2007) (noting plaintiffs' counsel was counsel "in at least 42 other similar actions in this District alleging violations of FACTA"); Price v. Lucky Strike Entm't, Inc., No. CV 07-960-ODW(MANx), 2007 WL 4812281, at *5 (C.D. Cal. Aug. 31, 2007) (noting class counsel was involved "in no fewer than twenty FACTA cases" in the Central District of California alone (emphasis omitted)); *see also* Simon v. Ashworth, Inc., No. CV071324GHKAJWX, 2007 WL 4811932, at *4 (C.D. Cal. Sept. 28, 2007). Indeed, in one case, the court found that the "sloppiness" of plaintiffs' counsel in using a "cut and paste" class certification motion from another case – but forgetting to change the case name – suggested counsel was not qualified to serve as class counsel. Vasquez-Torres v. McGrath's Publick Fish House, No. CV 07-1332 AHM (CWx), 2007 WL 4812289, at *4 (C.D. Cal. Oct. 12, 2007).

79. *Simon*, 2007 WL 4811932, at *3. After a break in the deposition, however, the plaintiff subsequently claimed that it was a joint decision to file suit – even though he had never seen the complaint prior to his deposition and did not know when it was filed. *Id.* at *2-3. Similarly, in another California case, the named class representative "readily admitted that all he [had] done [was travel] 140 miles to fetch a Love's receipt in order to give it to his attorney." Azoiani v. Love's Travel Stops & Country Stores, Inc., No. EDCV 07-90 ODW (OPx), 2007 WL 4811627, at *2 (C.D. Cal. Dec. 18, 2007).

80. Spikings v. Cost Plus, Inc., No. CV 06-8125-JFW (AJWx), 2007 U.S. Dist. LEXIS 44214, at *4 (C.D. Cal. May 29, 2007).

provisions do not distinguish between individual suits or class actions, the statutory amount is calculated per class member.[81]

Aggregating statutory damages claims warps the purpose of both statutory damages and class actions.[82] Combining the two mechanisms creates "a form of double counting which could easily lead to overdeterrence."[83] Together, the two devices can create a constitutionally excessive statutory damages award.

III. DUE PROCESS AND EXCESSIVENESS

In both its statutory damages decisions as well as its punitive damages cases, the Supreme Court has announced a basic proportionality principle: due process[84] forbids an excessive statutory damages[85] or punitive damages award.[86]

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81. FCRA, for example, is one of seven subchapters of the Consumer Credit Protection Act. 15 U.S.C. §§ 1601-1693r (2006). Yet the other six subchapters all limit the amount of statutory damages in a class action. *See* 15 U.S.C. § 1640(a)(2)(B) (limiting class action damages to "not . . . more than the lesser of $500,000 or 1 per centum of the net worth of the creditor" for both the Truth in Lending Act, 15 U.S.C. §§ 1601-1667f and the Consumer Leasing Act, 15 U.S.C. §§ 1667-1667f); 15 U.S.C. § 1691e(b) (same limit under Equal Credit Opportunity Act); 15 U.S.C. § 1692k(a)(2)(B) (same limit under Fair Debt Collection Practice Act); 15 U.S.C. § 1693m(a)(2)(B)(ii) (same limit under the Electronic Funds Transfer Act). The final subchapter, the Credit Repair Organizations Act, does not allow statutory damages. 15 U.S.C. § 1679g(a)(1).

82. Epstein, *supra* note 24, at 505 (recognizing that combining the class action with the Sherman Act's treble damages provision creates a "form of double counting").

83. *Id.* (questioning whether treble damages should be allowed in class actions). Both Professor Epstein and Professor Nagareda refer to this problem as "double counting." *E.g.*, *id.*; Nagareda, *supra* note 26, at 1878 ("Aggregation of statutory damages . . . would make for a kind of double counting discordant with the underlying remedial scheme."); *see also id.* at 1887 ("[C]lass certification layered on top of . . . per-violation damages . . . would distort, rather than facilitate, the remedial scheme of the statute.").

84. Both the statutory damages cases as well as the punitive damages cases apply the Due Process Clause of the Fourteenth Amendment. *E.g.*, St. Louis, Iron Mountain & S. Ry. Co. v. Williams, 251 U.S. 63, 66 (1919); State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 416 (2003). Of course, where statutory damages arise under a federal statute, the Fifth Amendment's Due Process Clause would apply. The standard, however, is the same under both clauses. *See, e.g.*, United States v. Bohn, 281 F. App'x 430, 435 n.4 (6th Cir. 2008) (per curiam); *see also* Zomba Enters. v. Panorama Records, Inc., 491 F.3d 574, 587 (6th Cir. 2007) (applying Fourteenth Amendment due process standards to federal statute without any discussion).

85. *E.g.*, *St. Louis Railway*, 251 U.S. 63; Waters-Pierce Oil Co. v. Texas, 212 U.S. 86 (1909).

86. *E.g.*, *State Farm*, 538 U.S. at 416.

The excessiveness standard originated in a series of *Lochner*-era[87] cases addressing statutory damages.[88] Building on these cases, the Court elaborated on the meaning of excessiveness in the punitive damages context.[89] In an ironic twist, although the punitive damages excessiveness standards derived from the earlier statutory damages jurisprudence, courts generally have found the punitive damages framework inapplicable to statutory damages, and return instead to the *Lochner*-era caselaw.

A. Origins of the Excessiveness Doctrine

The "grossly excessive" standard originated in the 1909 "trust busting" case of *Waters-Pierce Oil Co. v. Texas*.[90] Under an oil monopoly agreement with the Standard Oil Company,[91] the Waters-Pierce Oil Company operated in the state of Texas without any competition, which inflated Texan oil prices by 10 to 25%.[92] The jury found the company violated two antitrust statutes and awarded the State of Texas statutory damages of $1,623,500.[93] On appeal to the U.S. Supreme Court, Waters-Pierce argued that the statutory damages violated the company's due process rights.[94] The Court established a deferential standard of review focused on whether the award was "grossly excessive":

> The fixing of . . . penalties for unlawful acts against its laws is within the police power of the state. We can only interfere with

87. Although part of the *Lochner* Court's substantive due process legacy, these statutory damages cases are fairly deferential to the legislature. Indeed, during this period, the Court only struck down one statutory damages award. *E.g.*, Sw. Tel. & Tel. Co. v. Danaher, 238 U.S. 482 (1915) (finding statutory damages award of $6,300 violated due process). In *Danaher*, the Court's analysis focused on the reasonableness of the defendant's conduct and its good faith. *Id.* at 489-90. Moreover, despite the derogatory connotations of this phrase, these cases underlie the Court's modern due process framework for constitutional excessiveness. *See* discussion *infra* Part III.B.

88. *E.g.*, *St. Louis Railway*, 251 U.S. 63; *Danaher*, 238 U.S. 482; *Waters-Pierce*, 212 U.S. 86; Seaboard Air Line Ry. v. Seegers, 207 U.S. 73 (1907).

89. *See* BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 562 (1996); TXO Prod. Corp. v. Alliance Res. Corp., 509 U.S. 443, 446 (1993); *see also State Farm*, 538 U.S. at 411.

90. 212 U.S. 86.

91. *Id.* at 100.

92. *Id.* at 102.

93. *Id.* at 97. The suit was brought under two state antitrust statutes. *Id.* at 96. Under the first statute, the jury assessed statutory damages of $1,500 per day for a period of 1,033 days, which totaled $1,549,500. *Id.* at 97. Under the second statute, the jury awarded statutory damages of $50 per day for 1,480 days, for a total sum of $74,000. *Id.*

94. *Id.* at 111.

> such legislation . . . if the fines imposed are so grossly excessive as to amount to a deprivation of property without due process of law.[95]

Applying this standard, the Court found no due process violation. The Court noted that "the penalties imposed are large,"[96] but reasoned that the scope of the defendant's unlawful acts supported the penalty.[97]

In 1919, the Court added a proportionality component to the "grossly excessive" standard.[98] In *St. Louis, Iron Mountain & Southern Railway Co. v. Williams*, a state statute provided that any railroad that collected a fare above the prescribed amount would be subject to a penalty of "not less than fifty dollars nor more than three hundred dollars and costs of suit, including a reasonable attorney's fee."[99] In addition, the statute allowed a private plaintiff to recover the penalty in a civil suit.[100] The St. Louis, Iron Mountain & Southern Railway Company overcharged the plaintiffs by sixty-six cents.[101] The plaintiffs sued under the statute, obtaining a judgment for the sixty-six cents, a $75 penalty, and costs.[102] On appeal, the railroad company argued that the statutory penalty violated its due process rights because it was "not proportionate to the actual damages sustained."[103] The Court, however, rejected this argument.[104] The Court noted:

> Nor does giving the penalty to the aggrieved passenger require that it be confined or proportioned to his loss or damages; for, as it is imposed as punishment for the violation of a public law, the Legislature may adjust its amount to the public wrong rather than the private injury, just as if it were going to the state.[105]

The Court further observed that statutory damages are "essentially penal" and "primarily intended to punish."[106] The Court concluded that a statutory penalty violated due process "only where the penalty prescribed is so severe and

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95. *Id.*
96. *Id.* at 112.
97. *Id.* at 111-12. The Court noted that "[t]he business carried on by the defendant corporation in Texas was very extensive and highly profitable." *Id.* at 111. Moreover, unlike recent cases, it does not appear that the damages were "annihilating," as the defendant's property was worth "more than forty million dollars," and it had dividends "as high as 700 per cent per annum." *Id.* at 111-12.
98. St. Louis, Iron Mountain & S. Ry. Co. v. Williams, 251 U.S. 63 (1919).
99. *Id.* at 64.
100. *Id.*
101. *Id.*
102. *Id.*
103. *Id.*
104. *Id.* at 66.
105. *Id.*
106. *Id.*

oppressive as to be wholly disproportioned to the offense and obviously unreasonable."[107] While acknowledging that the $75 penalty seemed "large" when compared to the sixty-six cents overcharge, the Court concluded that the penalty was not "wholly disproportioned to the offense" so as to violate due process.[108]

B. The Meaning of "Grossly Excessive" Evolves

Seventy years after *St. Louis Railway*, the Court returned to the meaning of excessiveness under the Due Process Clause.[109] In *Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc.*,[110] the petitioners argued that a $6 million punitive damages award was constitutionally excessive under the Due Process Clause.[111] Citing *St. Louis Railway*, the Court noted that "the Due Process Clause places outer limits on the size of a civil damages award made pursuant to a statutory scheme."[112] In his concurrence, Justice Brennan likewise relied on the *Waters-Pierce* and *St. Louis Railway* line of cases:

> Several of our decisions indicate that even where a statute sets a range of possible civil damages that may be awarded to a private litigant, the Due Process Clause forbids damages awards that are 'grossly excessive,' or 'so severe and oppressive as to be wholly disproportioned to the offense and obviously unreasonable.'[113]

But because the due process argument was not properly raised in the lower courts, the Court declined to address the question.[114]

In 1993, however, the Court analyzed whether a particular punitive damages award violated the Due Process Clause in *TXO Production Corp. v. Alliance Resources Corp.*[115] The plurality began its analysis with a

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107. *Id.* at 66-67.

108. *Id.* at 67.

109. Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc., 492 U.S. 257, 276 (1989); Bankers Life & Cas. Co. v. Crenshaw, 486 U.S. 71 (1988).

110. 492 U.S. 257.

111. *Id.* at 276-77.

112. *Id.* at 276 (citing *St. Louis Railway*, 251 U.S. at 66-67).

113. *Id.* at 280-81 (Brennan, J., concurring) (citations omitted) (quoting Waters-Pierce Oil Co. v. Texas, 212 U.S. 86, 111 (1909), and *St. Louis Railway*, 251 U.S. at 66-67).

114. *Id.* at 277 (majority opinion).

115. 509 U.S. 443 (1993). Two years earlier in *Pacific Mutual Life Insurance Co. v. Haslip*, 499 U.S. 1, 18-19 (1991), the Court held that procedural due process limits a punitive damages award, but did not reach whether the award violated substantive due process. For an explanation of the difference between procedural due process and substantive due process in the context of punitive damages, see Sheila B. Scheuerman & Anthony J. Franze, *Instructing Juries on Punitive Damages: Due Process Revisited After* Philip Morris v. Williams, 10 U. PA. J. CONST. L. 1147 (2008).

discussion of the *Lochner*-era statutory damages cases,[116] and noted that under these cases, "the Due Process Clause . . . imposes substantive limits 'beyond which penalties may not go.'"[117]

The plurality seemed to find no analytical difference between a statutory damages award and a punitive damages award.[118] Although stating that "[t]he review of a jury's award for arbitrariness and the review of legislation surely are significantly different,"[119] the plurality subsequently applied the statutory damages standard to punitive damages.[120] Quoting *Waters-Pierce*, the plurality announced that the critical question was whether the award was "so 'grossly excessive'" as to violate due process.[121] To assess whether the amount of a punitive damages award is constitutionally excessive, the Court then adopted a general "reasonableness" test.[122] Echoing the *St. Louis Railway* public harm proportionality analysis, the Court found that a punitive damages award appropriately can consider "the possible harm to other victims that might have resulted if similar future behavior were not deterred."[123]

A few years later, the Court refined the meaning of "excessiveness" in the landmark *BMW of North America, Inc. v. Gore*.[124] In *BMW*, the Court identified three "guideposts" to determine whether an award is constitutionally excessive: (1) the reprehensibility of the defendant's conduct; (2) the relationship between the actual harm or potential harm to the plaintiff and the punitive damages award; and (3) the comparable civil or criminal penalties for the defendant's conduct.[125] Conflating statutory damages with punitive damages, the Court characterized *St. Louis Railway* as holding that a "*punitive* award may not be 'wholly disproportioned to the offense.'"[126]

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116. *TXO*, 509 U.S. at 453-54. Responding to the respondents' denigration of these cases as "*Lochner*-era precedents," the plurality noted that "the Justices who had dissented in the *Lochner* case itself joined those [statutory damages] opinions." *Id.* at 455.

117. *Id.* at 453-54 (quoting Seaboard Air Line Ry. v. Seegers, 207 U.S. 73, 78 (1907)).

118. *See id.* at 458 n.24 ("[O]ur cases have recognized for almost a century that the Due Process Clause of the Fourteenth Amendment imposes an outer limit *on such an award* . . . ." (emphasis added)).

119. *Id.* at 456.

120. *Id.* at 458.

121. *Id.* (quoting Waters-Pierce Oil Co. v. Texas, 212 U.S. 86, 111 (1909)).

122. *Id.*

123. *Id.* at 460; *see also* Anthony J. Franze & Sheila B. Scheuerman, *Instructing Juries on Punitive Damages: Due Process Revisited After* State Farm, 6 U. PA. J. CONST. L. 423, 443 & n.374 (2004) (explaining "potential harm" analysis of *TXO*).

124. 517 U.S. 559 (1996).

125. *Id.* at 574-75.

126. *Id.* at 575 (emphasis added) (quoting St. Louis, Iron Mountain & S. Ry. Co. v. Williams, 251 U.S. 63, 66-67 (1919)).

Citing *St. Louis Railway*, the Court emphasized that a punitive damages award should reflect the blameworthiness of the defendant's conduct[127] and described reprehensibility as "[p]erhaps the most important indicium of the reasonableness of a punitive damages award."[128] Drawing on its Eighth Amendment precedent,[129] the Court identified a spectrum of reprehensible conduct:

> violent crimes more reprehensible than nonviolent crimes; trickery and deceit more reprehensible than negligence; conduct causing physical harm more reprehensible than conduct causing purely economic harm; deliberate false statements more reprehensible than omissions of material facts; and repeated conduct more reprehensible than an isolated incident.[130]

Even within this spectrum, the Court noted that "infliction of economic injury, especially when done intentionally through affirmative acts of misconduct, or when the target is financially vulnerable, can warrant a substantial penalty."[131]

Modifying *St. Louis Railway*'s proportionality review which compared damages to the public harm, the Court's second factor focused on the relationship between "the actual harm inflicted on the plaintiff" and the amount of the punitive damages award.[132] The Court noted that higher ratios of punitive to compensatory damages could be justified where "the injury is hard to detect or the monetary value of noneconomic harm might have been difficult to determine."[133] Still, *BMW* did not foreclose *St. Louis Railway*'s consideration of public harm, noting that no mathematical formula – "even one that compares actual *and potential* damages to the punitive award"[134] – could denote the limits of due process.[135] Thus, the Court left open whether the due process excessiveness analysis should include harm to non-parties.[136]

Finally, the Court directed excessiveness be measured against "the civil or criminal penalties that could be imposed for comparable misconduct."[137]

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127. *Id.*

128. *Id.*

129. *Id.* at 576. For a comparison of the Court's punitive damages and excessive fines cases, see Sheila B. Scheuerman, *The Road Not Taken: Would Application of the Excessive Fines Clause to Punitive Damages Have Made a Difference?*, 17 WIDENER L.J. 949, 964-71 (2008).

130. Franze & Scheuerman, *supra* note 123, at 456 (footnotes omitted).

131. *BMW*, 517 U.S. at 576 (citation omitted).

132. *Id.* at 580-83.

133. *Id.* at 582.

134. *Id.* (emphasis added) (citing TXO Prod. Corp. v. Alliance Res. Corp., 509 U.S. 443, 458 (1993)).

135. *Id.*

136. *See id.*

137. *Id.* at 583.

The Court observed that a reviewing court should "'accord 'substantial deference' to legislative judgments concerning appropriate sanctions for the conduct at issue.'"[138]

In 2003, the Court further refined the *BMW* guideposts in *State Farm Mutual Automobile Insurance Co. v. Campbell.*[139] The Court repeated that the reprehensibility guidepost under *BMW* remains "'the most important indicium of the reasonableness of a punitive damages award'"[140] and reiterated the five reprehensibility factors from *BMW.*[141] Resolving the issue left open in *BMW*,[142] the Court explained that due process does not permit punishment based on harm to others:

> A defendant should be punished for the conduct that harmed the plaintiff, not for being an unsavory individual or business. Due process does not permit courts, in the calculation of punitive damages, to adjudicate the merits of other parties' hypothetical claims against a defendant under the guise of the reprehensibility analysis . . . .[143]

Addressing the second *BMW* guidepost, the *State Farm* Court emphasized that the inquiry should focus on the plaintiff's harm, not on harm to the public at large: "[T]he measure of punishment [must be] both reasonable and proportionate to the amount of harm to the plaintiff and to the general damages recovered."[144] Thus, the Court held that "few awards exceeding a single-digit ratio between punitive to compensatory damages, to a significant degree, will satisfy due process."[145]

In 2007, the Court again continued its refinement of constitutional excessiveness under the Due Process Clause.[146] In *Philip Morris USA v. Williams*,[147] the Court closed the door on including harm to non-parties in the proportionality analysis.[148] The Court explained that "the potential harm at

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138. *Id.* (quoting Browning-Ferris Indus. of Vt. v. Kelco Disposal, Inc., 492 U.S. 257, 301 (1989) (O'Connor, J., concurring in part and dissenting in part)).

139. 538 U.S. 408 (2003).

140. *Id.* at 419 (quoting *BMW*, 517 U.S. at 575).

141. *Id.*

142. *See* text accompanying *supra* notes 134-36.

143. *State Farm*, 538 U.S. at 423.

144. *Id.* at 426; *see also id.* at 425 ("The precise award in any case, of course, must be based upon the facts and circumstances of the defendant's conduct and the harm to the plaintiff.").

145. *Id.* at 425; *see also* Exxon Shipping Co. v. Baker, 128 S. Ct. 2605, 2626, 2633-34 (2008) (same).

146. Philip Morris USA v. Williams, 549 U.S. 346 (2007).

147. 549 U.S. 346.

148. *Id.* at 353-54. In *TXO*, the Court upheld a 526 to 1 ratio by considering "the possible harm to other victims that might have resulted if similar future behavior were not deterred." TXO Prod. Corp. v. Alliance Res. Corp., 509 U.S. 443, 460 (1993).

issue was harm potentially caused *the plaintiff*,"[149] not the public generally. Accordingly, the Court held that the Due Process Clause prohibits a state from imposing punitive damages based on injuries that the defendant "inflicts upon nonparties or those whom they directly represent, i.e., injury that it inflicts upon those who are, essentially, strangers to the litigation."[150]

The Court has, in fact, similarly fine-tuned the meaning of "excessiveness" as applied to criminal sentences and fines.[151] In *United States v. Bajakajian*,[152] for example, the Court created a three factor framework for evaluating the excessiveness of a criminal forfeiture, which evaluates the level of the defendant's culpability,[153] the harm caused by the defendant's conduct,[154] and other penalties imposed for the same conduct.[155] Indeed, the Court expressly has recognized that "the same general criteria" apply to determine the constitutional excessiveness of both punitive damages and criminal fines.[156]

Thus, the question of constitutional excessiveness has evolved over the past ninety years. The standard has developed from a "gross excessiveness" standard that considered public harm to a three-factor framework that focuses on the harm to the plaintiff. In sum, the Court's understanding of constitutional excessiveness has been consistent across different contexts, and has included the "same general criteria":[157] (1) the reprehensibility of the defendant's conduct,[158] (2) the relationship between the amount of the penalty and the harm to the plaintiff,[159] and (3) a comparison between the penalty and other civil or criminal sanctions.[160] The lower courts, however, largely have ignored these criteria in the realm of statutory damages.

IV. THE CURRENT DUE PROCESS FRAMEWORK FOR STATUTORY DAMAGES

Although the due process excessiveness standard has evolved, most courts refuse to apply the modern *BMW* guideposts to aggregate statutory damages. Instead, courts continue to rely on the old *St. Louis Railway*

149. *Philip Morris USA*, 549 U.S. at 354.

150. *Id.* at 353; *see also id.* at 357 ("[T]he Due Process Clause prohibits a State's inflicting punishment for harm caused strangers to the litigation.").

151. *See* Scheuerman, *supra* note 129, at 953-55, 958-59, 961-63.

152. 524 U.S. 321 (1998).

153. *Id.* at 338-39.

154. *Id.* at 339-40.

155. *Id.* at 339 n.14.

156. Cooper Indus., Inc. v. Leatherman Tool Group, Inc., 532 U.S. 424, 435 (2001).

157. *Id.*; *see also* Scheuerman, *supra* note 129, at 964-68.

158. *Compare* BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 575 (1996), *with* United States v. Bajakajian, 524 U.S. 321, 338-39 (1998).

159. *Compare BMW*, 517 U.S. at 580, *with Bajakajian*, 524 U.S. at 338-39.

160. *Compare BMW*, 517 U.S. at 583, *with Bajakajian*, 524 U.S. at 338-39.

standard. Moreover, courts generally defer decision on a defendant's due process challenge until after judgment, which leaves the defendant in the precarious position of having to explain a multi-million or billion dollar judgment to its shareholders.

A. Rejecting the Guideposts

Despite the changes to the Court's excessiveness analysis, most lower courts have denied due process challenges to aggregated statutory damages awards by relying on the *St. Louis Railway* "wholly disproportionate" standard.[161] These courts reject any attempt to measure the excessiveness of the statutory damages against the plaintiffs' harm.[162] Rather, these courts follow the old *St. Louis Railway* standard, and measure the excessiveness of the statutory damages against the "public harm"[163] – a principle rejected by the punitive damages framework.[164] At bottom, these decisions are premised on the assumption that legislatures are institutionally more competent to set a damages amount than juries.[165]

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161. *See, e.g.*, Centerline Equip. Corp. v. Banner Pers. Serv., Inc., 545 F. Supp. 2d 768, 777 (N.D. Ill. 2008); Accounting Outsourcing, LLC v. Verizon Wireless Pers. Commc'ns, L.P., 329 F. Supp. 2d 789, 809-10 (M.D. La. 2004) (relying on *St. Louis Railway* to reject due process challenge to class action under the TCPA).

162. *E.g.*, *Centerline Equip. Corp.*, 545 F. Supp. 2d at 777 ("There is no requirement that the statutory remedy be proportional to the plaintiff's own injury . . . .").

163. *E.g.*, *id.*; *Accounting Outsourcing, LLC*, 329 F. Supp. 2d at 809 & n.133. Courts similarly have used *St. Louis Railway* to reject due process challenges to statutory damages provisions in individual actions. *E.g.*, Zomba Enters., Inc. v. Panorama Records, Inc., 491 F.3d 574, 587-88 (6th Cir. 2007) (upholding statutory damages of $31,000 per infringement under *St. Louis Railway*); Native Am. Arts, Inc. v. Bundy-Howard, Inc., 168 F. Supp. 2d 905, 914-15 (N.D. Ill. 2001) (finding $1,000 per day per good statutory damages provision of the Indian Arts and Crafts Act did not violate due process); Kenro, Inc. v. Fax Daily, Inc., 962 F. Supp. 1162 (S.D. Ind. 1997) (finding that $500 minimum statutory damages under Telephone Consumer Protection Act did not violate due process); *see also* Holtzman v. Caplice, No. 07 C 7279, 2008 WL 2168762, at *6-7 (N.D. Ill. May 23, 2008) (rejecting pre-certification due process challenge to TCPA statutory damages); Italia Foods, Inc. v. Marinov Enters., Inc., No. 07 C 2494, 2007 WL 4117626, at *4 (N.D. Ill. Nov. 16, 2007) (same); Texas v. Am. Blastfax, Inc., 121 F. Supp. 2d 1085, 1090-91 (W.D. Tex. 2000) (rejecting due process challenge where State sued on behalf of Texas consumers). In *Texas v. American Blastfax, Inc.*, for example, the court considered whether the $500 minimum statutory damages under the Telephone Consumer Protection Act was constitutionally excessive. 121 F. Supp. 2d. at 1090. Applying *St. Louis Railway*, the court found that, "when measured against the overall harms of unsolicited fax advertising and the public interest in deterring such conduct," the $500 statutory minimum was not so "severe and oppressive" as to violate due process. *Id.* at 1091.

164. *See* text accompanying *supra* notes 132-45.

165. *See, e.g.*, Sadowski v. Med1 Online, LLC, No. 07 C 2973, 2008 WL 489360, at *5 (N.D. Ill. Feb. 20, 2008) (distinguishing *State Farm* and *BMW* because those

In *Phillips Randolph Enterprises LLC v. Rice Fields*,[166] for example, the Northern District of Illinois rejected a due process challenge to the statutory damages provisions of the Telephone Consumer Protection Act.[167] The court acknowledged that "the results reached in *State Farm* and *BMW* were in part based upon guidance from cases involving legislatively determined damage amounts."[168] Nevertheless, the court concluded that *State Farm* and *BMW* did not apply because "considerations pertinent to the validity of jury awards are not the same as those attendant to damage amounts set by statute."[169] The court presumed legislative deliberation, or at least conscious decision-making, regarding the statutory damages amount: "[T]he legislature must choose a benchmark that will be appropriate to many different situations, as well as taking into account considerations such as the public interest."[170] And, according to the court, assuming such deliberation takes place, "the legislature is justified in establishing an amount of damages that could be oppressive in other settings."[171] Thus, the court found the size of an aggregated award defensible because it would accomplish "the statute's goal of deterrence."[172]

Only a small minority of courts have recognized that the *BMW* and *State Farm* excessiveness standards apply to statutory damages awards.[173] For

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cases involved jury awards); Phillips Randolph Enters., LLC v. Rice Fields, No. 06 C 4968, 2007 WL 129052, at *2 (N.D. Ill. Jan. 11, 2007) (same); *see also* TXO Prod. Corp. v. Alliance Res. Corp., 509 U.S. 443, 456 (1993) (stating that "[t]he review of a jury's award for arbitrariness and the review of legislation surely are significantly different"); Lowry's Reports, Inc. v. Legg Mason, Inc., 302 F. Supp. 2d 455, 460 (D. Md. 2004) ("The unregulated and arbitrary use of judicial power that the *Gore* guideposts remedy is not implicated in Congress' carefully crafted and reasonably constrained statute.").

166. No. 06 C 4968, 2007 WL 129052, at *2-3 (N.D. Ill. Jan 11, 2007).

167. 47 U.S.C. § 227 (2000 & Supp. 2005) (allowing suit for actual damages or $500 per violation, whichever is greater).

168. *Phillips Randolph Enters., LLC*, 2007 WL 129052, at *2.

169. *Id.*

170. *Id.*

171. *Id.*

172. *Id.* at *3. Related to this approach is the argument that because the legislature has pre-determined the amount of damages, defendants have received "fair notice" of the severity of the penalty that could be imposed, thereby precluding any due process problem. *E.g.*, Accounting Outsourcing LLC v. Verizon Wireless Pers. Commc'ns, 329 F. Supp. 2d 789, 808-09 (M.D. La. 2004). Notice, however, does not render an award reasonable *per se*; indeed, a constitutionally excessive award remains constitutionally excessive even if the defendant had notice as to the potential amount. *E.g.*, Colby, *supra* note 3, at 403-04.

173. *E.g.*, Grimes v. Rave Motion Pictures, Birmingham, LLC, 552 F. Supp. 2d 1302, 1308 (N.D. Ala. 2008) (noting that "*State Farm*'s holding is no more than a recognition and elaboration of the easily understood principle enunciated in *St. Louis Iron Mountain & Southern Railway Co. v. Williams*"); *In re* Napster, Inc. Copyright Litig., Nos. C MDL-00-1369 MHP, C 04-1671 MHP, 2005 WL 1287611, at *11

example, in *In re Napster, Inc. Copyright Litigation*,[174] the court explicitly stated that it would apply the *BMW* guideposts to a statutory damages award.[175] The court acknowledged that "large awards of statutory damages can raise due process concerns."[176] Applying these principles, however, the court incorrectly found that aggregated damages in a class action do not present any unique proportionality issues.[177]

(N.D. Cal. June 1, 2005) ("The factors that the court would consider in making such a determination are similar to the 'guideposts' that the Supreme Court has identified in the context of reviewing the reasonableness of a jury award of punitive damages."). In *Grimes*, the Northern District of Alabama held that FACTA, as applied, violated the Due Process Clause. 552 F. Supp. 2d at 1305. The decision, however, did not focus on the constitutional excessiveness of the statutory damages provisions. Rather, the court found the statutory damages unconstitutional under the void-for-vagueness doctrine. *Id.* at 1305-06. *But see* Turner v. Creative Hospitality Ventures, Inc., 588 F. Supp. 2d 1347 (S.D. Fla. 2008) (rejecting *Grimes* and upholding constitutionality of FACTA's statutory damages provision); Lopez v. Gymboree Corp., No. C 07-0087 SI, 2007 WL 1690886, at *3 (N.D. Cal. June 9, 2007) (rejecting void-for-vagueness challenge to FACTA); Iosello v. Leiblys, Inc., 502 F. Supp. 2d 782, 785-86 (N.D. Ill. 2007) (same); Korman v. Walking Co., 503 F. Supp. 2d 755, 760 (E.D. Pa. 2007) (collecting cases). The *Grimes* court took a unique approach to the vagueness question, and focused on the range of statutory damages from $100 to $1,000. 552 F. Supp. 2d at 1306. The court determined that the $900 range left the ultimate amount of damages to "the whim of the jury." *Id.*; *see also id.* (under statutory range, "jury is allowed to wander indiscriminately between $100 and $1,000 for each willful FACTA violation"). Separately, the *Grimes* court also concluded that FACTA's punitive damages provision violated the Due Process Clause because it allowed punitive damages without proof of any harm. *Id.* at 1308. The court determined that FACTA's statutory damages did not represent any harm because they were alternative to actual damages. *Id.*

174. Nos. C MDL-00-1369 MHP, C 04-1671 MHP, 2005 WL 1287611 (N.D. Cal. June 1, 2005). *In re Napster* was part of the copyright infringement litigation against Napster, Inc. *Id.* at *1. The court certified a class of approximately 27,000 music publishers who had appointed The Harry Fox Agency as their non-exclusive agent for licensing their copyrighted works and collecting royalties. *Id.* at *1, 12. The Copyright Act allows the plaintiff to elect recovery of actual damages, or statutory damages of "not less than $750 or more than $30,000" per work. 17 U.S.C. § 504(a)-(c) (2006).

175. *In re Napster, Inc.*, 2005 WL 1287611, at *11.

176. *Id.* at *10.

177. *Id.* at *11. Focusing solely on the "addition effect," *see supra* text accompanying notes 23-27, the court understood the class action to simply duplicate what would otherwise be "a myriad of individual suits" totaling the same total amount of damages. *In re Napster, Inc.*, 2005 WL 1287611, at *11; *accord* Murray v. Cingular Wireless II, LLC, 242 F.R.D. 415, 421 (N.D. Ill. 2005) (finding that amount of damages "are the same regardless of whether the court certifies a class or not"). The court's analysis, however, ignores the distortion caused by class action treatment of statutory damages. *See supra* Part II.C. Moreover, the court's analysis was internally inconsistent. On the one hand, the court concluded that individual suits would seek

A handful of courts have used the *BMW/State Farm* excessiveness standard without any express discussion.[178] In *In re Trans Union Corp. Privacy Litigation*,[179] for example, the plaintiffs alleged that a consumer reporting agency violated the Fair Credit Reporting Act (FCRA) by selling marketing lists[180] and sought to represent a class of 190 million persons.[181] Thus, under FCRA's statutory damages provision, the minimum damages award was $19 billion.[182] The defendant argued that certifying the proposed 190 million person class to proceed would violate its due process rights.[183] Implicitly using the *BMW/State Farm* framework, the court examined the proportionality between the potential statutory damages award and "any actual damage[s]."[184] The court further noted that the statutory damages award had "little relation to the harm actually suffered by the class."[185] Accordingly, the court concluded that "approval of a class action could result in statutory minimum damages of over $19 billion, which is grossly disproportionate to any actual damage."[186]

Similarly, the U.S. Court of Appeals for the Second Circuit implicitly utilized the *BMW/State Farm* standards in *Parker v. Time Warner Entertainment Co.*[187] *Parker* involved a class of 12 million cable television subscribers seeking $1,000 each under the statutory penalty provisions of the Cable Communications Policy Act.[188] On a defense motion to deny certification,[189]

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the same amount of damages as class adjudication. *In re Napster, Inc.*, 2005 WL 1287611, at *11. On the other hand, the court found it "unlikely that a significant proportion of the absent class members would have the ability and desire to pursue individual . . . actions." *Id.* at *8.

178. *E.g.*, Parker v. Times Warner Entm't Co., 331 F.3d 13, 22 (2d Cir. 2003); *In re* Trans Union Corp. Privacy Litig., 211 F.R.D. 328, 351 (N.D. Ill. 2002); *see also* DirecTV, Inc. v. Gonzalez, No. Civ.A.SA-03-1170 SR, 2004 WL 1875046, at *4 (W.D. Tex. Aug. 23, 2004) (noting that "it may be that a statutory damages provision that grossly exceeds any actual damages would violate due process" in an individual action); *accord* DirecTV, Inc. v. Spillman, No. Civ.A.SA-04-82-XR, 2004 WL 1875045, at *4 (W.D. Tex. Aug. 23, 2004) (same); DirecTV, Inc. v. Tuma, No. Civ.A.SA-03-CV-1079, 2004 WL 1875047, at * 2 (W.D. Tex. Aug. 23, 2004) (same). *But see* Zomba Enters., Inc. v. Panorama Records, Inc., 491 F.3d 574, 588 (6th Cir. 2007) (refusing to apply *State Farm* to statutory damages "until the Supreme Court" does so).

179. 211 F.R.D. 328 (N.D. Ill. 2002).

180. *Id.* at 334.

181. *Id.* at 332, 350.

182. *Id.* at 350-51.

183. *Id.* at 346.

184. *Id.* at 350-51.

185. *Id.* at 351.

186. *Id.* at 350-51.

187. 331 F.3d 13 (2d Cir. 2003).

188. *Id.* at 15-16; *see also id.* at 23 (Newman, J., concurring). In *Parker*, the plaintiffs alleged that Time Warner violated the Cable Communications Policy Act by failing to inform subscribers about sales of subscriber information to third parties. *Id.*

the district court denied a damages class under Rule 23(b)(3)[190] based on the "disproportionality of a damages award that has little relation to the harm actually suffered by subscribers, and on the due process concerns attendant upon such an impact."[191] Although reversing to allow discovery on the "composition of the class,"[192] the Second Circuit acknowledged that "the potential for a devastatingly large damages award, out of all reasonable proportion to the actual harm suffered by members of the plaintiff class, may raise due process issues."[193]

B. Due Process Deferred

Regardless of whether the *St. Louis Railway* standard or the *BMW/State Farm* standard is applied, most courts defer decision on the due process question until after class certification.[194] Here, courts conveniently find punitive damages jurisprudence relevant. The Second Circuit, for example, cited *BMW* and *State Farm* to support its conclusion that any due process concerns

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at 15. The Cable Communications Policy Act allows "actual damages but not less than liquidated damages computed at the rate of $100 a day for each day of violation or $1,000, whichever is higher." 47 U.S.C. § 551(f)(2)(A) (2000).

189. Plaintiffs had not yet moved for class certification, and no discovery had been conducted on class certification. Parker v. Time Warner Entm't Co., 198 F.R.D. 374, 376 (E.D.N.Y. 2001).

190. The court also denied the plaintiffs' request to certify a damages class under Rule 23(b)(2). *Id.* at 381. The court found that the statutory damages claim was not "incidental" to plaintiffs' request for injunctive relief, and therefore the court limited Rule 23(b)(2) certification to plaintiffs' claims for equitable relief. *Id.* at 380-81.

191. *Id.* at 384.

192. *Parker*, 331 F.3d at 22. The Court of Appeals determined that the lower court's ruling was premature. *Id.* In an unusual procedural move, the defendant filed a motion to deny class certification before the plaintiffs moved for class certification. *Parker*, 198 F.R.D. at 376. No discovery was conducted regarding the class certification issues. *Id.* On appeal, the Second Circuit determined that "at least limited discovery concerning the composition of the class" should have been allowed. *Parker*, 331 F.3d at 22. Despite the district court's "legitimate concern" regarding the potentially devastating damages, the Court of Appeals found the court's conclusions "speculative" absent evidence regarding the size of the class. *Id.*

193. *Parker*, 331 F.3d at 22. Although citing both *State Farm* and *BMW* in his concurrence, Judge Jon Newman used the 1919 *St. Louis Railway* standard for evaluating the constitutionality of a statutory penalty. *Id.* at 26 (Newman, J., concurring) (citing St. Louis, Iron Mountain & S. Ry. Co. v. Williams, 251 U.S. 63, 66-67 (1919)). While noting that this standard was "somewhat analogous" to the Supreme Court's punitive damages framework, Judge Newman failed to apply the test, and left unanswered whether the $12 billion award violated due process. *Id.* at 26.

194. *E.g.*, Centerline Equip. Corp. v. Banner Pers. Serv., Inc., 545 F. Supp. 2d 768, 778 (N.D. Ill. 2008) (noting that even if statutory damages violate defendant's due process rights, "the appropriate remedy would be a reduction of the aggregate damages award, not a dismissal of [the plaintiffs'] claim[s]").

would not prevent class certification, but rather would apply post-judgment to "reduce the aggregate damage award."[195] Accordingly, many courts grant class certification despite the unconstitutionality of the statutory damages award.

Courts have refused to apply the *BMW* guideposts at the class certification stage for two main reasons.[196] First, these courts contend that, as with punitive damages, any due process violation posed by aggregated statutory damages should be addressed post-judgment through remittitur.[197] Second, these courts rely on a separation of powers argument, reasoning that rejection of class treatment should be decided by Congress.[198] Most of these courts seem troubled by the incongruity of the due process argument: the greater the number of alleged violations, the bigger the due process problem in certifying a statutory damages class action.[199]

The leading case supporting class treatment of statutory damages is *Murray v. GMAC Mortgage Corp.*,[200] a Seventh Circuit opinion by Judge Easterbrook. In *Murray*, a "professional plaintiff"[201] received a credit

195. *Parker*, 331 F.3d at 22.

196. In addition, many courts treat statutory damages suits as "negative value" claims, justifying class treatment. *E.g.*, Cicilline v. Jewell Food Stores, Inc., 542 F. Supp. 2d 831, 839 (N.D. Ill. 2008); Matthews v. United Retail, Inc., 248 F.R.D. 210, 215-16 (N.D. Ill. 2008). *But see* discussion *supra* Part II.

197. *See* Pirian v. In-N-Out Burgers, No SACV061251DOCMLGX, 2007 WL 1040864, at *5 (C.D. Cal. Apr. 5, 2007) (finding that due process concerns regarding size of damages award are "best addressed" after judgment); *In re* Napster, Inc. Copyright Litig., Nos. C MDL-00-1369 MHP, C 04-1671 MHP, 2005 WL 1287611, at *11 (N.D. Cal. June 1, 2005) (finding it "speculative" to address due process concerns posted by aggregated statutory damages award at class certification stage).

198. *E.g.*, Murray v. GMAC Mortgage Corp., 434 F.3d 948, 953-54 (7th Cir. 2006); *Cicilline*, 542 F. Supp. 2d at 847.

199. *See, e.g.*, White v. E-Loan, No. C 05-02080 SI, 2006 WL 2411420, at *8 n.8 (N.D. Cal. Aug. 18, 2006).

200. 434 F.3d 948.

201. The district court found that "Murray, her spouse, and their children [were] professional plaintiffs," participating in over fifty FCRA suits. *Id.* at 954. As another judge in the Northern District described the Murrays: "the named plaintiffs appear to greet the arrival of what most people would consider junk mail (*i.e.*, unsolicited offers of credit) with joy and eagerly show their mail to lawyers at Edelman & Combs pursuant to a pre-existing agreement in the hope of finding an offer that presents a colorable FCRA claim." Murray v. Cingular Wireless II, LLC, 242 F.R.D. 415, 418 (N.D. Ill. 2005). Although Judge Easterbrook agreed that "the Murrays are in this big time," 434 F.3d at 954, he found that Ms. Murray's litigiousness "implies experience, if not expertise." *Id.* Ms. Murray's counsel, Edelman, Combs, Latturner & Goodwin, LLC, is likewise a regular participant in FCRA litigation. Just a few of Edelman's FCRA class actions include *Halperin v. Interpark Inc.*, No. 07 C 2161, 2007 WL 4219419 (N.D. Ill. Nov. 29, 2007), and *Troy v. Red Lantern Inn, Inc.*, No. 07 C 2418, 2007 WL 4293014 (N.D. Ill. Dec. 4, 2007). Indeed, the plaintiff in *Troy* was similarly characterized as a "professional plaintiff," 2007 WL 4293014, at *2, but following *Murray*,

solicitation from GMAC Mortgage, which she alleged violated FCRA's firm offer[202] and "clear and conspicuous" notice provisions.[203] The plaintiff filed a class action suit against GMAC on behalf of 1.2 million recipients of similar offers.[204] The district court declined to certify a class action, but on interlocutory appeal, the Seventh Circuit reversed.[205]

The district court had determined that "GMAC would face a potential liability in the billions of dollars for purely technical violations of the FCRA that did not cause any actual damages."[206] The Seventh Circuit, however, rejected this argument. The court noted that Congress had set the high statutory damages amount without any cap for class actions: "The reason that damages can be substantial, however, does not lie in an 'abuse' of Rule 23; it lies in the legislative decision to authorize awards as high as $1,000 per person . . . ."[207] The Seventh Circuit concluded that so long as "a statute remains on the books, . . . it must be enforced rather than subverted."[208] The court acknowledged that it was proper for the judiciary to reduce a constitutionally excessive award, but determined that such judicial review should occur after class certification – presumably after judgment has been entered.[209] Despite the very purpose of statutory damages as an incentive for individual litigation,[210] the court concluded that individual suits were not a real alternative.[211]

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the district court found this litigiousness made Mr. Troy "a better class representative." *Id. But see* Price v. Lucky Strike Entm't, Inc., No. CV 07-960-ODW (MANx), 2007 WL 4812281, at *5 (C.D. Cal. Aug. 31, 2007) (citing class counsels' repeated FACTA litigation and that class representative, Joel Price, was involved in six FACTA cases in the Central District of California as evidence of the "potential for attorney abuse").

202. *See* 15 U.S.C. § 1681b(c)(1)(B)(i) (2006) (detailing firm offer requirements).

203. *Murray*, 434 F.3d at 950-51; *see also* 15 U.S.C. § 1681m(d)(1) (2006) (requiring provision of "clear and conspicuous" statement to consumers when creditor uses credit report to make an unsolicited credit offer). After Murray filed suit, Congress abolished the private right of action for violations of the clear disclosure requirement. 434 F.3d at 951; *see* 15 U.S.C. § 1681m(h)(8) (2006) (abolishing private right of action).

204. *Murray*, 434 F.3d at 951.

205. *Id.* at 956.

206. Murray v. GMAC Mortgage Corp., No. 05 C 1229, 2005 WL 3019412, at *3 (N.D. Ill. Nov. 8, 2005).

207. *Murray*, 434 F.3d at 953.

208. *Id.* at 954.

209. *Id.* ("An award that would be unconstitutionally excessive may be reduced, but constitutional limits are best applied after a class has been certified." (citation omitted)).

210. *See* discussion *supra* Part II.B.

211. *Murray*, 434 F.3d at 953. The court characterized FCRA claims as negative value suits where "potential recovery is too slight to support individual suits, but injury is substantial in the aggregate." *Id.*

Similarly, in *Parker v. Time Warner Entertainment Co.*,[212] the Second Circuit concluded that any due process violation caused by aggregated statutory damages would not prevent class certification.[213] Rather, the Second Circuit determined that any due process violation could be remedied by reducing the aggregate award after judgment.[214] In a separate concurring opinion, Judge Newman reasoned that denying certification on due process grounds "remits each victim to a separate lawsuit, needlessly clogging the courts with repetitious suits if many are filed, or rewarding some law violators with liability for only a slight amount of total damages if, as seems more likely, few suits are filed."[215]

With other circuits largely silent on the issue,[216] federal district courts understandably have relied, albeit erroneously, on *Murray* and *Parker*.[217] In *White v. E-Loan, Inc.*,[218] for example, a California district court rejected the defendant's due process argument[219] and certified a 100,000 member class seeking statutory damages between $10 million and $100 million under FCRA.[220] Although the court acknowledged the potential due process

212. 331 F.3d 13 (2d Cir. 2003).

213. *Id.* at 22.

214. *Id.*

215. *Id.* at 26 (Newman, J., concurring).

216. Although the issue was presented to the Ninth Circuit, the appeal was rendered moot by the parties' settlement. Soualian v. Int'l Coffee & Tea, LLC, No. 07-56377 (9th Cir. Sept. 16, 2008) (noting settlement of appeal); *see also* Soualian v. Int'l Coffee & Tea, LLC, No. CV 07-00502 RGK (JCx) (C.D. Cal. July 14, 2007) (docketing settlement and approval by court). A few courts denying class certification, however, have relied on a 1974 decision by the Ninth Circuit. *E.g.*, Saunders v. Louise's Trattoria, No. CV 07-1060 SJO (PJWx), 2007 WL 4812287, at *2 (C.D. Cal. Oct. 23, 2007); *see also* Kline v. Coldwell, Banker & Co., 508 F.2d 226 (9th Cir. 1974). In *Kline*, the Ninth Circuit rejected class treatment for a treble damages action under the Sherman Act and Clayton Act. 508 F.2d at 235.

217. *E.g.*, Cicilline v. Jewel Food Stores, Inc., 542 F. Supp. 2d 831, 839 (N.D. Ill. 2008); White v. E-Loan, Inc., No. C 05-02080 SI, 2006 WL 2411420, at *8 (N.D. Cal. Aug. 18, 2006); Murray v. New Cingular Wireless Servs., Inc., 232 F.R.D. 295, 304 (N.D. Ill. 2005).

218. No. C 05-02080 SI, 2006 WL 2411420 (N.D. Cal. Aug. 18, 2006).

219. *Id.* at *8-9.

220. *Id.* at *1, *7. By following *Murray* and granting class certification under FACTA, Judge James V. Selna created an intra-district split. *Compare* Medrano v. WCG Holdings, Inc., No. SACV 07-0506 JVS (RNBx), 2007 WL 4592113 (C.D. Cal. Oct. 15, 2007) (granting certification of FACTA class action); Reynoso v. S. County Concepts, No. SACV 07-373-JVS (RCx), 2007 WL 4592119 (C.D. Cal. Oct. 15, 2007) (same); Kesler v. Ikea U.S. Inc., No. SACV 07-568 JVS (RNBx), 2008 WL 413268 (C.D. Cal. Feb. 4, 2008), *superseded by statute*, Credit and Debit Card Receipt Clarification Act of 2007, Pub. L. No. 110-241, 122 Stat. 1565 (2008), *as recognized in* Bateman v. Am. Multi-Cinema, Inc., 252 F.R.D. 647 (C.D. Cal. 2008) (same), *with* Blanco v. CEC Entm't Concepts L.P., No. CV 07-0559 GPS (JWJx), 2008 WL 239658, at *2 (C.D. Cal. Jan. 10, 2008) (denying certification of FACTA

violation caused by the size of the statutory damages award,[221] the court determined that the due process issue was best addressed post-judgment.[222] Like the Seventh Circuit, the court found that any due process violation caused by the aggregated statutory damages amount was Congress's problem: "[T]o the extent any problem exists, it results from Congress's policy decisions and is therefore Congress's issue to address."[223]

V. A PRINCIPLED APPROACH TO AGGREGATE STATUTORY DAMAGES

A more principled approach to aggregate statutory damages would apply the *BMW/State Farm* guideposts and consider the issue during the class certification phase. As a threshold matter, it makes no sense to apply *Lochner*-era excessiveness standards when the due process framework for evaluating the excessiveness of punitive damages is well-defined, and in fact derived from the statutory damages cases. One of the core reasons courts apply the old standard – judicial deference to legislatively prescribed amounts – does not withstand scrutiny. Even assuming that Congress is better equipped than a jury to determine a damages range,[224] such institutional competence does not insulate legislation from constitutional scrutiny. Although legislatively-

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class action); Price v. Lucky Strike Entm't, Inc., No. CV 07-960-ODW (MANx), 2007 WL 4812281, at *4 (C.D. Cal. Aug. 31, 2007) (same); Spikings v. Cost Plus, Inc., No. CV 06-8125-JFW (AJWx), 2007 U.S. Dist. LEXIS 44214, at *9-16 (C.D. Cal. May 29, 2007) (same).

221. *White*, 2006 WL 2411420, at *8 (noting that "in this case the Due Process Clause might require that [the damages] be reduced"). Notably, the court failed to recognize that FCRA's statutory damages are a litigation-inducing mechanism. *Id.* at *9 (finding that the "statutory damages available under the FCRA are 'too slight to support individual suits.'" (quoting Murray v. GMAC Mortgage Corp., 434 F.3d 948, 953 (7th Cir. 2006))). The court concluded that "without class actions, there is unlikely to be any meaningful enforcement of the FCRA by consumers whose rights have been violated." *Id.*

222. *Id.* at *8.

223. *Id.*

224. The capacity of the civil jury to assess the amount of a punitive damages award has long been debated. *Compare, e.g.*, Theodore Eisenberg et al., *Juries, Judges, and Punitive Damages: An Empirical Study*, 87 CORNELL L. REV. 743 (2002) (concluding juries assess punitive damages at about the same amount as judges); Theodore Eisenberg et al., *The Predictability of Punitive Damages*, 26 J. LEGAL STUD. 623 (1997), *with, e.g.*, W. Kip Viscusi, *The Challenge of Punitive Damages Mathematics*, 30 J. LEGAL STUD. 313 (2001) (arguing juries are either unable or unwilling to follow detailed jury instructions on setting the amount of punitive damages award); A. Mitchell Polinsky, *Are Punitive Damages Really Insignificant, Predictable, and Rational? A Comment on Eisenberg et al.*, 26 J. LEGAL STUD. 663 (1997) (criticizing research by Theodore Eisenberg et al.); Cass R. Sunstein et al., *Assessing Punitive Damages (with Notes on Cognition and Valuation in Law)*, 107 YALE L.J. 2071 (1998) (arguing juries have difficulty setting amount of punitive damages award).

enacted guidelines are given deference, such deference is not absolute. The Constitution imposes substantive limits on the broad discretion Congress enjoys in defining a penalty.[225] Specifically, the Due Process Clause prohibits the imposition of "grossly excessive" penalties.[226] Where a penalty is challenged as constitutionally excessive, courts "engage[] in an independent examination of the relevant criteria."[227] Thus, courts have enforced the constitutional limits on grossly excessive penalties against statutes imposing the death penalty,[228] statutes imposing forfeiture,[229] and against punitive damages awarded by juries.[230] Following these analogous cases, due process requires thorough independent review of statutory damages awards.

A. The Current Excessiveness Standards Apply to Statutory Damages

"Constitutional excessiveness" has one definition.[231] The standard has evolved from a "gross excessiveness" standard that considered public harm to a three-factor framework that focuses on harm to the plaintiff. Across varying contexts from punitive damages to criminal punishment,[232] the Court has applied the "same general criteria"[233] when analyzing the question of constitutional excessiveness: (1) the reprehensibility of the defendant's conduct,[234] (2) the relationship between the amount of the penalty and the harm to the

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225. *E.g.*, Cooper Indus., Inc. v. Leatherman Tool Group, Inc., 532 U.S. 424, 432 (2001) ("Legislatures have extremely broad discretion in . . . setting the range of permissible punishment for [criminal] offense[s]." (citation omitted)); BMW of N. Am., Inc v. Gore, 517 U.S. 559, 568 (1996) ("States necessarily have considerable flexibility in determining the level of punitive damages that they will allow in different classes of cases and in any particular case."); St. Louis, Iron Mountain & S. Ry. Co. v. Williams, 251 U.S. 63, 66 (1919) (noting that states possess "a wide latitude of discretion" in prescribing statutory penalties); Waters-Pierce Oil Co. v. Texas, 212 U.S. 86, 111 (1909) ("The fixing of punishment for crime or penalties for unlawful acts against its laws is within the police power of the state.").

226. *E.g.*, Philip Morris USA v. Williams, 549 U.S. 346, 353 (2007); State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 416 (2003); *Waters-Pierce*, 212 U.S. at 111.

227. *Cooper Indus.*, 532 U.S. at 435.

228. Kennedy v. Louisiana, 128 S. Ct. 2641, 2646 (2008) (holding state statute that imposed death penalty for rape of a child was unconstitutionally excessive under Eighth Amendment).

229. United States v. Bajakajian, 524 U.S. 321, 324 (1998) (holding that fine imposed under federal criminal statute was unconstitutionally excessive under the Eighth Amendment).

230. *E.g.*, *State Farm*, 538 U.S. at 429; *BMW*, 517 U.S. at 574.

231. Scheuerman, *supra* note 129, at 964.

232. *See id.*

233. Cooper Indus., Inc. v. Leatherman Tool Group, Inc., 532 U.S. 424, 435 (2001).

234. *Compare Bajakajian*, 524 U.S. at 338-39, *with BMW*, 517 U.S. at 575.

plaintiff,[235] and (3) a comparison between the penalty and other civil or criminal sanctions.[236] No principled reason supports application of a separate, outdated standard to statutory damages. Accordingly, courts should apply these same factors when considering the constitutionality of a statutory damages award.

1. Reprehensibility of the Defendant's Conduct

As the Supreme Court has observed, the reprehensibility or blameworthiness of the defendant's conduct is "[p]erhaps the most important indicium" of the reasonableness of an award.[237] With respect to determining "reprehensibility" when assessing a statutory damages award, courts should consider whether "the conduct involved repeated actions or was an isolated incident,"[238] whether "the harm was the result of intentional malice, trickery, or deceit, or mere accident,"[239] whether "the harm caused was physical as opposed to economic,"[240] whether the defendant's conduct "evinced an indifference to or a reckless disregard of the health or safety of others,"[241] and whether "the target of the conduct had financial vulnerability."[242] The Supreme Court has cautioned that "the absence of all of [these factors] renders any award suspect."[243]

Consider application of these factors to the FACTA class action, *Kesler v. Ikea U.S. Inc.*[244] The defendant's unlawful conduct was giving the plaintiff a receipt for a credit card purchase that included the expiration date of the card.[245] The conduct did not involve any malice, trickery, or deceit, nor did the defendant's conduct involve physical harm. Arguably, the plaintiff "had financial vulnerability," but no more so than all credit card users in this age of identity theft. Likewise, although the defendant's conduct involved "repeated actions,"[246] this fact resulted from the nature of modern retail business. Moreover, in terms of reprehensibility, the defendant quickly took steps to

235. *Compare Bajakajian*, 524 U.S. at 339, *with BMW*, 517 U.S. at 575.
236. *Compare Bajakajian*, 524 U.S. at 338-39, *with BMW*, 517 U.S. at 583-84.
237. *BMW*, 517 U.S. at 583.
238. State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 419 (2003).
239. *Id.*
240. *Id.*
241. *Id.*
242. *Id.*
243. *Id.*
244. *See* text accompanying *supra* notes 43-55.
245. Kesler v. Ikea U.S Inc., No. SACV 07-568 JVS (RNBx), 2008 WL 413268, at *1 (C.D. Cal. Feb. 4, 2008), *superseded by statute*, Credit and Debit Card Receipt Clarification Act of 2007, Pub. L. No. 110-241, 122 Stat. 1565 (2008), *as recognized in* Bateman v. Am. Multi-Cinema, Inc., 252 F.R.D. 647 (C.D. Cal. 2008).
246. *Id.* at *2 (noting that 2.4 million receipts containing credit card expiration dates were printed during the relevant period).

comply with FACTA.[247] Overall, from the facts discussed in the decision, IKEA's conduct hardly appeared particularly blameworthy.

2. Relationship Between the Penalty and Plaintiff's Harm

"The second and perhaps most commonly cited indicium of an unreasonable or excessive . . . award is its ratio to the actual harm inflicted on the plaintiff."[248] In the punitive damages context, the Supreme Court has narrowed the second guidepost's focus to the harm caused to the plaintiff. While "[e]vidence of actual harm to nonparties can help to show that the conduct that harmed the plaintiff also posed a substantial risk of harm to the general public, and so was particularly reprehensible,"[249] a punitive damages award cannot be used "to punish a defendant directly on account of harms it is alleged to have visited on nonparties."[250]

Because statutory damages are also considered "punishment,"[251] the same limitation on harm to non-parties should apply in the statutory damages context. A court should consider the impact of the defendant's conduct on the public generally as part of its reprehensibility analysis, but not as part of its reasonable relationship inquiry. Accordingly, the court must determine whether the statutory damages amount bears a reasonable relationship to the harm suffered by the plaintiff. To be sure, a plaintiff often can elect statutory damages in lieu of actual damages. But for purposes of the due process inquiry, the actual damages (or lack thereof) suffered by the plaintiff should not be ignored. In the FACTA cases, for example, the harm could be described as an increased risk of potential identity theft[252] or as the violation of a statutory right to redaction of information on a credit card receipt.[253] Often, the harm may be negligible or even non-existent.[254]

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247. Within less than a month after plaintiff's purchase, IKEA had adjusted its credit card processing to redact the card's expiration date. *See id.* at *1-2.

248. BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 580 (1996).

249. Philip Morris USA v. Williams, 549 U.S. 346, 355 (2007).

250. *Id.*

251. *E.g.*, St. Louis, Iron Mountain & S. Ry. Co. v. Williams, 251 U.S. 63, 66 (1919).

252. *E.g.*, Cicilline v. Jewel Food Stores, Inc., 542 F. Supp. 2d 831, 841 (N.D. Ill. 2008); *see also* Murray v. GMAC Mortgage Corp., 434 F.3d 948, 953 (7th Cir. 2006) (noting that in FCRA cases "individual losses . . . are likely to be small – a modest concern about privacy, a slight chance that information would leak out and lead to identity theft"). Notably, absent the statutory rights created by FACTA, the risk of identity theft would not present a cognizable injury sufficient to confer Article III standing. *See, e.g.*, Bell v. Acxiom Corp., No. 4:06CV00485-WRW, 2006 WL 2850042, at *2 (E.D. Ark. Oct. 3, 2006).

253. *E.g.*, Ramirez v. Midwest Airlines, Inc., 537 F. Supp. 2d 1161, 1166-67 (D. Kan. 2008); *see also* Anderson v. Capital One Bank, 224 F.R.D. 444, 452 (W.D. Wis. 2004) (noting "the only harm to plaintiffs and the proposed class is the omission of

It could be argued that the reasonable relationship inquiry does not apply to statutory damages awards because any actual harm may be hard to measure.[255] The Supreme Court, however, did not eliminate the second guidepost in such cases.[256] Rather, the Court noted that a higher punitive damages award may be justified where "a particularly egregious act has resulted in only a small amount of economic damages,"[257] where "the injury is hard to detect,"[258] or where "the monetary value of noneconomic harm might have been difficult to determine."[259]

In short, courts must ensure that the statutory damages award "is both reasonable and proportionate to the amount of harm to the plaintiff."[260] In the *Kesler* example, the plaintiff did not allege that she actually was a victim of identity theft. Without any quantifiable information on actual harm, the plaintiffs' harm was at most an increased risk of identity theft or the violation of a statutory right to redaction of information on a credit card receipt. A statutory damages award of $240 million to $2.4 billion does not bear a reasonable relationship to such insignificant harm.

3. Comparable Sanctions

Finally, courts should consider comparable civil and criminal sanctions.[261] Obviously, the starting point for this factor would be the statutory penalty itself. And, to be sure, a reviewing court should "'accord 'substantial deference' to legislative judgments concerning appropriate sanctions for the

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the names of the consumer reporting agencies from the denial letter" as required by FCRA).

254. *E.g.*, Grimes v. Rave Motion Pictures Birmingham, LLC, 552 F. Supp. 2d 1302, 1308 (N.D. Ala. 2008) (finding no harm caused by FACTA violation). Indeed, in one FACTA case, the court found no actual harm, noting that the "[p]laintiff was so unconcerned about identity theft that she attached the debit card and credit card receipts from Defendant's stores to her declaration without redacting the expiration date." Evans v. U-Haul Co. of Cal., No. CV 07-2097-JFW (JCx), 2007 U.S. Dist. LEXIS 82026, at *17 (C.D. Cal. Aug. 14, 2007).

255. *See, e.g.*, Lowry's Reports, Inc. v. Legg Mason, Inc., 302 F. Supp. 2d 455, 460 (D. Md. 2004). In *Lowry's*, the court rather expansively found that the three *BMW* guideposts did not apply "because of the difficulties in assessing compensatory damages." *Id.* The difficulty in assessing harm, however, is irrelevant in applying the reprehensibility and comparable sanctions factors.

256. BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 582 (1996).

257. *Id.*

258. *Id.*

259. *Id.*

260. State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 426 (2003).

261. *E.g.*, United States v. Bajakajian, 524 U.S. 321, 338-39 (1998); *BMW*, 517 U.S. at 583-84.

conduct at issue.'"[262] But deference to the legislature's judgment is only justified where the legislature has actually engaged in deliberative decision-making. In the case of aggregated statutory damages, the inquiry is two-fold: (1) did the legislature deliberately choose the amount of statutory damages; and (2) did the legislature contemplate aggregated statutory damages through the class action device? Where the legislature has not considered the amount of the statutory penalty or the potential for aggregation, the court should not give deference to the statutory amounts.[263]

To be sure, in *Califano v. Yamasaki*[264] the Supreme Court did state that "[i]n the absence of a direct expression by Congress . . . class relief is appropriate in civil actions brought in federal court."[265] In *Califano*, however, the sole issue was whether the phrase "any individual" in the Social Security Act precluded class treatment.[266] As one court has recognized, "*Califano* did not eliminate . . . the rights established by the United States Constitution."[267] Here, by contrast, the inquiry into Congress's intent regarding class treatment simply determines the amount of deference that a court should give to the legislatively-set damages amount when evaluating a due process challenge.

A comparison of FACTA's remedial scheme with the Truth in Lending Act scheme illustrates the application of this guidepost.

a. Consideration of Aggregated Statutory Damages Under FACTA

FACTA is part of the Fair Credit Reporting Act ("FCRA"), and accordingly, it incorporates FCRA's statutory damages provision.[268] A review of the legislative history of these two statutes demonstrates that when adding the statutory damages provision to FCRA, and later incorporating those provisions into FACTA, Congress never considered the potential problem of aggregating individual claims through the class action.

Congress passed FCRA in 1970 as Title VI of the Consumer Credit Protection Act.[269] FCRA was enacted "to insure that consumer reporting

262. *BMW*, 517 U.S. at 583 (quoting Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc., 492 U.S. 257, 301 (1989) (O'Connor, J., concurring in part and dissenting in part)).

263. *See* Evanson, *supra* note 18, at 631 (arguing that statutory damages amounts are "unhelpful" where the legislature has not considered aggregation).

264. 442 U.S. 682 (1979).

265. *Id.* at 700.

266. *Id.*

267. Saunders v. Louise's Trattoria, No. CV 07-1060 SJO (PJWx), 2007 WL 4812287, at *3 (C.D. Cal. Oct. 23, 2007).

268. 15 U.S.C. §§ 1681-1681x (2006).

269. The legislative history of FCRA is a bit convoluted. On November 6, 1969, the Senate passed its version of FCRA, S. 823, by a vote of 69 to 1. *See* 115 CONG. REC. 33,413 (1969); 116 CONG. REC. 32,639 (1970) (statement of Sen. Proxmire) (noting vote count); 116 CONG. REC. 35,940 (1970) (statement of Sen. Proxmire). For the text of S. 823 as passed by the Senate in 1969, see 115 CONG. REC. 33,404-06

agencies exercise their grave responsibilities with fairness, impartiality, and a respect for the consumer's right to privacy."[270] The main purpose of FCRA was to "prevent consumers from being unjustly damaged because of inaccurate or arbitrary information[271] in a credit report."[272] As Representative Chalmers Wylie (R-OH) noted, "mistakes do occasionally occur in various types of credit reports, which mistakes are harmful to consumers in their efforts to obtain credit, insurance or employment."[273] Prior to FCRA, however, consumers did not have a right to obtain a copy of their own credit reports,[274]

(1969). The passed bill was referred to the House Subcommittee on Consumer Affairs, which held six days of hearings on a house version of FCRA, H.R. 16340, but no action was taken on this bill. *See* 116 CONG. REC. 36,574 (1970) (statement of Rep. Wylie); 116 CONG. REC. 35,940 (1970) (statement of Sen. Proxmire). In the final days of the session, the Senate added its version of FCRA (S. 823) as a rider to bank secrecy legislation passed by the House. *See* H.R. REP. NO. 91-1587 (1970) (Conf. Rep.), *as reprinted in* 1970 U.S.C.C.A.N. 4411, 4411. Thus, FCRA (or S. 823) became Title VI of H.R. 15073. *See id., as reprinted in* 1970 U.S.C.C.A.N. 4411, 4414.

270. 15 U.S.C. § 1681(a)(4) (2006).

271. Notably, credit reports at this time contained extensive personal information such as hearsay statements about a consumer's use of profanity and late-night parties, high school class rank and I.Q. *Fair Credit Reporting: Hearing on S. 823 Before the Subcomm. on Financial Institutions of the S. Comm. on Banking & Currency*, 91st Cong. 85 (1969) [hereinafter *Hearings on S. 823*] (statement of Alan F. Westin, Professor of Public Law and Government, Columbia University); *id.* at 166 (sample credit report listing consumer's I.Q. and high school class rank).

272. S. REP. NO. 91-517, at 1 (1969); *see generally* 116 CONG. REC. 35,941 (1970) (summarizing purposes of FCRA). Senator Proxmire, who introduced FCRA, remarked that the Act allowed the "consumer access to his credit file so that he is not unjustly damaged by an erroneous credit report." 115 CONG. REC. 33,408 (1969) (statement of Sen. Proxmire); *accord* 115 CONG. REC. 33,412 (1969) (statement of Sen. Williams) ("[FCRA] will prevent consumers from being unjustly damaged by inaccurate credit reports.").

273. 116 CONG. REC. 36,574 (1970) (statement of Rep. Wylie).

274. *See* 116 CONG. REC. 36,570 (1970) (statement of Rep. Sullivan) (noting that FCRA "provides consumers, . . . for the first time, with statutory rights to find out what material of a personal or financial nature has been circulated about them by credit reporting bureaus"). In 1969, twenty-seven states introduced legislation regulating credit reporting bureaus. S. REP. NO. 91-517, at 3 (1969); *see also, e.g.*, 1969 N.Y. Sess. Laws 4598-B, *reprinted in Hearings on S. 823*, *supra* note 266, at 40-46. Only two states, however, actually enacted consumer credit reporting statutes. *E.g.*, 1969 N.M. Laws 1302-05; 1969 Mass. Acts 248-49; *see also Hearings on S. 823*, *supra* note 266, at 63 (testimony of Lewis Stone, Assistant Counsel to New York Governor Rockefeller) (explaining that the New York bill passed the state assembly by a vote of 138 to 4, but died in committee in the state Senate). Under the New Mexico statute, a credit bureau was only liable to the consumer if it was notified of an error in a consumer's credit report and issued a subsequent report containing the error. 1969 N.M. Laws 1303. Massachusetts, on the other hand, placed enforcement under its unfair trade practices statute. 1969 Mass. Acts 249.

nor were creditors or employers required to inform consumers that an adverse credit report was a factor in a negative credit or employment decision.[275] Congress was particularly concerned with the harm erroneous information in a credit report caused consumers – often without their knowledge.[276]

To that end, FCRA created a private cause of action to enforce compliance, but only for actual damages.[277] In cases of both willful non-compliance as well as negligent[278] non-compliance, a consumer could collect actual damages plus attorney's fees.[279] In addition, if the consumer could show a willful violation, the plaintiff could collect punitive damages.[280]

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275. *See generally* 116 CONG. REC. 35,941 (1970) (statement of Sen. Proxmire).

276. *See* S. REP. NO. 91-157, at 3-4 (1969) (describing "inability" of consumer to know when he is damaged by erroneous information in his credit report); *accord* 116 CONG. REC. 36,574 (1970) (statement of Rep. Wylie) (noting "many people who are so harmed are unaware of the fact that misinformation in a credit report has harmed them"). As Representative Sullivan described FCRA's focus: "The loss of a credit card can, of course, be expensive, but, as Shakespeare said, the loss of one's good name is beyond price and makes one poor indeed. [FCRA] deals with that problem." 116 CONG. REC. 36,570 (1970) (statement of Rep. Sullivan).

277. Fair Credit Reporting Act, Pub. L. No. 91-508, § 616, 84 Stat. 1114, 1134 (1970); *see also* S. REP. NO. 91-517, at 7 (1969) (summarizing civil cause of action provision). The limitation to actual damages mirrored the New York bill discussed at the Senate hearings on S. 823. *See Hearings on S. 823*, *supra* note 271, at 45 (providing text of New York bill, which allowed civil liability for damages or injunctive relief). Again, the emphasis was on actual harm to the consumer. At the Senate hearings, Lewis B. Stone, Assistant Counsel to New York Governor Nelson A. Rockefeller, testified that the New York bill authorized "a civil action for damages or to enjoin violation." *Hearings on S. 823*, *supra* note 271, at 59 (statement of Lewis B. Stone).

278. As originally introduced, FCRA would have imposed liability only for willful violations. Fair Credit Reporting Act, S. 823, 91st Cong. § 166 (1969), *reprinted in Hearings on S. 823*, *supra* note 271, at 8. The version passed by the Senate, on the other hand, would have required a consumer to show either willfulness or gross negligence. Fair Credit Reporting Act, S. 823, 91st Cong. §§ 616-17 (1970), *reprinted in* 116 CONG. REC. 32,641 (1970). During conference, however, the standard was lowered to ordinary negligence "in order to provide a greater incentive for reporting agencies and users of information to comply" with the act. 116 CONG. REC. 35,940 (1970) (statement of Sen. Proxmire); *see also* H.R. REP. NO. 91-1587 (1970) (Conf. Rep.), *as reprinted in* 1970 U.S.C.C.A.N. 4411, 4416. As Wendell G. Lindsay, Jr. of the Louisiana Consumers Credit League testified, this provision was not "anything new," but simply embodied "the concept of fault." *Hearings on S. 823*, *supra* note 271, at 102 (statement of Wendell G. Lindsay, Jr.); *accord id.* at 111.

279. Fair Credit Reporting Act, Pub. L. No. 91-508, §§ 616-17, 84 Stat. 1114, 1134 (1970).

280. Fair Credit Reporting Act, Pub. L. No. 91-508, § 616, 84 Stat. 1114, 1134 (1970). As originally passed by the Senate, the bill imposed a $100 minimum and a $1,000 cap on punitive damages. Fair Credit Reporting Act, S. 823, 91st Cong. § 616 (1969), *reprinted in* 116 CONG. REC. 32,641 (1970); *see also* S. REP. NO. 91-517, at 7 (1969) (noting punitive damages cap of $1,000). During conference, however, this

Because most private damages suits would be for sums under $10,000.00,[281] FCRA provided an express federal jurisdictional grant without regard to the amount in controversy.[282]

Apart from the private cause of action, Section 621 of the FCRA gave enforcement authority to the Federal Trade Commission.[283] Indeed, under FCRA, "virtually all of the credit reporting agencies covered by the law would be under the regulatory authority of the Federal Trade Commission."[284] Professor Arthur Miller testified in support of FCRA that "[o]ne of the most desirable aspects of the bill is that it leaves the matter largely to administrative regulation."[285]

In 1996, Congress amended FCRA to allow statutory damages for willful violations.[286] The 1996 amendments created the current remedy provisions, which impose statutory damages of "not less than $100 and not more than $1,000."[287]

The introduction of the statutory damages concept can be traced to one person: Senator Richard Bryan. Congress began holding hearings on FCRA reform in 1989,[288] and in 1990, several bills were introduced to reform FCRA.[289] None of these bills, however, included a statutory damages provision.[290] The bills died in committee, and were re-introduced the following Congress.[291] Again, no bill mentioned statutory damages. In October 1991,

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cap was removed. H.R. REP. NO. 91-1587 (1970) (Conf. Rep.), *as reprinted in* 1970 U.S.C.C.A.N. 4411, 4416.

281. *Hearings on S. 823*, *supra* note 271, at 377 (statement of Professor Arthur R. Miller, then-professor at University of Michigan Law School) (noting that "[i]n most cases damages suits under the bill will involve under $10,000").

282. Fair Credit Reporting Act, Pub. L. No. 91-508, § 618, 84 Stat. 1114, 1134 (1970).

283. Fair Credit Reporting Act, Pub. L. No. 91-508, § 621, 84 Stat. 1114, 1134 (1970); *see also* S. REP. NO. 91-517, at 7-8 (1969) (discussing administrative enforcement by FTC).

284. *Hearings on S. 823*, *supra* note 271, at 29 (statement of Paul Rand Dixon, Chairman, FTC).

285. *Id.* at 362 (statement of Professor Arthur R. Miller).

286. Omnibus Consolidated Appropriations Act of 1997, Pub. L. No. 104-208, § 2412, 110 Stat. 3009, 3009-446 (1996) (codified as amended at 15 U.S.C. § 1681n(a) (2006)).

287. 15 U.S.C. § 1681n(a)(1)(A).

288. *Fair Credit Reporting Act: Hearing Before the Subcomm. on Consumer Affairs and Coinage of the H. Banking, Finance & Urban Affairs Comm.*, 101st Cong. (1989).

289. Credit Reporting Reform Act of 1989, H.R. 3740, 101st Cong. (1989); Consumer Credit Protection Amendments of 1990, H.R. 4213, 101st Cong. (1990); Fair Credit Reporting Amendments of 1990, H.R. 4122, 101st Cong. (1990); Consumer Credit Protection Amendments of 1990, S. 2764, 101st Cong. (1990).

290. *See* bills cited *supra* note 289.

291. Consumer Credit Protection Amendments of 1991, H.R. 194, 102d Cong. (1991); Credit Reporting Reform Act of 1991, H.R. 670, 102d Cong. (1991);

Senator Bryan introduced a FCRA reform bill in the 102nd Congress.[292] This bill proposed two civil liability changes. First, the bill would have imposed "furnisher liability," making FCRA's civil liability provisions applicable to persons who furnished incorrect information to a credit bureau.[293] Second, the bill would have imposed liability on persons who obtained a consumer report "by false pretenses."[294] This bill, however, died in the Committee on Banking. In May 1992, Senator Bryan re-introduced his FCRA reform bill,[295] but this time it contained statutory damages for willful noncompliance.[296]

Although this bill initially was defeated, Senator Bryan's bill ultimately became the basis of the 1996 FCRA amendments.[297] As introduced[298] and

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Consumer Credit Reporting Reform Act of 1991, H.R. 3596, 102d Cong. (1991); Fair Credit Reporting Amendments of 1990, H.R. 421, 102d Cong. (1991); Consumer Credit Protection Amendments of 1991, S. 1809, 102d Cong. (1991).

292. S. 1853, 102d Cong. (1991).

293. *Id.* § 7.

294. *Id.* § 8.

295. For an interesting colloquy addressing whether the Constitution requires contemporaneous passage by both Houses, see Seth Barrett Tillman, *Noncontemporaneous Lawmaking: Can the 110th Senate Enact a Bill Passed by the 109th House?*, 16 CORNELL J.L. & PUB. POL'Y 331 (2007) (opening); Aaron-Andrew P. Bruhl, *Against Mix-and-Match Lawmaking*, 16 CORNELL J.L. & PUB. POL'Y 349 (2007) (response); Seth Barrett Tillman, *Defending the (Not So) Indefensible*, 16 CORNELL J.L. & PUB. POL'Y 363 (2007) (reply).

296. Consumer Reporting Act of 1992, S. 2776, 102d Cong. § 110 (1992).

297. Like the original passage of FCRA, these amendments had a "long, interminable journey" through Congress. 140 CONG. REC. H9810 (daily ed. Sept. 17, 1994) (statement of Rep. Gonzalez). Although S. 1583 passed the Senate, the bill was defeated on the House floor due to concerns about whether state laws should be preempted by FCRA. *The Consumer Reporting Reform Act of 1993: Hearing on S. 783 Before the S. Comm. on Banking, Housing and Urban Affairs*, 103d Cong. 6 (1993) [hereinafter *Hearing on S. 783*] (statement of Sen. Bond); *accord The Consumer Reporting Reform Act of 1993: Hearing on H.R. 1015 Before the Subcomm. on Consumer Credit and Insurance of the H. Comm. On Banking, Finance and Urban Affairs*, 103d Cong. 65-66, 73 (1993) [hereinafter *Hearing on H.R. 1015*] (statement of Rep. McCandless). Senator Bryan re-introduced the bill (with no substantive changes to the proposed FCRA civil liability sections) in the following Congress. Consumer Reporting Reform Act of 1993, S. 783, 103d Cong. (1993); *see also* H.R. 1015, 103d Cong. (1993) (proposing amendments to FCRA but no changes to civil liability sections); H.R. 619, 103d Cong. (1993) (same). Both the House and Senate held hearings on the amendments. *Hearing on S. 783*, *supra*; *Hearing on H.R. 1015*, *supra*. The bills passed both the Senate and the House, but then died at the end of the session. In the 104th Congress, Senators Bond and Bryan again introduced FCRA reform legislation. S. 709, 104th Cong. (1995). This bill was incorporated as Title IV of the Economic Growth and Regulatory Paperwork Reduction Act of 1995. S. REP. NO. 104-185, at 18 (1995). No hearings were held on S. 709 in the 104th Congress, *see id.* at 65, and the amendments finally passed as part of a 1997 appropriations bill. Omnibus Consolidated Appropriations Act of 1997, Pub. L. No. 104-208, § 2412, 110 Stat. 3009, 3009-446 to -447.

passed in the Senate,[299] the bill would have set the minimum statutory award at $300. The FCRA amendments passed by the House, however, would have imposed statutory damages only for the false pretenses liability originally contemplated by Senator Bryan's 1991 bill.[300] When the two bills were reconciled, however, the Senate version prevailed, though the minimum award was lowered to $100.[301]

Thus, the legislative history shines no light on why Congress chose these amounts.[302] No committee report accompanied the final bill.[303] And the limited discussion of the civil liability provisions focused on the possibility of frivolous suits[304] and the imposition of furnisher liability,[305] not on the amount or remedy of statutory damages. Indeed, in sharp contrast to the statutory damages provision, the Senate Report reveals that Congress was

298. Consumer Reporting Reform Act of 1993, S. 783, 103d Cong. § 110 (1993) (as introduced in the Senate), *reprinted in* 140 CONG. REC. S4970 (daily ed. May 2, 1994).

299. Consumer Reporting Reform Act of 1994, S. 783, 103d Cong. § 110 (1994) (as passed by Senate, May 4, 1994), *reprinted in* 140 CONG. REC. 9187 (1994).

300. H.R. 1015, 103d Cong. § 111 (1993). The reason for these damages was "[t]o enhance the privacy of consumer records covered by FCRA." *Hearing on H.R. 1015*, *supra* note 297, at 105.

301. Consumer Reporting Reform Act of 1994, S. 783, 103d Cong. § 112 (1994), *reprinted in* 140 CONG. REC. 25,859 (1994). The Consumer Reporting Reform Act of 1994 was re-introduced in the 104th Congress as the Consumer Reporting Reform Act of 1995 (S. 709), and finally passed by Congress as part of an appropriations bill. *See supra* note 297.

302. Indeed, little discussion of the statutory damages provision itself – never mind the amount – occurred. Apart from one paragraph by Consumers Union praising the statutory damages provision, it is not mentioned in any of the legislative history. *Cf. Hearing on S. 783*, *supra* note 297, at 66 (prepared statement of Michelle Meier, Counsel for Government Affairs at Consumer Union).

303. *See* 140 CONG. REC. 25,870-71 (1994) (statement of Rep. Kennedy noting absence of conference report).

304. S. REP. NO. 104-185, at 49 (1995) (noting Committee's awareness of "concerns" regarding "unwarranted litigation"); *see also Hearing on S. 783*, *supra* note 297, at 38-39 (colloquy on potential frivolous suits between Michelle Meier, Counsel, Consumers Union, and Sen. Bond). Congress addressed the potential for frivolous litigation by adding Section 616(c), which allows a prevailing party to recover attorneys' fees where an action is filed in bad faith or for purposes of harassment. S. REP. NO. 104-185, at 49 (1995); *see also* 15 U.S.C. § 1681n(c) (2006).

305. *See* 140 CONG. REC. 8996 (1994) (summarizing Managers' Amendment to S. 783 to preclude private cause of action against furnishers); *id.* at 8997 (statement of Sen. D'Amato) (expressing concern "about the civil liability that S. 783 would impose on industries that provide credit history information to credit bureaus"); *Hearing on S. 783*, *supra* note 297, at 4-5 (statement of Sen. Bryan) (noting furnisher liability concern); *see also* Consumer Reporting Reform Act of 1994, S. 783, 103d Cong. § 622 (1994) (incorporating limitations on furnisher liability in final version of S. 783 passed by Senate), *reprinted in* 140 CONG. REC. 9187 (1994).

concerned with "consumers who have been wronged,"[306] suggesting injured consumers.

Nor is it even clear why Congress adopted a statutory damages provision in the first place. A 1993 Senate Report mentions that civil liability provisions were added in order to help consumers "protect their privacy and ensure the accuracy of information in their files."[307] No further discussion of the issue appears in the legislative history.

Notably, the 1996 amendments also expanded the FTC's enforcement authority under FCRA by allowing the FTC to impose civil penalties for "knowing violation[s], which constitute[] a pattern or practice."[308] During hearings in 1993, David Medine, Associate Director for Credit Practices at the FTC, asked Congress to enhance the FTC's enforcement powers under FCRA.[309] Discussing the civil penalty provision, Mr. Medine testified regarding the FTC's policy on the amount of civil penalties for FCRA violations: "They ought to be set at a level that has some impact on . . . business so it's an incentive for them and others to comply with the law. But they're never going to be set at a level that's going to put anyone out of business . . . ."[310]

Remarkably, during earlier consideration of FCRA amendments, Representative Bachus had noted the problems caused by statutory damages under the Fair Debt Collections Practices Act:

> One of the unintended results [of the FDCPA] was a rise in technical lawsuits filed against collection agencies. Few of these lawsuits are for substantive violations of the Fair Debt Collections Practices Act . . . . What has happened because of the $1,000 statutory damages provision in the law, collectors settle out of court because the cost of fighting the suit, even if they win, would exceed an out-of-court settlement.[311]

Despite this warning, no discussion of the new FCRA remedy or the potential for statutory damages class actions[312] occurred.

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306. S. REP. NO. 104-185, at 49 (1995).

307. S. REP. NO. 103-209, at 6 (1993).

308. 15 U.S.C. § 1681s(a)(2) (2006).

309. *Hearing on S. 783*, *supra* note 297, at 9 (statement of David Medine). The FTC also supported private rights of action "when a person impermissibly accesses a consumer's report." *Id.* at 47. No mention was made, however, of the appropriate remedy in a private cause of action.

310. *Hearing on S. 783*, *supra* note 297, at 14-15 (statement of David Medine).

311. 140 CONG. REC. 25,868 (1994) (statement of Rep. Bachus).

312. The same bill as the FCRA amendments also included the Credit Repair Organizations Act. Consumer Reporting Reform Act of 1994, S. 783, 103d Cong. tit. II (1994), *reprinted in* 140 CONG. REC. 8938-40 (1994). While no thought seems to have been given to class actions under FCRA, Congress expressly addressed the

In 2003, Congress added FACTA to FCRA, thereby incorporating FCRA's statutory damages remedy.[313] The main impetus for FACTA was a concern with identity theft.[314] With respect to receipt truncation, Congress's goal was to "restrict the amount of information available to identity thieves."[315] But, again, no discussion of the statutory damages remedy or the potential for class treatment occurred.

Based on the legislative history, FCRA's $100 to $1,000 statutory damages provision is no less arbitrary than a jury award of punitive damages. In these circumstances, no deference is due to the statutory amount.

b. Consideration of Aggregated Statutory Damages Under TILA

By contrast, Congress expressly considered aggregated statutory damages under the Truth in Lending Act (TILA).[316] As originally enacted in 1968, the TILA permitted private civil actions against creditors who failed to comply with the statute's disclosure requirements[317] and allowed a successful plaintiff to collect a minimum recovery of $100 to $1,000.[318]

When aggregated through a class action, however, the statutory minimum resulted in "potentially devastating" awards.[319] Judge Marvin Frankel authored the leading opinion addressing aggregated statutory damages under

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possibility of class actions under CROA. *Id.* § 409 (as introduced in Senate), *reprinted in* 140 CONG. REC. 8939 (1994); Consumer Reporting Reform Act of 1994, S. 783, 103d Cong. tit. II § 409 (1994) (as passed by Senate, May 4, 1994), *reprinted in* 140 CONG. REC. 9190 (1994). CROA, however, only allows actual damages. *Id.*

313. Fair and Accurate Credit Transaction Act of 2003, Pub. L. No. 108-59, 117 Stat. 1952.

314. 149 CONG. REC. 26,891 (2003) (statement of Sen. Shelby). As Senator Shelby explained, "[i]dentity theft involves a person using someone else's personal information without their knowledge to commit fraud or theft." *Id.*

315. *Id.* (statement of Sen. Shelby).

316. 15 U.S.C. §§ 1601-1667f (2006).

317. Truth in Lending Act, Pub. L. No. 90-321, § 130, 82 Stat. 146, 157 (1968) (codified as amended at 15 U.S.C. § 1640(a) (2006)).

318. *Id.* TILA's civil liability provision originally provided:

> Except as otherwise provided in this section, any creditor who fails in connection with any consumer credit transaction to disclose to any person any information required under this chapter to be disclosed to that person is liable to that person in an amount equal to the sum of
> (1) twice the amount of the finance charge in connection with the transaction, except that the liability under this paragraph shall not be less than $100 nor greater than $1,000; and
> (2) in the case of any successful action to enforce the foregoing liability, the costs of the action together with a reasonable attorney's fee as determined by the court.

Id.

319. Watkins v. Simmons & Clark, Inc., 618 F.2d 398, 399 (6th Cir. 1980).

the TILA.[320] In *Ratner v. Chemical Bank New York Trust Co.*, the defendant bank failed to show the nominal annual percentage rate on credit card statements that reported an outstanding principal balance but no accrued interest charge.[321] The court found that this omission violated the TILA, and subsequently considered whether to certify the suit as a class action.[322] The proposed class of credit card holders included 130,000 individuals, which at the minimum statutory damages rate would result in a minimum damages award of $13,000,000.[323] The court concluded that the plaintiff had suffered, at most, less than $2 in actual damages.[324] The court further noted that the bank had corrected its statement practices, and was now in compliance with the TILA.[325]

Based on these circumstances, the court denied class certification.[326] The court determined that "the incentive of class-action benefits is unnecessary in view of the Act's provisions for a $100 minimum recovery and payment of costs and a reasonable fee for counsel."[327] The court noted that the aggregated statutory damages award "would be a horrendous, possibly annihilating punishment, unrelated to any damage to the purported class or to any benefit to defendant, for what is at most a technical and debatable violation of the Truth in Lending Act."[328] Thus, the court concluded that allowing a class action would be "inconsistent with the specific remedy supplied by Congress."[329]

Adopting the rationale of *Ratner*, a majority of federal courts similarly concluded that the TILA's statutory penalties were "a substitute, in vindicating the rights of the small litigant, for the class action device,"[330] and therefore denied class certification of TILA claims.[331]

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320. *See* Ratner v. Chem. Bank N.Y. Trust Co, 54 F.R.D. 412 (S.D.N.Y. 1972).
321. *Id.* at 413.
322. *Id.*
323. *Id.* at 414.
324. *Id.* at 413 n.2.
325. *Id.* at 414.
326. *Id.* at 414.
327. *Id.* at 416.
328. *Id.*
329. *Id.*
330. Mathews v. Book-of-the-Month Club, Inc., 62 F.R.D. 479, 479 (N.D. Cal. 1974).
331. *E.g.*, Alsup v. Montgomery Ward & Co., 57 F.R.D. 89, 93 (N.D. Cal. 1972) ("[S]ince Congress had encouraged the consumer to enforce the Act through individual effort, the incentive of class action benefits is hardly necessary."); Shields v. Valley Nat'l Bank of Ariz., 56 F.R.D. 448 (D. Ariz. 1972); Kriger v. European Health Spa, Inc., 56 F.R.D. 104, 106 (E.D. Wis. 1972); Shields v. First Nat'l Bank of Ariz., 56 F.R.D. 442, 446 (D. Ariz. 1972) ("The Truth in Lending Act, however, is drafted to that the incentive offered by a class action is not necessary to enforce the provisions of the Act."); Wilcox v. Commerce Bank, 55 F.R.D. 134, 138 (D. Kan. 1972), *aff'd*, 474 F.2d 336 (10th Cir. 1973); Rogers v. Coburn Fin. Corp. of DeKalb, 54

In response to these decisions, Congress amended the TILA's civil liability provisions in 1974.[332] As explained in the Report of the Senate Banking Committee, Congress expressly considered the issue of aggregated statutory damages:

> A problem has arisen in applying minimum liability provisions in class action suits involving millions of consumers. If each member of the class is entitled to a minimum award of $100, a creditor's liability can be enormous. For example, if a large national department store chain with 10 million customers fails to include a required item of information on its monthly billing statement, it can be subject to a minimum liability of $1 billion in a class action suit. . . .
>
> The purpose of the civil penalties section under Truth in Lending was to provide creditors with a meaningful incentive to comply with the law without relying upon an extensive new bureaucracy. However, the Committee feels this objective can be achieved without subjecting creditors to enormous penalties for violations which do not involve actual damages and may be of a technical nature. Putting a reasonable limit on a creditor's maximum class action liability would seem to be in the best interests of both creditors and consumers.[333]

Congress thus limited TILA's original statutory damages provision to individual actions, and added a separate provision limiting aggregated statutory damages.[334] In choosing to cap aggregated statutory damages, Congress sought to "protect small business firms from catastrophic judgments,"[335]

F.R.D. 417, 419 (N.D. Ga. 1972); Buford v. Am. Fin. Co., 333 F. Supp. 1243, 1251 (N.D. Ga. 1971); Gerlach v. Allstate Ins. Co., 338 F. Supp. 642 (S.D. Fla. 1972); Goldman v. First Nat'l Bank of Chi., 56 F.R.D. 587 (N.D. Ill. 1972). *But see, e.g.*, Joseph v. Norman's Health Club, Inc., 336 F. Supp. 307 (E.D. Mo. 1971) (granting class certification under the TILA).

332. Act of Oct. 28, 1974, Pub. L. No. 93-495, § 408(a), 88 Stat. 1500, 1518.

333. S. REP. NO. 93-278, at 14-15 (1973), *quoted in* Watkins v. Simmons & Clark, 618 F.2d 398, 400 n.6 (6th Cir. 1980). As Senator Bennett remarked during congressional debates, "if this [statutory] minimum were to be applied in class action suits where the class involves a large number of individuals, the amount for which the creditor could be liable would be astronomical." 119 CONG. REC. 25, 416 (1973).

334. Act of Oct. 28, 1974, Pub. L. No. 93-495, § 408(a), 88 Stat. 1500, 1518. As originally enacted, the cap was $100,000 or 1% of the net worth of the creditor. *Id.* Congress raised the maximum dollar amount to $500,000 in 1976. Consumer Leasing Act of 1976, Pub. L. No. 94-240, § 4(3), 90 Stat. 257, 260 (codified as amended at 15 U.S.C. § 1640(a) (2006)).

335. H.R. REP. NO. 93-1429, at 37 (1974) (Conf. Rep.), *as reprinted in* 1974 U.S.C.C.A.N. 6148, 6153.

while at the same time employ the deterrent effect of both the statutory damages provision and the class action device.[336] In increasing the cap on aggregated statutory damages in 1976, Congress again sought to achieve this balance while noting its desire "to limit . . . exposure of creditors to vast judgments whose size would depend on the number of members who happened to fall within the class."[337]

Thus, when applying the third factor to an aggregated statutory damages award under the TILA, deference should be given to the legislative range set by Congress. Congress expressly considered the possibility of aggregated damages and set a damages level specifically for class actions.

B. Due Process Must Be Addressed at Class Certification

Once the due process violation created by an aggregated statutory damages award is acknowledged, class certification should be denied.[338] Although several courts have refused to certify statutory damages class actions based on the potentially "annihilating damages,"[339] few courts expressly have anchored their denials on the inevitable due process violation posed by any verdict.[340] The Federal Rules of Civil Procedure provide a mechanism to

336. S. REP. NO. 93-278, at 14-15 (1973), *quoted in Watkins*, 618 F.2d at 400 n.6.

337. S. REP. NO. 94-590, at 8 (1976), *as reprinted in* 1976 U.S.C.C.A.N. 431, 438.

338. *See* Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 613 (1997) (noting that "rules of procedure 'shall not abridge, enlarge or modify any substantive right'" (quoting Rules Enabling Act, 28 U.S.C. § 2072(b))); *see also* Encarnacion *ex rel.* George v. Barnhart, 191 F. Supp. 2d 463, 469 (S.D.N.Y. 2002) (denying class certification where certification would be "likely to implicate the due process rights of absent class members").

339. *Cf.* Ashby v. Farmers Ins. Co. of Or., No. CV 01-1446-BR, 2004 WL 2359968, at *8 (D. Or. Oct. 18, 2004) (granting class certification under FCRA where defendant did not argue that the statutory damages would "deal a fatal financial blow to its business").

340. *See, e.g.*, Blanco v. CEC Entm't Concepts L.P., No. CV 07-0559 GPS (JWJx), 2008 WL 239658, at *2 (C.D. Cal. Jan. 10, 2008) (finding that "the potential damages at issue are grossly disproportionate to the alleged injury" and citing *State Farm*); Price v. Lucky Strike Entm't, Inc., No. CV 07-960-ODW (MANx), 2007 WL 4812281, at *4 (C.D. Cal. Aug. 31, 2007) (noting "class recovery may violate defendants' due process rights"); Azoiani v. Love's Travel Stops & Country Stores, Inc., No. EDCV 07-90 ODW (OPx), 2007 WL 4811627, at *4 (C.D. Cal. Dec. 18, 2007) (same); Vasquez-Torres v. McGrath's Publick Fish House, Inc., No. CV 07-1332 AHM (CWx), 2007 WL 4812289, at *7 (C.D. Cal. Oct. 12, 2007) (noting that "potential damages are wildly disproportionate to the harm and would ruin [the defendant]"); Evans v. U-Haul Co. of Cal., No. CV 07-2097-JFW (JCx), 2007 U.S. Dist. LEXIS 82026, at *14 (C.D. Cal. Aug. 14, 2007) (noting "the minimum statutory damages would be enormous and completely out of proportion given the lack of any actual harm"); Torossian v. Vitamin Shoppe Indus., No. CV 07-0523 ODW (SSx), 2007 U.S. Dist. LEXIS 81961, at *10 (C.D. Cal. Aug. 7, 2007) (same); Hillis v. Equifax Consumer Servs. Inc., 237 F.R.D. 491, 507 (N.D. Ga. 2006) (denying class action

acknowledge and address the facial due process problem posed by statutory damages class actions: Rule 23(b)(3)'s superiority requirement.[341] Simply put, how can a class action, which if certified would necessarily result in mandatory statutory damages in excess of those permitted by the Constitution, be "superior" to individual suits that will not pose such a problem?

To be sure, this approach requires courts to assume that the plaintiff will prevail at trial, and admittedly, courts traditionally address excessive awards after judgment. But these cases do not fit neatly within the usual framework because, unlike punitive damages cases, the verdict amount involves simple math. In a punitive damages case, for example, the court must await the jury's verdict to know the amount of the award. By contrast, the amount of an aggregated statutory damages award is a mere mathematical exercise, calculated by multiplying the number of class members by the statutory damages amount. Nothing relevant to the due process inquiry is gained by delaying consideration of the defendant's due process rights until after judgment.[342] In

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under Credit Repair Organizations Act where $200 million statutory damages award was "far out of proportion to the conduct alleged in this case"); Anderson v. Capital One Bank, 224 F.R.D. 444, 452-53 (W.D. Wis. 2004) (noting "element of unfairness in subjecting a defendant to a suit by a class of 19,840 persons theoretically eligible for awards of $100 to $1,000"); *see also In re* Trans Union Corp. Privacy Litig., 211 F.R.D. 328, 346-51 (N.D Ill. 2002) (finding FCRA class action was not superior but never expressly ruling on defendant's due process argument).

341. *See, e.g.*, *Blanco*, 2008 WL 239658, at *2 (denying FACTA class action on superiority grounds); Serna v. Costco Wholesale Corp., No. CV 07-1491 AHM (JWJx), 2008 WL 234197, at *1 (S.D. Cal. Jan. 3, 2008) (same); *Price*, 2007 WL 4812281, at *1 (same); *Azoiani*, 2007 WL 4811627, at *4-6 (same); Vartanian v. Estyle, Inc., No. CV 07-0307 DSF (RCx), 2007 WL 4812286, at *2 (C.D. Cal. Nov. 26, 2007) (same); Saunders v. Louise's Trattoria, No. CV 07-1060 SJO (PJWx), 2007 WL 4812287, at *3 (C.D. Cal. Oct. 23, 2007) (same); *Vasquez-Torres*, 2007 WL 4812289, at *7-8 (same); *Torossian*, 2007 U.S. Dist. LEXIS 81961, at *14-16 (same); Papazian v. Burberry Ltd., No. CV 07-1479 GPS (RZx), 2007 WL 4812280, at *1 (C.D. Cal. Aug. 3, 2007) (same); Lopez v. KB Toys Retail, Inc., No. CV 07-144-JFW (CWx), 2007 U.S. Dist. LEXIS 82025, at *17-18 (C.D. Cal. July 17, 2007) (same); Najarian v. Charlotte Russe, Inc., No. CV 07-501-RGK (CTx), 2007 U.S. Dist. LEXIS 59879, at *6-7 (C.D. Cal. June 12, 2007) (same); Soualian v. Int'l Coffee & Tea LLC, No. CV 07-502-RGK (JCx), 2007 WL 4877902, at *3 (C.D. Cal. June 11, 2007) (same); Spikings v. Cost Plus, Inc., No. CV 06-8125-JFW (AJWx), 2007 U.S. Dist. LEXIS 44214, at *9-16 (same) (C.D. Cal. May 29, 2007); Legge v. Nextel Commc'ns, Inc., No. CV 02-8676DSF (VNKX), 2004 WL 5235587, at *12 (C.D. Cal. June 25, 2004) (same); *Anderson*, 224 F.R.D. at 452-53 (denying FCRA class action on superiority grounds); *In re Trans Union Corp. Privacy Litig.*, 211 F.R.D. at 346-51 (same).

342. Although evaluating the constitutional excessiveness of an aggregated statutory damages award will require the court to "'delve beyond the pleadings,'" "the requirements set out in Rule 23 are not mere pleading rules." *In re* Hydrogen Peroxide Antitrust Litig., 552 F.3d 305, 316 (3d Cir. 2009) (quoting Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 259 F.3d 154, 167 (3d Cir. 2001)). Indeed,

certain cases, the statutory minimum alone will be constitutionally excessive. For example, in a FACTA class action against KB Toys, the potential $290 million minimum statutory damages award was more than 600% of the company's net worth.[343] A class action that indisputably will result in a constitutionally excessive damages award cannot be considered a "superior" method of adjudication. Thus, the excessiveness of a statutory damages award can and should be assessed at the class certification stage.

Many courts, however, seem to believe that the solution to the due process violation is to grant certification and subsequently reduce the aggregated statutory award in post-judgment proceedings.[344] This alternative, however, violates the plain text of the statute and ignores the reality of class certification.

Awarding each class member less than the statutory prescribed amount contravenes the plain text of the statute. In his *Parker* concurrence, for instance, Judge Newman expressly recognized that awarding less than the statutory damages "cannot be reconciled with the terms of the statute."[345] Beyond judicially amending the statutory remedy provision, remittitur of an aggregated statutory damages award harms the class by reducing each plaintiff's recovery below the amount he otherwise would have been entitled to receive in an individual suit.[346] For example, in *Texas v. American Blastfax, Inc.*, a district court in Texas initially rejected a due process challenge to a $2.34 billion aggregate statutory damages award under the Telephone Consumer Protection Act.[347] After trial, however, the court concluded that the aggregate award was "inequitable and unreasonable," and reduced the damages from the prescribed statutory amount of "up to $500 per violation" to seven cents per violation – a reduction of 99.986%.[348] Although this individual harm

courts must engage in "a rigorous examination of the facts to determine if the certification requirements . . . [are] met." *See, e.g.*, *id.* at 316 n.15.

343. *Lopez*, 2007 U.S. Dist. LEXIS 82025, at *14.

344. *See* discussion *supra* Part IV. Another option would be to grant class certification and subsequently decertify the class should the damages award prove to be excessive. While this solution would not violate the statutory text, it similarly ignores the reality of class certification: certification is the pivotal moment in class action litigation "for it may sound the 'death knell' of the litigation on the part of plaintiffs, or create unwarranted pressure to settle . . . on the part of defendants." *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d at 310 (quoting *Newton*, 259 F.3d at 162).

345. Parker v. Time Warner Entm't Co., 331 F.3d 13, 27 (2d Cir. 2003) (Newman, J., concurring). Judge Newman nevertheless found a reduction justified in order to avoid a "bizarre result not intended by Congress." *Id.* at 28. Thus, Judge Newman offered a novel solution: awarding the statutory minimum to the named class representatives, *id.* at 29, and awarding "substantially less than $1,000" to the rest of the class. *Id.* at 27.

346. *E.g.*, Murray v. New Cingular Wireless Servs., Inc., 232 F.R.D. 295, 304 (N.D. Ill. 2005).

347. *See* discussion *supra* note 158.

348. Texas v. Am. Blastfax, Inc., 164 F. Supp. 2d 893, 900 (W.D. Tex. 2001).

problem could potentially be remedied by allowing class members a second opportunity to opt-out of the class after judgment,[349] this "solution" ignores the practical reality that few, if any, of these suits will reach judgment.

The failure of courts to address the due process issue at the class certification stage forces the case to "head straight down the settlement path"[350] – a factor that courts are beginning to consider in determining whether the class action is "superior."[351] *Murray* itself involved a class settlement – one which the Seventh Circuit found left the class "empty-handed."[352] Given the massive sums generated by aggregated statutory damages, these cases become a "bet-the-company" proposition,[353] which places enormous pressure on the defendant to settle.[354] As the U.S. Court of Appeals for the Fifth Circuit recently stated, "class certification may be the backbreaking decision that places 'insurmountable pressure' on a defendant to settle, even where the defendant has a good chance of succeeding on the merits."[355] "After all, a 10

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349. *See* FED. R. CIV. P. 23(c)(2)(B)(v); *see also Murray*, 232 F.R.D. at 304.

350. *Panel 7: Class Actions as an Alternative to Regulation: The Unique Challenges Presented by Multiple Enforcers and Follow-On Lawsuits*, 18 GEO. J. LEGAL ETHICS 1311, 1329 (2005) (panel discussion statement of Bruce Hoffman, then Deputy Director of the FTC's Bureau of Competition); Nagareda, *supra* note 26, at 1875 ("Whatever their partisan stakes in a given litigation, all sides recognize that the overwhelming majority of actions certified to proceed on a class-wide basis (and not otherwise resolved by dispositive motion) result in settlements."). *But see* Charles Silver, *"We're Scared To Death": Class Action Certification and Blackmail*, 78 N.Y.U. L. REV. 1357 (2003) (challenging normative and factual basis of "blackmail" analogy); David Rosenberg, *Mass Tort Class Actions: What Defendants Have and Plaintiffs Don't*, 37 HARV. J. ON LEGIS. 393, 430 (2000) ("[D]oubt[ing] that litigation class actions . . . exert systematic blackmail pressure against defendants.").

351. *See, e.g.*, *In re* Hydrogen Peroxide Antitrust Litig., 552 F.3d 305, 310 (3d Cir. 2009).

352. Murray v. GMAC Mortgage Corp., 434 F.3d 948, 952 (7th Cir. 2006). Under the terms of the settlement, the defendant agreed to pay $3,000 to the class representative, with $947,000, divided between the 1.2 million class members and the plaintiffs' counsel. *Id.* As the Seventh Circuit noted, the settlement amounted to less than $1 per class member. *Id.* The court rejected the settlement as "untenable." *Id.*

353. *See* Szabo v. Bridgeport Machs., Inc., 249 F.3d 672, 675 (7th Cir. 2001).

354. *E.g.*, David Marcus, Erie, *The Class Action Fairness Act, and Some Federalism Implications of Diversity Jurisdiction*, 48 WM. & MARY L. REV. 1247, 1287 (2007); Deborah R. Hensler & Thomas D. Rowe, Jr., *Beyond "It Just Ain't Worth It": Alternative Strategies for Damage Class Action Reform*, LAW & CONTEMP. PROBS., Spring/Summer 2001, at 137, 138 (noting "higher-than-average risks" present in class action litigation create incentives to settle); *cf.* Klay v. Humana, Inc., 382 F.3d 1241, 1275 (11th Cir. 2004) (finding that denying class "certification may create . . . 'hydraulic' pressures on the plaintiffs, causing them to either settle – or more likely – abandon their claims altogether").

355. Regents of the Univ. of Cal. v. Credit Suisse First Boston (USA), Inc., 482 F.3d 372, 379 (5th Cir. 2007) (quoting Castano v. Am. Tobacco Co., 84 F.3d 734, 746 (5th Cir. 1996)). Even Judge Jack Weinstein, a leading proponent of the class action,

percent exposure to a ten billion dollar verdict counts as real money, even today."[356]

In these aggregated statutory damages class actions, however, some courts have misunderstood the potential "blackmail" effect of certification. In *Cicilline v. Jewel Food Stores, Inc.*,[357] for example, the court noted that should the defendant ultimately succeed at trial, then "there is nothing with which to blackmail it."[358] This unrealistic view overlooks the pressures on companies to settle claims, such as the impact on a company's reputation and stock price. In *Cicilline*, the defendant faced liability between $100 million and $1 billion for failing to redact expiration dates from customer receipts.[359] Even though such an award would be "ruinous" and would "far exceed [the defendant's] net worth,"[360] the court refused to credit the defendant's due process argument at the class certification stage. Yet, as another court correctly has recognized, "[p]utting [a defendant] at risk of ruinous damages for failing to excise the expiration dates from credit card receipts would serve as an invitation for clever attorneys to bludgeon defendants into settlement in order to avoid ruination."[361]

As is often the case, these settlements do not achieve much for consumers. In *Kligensmith v. Max & Erma's Restaurants, Inc.*,[362] for instance, the

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has acknowledged that class certification may "encourage settlement of the litigation." *In re* "Agent Orange" Prod. Liab. Litig., 100 F.R.D. 718, 721 (E.D.N.Y. 1983).

356. Epstein, *supra* note 24, at 496.

357. 543 F. Supp. 2d 831 (N.D. Ill. 2008).

358. *Id.* at 840.

359. *Id.*

360. *Id.*

361. Vasquez-Torres v. McGrath's Publick Fish House, Inc., No. CV 07-1332 AHM (CWx), 2007 WL 4812289, at *7 (C.D. Cal. Oct. 12, 2007); *see also* Parker v. Time Warner Entm't Co., 331 F.3d 13, 22 (2d Cir. 2003) (recognizing that the potentially enormous aggregate statutory damages award creates "an *in terrorem* effect on defendants, which may induce unfair settlements"); *cf.* Grimes v. Rave Motion Pictures Birmingham, LLC, 552 F. Supp. 2d 1302, 1308-09 (N.D. Ala. 2008) (describing defendant's choice post-certification as either bankruptcy or settlement). To be sure, a defendant can seek an interlocutory appeal of the lower court's decision to grant class certification. FED. R. CIV. P. 23(f); *see also* Klay v. Humana, Inc., 382 F.3d 1241, 1275 (noting "settlement pressures have already been taken into account in the structure of Rule 23"). Indeed, the advisory committee notes to Rule 23(f) expressly acknowledged the decisive pressure of certification: "An order granting certification . . . may force a defendant to settle rather than incur . . . the risk of potentially ruinous liability." FED. R. CIV. P. 23(f) advisory committee's note. That said, any appeal under Rule 23(f) is discretionary with the Court of Appeal. FED. R. CIV. P. 23(f). Moreover, where the defendant faces unfavorable circuit precedent, such as within the Seventh Circuit, any such appeal would be futile.

362. No. 07-0318, 2007 WL 3118505 (W.D. Pa. Oct. 23, 2007); *see also* Palamara v. Kings Family Restaurants, No. 07-317, 2008 WL 1818453, at *2, *6 (W.D. Pa. Apr. 22, 2008) (approving FACTA class action settlement under which class received certificates for free food items with a retail value of less than $5.00 per certificate).

court approved a FACTA settlement in which the class[363] received coupons for a $4.00 discount on their next purchase.[364] The plaintiffs' counsel, on the other hand, received $110,000 in fees and costs.[365] Illustrating that defendants can be forced to settle regardless of any meritorious defenses, plaintiffs' counsel admitted that "significantly credible and persuasive evidence [existed] that Defendant's violations were not 'willful' and were, therefore, outside the scope of the statutory sanctions."[366] In an odd twist, the court still determined that any due process concerns under the statutory damages provisions "are more appropriately reserved until after class certification and trial/resolution,"[367] even though no such opportunity existed under the settlement.

In short, class certification provides no new information regarding the due process implications of the aggregated statutory damages award.[368] The amount of the award is easily calculable at the class certification stage, rendering due process analysis appropriate. To grant class certification in light of a due process violation defies logic. The proper solution is for courts to deny class certification when faced with aggregated statutory damages that are constitutionally excessive under *BMW* and *State Farm*.

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363. Despite the breadth of the class definition, the court noted that plaintiffs' and defense counsel agreed that the class excluded any individual who sustained actual injury as a result of the defendant's publication of prohibited information on credit card receipts. *Kligensmith*, 2008 WL 3118505, at *1.

364. *Id.* at *2. The named class representative received $2,500.00. *Id.*

365. *Id.*

366. *Id.* at *1. Indeed, the court noted that "the absence of any willful violation of FACTA, which, if sufficiently established at trial, could leave the class entirely unentitled to *any* statutory-violation award." *Id.* at *5.

367. *Id.* at *3.

368. Professor Epstein noted a similar phenomena in calculating damages in antitrust cases. Epstein, *supra* note 24, at 503-05. As he explained:

> A low standard is used to pass on the merits of the plaintiff's claim for class certification, so that the entire matter of the proper measure of damages is left in abeyance until the class is formed, to be sorted out only thereafter. The net effect is that the burden shifts to the defendant to find ways to disentangle itself from class status only after the armies have massed on the other side of the table. Yet, as best one can tell, the class formation itself supplies no new evidence or insight on how the measure of damage question should be decided.

Id. at 505 (footnote omitted).

VI. CONCLUSION

"Not all substantive principles necessarily warrant enforcement to the *n*th degree."[369] On a substantive level, Congress's decision to allow private rights of action absent any actual harm could be considered a mistake.[370] But disagreement with the underlying substantive law does not translate into a judicial self-help remedy. While it might be best for Congress to change the enforcement mechanisms in these statutes, courts are in no position to select which features of a substantive law to modify. Class actions are a creature of procedural law, and as such, are not supposed to alter the underlying substantive law. Reducing the statutory damages judgment to accommodate the class action device emphasizes procedure over substance, and in turn, preferences one litigation-inducing mechanism – the class action – over the one expressly chosen by Congress – statutory damages.[371] Courts should apply the current excessiveness standard to these aggregated statutory damages claims, and deny class certification where the award bears no reasonable relationship to the plaintiffs' harm.

369. Nagareda, *supra* note 26, at 1884. Professor Nagareda terms this the "Javert problem," a reference to the dogged persistence of police inspector Javert in his pursuit of Jean Valjean for the theft of a loaf of bread in *Les Miserables* by Victor Hugo. *Id.*

370. As I previously have argued, private litigation should be limited to claims of actual harm where dual public and private enforcement regimes exist side by side. *See generally* Sheila B. Scheuerman, *The Consumer Fraud Class Action: Reining in Abuse by Requiring Plaintiffs to Allege Reliance as an Essential Element*, 43 HARV. J. ON LEGIS. 1, 30-33 (2006).

371. *See* Nagareda, *supra* note 26, at 1884-88 (discussing normative problem posed by aggregated statutory damages which effectively amend the "underlying [statutory] scheme through means other than reform legislation itself").