AVOIDING ANNIHILATION: WHY TRIAL JUDGES SHOULD REFUSE TO CERTIFY A FACTA CLASS ACTION FOR STATUTORY DAMAGES WHERE THE RECOVERY WOULD LIKELY LEAVE THE DEFENDANT FACING IMMINENT INSOLVENCY

INTRODUCTION

Is a class action truly the superior method of adjudicating a claim when the suit will impose annihilative liability on a defendant, leaving the defendant teetering on the edge of bankruptcy? What if that defendant's actions were basically harmless? In *Leysoto v. Mama Mia I., Inc.*, the defendant, a locally-owned restaurant, faced such a possibility.[1] In *Leysoto*, the proposed class of approximately 46,000 members sought statutory damages between $100 and $1000 per consumer under the Fair and Accurate Credit Transactions Act (FACTA).[2] The plaintiffs brought suit for Mama Mia's failure to comply with FACTA's truncation requirements by printing more than the last five digits

[1] 255 F.R.D. 693 (S.D. Fla. 2009).
[2] *Id.* at 694.

of consumers' credit or debit card numbers on their receipts.[3] They offered no evidence of any economic harm experienced as a result of the violation. Therefore, if the class were certified, it would expose Mama Mia, a company with a net worth of approximately $40,000, to liability of $4.6 to $46 million in damages for no actual harm.[4]

District court judges across the United States have exercised the considerable discretion implicit in Federal Rule of Civil Procedure 23(b)(3) to deny class certification of claims for minimum statutory damages. These judges have ruled that a class action is not the superior method of adjudication when the proposed class recovery is (1) "potentially annihilatory" to the defendant and (2) disproportionate to plaintiffs' (lack of) actual economic injury.[5] District and circuit courts that have addressed this issue, however, are divided "as to whether and under what circumstances class action status . . . should be denied as not superior because of the potential for enormous damages . . . for a huge class."[6]

Combining a statutory scheme such as FACTA, which imposes minimum statutory damages per-consumer, and the class action mechanism raises three specific concerns. First, large-scale aggregation of statutory damages "potentially distorts" the intent and purpose behind the statutory damages provision and Rule

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[3] *Id.* (Plaintiff Leysoto claimed that after paying for a meal at the restaurant, he received a receipt that displayed both the expiration date and full number of his credit card). This is a violation of FACTA under 15 U.S.C. § 1681c(g)(1) (2006), which states: "[N]o person that accepts credit cards or debit cards for the transaction of business shall print more than the last 5 digits of the card number or the expiration date upon any receipt provided to the cardholder at the point of the sale or transaction." When a party willfully violates the statute, FACTA provides for a recovery of "any actual damages sustained by the consumer" or statutory damages of at least $100 and no more than $1000. 15 U.S.C. § 1681n(a)(1)(A) (2006).

[4] *Leysoto*, 255 F.R.D. at 694, 697 (ruling that a class action was not the superior method of adjudication here and refusing to certify the class).

[5] *Id.* at 697; *see* FED. R. CIV. P. 23(b)(3) (providing for the certification of a class where common questions of law and fact predominate and a class action is superior to all other methods of adjudication); *see also* Ratner v. Chem. Bank N.Y. Trust Co., 54 F.R.D. 412, 416 (S.D.N.Y. 1972) ("Students of [Rule 23(b)(3)] have been led generally to recognize that its broad and open-ended terms call for the exercise of some considerable discretion of a pragmatic nature.").

[6] STUART ROSSMAN ET AL., CONSUMER CLASS ACTIONS § 10.5.2.5.5, at 167 (7th ed. 2010).

23.[7] Second, a large aggregated statutory penalty threatens to violate the due process rights of defendants where the aggregated damages award is "so severe and oppressive as to be wholly disproportioned to the offense and obviously unreasonable."[8] Finally, certification of such a class has the potential for an "*in terrorem* effect" on defendants, pressuring a defendant to settle even when a viable defense exists rather than face the risk of ruinous liability.[9]

In the context of the current economic recession, unemployment rates, and general anxiety about our national debt, it is difficult to justify the risk of such class action settlements or judgments bankrupting large corporations and costing hundreds, even thousands, of jobs when plaintiffs experienced little or no harm.[10] This Comment argues that district court judges, in their discretion, should consider the potential annihilative effect of aggregated statutory damages on a defendant as a factor under the superiority requirement of Rule 23(b)(3) and deny certification of a FACTA truncation class when the proposed statutory recovery threatens the defendant's survival.[11]

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[7] Parker v. Time Warner Entm't Co., 331 F.3d 13, 22 (2d Cir. 2003) ("It may be that the aggregation in a class action of large numbers of statutory damages claims potentially distorts the purpose of both statutory damages and class actions.").

[8] St. Louis, I.M. & S. Ry. Co. v. Williams, 251 U.S. 63, 66–67 (1919) (citations omitted) (establishing the standard for when statutory damages are contrary to the Due Process Clause).

[9] *Parker*, 331 F.3d at 22 (The court noted that the aggregation of large numbers of claims for statutory damages could "create a potentially enormous aggregate recovery for plaintiffs, and thus an *in terrorem* effect on defendants, which may induce unfair settlements.").

[10] In August 2011, the national unemployment rate was 9.1%. *National Unemployment Update*, NAT'L CONFERENCE OF STATE LEGISLATURES, http://www.ncsl.org/?tabid=13307 (last visited Apr. 9, 2012). These aggregated FACTA settlements do threaten bankruptcy. For example, had the court certified the class and the plaintiff proven willful violation in *Spikings v. Cost Plus, Inc.*, the minimum statutory damages of $100 per occurrence aggregated over the 3.4 million members of the potential class, resulting in at least $340 million in damages, certainly would have put the company—with a net worth of only $316 million—"out of business." Spikings v. Cost Plus, Inc., No. CV 06-8125-JFW (AJWx), 2007 U.S. Dist. LEXIS 44214, at *12 (C.D. Cal. May 25, 2007).

[11] The claim proposed in this Comment is based on Judge Wilkinson's concurring opinion in *Stillmock v. Weis Mkts., Inc.* 385 F. App'x 267, 275–82 (4th Cir. 2010) (Wilkinson, J., concurring). In an appeal from the district court's refusal to certify a class of FACTA truncation claims, Judge Wilkinson advocated that "annihilative

Part I begins by looking more closely at the problems created by aggregating statutory damage claims in a large class action. Part II provides an overview of how courts have addressed the issue of annihilative damages at the certification stage and how Congress has addressed such problems in similar consumer protection acts. Finally, Part III defines the annihilative damages standard and discusses how the application of this standard at the certification stage best circumvents the problems created by aggregated statutory claims. This Part also examines the public policy and economic arguments favoring this judicial solution, and demonstrates that enforcement of FACTA does not require annihilatory damages.

I. RAMIFICATIONS OF AGGREGATING STATUTORY DAMAGES

A. Distortion of Congressional Intent and the Purpose of Rule 23

The aggregation of claims for statutory damages in a class action under FACTA, resulting in an enormous damages award, distorts the purpose and intent of both the statutory scheme and Rule 23. The class action mechanism and statutory damages serve similar purposes. Federal Rule of Civil Procedure 23 was established to provide an avenue for parties to bring suits when the recovery being sought is so small it would not be "economically feasible to obtain relief within the traditional framework of a multiplicity of small individual suits."[12] In cases in which plaintiffs experience actual harm—where plaintiffs suffered at the hands of a powerful corporation—class action adjudication is almost a necessity to ensure that plaintiffs are adequately

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damages" be considered "in the context of Rule 23(b)(3)'s superiority requirement." *Id.* at 278.

[12] Coleman v. Gen. Motors Acceptance Corp., 296 F.3d 443, 449 (6th Cir. 2002) (quoting Deposit Guar. Nat'l Bank v. Roper, 445 U.S. 326, 339 (1980)); *see* Buford v. H & R Block, Inc., 168 F.R.D. 340, 345–46 (S.D. Ga. 1996) (The class action mechanism "provide[s] a feasible means for asserting the rights of those who 'would have no realistic day in court if a class action were not available.'" (citation omitted)). Class actions are meant to "vindicate individual rights" where an individual action would not be feasible. *See* Ted Frank, *Omission in FACTA Might Be Windfall for Plaintiff's Bar*, CLASS ACTION WATCH, Sept. 2007, at 15, http://www.fed-soc.org/publications/detail/class-action-watch-september-2007.

compensated and defendants deterred from continuing the bad act. Similarly, FACTA provides statutory damages to encourage citizens to bring a claim for a violation of that particular statute even though actual damages may be "small or difficult to ascertain."[13] Both Rule 23 and the availability of statutory damages create incentives for plaintiffs to sue when an otherwise individual actual damages suit would yield little financial recovery.

Combined, however, these two mechanisms result in over-deterrence, "potentially distort[ing] the purpose of both statutory damages and class actions."[14] There is nothing to suggest that Congress or the committee that developed Rule 23 intended for FACTA and similar private-claim promoting statutes to operate in the context of class actions. The class action mechanism as applied to a FACTA suit effectively provides a windfall for cases in which plaintiffs already have incentive to sue individually for statutory damages and attorney's fees.[15]

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[13] Sheila B. Scheuerman, *Due Process Forgotten: The Problem of Statutory Damages and Class Actions*, 74 MO. L. REV. 103, 110 (2009) (quoting Perrone v. Gen. Motors Acceptance Corp., 232 F.3d 433, 436 (5th Cir. 2000)) (internal quotation marks omitted); *see* 15 U.S.C. § 1681n (2006). In her article, Scheuerman recognizes that applying the class action mechanism to claims for statutory damages brought under FACTA may result in over-deterrence. Scheuerman, *supra*, at 111–15. After expressing concerns regarding due process issues, Scheuerman argues that courts should apply the guideposts established in *BMW of North American, Inc. v. Gore*, 517 U.S. 559 (1996) (the due process standard for punitive damages), at the certification stage to determine whether the aggregate statutory damages awards from a class would be unconstitutionally excessive. *Id.* at 146–51. Furthermore, she proposes that "[o]nce the due process violation created by an aggregated statutory damages award is acknowledged, class certification should be denied." *Id.* at 146 (citations omitted). This solution is broader than the annihilative standard suggested in this Comment because not all unconstitutionally excessive aggregate statutory damages awards will be annihilating to a defendant. Scheuerman recommends that the constitutionality of the potential award be assessed at the certification stage, whereas the annihilatory standard will prevent the court from reaching the question of unconstitutionally excessive awards in the extreme cases of ruinous liability. *See id.* at 146–48.

[14] *Parker*, 331 F.3d at 22; *see* Scheuerman, *supra* note 13, at 111 ("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.").

[15] See *infra* Part III.B.1 (demonstrating the operation of the annihilative standard within the congressional intent and purpose behind FACTA and Rule 23).

B. Aggregated Statutory Damages and the Due Process Clause

When members of a putative class experience little or no actual economic damages from the disclosure of their card numbers, class certification for statutory rather than actual damages raises constitutional concerns as well as general questions of fairness.[16] Aggregated statutory claims implicate the Due Process Clause when the statutory damages awarded are highly disproportionate to the actual harm. According to the Supreme Court in *St. Louis, I.M. & S. Railway Co. v. Williams*, a statutory penalty may violate the Due Process Clause when the statutory damage award is "so severe and oppressive as to be wholly disproportioned to the offense and obviously unreasonable."[17] *Williams* involved a law regulating rates charged by railroads, which imposed a per-violation penalty on a railroad of fifty to three-hundred dollars each time it collected rates higher than those prescribed by the statute.[18] The Court ruled that this "essentially penal" statute did not violate the Due Process Clause because it was not "so severe and oppressive as to be wholly disproportioned to the offense."[19]

Courts that recognize a due process limitation on statutory damages awards generally cite *State Farm Mutual Automobile Insurance Co. v. Campbell* in support.[20] In *Campbell,* the Supreme Court stated that due process "prohibits the imposition of grossly excessive or arbitrary punishments on a tortfeasor" because such a punishment "constitutes an arbitrary deprivation of property."[21]

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[16] *Stillmock*, 385 F. App'x at 278 (Wilkinson, J., concurring) ("Certifying a class action that would impose annihilative damages where there has been no actual harm from identity theft could raise serious constitutional concerns . . . ."); *see* Michael E. Chaplin, *What's So Fair About the Fair and Accurate Credit Transactions Act?*, 92 MARQ. L. REV. 307, 312 (2008) ("It offends fundamental notions of fairness when litigants, without actual injury (and without the prospect of actual injury), are allowed to use the courts as a means of financial gain."); *see also* Anderson v. Capital One Bank, 224 F.R.D. 444, 452–53 (W.D. Wis. 2004).

[17] 251 U.S. 63, 67 (1919) (citations omitted).

[18] *Id.* at 64. Here the railway was charging sixty-six cents more than the prescribed rate. *Id.*

[19] *Id.* at 66–67. The punishment-to-harm ratio in this case was between 50 to 0.6 and 300 to 0.6. *Id.*

[20] *See Stillmock*, 385 F. App'x at 278 (Wilkinson, J., concurring) (citing State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408 (2003)); Parker v. Time Warner Entm't Co., 331 F.3d 13, 22 (2d Cir. 2003) (same).

[21] *Campbell*, 538 U.S. at 416–17 (citations omitted).

Campbell involved an action brought against an automobile liability insurer for bad-faith failure to settle within the policy limits, fraud, and intentional infliction of emotional distress.[22] The Supreme Court held that an award of $145 million in punitive damages violated due process where the plaintiffs recovered only $1 million in compensatory damages.[23] The *Campbell* Court applied the *Gore* guideposts, established in *BMW of North America, Inc. v. Gore*, and found that the punitive award at issue was "neither reasonable nor proportionate to the wrong committed."[24]

The rule of excessive punishment is analogous to statutory damages because statutory damages serve both a punitive and compensatory function.[25] Punitive damages serve "deterrence and retribution" functions, while compensatory damages are meant to "redress the concrete loss that the plaintiff has suffered."[26] Statutory damages, specifically those provided for under FACTA, are intended to deter violations of the statute by encouraging citizens to act as private attorneys general and enforce the statute with civil suits.[27] The punitive effect of statutory damages, however, raises Due Process Clause concerns. This punitive effect, "when aggregated across a large number of similar acts, can grow so enormous that it becomes an unconstitutionally excessive punishment."[28] Given their punitive function, courts should hold statutory damages to a constitutional standard similar to the one applied to the punitive damages award in *Campbell*—damages must not be so "severe" in proportion to the actual harm that occurred.

The Second Circuit recognized this due process concern in *Parker v. Time Warner Entertainment Co.*, stating that when statutory damages "expand . . . so far beyond the actual damages

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[22] *Id.* at 414.

[23] *Id.* at 426, 429.

[24] *Id.* at 429; *see* BMW of N. Am., Inc. v. Gore, 517 U.S. 559 (1996).

[25] *See* J. Cam Barker, Note, *Grossly 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, 527 (2004) (noting that a statutory damages award has both a compensatory and a punitive component).

[26] *Campbell*, 538 U.S. at 416.

[27] Scheuerman, *supra* note 13, at 111.

[28] Barker, *supra* note 25, at 526.

suffered," they function more like punitive damages and may raise due process issues.[29] In his concurring opinion in *Parker*, Judge Newman quoted the "severe and oppressive" standard applied in *Williams* and compared the due process objections to aggregated statutory damages awards to those identified by the Supreme Court in *Campbell*.[30]

Although the Eleventh Circuit declined to address the as-applied constitutionality of an aggregated statutory damages award, the court did find 15 U.S.C. § 1681n constitutional on its face.[31] The defendant in *Harris v. Mexican Specialty Foods, Inc.* challenged the statutory damages provision established by the Fair Credit Reporting Act (FCRA), and imposed for FACTA violations, as unconstitutionally vague and excessive on its face, and violative of the Due Process Clause as applied to the defendant in the class action suit.[32] The court held that the provision was constitutional on its face because section 1681n only allows for statutory damages in lieu of a claim for actual damages and since some future plaintiff might seek statutory damages rather than actual damages from a FACTA violation.[33] The Eleventh Circuit has stated, however, that it is likely to find that

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[29] 331 F.3d 13, 22 (2d Cir. 2003).

[30] *Id.* at 26 (Newman, J., concurring) (quoting St. Louis, I.M. & S Ry. Co. v. Williams, 251 U.S. 63, 66–67 (1919)) (internal quotation marks omitted).

[31] Harris v. Mexican Specialty Foods, Inc., 564 F.3d 1301, 1312–13 (11th Cir. 2009); *see* 15 U.S.C. § 1681n (2006).

[32] *Id.* at 1307. The Eleventh Circuit ruled that the defendants' unconstitutionally excessive as applied claims were not yet ripe, and thus decline to rule on the issue. *Id.* at 1310. According to the *Harris* opinion, the pre-trial determinations of unconstitutional excessiveness require assumptions and should be reviewed after the jury has handed down damages. *Id.* at 1309–10 ("The district court therefore lacked jurisdiction to consider whether the FCRA's statutory-damages provision . . . will yield an unconstitutionally excessive verdict as applied to these defendants.").

[33] *Id.* at 1313. The court relied on Eleventh Circuit Court precedent that the "mere possibility of a constitutional application is enough to defeat a facial challenge to [a] statute." *Id.* (citing High Ol' Times, Inc. v. Busbee, 673 F.2d 1225, 1228 (11th Cir. 1982)). When sought in an individual claim, this statutory penalty creates, at the most extreme, a damages-to-harm ratio of 1000 to 0 (if the plaintiff enforcing the FACTA violation suffered no actual harm). When this statutory penalty is aggregated across tens of thousands of claims, however, the as-applied constitutional analysis differs—with ratios as high as 4.6 million to 0. See *infra* Part III.B.2 for a complete as-applied due process analysis of aggregated statutory damages awarded in a FACTA claim.

a class action was not superior when the potential damages are so disproportionate to any harm suffered.[34]

The due process implications are much more than just the speculative concerns of a few judges.[35] In fact, if a class aggregates thousands of claims that allege no actual harm, statutory damages for a FACTA violation will almost certainly be declared unconstitutionally excessive when analyzed according to due process factors traditionally applied to punitive damages.[36]

C. Blackmail Settlements

Defendants facing enormous potential liability, which may fatally impact their business, sometimes agree to large settlements and abandon possible defenses.[37] In a speech given in 1972, Judge Friendly first referred to settlements induced by the possibility of an immense class-action judgment as "blackmail settlements."[38] This term expresses the concern that plaintiffs will seek class certification to threaten or intimidate the defendant into settling.[39] The court in *In re Rhone-Poulenc* addressed the settlement pressure concern after plaintiffs successfully certified some of their class action claims against a blood products manufacturer for allegedly infecting them with HIV.[40] Judge Posner reasoned that the defendant might "not wish to roll [the] dice" because it potentially faced liability for $25 billion and could not be absolutely certain of prevailing on the merits of the case.[41] The Seventh Circuit ultimately decertified the class based on

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[34] Klay v. Humana, Inc., 382 F.3d 1241, 1271 (11th Cir. 2004).

[35] *See infra* Part III.B.2.

[36] These due process factors are laid out in *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 575–84 (1996), and *State Farm Automobile Insurance Co. v. Campbell*, 538 U.S. 408 (2003).

[37] Stillmock v. Weis Mkts., Inc., 385 F. App'x 267, 281 (4th Cir. 2010) ("Companies may be forced to settle in the face of such annihilating liability, even if they have a strong defense. . . . [T]he substantial costs associated with settlement will inevitably be passed on to consumers . . . ."); Castano v. Am. Tobacco Co., 84 F.3d 734, 746 (5th Cir. 1996) ("[C]lass certification creates insurmountable pressure on defendants to settle . . . ." (citing Peter H. Schuck, *Mass Torts: An Institutional Evolutionist Perspective*, 80 CORNELL L. REV. 941, 958 (1995))).

[38] Aaron B. Lauchheimer, Note, *A Classless Act: The Ninth Circuit's Erroneous Class Certification in* Dukes v. Wal-Mart, Inc., 71 BROOK. L. REV. 519, 550 (2005).

[39] *Id.* at 549–50.

[40] *In re* Rhone-Poulenc Rorer, Inc., 51 F.3d 1293, 1294 (7th Cir. 1995).

[41] *Id.* at 1298.

concerns about settlement pressure created by aggregated claims, which force defendants to "stake their companies on the outcome of a single jury trial."[42]

In the article, *Aggregation and Its Discontents: Class Settlement Pressure, Class-Wide Arbitration, and CAFA*, Richard Nagareda divides the concept of class-action settlement pressure into two aspects of the class action mechanism—the addition effect and the amplification effect.[43] The addition effect recognizes that the certification of a class increases the number of claims a defendant will face because plaintiffs typically have greater incentive to join a class action than to bring an individual suit for an identical claim.[44] Although this addition effect is the exact result intended by the authors of Rule 23, it raises concerns when the class action involves claims for minimum statutory damages.[45] In such situations, the addition effect distorts the "remedial scheme" Congress established in setting forth statutory damages "seemingly . . . with the scenario of individual litigation in mind."[46] The addition effect of statutory damages effectively multiplies the pressure because the defendant, if liable, faces guaranteed damages.

The amplification effect of a class action is based on the risk associated with an all-or-nothing judgment.[47] The "variance in outcomes is much greater" in a class action suit than if the defendant were facing the exact same number of individual claims.[48] For example, if a class of 100,000 is certified in a FACTA statutory damages suit, the defendant will either win the case and incur no liability, or lose the case and incur between $10 million and $100 million in damages. Alternatively, if the defendant faced 100,000 individual claims, some would likely be dismissed while

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[42] *Id.* at 1299.

[43] Richard A. Nagareda, *Aggregation and Its Discontents: Class Settlement Pressure, Class-Wide Arbitration, and CAFA*, 106 COLUM. L. REV. 1872, 1881 (2006).

[44] *Id.* ("In *Rhone-Poulenc*, this addition effect consisted of the contrast between the 300 or so claims that Judge Posner estimated defendants would face in a world of individual trials and the 'thousands' of claims that they would face . . . in the event of class certification." (quoting *Rhone-Poulenc*, 51 F.3d at 1298)).

[45] *Id.* at 1885 ("Case law identifies one scenario for class action litigation in which the addition effect, simply as addition, rises to the level of normative concern.").

[46] *Id.* at 1886.

[47] *Id.* at 1881–82.

[48] *Id.*

others might incur liability for the defendant. But the variance in outcome of each individual case is much smaller: either no liability or between $100 and $1000 in statutory damages. When combined with the addition effect, the amplification effect increases the pressure greatly on a defendant to settle rather than risk an-all-or-nothing judgment.

The authors of Rule 23, recognizing the legitimacy of settlement pressure, included in Rule 23(f) the ability to bring an interlocutory appeal of the decision to certify the class.[49] If a class is certified and the defendant caves to the pressure, however, an appellate court will never have the opportunity to review the ruling that forced them to settle—class certification.[50]

II. BACKGROUND

A. The Origins of the Annihilative Argument—Ratner v. Chemical Bank New York Trust Co.

Subsequent cases have credited Judge Frankel's opinion in the 1972 district court case of *Ratner v. Chemical Bank New York Trust Co*. with first relying on the concept of annihilatory damages to find that a class action was not the superior method of adjudication.[51] Although none of the putative class members suffered more than nominal damages, the plaintiffs in *Ratner* sought statutory damages under the Truth in Lending Act (TILA) for the defendant's failure to disclose an annual percentage rate to

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[49] Lauchheimer, *supra* note 38, at 550. The Advisory Committee listed one factor in the inclusion of this provision: "An order granting certification . . . may force a defendant to settle rather than incur the costs of defending a class action and run the risk of potentially ruinous liability." *Id.* (alternation in original) (quoting FED. R. CIV. P. 23 advisory committee's note) (internal quotation marks omitted).

[50] *Rhone-Poulenc*, 51 F.3d at 1298; *see infra* Part III.B.3 (revisiting settlement pressure and demonstrating how applying the annihilative standard at the certification stage protects defendants from the most extreme settlement pressure).

[51] Ratner v. Chem. Bank N.Y. Trust Co., 54 F.R.D. 412, 413 (S.D.N.Y. 1972); David L. Permut & Tamra T. Moore, *Recent Developments in Class Actions: The Fair Credit Reporting Act*, 61 BUS. LAW. 931, 939 (2006) ("Many of these courts rely on the rationale utilized long ago in *Ratner v. Chemical Bank* and its progeny, which served as a roadblock to the certification of TILA classes prior to the enactment of a class action damages cap." (citation omitted)).

its cardholders.[52] Similar to the statutory damages provided for violations of FACTA, section 130(a) of TILA guarantees damages of at least $100 plus reasonable attorneys' fees and other costs when liability is proven.[53] Judge Frankel ruled that the class action was not superior because the damages and attorneys' fees allowed under TILA provide sufficient incentive for the plaintiff to bring an individual suit, and because the class action of approximately 130,000 members would expose the defendant to at least $13 million in damages.[54] Frankel was persuaded by the defendant's argument that this recovery would be a "possibly annihilating punishment, unrelated to any damage to the purported class or to any benefit to [the] defendant."[55] But, he went further than denying certification of the class under these particular circumstances and held that the class action mechanism was "essentially inconsistent" with the statutory damages provided by Congress in TILA.[56]

Judge Frankel believed that the discretion left to trial judges through the open-ended terms of Rule 23(b)(3) called for him to make a "pragmatic" judgment as to whether a class action was proper.[57] The *Ratner* rationale spread like wild fire, and courts routinely refused to certify classes in TILA cases.[58] The Ninth and

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[52] *Ratner*, 54 F.R.D. at 413 ("[P]laintiff suffered no damages at all or . . . , at most, he may be supposed to have been damaged in some amount representing a small fraction of $100." (footnote omitted)).

[53] Truth in Lending Act § 130(a), 15 U.S.C. § 1640(a) (2006).

[54] *Ratner*, 54 F.R.D. at 416.

[55] *Id.*

[56] *Id.* Following the *Ratner* opinion, the Tenth Circuit refused to hold that a class action is an improper method of adjudication of TILA claims "under all circumstances." Wilcox v. Commerce Bank of Kan. City, 474 F.2d 336, 347–48 (10th Cir. 1973). The court, however, affirmed the district court's finding that the class action was inferior based on Judge Frankel's annihilatory punishment rationale. *Id.* at 348–49.

[57] *Ratner*, 54 F.R.D. at 416.

[58] *See, e.g.*, Katz v. Carte Blanche Corp., 496 F.2d 747, 770, (3d Cir. 1974) (Aldisert, J., dissenting); *In re* Trans Union Corp. Privacy Litig., 211 F.R.D. 328, 348 (N.D. Ill. 2002). The *Katz* court found:

> Appellant's basic theme, sounded in [*Ratner*] and repeated in some 34 reported and unreported district court opinions chanting the same litany, is that a class action should not lie because in the event the court finds liability, an award of the statutory penalty of $100 for each class member would defeat the purpose of [TILA] and, moreover, would threaten the solvency of the appellant because the statutory penalty would greatly exceed potential actual damages.

Tenth Circuits also adopted Frankel's reasoning in the years immediately following *Ratner*.[59] In *Wilcox v. Commerce Bank of Kansas City*, a TILA action, the Tenth Circuit upheld the district court's decision to deny certification of a class based in part on Judge Frankel's rationale.[60] The district judge in *Wilcox* had voiced concerns that certification of a class of approximately 180,000 members claiming statutory damages of at least $100 would result in an annihilatory punishment.[61]

Several district courts adjudicating FACTA claims have also adopted Judge Frankel's reasoning from *Ratner*.[62] Recent cases citing *Ratner*, however, have focused as much on the disproportionality portion of his argument as on the portion concerning the effect of an enormous statutory damage award on the defendant. For example, prior to the decision in *Bateman v. American Multi-Cinema, Inc.*, district courts in the Ninth Circuit "did not deny class certification solely because of the possible financial impact it would have on the defendant, but because of the disproportionality of the damages award in relation to the harm actually suffered by the class."[63]

Katz, 496 F.2d at 770 (citations omitted).

[59] *See* Kline v. Coldwell, Banker & Co., 508 F.2d 226, 234–35 (9th Cir. 1974) (noting in dicta that class actions are not superior when aggregation would carry the statutory damage regime to an "'absurd and stultifying extreme'" (quoting *Ratner*, 54 F.R.D. at 414)); *Wilcox*, 474 F.2d at 341–47.

[60] *Wilcox*, 474 F.2d at 342.

[61] *Id.* at 340, 342. Judge O'Connor considered the potential aggregated remedy to be a "horrendous, possibly annihilating punishment, unrelated to any damage." *Id.* at 342 (internal quotation marks omitted).

[62] *See* Bateman v. Am. Multi-Cinema, Inc., 623 F.3d 708, 715 (9th Cir. 2010); Azoiani v. Love's Travel Stops & Country Stores, Inc., No. EDCV 07-90 ODW (OPx), 2007 WL 4811627 (C.D. Cal. Dec. 18, 2007); Vartanian v. Estyle, Inc., No. CV 07-0307 DSF (RCx), 2007 WL 4812286 (C.D. Cal. Nov. 26, 2007); Saunders v. Trattoria, No. CV 07-1060 SJO (PJWx), 2007 WL 4812287 (C.D. Cal. Oct. 23, 2007); Price v. Lucky Strike Entm't, Inc., No. CV 07-960-ODW (MANx), 2007 WL 4812281 (C.D. Cal. Aug. 31, 2007); Najarian v. Avis Rent A Car Sys., No. CV 07-588-RGK (Ex), 2007 WL 4682071 (C.D. Cal. June 11, 2007).

[63] Soualian v. Int'l. Coffee & Tea LLC, No. CV 07-502-RGK (JCx), 2007 WL 4877902, at *2 (C.D. Cal. June 11, 2007) (footnote omitted) (citing *Ratner*, 54 F.R.D. at 416). This Comment does not seek to discount proportionality. Instead, the annihilatory standard includes the proportionality argument because annihilatory damages are inherently disproportionate when no actual harm is alleged.

B. Circuit Courts Ruling on the Issue of Annihilation at the Certification Stage

Although few circuit courts of appeal have addressed whether annihilatory damages can be considered at the certification stage in the context of FACTA claims, circuits have found that the size of potential liability is generally an appropriate superiority factor to be examined at that time. The leading opinions from the Fifth and Eleventh Circuit Courts of Appeal favor including the size of the potential liability and the effect on the defendant—particularly the defendant's due process rights—as part of the non-exhaustive list of superiority factors.[64] But, the Seventh and Ninth Circuits have taken the opposite position, ruling that the size of a potential damage award is not a valid reason for a trial judge to refuse to certify a 23(b)(3) class.[65] The Second Circuit, as evidenced by the opinion in *Parker v. Time Warner Entertainment Co.*, seems to straddle the fence.[66]

1. Circuit Court Opinions Recognizing the Effect of Potential Liability as a Superiority Factor

In *Castano v. American Tobacco Co.*, the Fifth Circuit reversed the district court's certification of a mass tort class action against the tobacco industry, and found that the class failed the superiority requirement because of the effect certification would have on the defendant.[67] The circuit court recognized that such a massive tort class dramatically increased the defendant's stakes because, if found liable, it would have faced "significantly higher damage awards" and an "insurmountable pressure" to settle prior

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[64] *See* Klay v. Humana, Inc., 382 F.3d 1241 1271 (11th Cir. 2004); London v. Wal-Mart Stores, Inc., 340 F.3d 1246 (11th Cir. 2003); Castano v. Am. Tobacco Co., 84 F.3d 734 (5th Cir. 1996).

[65] *See Bateman*, 623 F.3d 708; Murray v. GMAC Mortg. Corp., 434 F.3d 948, 951 (7th Cir. 2006).

[66] *See* Parker v. Time Warner Entm't Co., 331 F.3d 13 (2d Cir. 2003).

[67] 84 F.3d at 737. *Castano* was described as "what may be the largest class action ever attempted in federal court." *Id.* The members of the plaintiff class sought compensatory and punitive damages for injury caused by nicotine addiction, claiming the tobacco defendants "fraudulently failed to inform consumers that nicotine is addictive and manipulated the level of nicotine in cigarettes to sustain their addictive nature." *Id.*

to adjudication.[68] Refusing to "commit[] the fate of an entire industry . . . to a single jury," the Fifth Circuit decertified the class, reasoning that individual suits were a viable option for plaintiffs and lacked the risks the defendants otherwise faced.[69]

The Eleventh Circuit expressly allows examination of the effect a potential damages award will have on a defendant when determining whether or not to certify a class action under Rule 23(b)(3).[70] Within the majority opinions from *Klay v. Humana, Inc.* and *London v. Wal-Mart Stores, Inc.*, the Eleventh Circuit noted in dicta: "In cases where the defendants' potential liability would be enormous and completely out of proportion to any harm suffered by the plaintiff, we are likely to find that individual suits, rather than a single class action, are the superior method of adjudication."[71]

Both of these cases cited Judge Frankel's *Ratner* rationale for refusing to certify a class when the statutory damages are enormous and disproportionate.[72] The claims in *Klay*, however, involved violations of the RICO Act, which provides for trebling of actual damages suffered by the plaintiff—not statutory damages—meaning the potential damages imposed on the defendant would not have been totally out of proportion to the actual harm suffered by the plaintiffs.[73] The TILA class in *London* was decertified because the class failed to satisfy all four elements of Rule 23(a), and thus it was unnecessary to examine the size of the potential damages award and superiority.[74]

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[68] *Id.* at 746 (citations omitted).

[69] *Id.* at 752.

[70] *See* Klay v. Humana, Inc., 382 F.3d 1241 1271 (11th Cir. 2004).

[71] *Id.* (quoting London v. Wal-Mart Stores, Inc., 340 F.3d 1246, 1255 n.5 (11th Cir. 2003)) (internal quotation marks omitted).

[72] *Id.* (citing Ratner v. Chem. Bank N.Y. Trust Co., 54 F.R.D. 412, 416 (S.D.N.Y. 1972)); *London*, 340 F.3d at 1255 n.5 (same).

[73] *Klay*, 382 F.3d at 1271–72.

[74] *London*, 340 F.3d at 1253–55 (ruling that London, the named plaintiff, was not proper to represent the class).

2. Circuit Courts Ruling that Consideration of the Size of a Potential Damages Award at the Certification Stage is Improper

In *Murray v. GMAC Mortgage Corp.*, the Seventh Circuit ruled that a "ruinously high" potential award was not a proper ground for refusing to certify a class.[75] Judge Easterbrook reasoned that refusing to certify a class on account of the potentially enormous and destructive damages award would subvert the FCRA, which Congress had not yet amended to cap the aggregated statutory damages.[76] After noting that the trial judge referred to certification of this particular FCRA class as an "abuse[] of the class action mechanism," the court attributed the enormity of the damages not to an abusive intent by the plaintiffs, but to Congress's guarantee of damages between $100 and $1000 coupled with the more than one million violations of the FCRA by the defendant.[77]

In the FACTA case *Bateman v. American Multi-Cinema, Inc.*, the Ninth Circuit—citing reasoning from *Murray*—ruled that "allowing consideration of the potential enormity of any damages award would undermine the compensatory and deterrent purposes of FACTA."[78] Before the *Bateman* opinion came down, district courts in the Ninth Circuit had continuously refused to certify classes in FACTA cases based on the reasoning that a class that resulted in enormous liability disproportionate to any actual harm was not the superior method of adjudication.[79] But, *Bateman* superseded these district court decisions, creating new precedent in the Ninth Circuit that "limit[ing] class availability merely on the basis of *enormous* potential liability . . . would subvert

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[75] 434 F.3d 948, 951 (7th Cir. 2006).

[76] *Id.* at 954 ("Maybe suits such as this will lead Congress to amend the Fair Credit Reporting Act; maybe not. While a statute remains on the books, however, it must be enforced rather than subverted.").

[77] *Id.* at 953.

[78] 623 F.3d 708, 722 (9th Cir. 2010).

[79] *See* Blanco v. CEC Entm't Concepts L.P., No. CV 07-0559 GPS (JWJx), 2008 WL 239658 (C.D. Cal. Jan. 10, 2008); Azoiani v. Love's Travel Stops & Country Stores, Inc., No. EDCV 07-90 ODW (OPx), 2007 WL 4811627 (C.D. Cal. Dec. 18, 2007); Najarian v. Avis Rent A Car Sys., No. CV 07-588-RGK (Ex), 2007 WL 4682071 (C.D. Cal. June 11, 2007); Soualian v. Int'l Coffee & Tea LLC, No. CV 07-0502-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 25, 2007).

congressional intent."[80] The court implied that this holding would not apply if the defendant claims that the aggregate damages award from a FACTA class action would result in bankruptcy.[81] The court instead stated that it "reserve[d] judgment as to whether a showing of *ruinous liability* would warrant denial of class certification in a FACTA or similar action."[82] In doing so, the Ninth Circuit distinguished between refusing to certify a class on the basis of enormous liability—liability that would be "unpleasant to a behemoth company"—and refusing to certify a class where the potential aggregate liability would put the defendant out of business.[83]

3. The Second Circuit: It Could Go Either Way

In *Parker v. Time Warner Entertainment Co.*, the Second Circuit vacated a district court decision refusing to certify a class.[84] The lower court concluded that a class action was not superior when potential liability was "grossly disproportionate" to any harm suffered by members of the plaintiff class.[85] The circuit court disagreed with the lower court's conclusion because it was based on assumptions rather than findings of fact.[86] The district court had barred any discovery leaving the record void of any evidence as to the size of the class, the number of plaintiffs who suffered actual damages, or the potential size of the damages that the defendant faced.[87] The circuit court, however, left the door open for district courts to examine the size of potential liability as a superiority factor when presented with adequate evidence.[88]

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[80] *Bateman*, 623 F.3d at 723 (emphasis added) (internal quotation marks omitted).

[81] *Id.*

[82] *Id.* (emphasis added) (internal quotation marks omitted).

[83] *Id.* (quoting Chamberlan v. Ford Motor Co., 402 F.3d 952, 960–61 (9th Cir. 2005) (per curiam)) (internal quotation marks omitted).

[84] 331 F.3d 13, 21 (2d Cir. 2003). *Parker* involved an action for monetary and injunctive relief for violations of the subscriber privacy provisions of the Cable Communications Policy Act. *Id.* at 15.

[85] *Id.* at 21.

[86] *Id.*

[87] *Id.* at 21–22.

[88] *Id.* The court stated that "[b]ecause the district court decided Time Warner's motion without the factual support necessary to support its legal conclusions," the refusal to certify was not proper. *Id.* at 22. It did not, however, explicitly say that it was

In his majority opinion, Judge Underhill recognized several issues that may arise when statutory damages are combined with the class action mechanism, such as due process concerns, distortion of the purpose behind both the statutory damages regime and Rule 23, and a possible *in terrorem* effect on defendants leading to unfair settlements.[89] But, he stated that the due process issues should be addressed by "nullify[ing] [the] effect and reduc[ing] the aggregate damage award," not by denying certification.[90] Thus, it remains unclear how the Second Circuit would rule on annihilatory damages as a superiority factor if properly presented with the issue and supportive evidence.

C. District Court Treatment of Aggregated Statutory Damages Claimed Under FACTA

To develop a full picture of the current judicial dispute over the appropriateness of considering whether an enormous aggregate statutory damages award will annihilate a defendant at the class certification stage, it is helpful to examine how district courts have interpreted precedent in circuits that have addressed the issue. The analyses of district court opinions from the Eleventh and Seventh Circuits prove especially helpful.

1. District Court Opinions from the Eleventh Circuit

In *Leysoto v. Mama Mia I., Inc.*, the district court in south Florida ruled that a class action was not the superior method of adjudication.[91] It held that imposing a potential statutory damages award of between $46 million and $4.6 billion on a local restaurant business with net assets of only $40,000 "would not be a fair, efficient, or cost-effective adjudication of the controversy."[92] District Judge Seitz relied on dicta from *London* as authority that

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improper to deny certification based on the effect the potential enormous damage award would have on the defendant. *Id.*

[89] *Id.*

[90] *Id.* ("And it may be that in a sufficiently serious case the due process clause might be invoked, not to prevent certification, but to nullify that effect and reduce the aggregate damage award." (citing State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 416 (2003); BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 580 (1996))).

[91] 255 F.R.D. 693, 698 (S.D. Fla. 2009); *see supra* notes 1–5.

[92] *Leysoto*, 255 F.R.D. at 698.

district courts in the Eleventh Circuit may consider potential damages at the class certification stage.[93] The judge believed that the statutory damages, attorneys' fees, and costs provide individual plaintiffs with adequate opportunity to seek compensation and enforce FACTA.[94] That belief, in conjunction with her concern that class certification might be used as a "Sword of Damocles" to hang over the defendant as pressure to settle and that the "annihilation associated with certification does not serve the purpose of [FACTA] legislation," led her to deny certification of the class.[95]

Similarly, in *Ehren v. Moon, Inc.*, the court refused to certify and ruled that a class was not superior "where the complaint contain[ed] no indication of any actual damages" and "the aggregated relief could be oppressive in consequence."[96] The court cited dicta from both *London* and *Klay* that implied the Eleventh Circuit would find a class fails the Rule 23(b)(3) superiority requirement where potential liability is "enormous and completely out of proportion to any harm suffered by the plaintiff."[97] Similar to the *Leysoto* decision, the court reasoned that the provision of statutory damages, reasonable costs, and attorneys' fees presented "adequate alternatives and incentives" for plaintiffs with claims under FACTA to bring individual suits.[98] The court found these individual suits superior to a class action.[99]

On the other hand, in *Keller v. Macon County Greyhound Park, Inc.* a district court in Alabama certified a FACTA class and declined to extend *London*'s observation that a class may not be superior where the potential damages are out of proportion to any harm suffered by the plaintiff.[100] The *Keller* court refused to adopt

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[93] *Id.* at 697 ("*London* indicates that lower courts may consider potential class damages, in conjunction with the plaintiff's actual injury . . . ." (citing London v. Wal-Mart Stores, Inc., 340 F.3d 1246, 1255 n.5 (11th Cir. 2003))).

[94] *Id.* at 699.

[95] *Id.*

[96] Ehren v. Moon, Inc., No. 09-21222-Civ, 2010 WL 5014712, at *2 (S.D. Fla. Dec. 3, 2010).

[97] *Id.* (quoting Klay v. Humana, Inc., 382 F.3d 1241, 1271 (11th Cir. 2004); *London*, 340 F.3d at 1255 n.5) (internal quotation marks omitted).

[98] *Id.*

[99] *Id.*

[100] Keller v. Macon Cnty. Greyhound Park, Inc., No. 3:07-CV-1098-WKW [WO], 2011 WL 1085976, at *10–11 (M.D. Ala. Mar. 24, 2011).

this notion because it appeared only in dicta.[101] This court also distinguished *Leysoto* and *Ehren* because the damages in those cases had a potentially ruinous effect on the defendant, whereas in *Keller* the putative class sought a much smaller statutory damages award and the defendant had a relatively higher net worth.[102] Apparently, the *Keller* court did not foresee that the damages resulting from this particular class could have an annihilative effect on the defendant, and thus the potential liability was insufficient for finding the class inferior.

2. District Court Opinion From the Seventh Circuit

Following precedent established in *Murray*, a district court in Indiana in *In re H & R Block Mortgage Corp.* ruled that the argument that aggregated statutory damages would result in bankruptcy was premature at the certification stage.[103] The *H & R Block* case noted that, in *Murray,* the Seventh Circuit reversed a decision refusing to certify an analogous FCRA class and rejected the argument that such a class was not superior because of the size of the potential damages, the possible effect on the defendant, and the disproportionality to the harm suffered by the plaintiff.[104] Additionally, it reasoned that the defendant faced potentially enormous class damages not because of certification in the context of claims for statutory damages, but because the defendant chose to violate the statute numerous times.[105] Persuaded by this reasoning, the court found *Murray* to be binding precedent.[106]

D. Legislative Caps of Aggregated Statutory Damages in Other Consumer Protection Acts

The Consumer Credit Protection Chapter of Title 15 of the United States Code consists of seven consumer protection

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[101] *Id.* at *11.

[102] *Id.*; *see supra* note 4 and accompanying text (comparing the statutory damages sought to the defendant's net worth in *Leysoto*).

[103] *In re* H & R Block Mortg. Corp., Prescreening Litig., 244 F.R.D. 490, 495 (N.D. Ind. 2007).

[104] *Id.* at 494–95.

[105] *Id.* at 496.

[106] *Id.* at 495.

subchapters: Consumer Credit Disclosure, Credit Repair Organizations, Credit Reporting Agencies, Equal Credit Opportunity, Debt Collection Practices, Electronic Fund Transfers, and Truth in Lending Regulations.[107] Six of these seven subchapters—all but the Credit Repair Organizations subchapter—provide for statutory damages. The civil liability section of the Fair Credit Reporting Act, section 1681n, codified under the Credit Reporting Agencies subchapter, applies to all willful FACTA violations.[108]

Section 1681n provides for "any actual damages sustained by the consumer as a result of the failure or damages of not less than $100 and not more than $1,000."[109] The other subchapters that provide for statutory damages, including TILA, the Fair Debt Collection Practices Act, and the Equal Credit Opportunity Act, explicitly address aggregation of these damages in class actions.[110] When one of these damages provisions is implicated in a class action, the available aggregated damages are limited to "not [] more than the lesser of $500,000 or 1 per centum of the net worth of the [defendant]."[111] The statutory damages provision established by FCRA and applicable to FACTA, however, does not mention aggregation or class actions.[112] FCRA (which encompasses FACTA) is the only consumer protection act codified in Title 15, Chapter 41 of the code that provides for statutory damages but does not provide guidelines for when these damages are aggregated in a class action.[113]

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[107] 15 U.S.C. Chapter 41 (Consumer Credit Protection).

[108] 15 U.S.C. § 1681n (2006).

[109] § 1681n(a)(1)(A).

[110] 15 U.S.C. §§ 1640 (2006) (Truth in Lending Act), 1691e (2006) (Equal Credit Opportunity Act), 1692k (2006) (Fair Debt Collection Practices Act), 1693m (2006) (Electronic Funds Transfer Act).

[111] § 1640(a)(2)(b); *accord* §§ 1691e, 1692k, 1693m. It should be noted that the current statutory damages limit of $500,000 will soon be increased to a limit of $1 million. *See* Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 1416, 124 Stat. 2153 (2010). References herein to the statutory damages limit or cap are to the current limit of $500,000.

[112] *See* § 1681n.

[113] *See In re* Trans Union Corp. Privacy Litig., 211 F.R.D. 328, 347–48 (N.D. Ill. 2002) ("Each of the other subchapters specifically provides a cap on class action damages. The FCRA does not." (citations omitted)).

III. THE ANNIHILATIVE DAMAGES STANDARD PROVIDES THE BEST SOLUTION WHEN JUDGES ARE FACED WITH THE EXTREME CIRCUMSTANCES CREATED BY AGGREGATING STATUTORY DAMAGES IN A FACTA CLASS ACTION

Although the problems of aggregated FACTA statutory damages claims would best be resolved by a legislative cap similar to that provided in TILA, it is unclear when and if Congress will take action to limit the aggregation of damages sought in FACTA actions under section 1681n. Until Congress provides a statutory solution, trial judges should exercise their Rule 23 discretion and consider both the potential size of the recovery and the impact on the defendant as factors of superiority, and deny class certification when the potential statutory damages are annihilative.

Refusing to certify a class seeking potential aggregated statutory damages that would financially cripple the defendant remains true to the intent of both Rule 23 and the statutory damages provision. This solution will not totally preempt the due process concerns raised by disproportionate statutory damages or always remove the pressure to settle, which may build even in aggregated claims for statutory damages that do not rise to the annihilatory level. But, refusing to certify classes that do present a risk of annihilation allows judges to avoid the most extreme manifestations of these concerns.

A. Defining the Annihilative Standard

As Judge Wilkinson argued in *Stillmock*, trial judges should refuse to certify a class where the aggregated statutory damage award is likely to be annihilative.[114] Crushing or ruinous liability occurs when the liability imposed is likely to leave the defendant insolvent or in grave risk of insolvency.[115] Therefore, the

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[114] Stillmock v. Weis Mkts., Inc., 385 F. App'x 267, 278 (4th Cir. 2010) (Wilkinson, J., concurring).

[115] In his article *Class Retreat From Mass Deceit*, Jeffrey Payne implies that defendants can raise a "crushing liability defense" when insolvent or otherwise severely financially handicapped. Jeffrey A. Payne, Note, *Class Retreat From Mass Deceit: Assessing Class Action Compatibility with Truth in Lending Act Rescission*, 43 LOY. L.A. L. REV. 1207, 1231 (2010).

annihilative standard should be defined as a damages award that is likely to leave the defendant *imminently insolvent*.[116]

In defining *insolvent* for the purposes of the annihilative standard, it is helpful to draw parallels to the Uniform Commercial Code and the Federal Bankruptcy Code. Insolvency is defined in the U.C.C. as "ceas[ing] to pay debts in the ordinary course of business" or being unable "to pay debts as they become due."[117] Similarly, the Bankruptcy Code defines insolvency as a "financial condition such that the sum of such entity's debts is greater than all of such entity's property, at a fair valuation."[118] Defining the annihilative standard as a damages award that would likely leave the defendant in imminent danger of insolvency, judges should refuse to certify a class where the statutory award will likely leave the defendant company in immediate danger of being unable to pay its debts.[119]

When voicing concern about enormous damages and the effect on defendants, judges often speak in terms and phrases comparable to the imminent insolvency standard. For example, the district court in *Murray v. New Cingular Wireless Services, Inc.* ruled that the size of the potential damages award did not constitute a failure of the superiority requirement when the defendant did not claim that the award would "deal a fatal financial blow to its business."[120] Similarly in *Haynes v. Logan Furniture Mart, Inc.*, the Seventh Circuit recognized the due process and fairness concerns if "crushing damages" are imposed.[121] These images of a *fatal financial blow* to a business

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[116] "Imminent insolvency" is defined in *Ballentine's Law Dictionary* as "[i]nsolvency likely to occur at any moment." BALLENTINE'S LAW DICTIONARY 583 (3d ed. 1969) (citing Arnold v. Globe Exch. Bank, 40 F.2d 955 (E.D.N.Y. 1930)).

[117] U.C.C. § 1-201(23) (2001).

[118] 11 U.S.C. § 101(32)(A) (2006).

[119] *Merriam-Webster's Dictionary* defines "imminent" as "ready to take place; *especially*: hanging threateningly over one's head." *Imminent Definition*, MERRIAM-WEBSTER.COM, http://www.merriam-webster.com/dictionary/imminent (last visited Apr. 7, 2012). "Imminent" carries a similar legal meaning. For example, *Black's Law Dictionary* defines "imminent danger" as "[a]n immediate, real threat." BLACK'S LAW DICTIONARY 450 (9th ed. 2010).

[120] 232 F.R.D. 295, 304 (N.D. Ill. 2005).

[121] 503 F.2d 1161, 1164 (7th Cir. 1974) ("[P]rocedural fairness with respect to protecting defendants from crushing damages predicated on the statutory minimum recovery is an important consideration in determining the superiority of the class action . . . .").

and a damages award that would *crush* a business implicate the notion of insolvency or a serious risk of insolvency.

Defining a standard under which aggregated statutory damages are improper avoids the problems associated with a bright-line rule, such as: class actions for statutory damages are not superior when the potential damages would bankrupt the defendant. A bright-line rule, although easier and often more efficient for a judge to apply,[122] may be subject to abuse as a benchmark of how many plaintiffs could be included in a class without risking failure of the superior requirement due to annihilative liability. Also, this benchmark may prevent certain classes from suing, which would notify the defendant of its noncompliance with FACTA, because any class action certainly causes some fear of "imminent insolvency" given the addition and amplification effect. A standard or a "flexible rule" stresses fairness, allowing the court to determine when the size of a potential class damages award actually threatens a particular defendant's business.[123]

Defining the annihilative standard in the context of "imminent insolvency" allows judges to prevent the most extreme results, without altogether doing away with class actions in suits claiming statutory damages. Congress did not intend for courts to blindly refuse to certify a class seeking statutory rather than actual damages. Had it intended such blanket denial, Congress would have prohibited class actions seeking statutory damages under TILA instead of imposing a cap.[124] Nonetheless, it is still important to consider the effect the damages will have on a defendant when there is a "real possibility" that it will not survive such liability.[125]

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[122] Ellie Margolis, *Closing the Floodgates: Making Persuasive Policy Arguments in Appellate Briefs*, 62 MONT. L. REV. 59, 72 (2001) (discussing the tension between bright-line and flexible rules).

[123] *See id.* A flexible rule allows a court to "take into account the individual circumstances of each case." *Id.*

[124] *See* 15 U.S.C. § 1640(a)(2)(B) (2006).

[125] Payne, *supra* note 115, at 1231 ("To the extent that a court may consider a lender's financial status in certifying TILA-rescission classes, the court should limit such a defense to those lenders for whom insolvency is a real possibility.").

B. Solving the Problems Posed by Annihilative Statutory Damages

1. Staying True to the Purpose of Rule 23 and Congressional Intent

The intent of the authors of Rule 23—that the rule be applied with wide discretion by trial judges—supports a finding that a class action fails the superiority requirement when the aggregated statutory damages would impose ruinous liability on a defendant for a violation that caused little or no actual harm to the plaintiffs.

The authors of Rule 23 included subsection (b)(3) to make class actions available when "convenient and desirable" in cases "in which a class action would achieve economies of time, effort, and expense . . . without sacrificing procedural fairness or bringing about other undesirable results."[126] Courts have interpreted Rule 23 as providing trial judges with wide discretion in deciding whether a class action is the appropriate method for adjudication in light of what would be practical under the circumstances.[127] Rule 23 was intended to provide the trial court with the authority to "employ realism and good sense in denying class action status."[128] Classes certified under Rule 23(b)(3) are only meant to proceed if the trial judge determines, through discretion and good sense, that a class is the "fairest, most efficient, and . . . the most just way" of resolving the conflict.[129] Therefore, if a judge determines that a class action is not practical because the aggregated statutory damages could financially destroy a business, it is within his discretion—and the purpose of Rule 23—to refuse to certify that class.

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[126] FED. R. CIV. P. 23 advisory committee's note (citing ZECHARIAH CHAFEE, JR., SOME PROBLEMS OF EQUITY 201 (1950)).

[127] *See* Ratner v. Chem. Bank N.Y. Trust Co., 54 F.R.D. 412, 416 (S.D.N.Y. 1972) ("Students of the Rule have been led generally to recognize that its broad and open-ended terms call for the exercise of some considerable discretion of a pragmatic nature."); *see also* Wilcox v. Commerce Bank of Kan. City, 474 F.2d 336, 346 (10th Cir. 1973) ("[T]he Rule requires the weighing of one reason against another or against consideration of common sense and practicality."); Marvin E. Frankel, *Some Preliminary Observations Concerning Civil Rule 23,* 43 F.R.D. 39, 39 (1967) ("[Rule 23] confides to the district judges a broad range of discretion." (citations omitted)).

[128] *Wilcox*, 474 F.2d at 347.

[129] Frankel, *supra* note 127, at 43.

There is little record of the congressional intent underlying the statutory damages provision of the FCRA.[130] But, one can infer Congress's purpose in providing statutory damages for FACTA violations from the legislative history of the similar damages provision in TILA. Congress amended TILA in 1974, capping aggregated statutory damages resulting from a class suit at what is now the "lesser of $500,000 or 1 per centum of the net worth of the creditor."[131] The Senate committee responsible for the amendment recognized that the original deterrence purpose of statutory damages still held true: "to provide creditors with a meaningful incentive to comply with the law."[132] They also noted, however, that deterrence could be achieved "without subjecting creditors to enormous penalties for violations which do not involve actual damages and may be of a technical nature."[133] The legislature chose to cap the aggregated damages under TILA in order to preserve the "deterrent effect" of bringing claims for statutory damages in a class action suit while "protect[ing] small business firms from catastrophic judgments."[134] In light of the commentary surrounding the TILA cap, it is rational to infer that Congress did not intend violations of the statutory damages provisions of these consumer protection laws to effectively ruin businesses. Similarly, the objective of FACTA truncation—protecting consumers from vulnerability to identity theft—can be achieved without subjecting businesses to bankruptcy if judges certify only those FACTA classes that are superior and will not result in annihilatory liability.

The Ninth Circuit has opined that by not capping aggregated damages under FACTA, limiting the number of persons that could be certified in a class, or explicitly providing for awards below the statutory minimum damages, Congress intended for there not to be any other barriers or limits to consumers bringing their FACTA claims as class actions.[135] The court reasoned that because there was already discord in the district courts over whether it was

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130 *See* 15 U.S.C. § 1692 (2006).

131 15 U.S.C. § 1640a(2)(B) (2006).

132 S. REP. NO. 93-278, at 14 (1973).

133 *Id.*

134 Scheuerman, *supra* note 13, at 145–46 (quoting H.R. REP. NO. 93-1429 (1974) (Conf. Rep.), *reprinted in* 1974 U.S.C.C.A.N. 6148, 6153).

135 Bateman v. Am. Multi-Cinema, Inc., 623 F.3d 708, 718 (9th Cir. 2010).

proper to assess the deleterious effect of the damages on the defendant at the certification stage, Congress must have been aware of the issue at the time they amended FACTA with the Credit and Debit Card Receipt Clarification Act of 2007.[136] Furthermore, because Congress was aware of the split and amended the act but did nothing to resolve the issue, Congress must not have been "sufficiently concerned about disproportionate damages as a result of class actions."[137] Based on the lack of congressional action, the Ninth Circuit determined that "limit[ing] class availability merely on the basis of *enormous* potential liability . . . would subvert congressional intent."[138]

Congressional inaction differs from congressional action, and the former is not necessarily evidence of congressional intent. The Ninth Circuit in *Bateman* did not consider the possibility that Congress declined to cap the aggregated FACTA damages in order to see how judicial opinions on issues such as the due process implications of enormous aggregated statutory damages develop in the courts. Further, Congress's failure to impose an express limit does not necessarily mean that Congress intended the courts to refrain from establishing a common law limit on the statutory penalty levied against one defendant in a single suit. Thus, a constitutional issue still remains requiring a resolution—the effect of these enormous and disproportionate statutory awards on a defendant's due process rights.[139]

2. Avoiding the Due Process Issue

Some judges have ruled that due process issues are not proper to consider at the certification stage and should be addressed in post-trial hearings where the damage award can be reduced if necessary.[140] For four reasons, judges should avoid the

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[136] *Id.* at 712, 720 (citing Credit and Debit Card Receipt Clarification Act of 2007, Pub. L. No. 110-241, 122 Stat. 1565 (2008)).

[137] *Id.* at 720 ("Had Congress been sufficiently concerned about disproportionate damages as a result of class actions, it would have limited class availability or aggregate damages.").

[138] *Id.* at 723 (emphasis added) (internal quotation marks omitted).

[139] See the due process problem explored *supra* in Part I.B.

[140] In *Parker*, the Second Circuit recognized the potential due process concerns raised by combining the class action with statutory damages but stated that, if the Due Process Clause is invoked, it should not be to "prevent certification, but to nullify that

due process issue altogether by considering the potential size of the damage award at the certification stage: (1) if the defendant is found liable, a massively aggregated statutory award will certainly be found unconstitutional; (2) consideration at the certification stage will give effect to the avoidance doctrine; (3) settlement pressure dooms the "wait-and-see" approach; and (4) judicial remittitur below the per-consumer statutory minimum violates the language of the statute.

a. Massively Aggregated Statutory Awards Certainly Will Be Found Unconstitutional

Imposing annihilative aggregated statutory damages when there has been little or no actual harm violates the due process rights of defendants. Many judges have expressed such concerns, and these concerns withstand scrutiny under factors typically applied to assess the constitutionality of punitive damages: the defendant's ability to pay, the reprehensibility of defendant's conduct, and the ratio of compensatory damages to punitive damages.[141] Assuming the 46,000-member class in *Leysoto* were certified and each plaintiff awarded the minimum statutory damages of $100, the company would have faced an aggregated statutory damages award of $4.6 million.[142]

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effect and reduce the aggregate damage award." Parker v. Time Warner Entm't Co., 331 F.3d 13, 22 (2d Cir. 2003) (citations omitted). In *Murray*, the Seventh Circuit ruled that "constitutional limits are best applied after a class has been certified." Murray v. GMAC Mortg. Corp., 434 F.3d 948, 954 (7th Cir. 2006). In his concurring opinion in *Parker*, Judge Newman offered a similar alternative to reducing the statutory damage award. 331 F.3d at 27 (Newman, J., concurring). He advocated avoiding due process concerns by certifying the class "only up to some reasonable aggregate amount of damages" resulting in an award of "substantially less" than the statutory minimum. *Id.* at 27–28.

[141] In *Gore*, the Supreme Court held that in determining whether punitive damages are "grossly excessive" courts should look to (1) "the degree of reprehensibility of the defendant's conduct"; (2) "[the] ratio [of the punitive damage award] to the actual harm inflicted on the plaintiff"; and (3) a comparison of "the punitive damages award and the civil or criminal penalties that could be imposed for comparable misconduct." BMW of N. Am., Inc. v Gore, 517 U.S. 559, 575–84 (1996).

[142] *See* Leysoto v. Mama Mia I., Inc., 255 F.R.D. 693 (S.D. Fla. 2009).

i. Defendant's Ability to Pay

Mama Mia's potential statutory penalty—between $4.6 and $46 million—seems particularly excessive when viewed in light of the corporation's net assets of approximately $40,000.[143] Courts have ruled that judges may properly consider a defendant's ability to pay in assessing whether punitive damages are grossly excessive.[144] Despite *Gore*'s prohibition on upholding otherwise unconstitutional punitive damages because of the defendant's wealth, the Tenth Circuit stated in *Continental Trend Resources, Inc. v. OXY USA, Inc.* that *Gore* should not be interpreted to mean that the defendant's ability to pay is "irrelevant."[145] Other courts have held that judges should consider the defendant's ability to pay or financial situation in assessing punitive damages because punitive damages are meant to deter, which is not furthered by the imposition of a penalty the defendant could not possibly pay.[146]

Statutory damages are also meant to punish the defendant and deter future violations, and there is no value in imposing a statutory punishment that a defendant cannot possibly pay. Therefore, judges should consider a defendant's ability to pay when reviewing whether or not aggregate statutory damages are unconstitutionally excessive. Mama Mia's glaring inability to pay even a fraction of the minimum $4.6 million award certainly

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[143] *Id.* at 697.

[144] A court, however, should not impose an otherwise unconstitutionally excessive award of punitive damages on a defendant simply because said defendant is wealthy.

[145] 101 F.3d 634, 641 (10th Cir. 1996); *see also Gore*, 517 U.S. at 585. A defendant's ability to pay should be considered when reviewing punitive damages because "$50,000 may be awesome punishment for an impecunious individual defendant but wholly insufficient to influence the behavior of a prosperous corporation." *Cont'l Trends*, 101 F.3d at 641.

[146] Lee v. Edwards, 101 F.3d 805, 813 (2d Cir. 1996) ("We recognize that one purpose of punitive damages is deterrence, and that deterrence is directly related to what people can afford to pay." (citing Vasbinder v. Scott, 976 F.2d 118, 121 (2d Cir. 1992))). For example, in *Myers v. Central Florida Investments, Inc.*, the Eleventh Circuit applying Florida law held that because the purpose of punitive damages is to "punish the defendant for its wrongful conduct and to deter similar misconduct," a judge may properly consider the wealth of the defendant when "determining the reasonableness of a punitive award." 592 F.3d 1201, 1216 (11th Cir. 2010) (citation omitted) (internal quotation marks omitted). Additionally, the punitive damage award should "not result in economic castigation or bankruptcy of the defendant." *Id.* (citations omitted) (internal quotation marks omitted).

weighs in favor of finding that such an award would be grossly excessive and unreasonable.

ii. Reprehensibility of Conduct

In order to assess the reprehensibility of Mama Mia's conduct—knowingly failing to remove credit and debit card numbers from approximately 46,000 receipts—it is helpful to compare the conduct to the reprehensibility factors set out in *Gore* and *Campbell*. These reprehensibility factors include whether:

> [T]he harm caused was physical as opposed to economic; the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others; the target of the conduct had financial vulnerability; the conduct involved repeated actions or was an isolated incident; and the harm was the result of intentional malice, trickery, or deceit, or mere accident.[147]

At most, Mama Mia's FACTA violation caused some unquantifiable emotional harm due to the fear of identity theft. No plaintiff alleged any actual economic loss and it would require a great stretch of the imagination to contemplate any physical harm that could possibly result from the failure to properly truncate. Nor can it be said that the FACTA violation at issue demonstrated any "indifference to or a reckless disregard of the health or safety of others," or targeted a vulnerable population.[148] Although the defendant's conduct did involve repeated acts, to recover statutory damages for these violations the defendant must have at least acted in reckless disregard.[149] Mama Mia's conduct,

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[147] State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 419 (2003) (citing *Gore*, 517 U.S. at 576–77).

[148] *Id.*

[149] Title 15 U.S.C. § 1681n(a) (2006) requires that in order to recover statutory damages, the defendant must have "willfully fail[ed] to comply." A defendant who recklessly violates the statute, however, could meet this willful noncompliance standard. The Supreme Court interpreted the willfulness requirement for statutory damages under section 1681n to encompass "not only knowing violations of a standard, but reckless ones as well." Safeco Ins. Co. of Am. v. Burr, 551 U.S. 47, 57 (2007) (citing McLaughlin v. Richland Shoe Co., 486 U.S. 128, 132–33 (1988)). In *Murray v. New Cingular Wireless*, the Seventh Circuit read recklessness to mean something "more than negligence but less than knowledge of the law's requirements." Murray v. New

knowingly or recklessly printing noncompliant receipts, fits somewhere between "mere accident" and intentional conduct.[150] Although the defendant's conduct is not entirely blameless, the FACTA violations do not seem reprehensible in the traditional sense—there has been no physical harm, harm to a vulnerable population, or intentional deceit. At its worst, Mama Mia's behavior evidences a disregard for, or failure to become aware of, a statutory regulation intended to protect individuals from financial harm.

iii. Ratio of Compensatory Damages to Punitive Damages

One must also compare the portion of the statutory damages award that is meant to compensate the plaintiffs with the portion of the award that is punitive. In other words, the size of the damage award is compared to the actual or potential harm suffered by the plaintiff class as a result of Mama Mia's FACTA violation.[151] The potential harm caused by a violation of FACTA's truncation requirement is any risk of future identity theft due to the inclusion of card numbers on the receipt. These harms, however, are difficult to assess in statutory damages cases precisely because statutory damages are sought *instead of* actual damages and there are no allegations of actual or quantifiable harm suffered as a result of the violation. Thus, the compensatory function of the aggregated statutory damage award is effectively zero.

Although the defendant had violated the statute approximately 46,000 times, no plaintiff alleged they suffered any harm, which means there is zero harm for the statutory damages to compensate. Forty-six thousand multiplied by zero is still zero.[152] Even if a "higher ratio may be justified in cases in which

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Cingular Wireless Servs., Inc., 523 F.3d 719, 726 (7th Cir. 2006) (citing *Safeco*, 551 U.S. 47).

[150] *See infra* note 159.

[151] *See* Barker, *supra* note 25, at 539. ("The second guidepost in the determination of gross excessiveness is the ratio of the punitive damage award to the actual or potential harm inflicted on the plaintiff.").

[152] In his application of the *Gore* guideposts to statutory damages recovered under copyright infringement laws, J. Cam Barker assessed the actual harm of file sharing as the actual cost of a musical album that might have been spent had it not been illegally downloaded. *Id.* at 548. Therefore, Barker concluded that approximately $735 of the

the injury is hard to detect" or the harm is largely noneconomic, the ratio of 4.6 million punitive to zero compensatory damages is certainly excessive.[153]

iv. All Signs Point to a Due Process Violation

Because the defendant's net assets were a mere $40,000, its conduct did not seem reprehensible in the traditional sense, and the ratio of punitive to compensatory effect was poor, any judge should find this statutory damage award of $4.6 million grossly excessive when imposed for a violation that caused no quantifiable harm.[154] Under similar circumstances, if such an annihilative statutory damage award were handed down, it would likely be unconstitutional in light of the defendant's inability to pay and the extreme disproportionality between the compensatory and punitive function effectively served by the damages.

b. Making Class Certification Rulings in Light of the Constitutional Avoidance Doctrine

Avoiding the due process issue by considering annihilative liability at the certification stage allows the court to adjudicate the matter without having to resolve a constitutional issue. In advocating for consideration of annihilative damages in the context of Rule 23(b)(3), Judge Wilkinson relied on the avoidance doctrine and Justice Brandeis's concurring opinion in *Ashwander v. Tennessee Valley Authority*.[155] Under the doctrine of constitutional avoidance, the Supreme Court generally will not decide a case based on a constitutional issue if non-constitutional

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$750 statutory damage amount served a punitive rather than compensatory function. *Id.*

[153] BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 582 (1996). The court noted that although there is no ratio that will always be unconstitutional, "[w]hen the ratio is a breathtaking 500 to 1 . . . the award must surely 'raise a suspicious judicial eyebrow.'" *Id.* at 583 (quoting TXO Prod. Corp., v. Alliance Res. Corp., 509 U.S. 443, 481 (1993) (O'Connor, J., dissenting)).

[154] This assessment differs from an assessment of individual action brought under FACTA, in which the ratio of punitive damages to actual harm (assuming no actual harm were alleged) would be somewhere between 100 to 0 and 1000 to 0.

[155] Stillmock v. Weis Mkts., Inc., 385 F. App'x 267, 278 (4th Cir. 2010) (Wilkinson, J., concurring); *see* Ashwander v Tenn. Valley Auth., 297 U.S. 288, 346–47 (1936) (Brandeis, J., concurring).

grounds for adjudication exist.[156] In the realm of statutory interpretation, constitutional avoidance is based on the presumption that Congress enacts legislation that is aligned with the protection of fundamental constitutional liberties when those liberties are implicated by that legislation.[157] Although the doctrine of constitutional avoidance was applied by judges long before Justice Brandeis took the bench, he is typically credited for this canon as laid out in his concurrence in *Ashwander*.[158] The doctrine is not limited in application to the Supreme Court. Lower courts often use the doctrine of constitutional avoidance and decide cases on any proper grounds other than the constitutional questions presented.[159] Under this precedent, all federal courts should make every effort to adjudicate a case on any legitimate non-constitutional grounds before addressing the constitutional questions underlying the case. Ruling that a class is not superior under Rule 23 because it would create enormous liability, rather than addressing the constitutionality of the aggregate award after trial, demonstrates avoidance "in the best tradition of the Brandeis concurrence."[160]

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[156] Escambia Cnty. v. McMillan, 466 U.S. 48, 51 (1984) ("It is a well-established principle governing the prudent exercise of this Court's jurisdiction that normally the Court will not decide a constitutional question if there is some other ground upon which to dispose the case." (citing *Ashwander*, 297 U.S. at 347)).

[157] Regan v. Time, Inc., 468 U.S. 641, 696 (1984) (Stevens, J., concurring in part and dissenting in part).

[158] Before becoming Chief Justice of the Supreme Court, John Marshall adhered to the principle of only deciding a constitutional issue when it was "indispensably necessary to the case." *Ex parte* Randolph, 20 F. Cas. 242, 254 (C.C.D. Va. 1833) (No. 11,558). If the case could be decided on grounds other than the constitutional ones, "a just respect for the legislature requires, that the obligation of its laws should not be unnecessarily and wantonly assailed." *Id.* In his concurrence, Justice Brandeis laid out several rules of decision developed by the Supreme Court to avoid "passing upon a large part of all the constitutional questions pressed upon it." *Ashwander*, 297 U.S. at 347. Among these rules: "The Court will not pass upon a constitutional question although properly presented by the record, if there is also present some other ground upon which the case may be disposed of." *Id.* Justice Brandeis's *Ashwander* concurrence has been referred to as "one of the most respected opinions ever written by a Member of [the] Court." Delaware v. Van Arsdall, 475 U.S. 673, 693 (1986) (Stevens, J., dissenting).

[159] *See, e.g.*, Artichoke Joe's Cal. Grand Casino v. Norton, 353 F.3d 712, 730–31 (9th Cir. 2003); Adams v. City of Battle Creek, 250 F.3d 980, 986 (6th Cir. 2001); United States v. Taveras, 133 F. Supp. 2d 298, 307 (S.D.N.Y. 2001).

[160] *Stillmock*, 385 F. App'x at 278.

c. Settlement Pressure Dooms the "Wait-and-See" Approach

If courts apply the "wait-and-see" approach to due process issues raised by enormous aggregate damages, then the defendant's due process rights might go unaddressed were it to fold to the pressure of the enormous liability of the certified class and agree to a large settlement.[161] When the defendant settles a claim under pressure from the certification of the class, neither the decision to certify such a class nor the size of the settlement agreement will be reviewed on appeal.[162] Therefore, if courts participate in the "quintessential judicial punt" and decline to address the size of the potential aggregate award and its bearing on due process, they risk that the defendant will settle before the issue can be addressed.[163]

d. Judicial Remittitur Below the Per-Consumer Statutory Minimum Violates the Language of the Statute

If judges choose to wait and address the due process implications after the verdict has been entered and an aggregate award handed down, the remedy is likely to be a judicial reduction in the award. This remittitur may require the judge to reduce per-consumer awards below the statutory minimum, therefore violating the plain meaning of the statute. As Judge Newman points out in his *Parker* concurrence: "[C]onstru[ing] [the statute] to authorize an award of substantially less than [the statutory minimum] to all but the initially named plaintiffs . . . . cannot be reconciled with the terms of the statute . . . ."[164]

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[161] Chaplin, *supra* note 16, at 332 ("[The] wait-and-see attitude has substantial potential consequences, chief of which is the concern with wringing an unfair settlement from a merchant justifiably concerned with unknown liability and the uncertainty of the litigation process.").

[162] *See* Scheuerman, *supra* note 13, at 103–04, 148–50; *supra* Part I.C.

[163] Scheuerman, *supra* note 13, at 104 ("[D]eclining to consider any due process limit until after the class has been certified and a verdict entered. . . . [typically] means that the court will never reach the due process issue.").

[164] Parker v. Time Warner Entm't Co., 331 F.3d 13, 27 (2d Cir. 2003) (Newman, J., concurring).

3. Preempting Settlement Pressure

Application of the imminent insolvency standard will also relieve the possibility of blackmail settlements in the more extreme FACTA cases. Courts that refuse to certify annihilative classes shield the defendant from facing the most extreme form of settlement pressure—settle or risk bankruptcy. Excessively large classes seeking statutory damages function as a type of *judicial blackmail* the moment they are certified.[165] Although Rule 23(f) allows interlocutory appeals concerning certification, the risk is still present that a defendant will find it too costly to pursue and instead settle.[166] Furthermore, if the courts decide that it is not proper to consider the size of the potential damages award at the certification stage, an interlocutory appeal of the class certification decision would not be helpful anyway. Barring plaintiffs from aggregating these statutory claims negates the threat of unfair settlements, instead leaving plaintiffs to bring individual claims that defendants may decide to settle or litigate based only on the validity of their defense and not the coercion of judicial blackmail.

4. Consideration of the Size of Potential Liability Does Not Constitute a Decision on the Merits in Violation of *Eisen v. Carlisle & Jacquelin*

Although considering the size of potential liability requires a prospective assessment of the damages that would be awarded if the class were to succeed on the merits, it does not involve an impermissible decision on the merits. In the 1974 decision *Eisen v. Carlisle & Jacquelin*, the Supreme Court held that "nothing in either the language or history of Rule 23 [] gives a court any

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[165] Lauchheimer, *supra* note 38, at 551. In *Coopers & Lybrand v. Livesay*, the Supreme Court stated that "certification of a large class may so increase the defendant's potential damages liability and litigation costs that he may find it economically prudent to settle and to abandon a meritorious defense." 437 U.S. 463, 476 (1978). Such large classes, however, can be a "double-edged sword" for plaintiffs, because a defense victory on the merits is a res judicata bar against subsequent individual suits by the class members. Lauchheimer, *supra* note 38, at 551.

[166] Settling rather than risking their business in litigation, is potentially a poor compromise for both parties. It is possible it will also harm the members of the class because the blackmail settlement, while costly for the defendant, may actually pay each individual plaintiff less than the statutory minimum.

authority to conduct a preliminary inquiry into the merits of a suit in order to determine whether it may be maintained as a class action."[167] But, the distinction between class certification discovery and merits discovery is fuzzy; and circuit and district courts have interpreted the Court's ruling to allow the examination of evidence necessary to assess Rule 23 factors, such as the possible size of recovery and the effect it will likely have on a defendant.[168] For example, the Third Circuit has interpreted the *Eisen* decision as consistent with the practice of commanding evidentiary discovery necessary to assess the factors of Rule 23 at the certification stage:

> An overlap between a class certification requirement and the merits of a claim is no reason to decline to resolve relevant disputes when necessary to determine whether a

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[167] 417 U.S. 156, 177 (1974); *see* 2 ALBA CONTE & HERBERT B. NEWBERG, NEWBERG ON CLASS ACTIONS § 4:44 (4th ed. 2002); Richard Marcus, *Reviving Judicial Gatekeeping of Aggregation: Scrutinizing the Merits on Class Certification*, 79 GEO. WASH. L. REV. 324, 332–41 (2011). On remand from *Eisen*'s first trip to the Second Circuit, the trial judge conducted small pre-certification-hearing hearings at which much evidence was presented on who should bear what percentage of the cost of providing notice to all potential class members. Marcus, *supra*, at 335–36. The Supreme Court eventually ruled that delving into the substantive merits of a claim at the certification stage violates Rule 23's command that a decision on class certification be made "[a]s soon as practicable after the commencement of [the] action . . . ." *Eisen*, 417 U.S. at 178 (alterations in original) (internal quotation marks omitted). The amended version of the Rule now states: "At an early practicable time . . . the court must determine by order whether to certify the action as a class action." FED. R. CIV. P. 23(c)(1)(A).

[168] *See* Marcus, *supra* note 167, at 340–41. Marcus further argues:

> [T]here was abundant opportunity to dispute the dividing line between "merits" discovery and "class" discovery. As the Fifth Circuit put it in an en banc 1973 case, "[i]t is inescapable that in some cases there will be overlap between the demands of [Rule] 23(a) and (b) and the question of whether [a] plaintiff can succeed on the merits. . . ."
>
> The Supreme Court itself recognized in 1978 that "the class determination generally involves considerations that are 'enmeshed in the factual and legal issues comprising the plaintiffs' cause of action.'"

Id. at 340–41 (brackets in original) (quoting *Coopers*, 437 U.S. at 469; Huff v. N.D. Cass Co. of Ala., 485 F.2d 710, 714 (5th Cir. 1973)). The Second and Seventh Circuits have ruled that "evidentiary inquiries" or "'findings' on a mixed issue of law and fact" are often necessary to rule on class certification and are not prohibited by the Supreme Court's ruling in *Eisen*. Marcus, *supra* note 167, at 350–51 (citing *In re* Initial Pub. Offerings Secs. Litig., 471 F.3d 24, 40–41 (2d Cir. 2006); Szabo v. Bridgeport Machs., Inc., 249 F.3d 672, 676 (7th Cir. 2001)).

> class certification requirement is met. . . . *Eisen* is best understood to preclude only a merits inquiry that is not necessary to determine a Rule 23 requirement.[169]

Similarly, district courts in the Eleventh Circuit have held that because it is often necessary to "touch[] on the merits of the litigation" in order to make the required findings under Rule 23, it is within the trial court's discretion to do so at the certification stage to the extent necessary to determine whether a class should be certified according to Rule 23.[170]

The annihilative standard argument advocates assessing the size of the potential aggregated damages award (and the likely effect on the defendant) as a superiority factor under Rule 23(b)(3). Thus, any examination of the merits of the case for this assessment is necessary for a thorough and accurate determination of whether the class should be certified. Under the principle set forth by the Third Circuit, and echoed by district courts in the Eleventh Circuit, *Eisen* does not forbid such an inquiry.

C. Policy of Preventing Annihilation

It is a dangerous policy to allow plaintiffs to financially cripple a defendant with the justice system in the absence of actual harm simply to enforce a statute. Such a harsh penalty without an actual injury "offends fundamental notions of fairness," and the economic costs outweigh any benefit of deterrence or compensation.[171]

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[169] *In re* Hydrogen Peroxide Antitrust Litig., 552 F.3d 305, 316–17 (3d Cir. 2008) (citing Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 259 F.3d 154, 166–69 (3d Cir. 2001)); *see* Marcus, *supra* note 167, at 351–54.

[170] *See* Campos v. Choicepoint, Inc., 237 F.R.D. 478, 484 (N.D. Ga. 2006) (quoting Cooper v. S. Co., 390 F.3d 695, 712 (11th Cir. 2004) (internal quotation marks omitted) ("[I]t [is] impossible to meaningfully address the Rule 23 criteria without at least touching on the 'merits' of the litigation." (quoting *Cooper*, 390 F.3d at 712) (internal quotation marks omitted)); *see also* Leysoto v. Mama Mia I., Inc., 255 F.R.D. 693, 696 (S.D. Fla. 2009) ("[I]t is within a court's discretion to consider the merits of the claims in order to determine whether the requirements of Rule 23 are satisfied." (citations omitted)).

[171] Chaplin, *supra* note 16, at 312 ("It offends fundamental notions of fairness when litigants, without actual injury (and without the prospect of actual injury), are allowed to use the courts as a means of financial gain.").

First, the combination of class action adjudication and a statutory damages provision creates a "draconian outcome" that subverts the policy goal of fairness.[172] This is especially the case when the combination results in the destructive punishment of a company for statutory violations that caused little or no quantifiable harm. It is unfair to impose a larger penalty than is necessary to accomplish the purposes of statutory damages—compensation, retribution, and deterrence.

Similarly, in criminal sentencing, a judge should impose a sentence or penalty that is only as severe as is necessary.[173] A criminal sentence performs several policy functions: prevention, deterrence, rehabilitation, and retribution.[174] In handing down a punishment, courts consider these goals and impose only the sentence that is necessary, for example, to deter future conduct, rehabilitate the wrongdoer, and punish the wrongdoer for the conduct.[175] To accomplish the retributive function of a penalty, courts should "impose the minimum sentence that is consistent with . . . the gravity of the offense."[176] In keeping with the principle of the minimum necessary sentence, the United States Sentencing Guidelines provide for an annihilatory penalty—the so-called *corporate death penalty*—only against the worst bad actors: corporations falling into the classification of "criminal purpose organizations."[177]

Punitive and statutory damages meant to punish and deter statutory violations can be classified as quasi-criminal remedies

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[172] Note, *Class Actions Under the Truth in Lending Act*, 83 YALE L.J. 1410, 1415 (1974) (citing Richard F. Dole, Jr., *Private Enforcement of Consumer Credit Legislation*, 26 BUS. LAW 915, 918 (1971)). In this 1974 Note for the *Yale Law Journal*, the author observed that the "'annihilating' punishment" TILA would impose on the defendant in *Ratner* if decided as a class action—$13 million despite no allegations of actual damages—resulted in a "draconian outcome." *Id.* (citing *Dole*, *supra*, at 918).

[173] 24 C.J.S. *Criminal Law* § 1997 (2006).

[174] *Id.* § 1997, at 23.

[175] *Id.* § 1997, at 25 ("The court must impose a sentence sufficient, but not greater than necessary, to comply with these purposes." (citations omitted)).

[176] *Id.* § 1997, at 23 (citations omitted).

[177] Mary Kreiner Ramirez, *The Science Fiction of Corporate Criminal Liability: Containing the Machine Through the Corporate Death Penalty*, 47 ARIZ. L. REV. 933, 939–40 (2005) (internal quotation marks omitted) ("For the 'worst' offenders, defined by the United States Sentencing Guidelines as 'criminal purpose organizations,' the Guidelines provide for fines that divest the corporation of all its net assets." (footnotes omitted)).

that "blend the criminal law function of punishment and deterrence with the tort law goal of reparation."[178] As such, courts should mirror the analysis employed in criminal sentencing and consider a punishment's purposes and limitations when handing down civil penalties in the form of punitive damages or aggregated statutory damages. Imposing a destructive statutory penalty when the underlying violation caused little actual harm violates the retributive concept that a punishment should fit the crime, a policy deeply rooted in the idea of fairness. At least one district court judge assessing superiority has recognized that aggregating statutory damages claims in a class action fails this policy. In *Anderson v. Capital One Bank*, the trial judge noted that there was "more than an element of unfairness in subjecting a defendant to a suit by a class of 19,840 persons theoretically eligible for awards of $100 to $1000."[179] Such class actions, which ring *unfair* because of their potential impact on defendants, should not be certified as superior under Rule 23(b)(3).

Second, the economic costs posed by certifying these classes outweigh any benefit of increasing incentives for individuals to bring FACTA claims. Aggregating claims for statutory damages in a class action serves as a deterrent—a central policy goal of the statute—but in reality this deterrent effect is small.[180] The Seventh Circuit in *Murray* observed that "society may gain from the deterrent effect of financial awards" if a Rule 23(b)(3) class is certified in situations in which "the potential recovery is too slight to support individual suits, but injury is substantial in the aggregate."[181] The deterrent effect of aggregation, however, is

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[178] Thomas Koenig & Michael Rustad, "*CrimTorts" as Corporate Just Deserts*, 31 U. MICH. J.L. REFORM 289, 293 (1998).

[179] 224 F.R.D. 444, 452–53 (W.D. Wis. 2004). The judge in *Anderson* found these potential damages provided by the statutory damages provision of the FCRA so unfair because they were "wholly out of proportion to the harm done to any of the class members or to all of them together" by the alleged violations of the Equal Credit Opportunity Act. *Id.* at 453.

[180] It might initially seem as if this central policy benefit *is* the exact purpose for which class actions were created: access to the courts, and loss compensation, to those for whom it would not otherwise be financially feasible. But, in most claims for statutory damages (and in FACTA claims in particular) members of the putative class have not experienced actual harm and so are not terribly concerned with compensation.

[181] Murray v. GMAC Morg. Corp., 434 F.3d 948, 953 (7th Cir. 2006) (citing Mace v. Van Ru Credit Corp., 109 F.3d 338, 344–45 (7th Cir. 1997)).

minor when one reflects on the immediacy with which businesses typically become FACTA compliant after complaints are filed, the existence of other incentives to bring individual suits, and the availability of alternative enforcement by the Federal Trade Commission.

Observing that the defendant in *Leysoto* complied with FACTA within two months of the plaintiff filing his individual complaint, the trial judge stated that aggregation of FACTA claims is "simply unnecessary to effectively enforce the Act and compensate victims of identity theft."[182] The facts of *Price v. Lucky Strike Entertainment, Inc.* are even more persuasive on this ground.[183] In *Price,* the defendant began removing the expiration date from its receipts "promptly" after learning of the FACTA violation, and became completely FACTA-compliant within only four days.[184] This immediate response to comply after notification of an *individual* plaintiff's complaint "nullif[ies] any specific deterrence benefit that might have derived from class certification."[185]

Furthermore, the incentives to bring individual actions for FACTA violations ensure that individual claims are a viable alternative, relieving "concerns that Defendants would avoid accountability in the absence of class certification."[186] These incentives render successful suits "essentially costless" for plaintiffs.[187] Finally, the Federal Trade Commission has the power to enforce FACTA, imposing penalties on companies that

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[182] Leysoto v. Mama Mia I., Inc., 255 F.R.D. 693, 699 (S.D. Fla. 2009).

[183] Price v. Lucky Strike Entm't, No. CV 07-960-ODW (MANx), 2007 WL 4812281 (C.D. Cal. Aug. 31, 2007).

[184] *Id.* at *5.

[185] *Id.* (citing Abels v. JBC Legal Grp., P.C., 227 F.R.D. 189, 195 (N.D. Cal. 2005)).

[186] *Id.* at *6 (citing 15 U.S.C. § 1681n (2006)). Here the court reiterated that "section 1681n provides attorneys' fees [as well as reasonable costs] for successful litigants, ensuring that individual actions by consumers are viable." *Id.* Similarly, in *Stillmock* Judge Wilkinson recognized "no shortage of incentives for consumers to bring individual suits under FACTA," which provides "both costs and reasonable attorney's fees 'in the case of any successful action.'" Stillmock v. Weis Mkts., Inc., 385 F. App'x 267, 282 (4th Cir. 2010) (Wilkinson, J., concurring) (quoting §§ 1681n(a)(3), 1681o(a)(2)); *see also* Coleman v. Gen. Motors Acceptance Corp., 296 F.3d 443, 449 (6th Cir. 2002) ("ECOA's provision for the award of attorney's fees and costs to successful plaintiffs eliminates any potential financial bar to pursuing individual claims.").

[187] *Stillmock*, 385 F. App'x at 282 (Wilkinson, J., concurring) (quoting Anderson v. Capital One Bank, 224 F.R.D. 444, 453 (W.D. Wis. 2004)).

violate the statute even if private plaintiffs fail to carry out the role of private attorneys general by bringing civil claims.[188] These alternative deterrence mechanisms demonstrate that the main benefit of certifying classes of FACTA claims—ensuring deterrence of future violations—is actually quite small.

The costs of these aggregated statutory recoveries outweigh the small benefit of deterrence and are particularly outrageous given the state of our economy. The overarching policy goal when examining litigation from an economic efficiency point of view is to "maintain a legal system that promotes competition and growth in the economy."[189] Certifying class actions when the damages sought are guaranteed and threaten the defendant's survival undercuts this general economic goal.

Judges should take into account the serious cost of job losses that often accompanies these massively aggregated damages.[190] Imposing such extreme liability on businesses may put them out of business, subsequently removing jobs from the market, contributing to unemployment, and negatively impacting the economy. The policy applied to corporations in the realm of criminal law is once again telling. The United States Department of Justice considers the possibility of lost jobs and the impact on innocent employees when deciding whether to bring criminal charges against a corporation.[191] Similarly, courts should consider the economic impact to entire communities that might result from imposing annihilative liability on a corporation through a class action.

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[188] Chaplin, *supra* note 16, at 338 ("'[T]here are other federal enforcement alternatives, such as through the Federal Trade Commission.'" (quoting 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))).

[189] Margolis, *supra* note 122, at 79.

[190] In *Stillmock*, Judge Wilkinson refers to the combination of statutory damages and class actions as a real jobs killer, pointing out that if the class seeking $1.4 billion to $14 billion in damages were successful in proving liability, Weis Markets, Inc., worth $900 million, would go under and approximately 17,600 individuals would lose their jobs. *Stillmock*, 385 F. App'x at 279–80.

[191] Ramirez, *supra* note 177, at 971.

D. FACTA Enforcement Does Not Require Annihilative Damages

Although applying the imminent insolvency standard will deny certification to some massive classes, the FACTA regulations remain enforceable for three reasons: (1) plaintiffs and plaintiffs' attorneys will likely continue to file class action complaints for FACTA violations; (2) individual plaintiffs who experience actual damages due to improper truncation may seek compensation; and (3) the Federal Trade Commission retains the power to enforce the statute.

Even when the annihilative standard is adopted, it is reasonable to expect that plaintiffs will continue to file class actions seeking statutory damages for FACTA violations, just as plaintiffs continue to do so in TILA suits despite the limitations placed on such relief in the statute's 1974 amendment.[192] When Congress capped the amount of class action damages available under TILA, it did so with the purpose of "strik[ing] an appropriate balance between the advantages of the class action as a vehicle of a private enforcement and the need of creditors to avoid financial ruin."[193] Congress did not, therefore, intend to bar plaintiffs from seeking relief through a combination of the TILA damages provisions and Rule 23's class action mechanisms. Nor has the cap resulted in TILA actions grinding to a halt. A quick search reveals that plaintiffs are still bringing actions for statutory damages under TILA regardless of the cap.[194] Similarly, plaintiffs will likely continue to file FACTA claims and seek Rule 23(b)(3) class certification when the aggregation of their FACTA

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[192] Massive aggregated statutory damages awards are no longer recoverable under TILA, which currently caps the aggregated award at "the lesser of $500,000 or 1 per centum of the net worth of the [defendant]." 15 U.S.C. §1640(a)(2)(B) (2006); *see supra* note 111.

[193] Barber v. Kimbrell's, Inc., 577 F.2d 216, 223 (4th Cir. 1978) (citing S. REP. NO. 93–278, at 14–15 (1973)).

[194] *See* Capela v. J.G. Wentworth, LLC, No. CV09-882 (SJF) (WDW), 2009 WL 3128003 (E.D.N.Y. Sept. 24, 2009); Briscoe v. Deutsche Bank Nat'l Trust Co., No. 08 C 1279, 2008 WL 4852977 (N.D. Ill. Nov. 7, 2008); Motley v. Homecomings Fin., LLC, 557 F. Supp. 2d 1005 (D. Minn. 2008); Veal v. Crown Auto Dealerships, Inc., No. 8:04-CV-323-T-27, 2006 WL 435693 (M.D. Fla. Feb. 21, 2006); Myers v. First Tenn. Bank, N.A., No. Civ.A. 96-A-783-N, 2000 WL 351810 (M.D. Ala. Mar. 30, 2000).

claims would not be so large as to meet the annihilative liability standard.

Furthermore, FACTA claims for compensatory damages, in which the plaintiff has experienced and alleges actual harm resulting from the failure to truncate their card information, will be unaffected by adoption of an annihilative standard for class certification. This subset of FACTA cases is unaffected by this proposal principally because plaintiffs often bring these suits individually rather than in aggregation—perhaps in anticipation of the denial of certification because individual issues of damages predominate over common questions of law or fact.[195] Regardless, the annihilative standard proposed here is inapplicable to claims for actual damages brought in a FACTA class because judges should consider possible annihilation only when it would result from statutory, rather than actual, damages.

Finally, the concern that more egregious violators of FACTA will go unpunished due to the potential class in any suit for statutory damages exceeding the annihilative damages standard is unfounded. Their violations will still be addressed by the FTC, which has the power to take administrative actions against these misbehaving corporations. Section 1681s of the Consumer Credit Protection Act provides that violators of any of the federal consumer protection statutes, including FACTA, are subject to administrative enforcement by the FTC under the Federal Trade Commission Act.[196] Specifically, the FTC has the power to bring a civil action against any person or entity committing a knowing violation of a consumer protection act, such as FACTA or TILA, subjecting such violators to "a civil penalty of not more than $2,500 per violation."[197] This provision, however, still affords some protection for the defendant, requiring that courts "shall take into account the degree of culpability, any history of prior such conduct, ability to pay, effect on ability to continue to do business, and such other matters as justice may require."[198] Therefore, the

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[195] Certification of a Rule 23(b)(3) class requires that "the questions of law or fact common to class members predominate over any questions affecting only individual members." FED. R. CIV. P. 23(b)(3).

[196] 15 U.S.C. § 1681s (2006).

[197] § 1681s(a)(2)(A).

[198] § 1681s(a)(2)(B).

FTC has the authority to enforce these consumer protection laws, but not to the extent that enforcement jeopardizes the existence of the defendant in violation of the laws.

CONCLUSION

While we patiently wait for the day that Congress will cap the amount of aggregated statutory damages available in a class action for violations of FACTA, trial judges should use the wide discretion available under Rule 23(b)(3) to protect small businesses, large corporations, and entire industries from the risk of insolvency under FACTA when there is only negligible harm to the plaintiffs. Refusing to certify a FACTA class when statutory damages would expose the defendant to imminent insolvency is consistent with congressional intent underlying Rule 23, FACTA, and the applicable statutory damages provision. Furthermore, refusing to certify such a class relieves the judge of declaring the excessive statutory damages award unconstitutional, giving effect to the Supreme Court's tradition of constitutional avoidance. Finally, applying the annihilative standard of imminent insolvency at the certification stage allows judges to protect defendants from the most extreme form of settlement pressure—the threat of bankruptcy from an all-or-nothing judgment.

In applying the annihilative standard at the certification stage, judges should examine the potential impact on the defendant of the minimum statutory damages for that class size. This potential impact of the aggregated damages functions as a superiority factor that the judge should weigh under Rule 23(b)(3) in determining whether or not a class action is the superior method of adjudication in the particular case. Because courts have ruled that any inquiry necessary to determine whether or not certification is proper does not violate the Supreme Court's prohibition of inquiring into the merits of the case, forecasting the size of a possible award and comparing it to the defendant's net worth is part of a necessary weighing of the superiority factors under Rule 23(b)(3), and proper at the certification stage.

Judges can and should use their certification discretion to prevent the FACTA class action from becoming a jobs killer. The important role of deterring companies from continuing to violate

FACTA will be perpetuated by plaintiffs who take advantage of the incentives to sue for statutory damages, and plaintiffs who sue to recover actual damages suffered from identity theft resulting from an improperly truncated receipt. This solution will avoid the impractical result of costing defendants their corporations, and often innocent individuals their jobs, only to provide plaintiffs with a minimal recovery.

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