

AGGREGATION OR STACKING OF PENALTIES OR PUNITIVE MEASURES

JULIAN W. POON
THEANE EVANGELIS KAPUR
BLAINE H. EVANSON¹

I. Introduction

While the class action device has many benefits, in some circumstances it can create perverse results. One such circumstance is a class action that aggregates statutory penalties, even minimum statutory damages, across a large plaintiff class, which can result in an enormous judgment against the defendant—several multiples beyond what the enacting legislature ever could have intended. Aggregated penalties thus have the potential to distort the underlying legislative scheme, force defendants to settle meritless lawsuits, and result in a punishment that is grossly disproportionate to the reprehensibility of the defendant’s conduct. Aggregated penalties arise when plaintiffs file a class action lawsuit seeking statutory damages on behalf of hundreds or thousands of putative class members. Examples of statutes that allow for statutory damages include the Fair and Accurate Credit Transactions Act (FACTA),² the Fair Credit Reporting Act (FCRA),³ the Truth in Lending Act (TILA),⁴ the Telephone Consumer Protection Act (TCPA),⁵ and state waiting-time penalty statutes.⁶ Many of these statutes allow individuals to recover statutory damages ranging from \$100 to \$1,000 even if no actual harm is alleged.

1. The authors wish to thank Vaughn A. Blackman and Elizabeth R. Doisy for their invaluable assistance in preparing this chapter.

2. 15 U.S.C. § 1681c(g).

3. *Id.* at § 1681–1681x.

4. *Id.* at § 1640.

5. 47 U.S.C. § 227.

6. *See, e.g.*, CAL. LAB. CODE § 203; OR. REV. STAT. § 652.150.

For example, in *Price v. Lucky Strike Entertainment, Inc.*, the proposed plaintiff class of approximately 33,000 members could have collected damages between \$3.3 million and \$33 million for a FACTA violation, even though plaintiffs alleged no actual damages.⁷ The court denied certification, holding it could not put a company out of business for failing to remove expiration dates from credit card receipts when no actual harm was alleged.⁸ As in *Price*, aggregated statutory damages may force many defendant companies into bankruptcy.

Faced with potentially crushing liability in such cases, defendants often see no choice but to settle. But there are important ways in which defendants can challenge, limit, and control otherwise excessive awards of aggregated penalties in class action lawsuits. First, defendants can use such penalties as a sword in opposing class certification. Either in their opposition to a plaintiff's motion for class certification or in their own preemptive motion to preclude class certification, defendants can argue that, given such penalties, the class should not be certified because it would not meet the requirements of Federal Rule of Civil Procedure 23 (or the analogous state law or other rule governing class actions). Class actions involving aggregated penalties fail to satisfy Rule 23's superiority requirement for a number of reasons. For one, aggregation results in damages that are disproportionate to any actual harm suffered and often apply even when there has been no such harm. And crippling damages are possible even when the defendant has substantially complied with the statute. In addition, there is potential for abuse by lawyers seeking to enrich themselves personally. Moreover, statutory penalties often mean that individual class members already have sufficient incentive to bring their own individual actions, without the added incentive of a class action. Finally, Rule 23's predominance requirement often will not be satisfied, especially when the statutory penalties are predicated on a finding that the defendant has acted willfully. After all, due process requires an individualized inquiry into the circumstances surrounding the harm each class member allegedly suffered and its relationship to any punitive award.

Second, defendants have strong arguments that such enormous penalties violate due process. The due process clauses of the 5th and 14th amendments to the U.S. Constitution prohibit Congress and the states from imposing civil penalties that are disproportionate to the underlying offense. This principle was elaborated upon through a series of Supreme Court cases in the early 20th century, holding that a statutory penalty violates due process when it is "so severe and oppressive as to be wholly disproportioned to the offense and obviously unreasonable."⁹ Later, in *BMW of North America, Inc. v. Gore*,¹⁰ the Court set forth three guideposts for

7. No. CV 07-960-ODW(MANx), 2007 WL 4812281, at *4-5 & n.4 (C.D. Cal. Aug. 31, 2007).

8. *Id.*

9. *E.g., St. Louis, I.M. & S. Ry. Co. v. Williams*, 251 U.S. 63, 67 (1919).

10. 517 U.S. 559, 575 (1996).

determining whether a punitive award is so excessive that it violates due process. These due process limitations may offer some hope to defendants seeking to cabin the exorbitant liability created by aggregating statutory penalties, and defendants can and should consider raising and preserving due process arguments at various stages throughout the litigation.

II. *Why Combining Class Actions and Statutory Damages Is Problematic*

Some courts have rejected due process challenges to aggregated penalties, noting that if every individual in a class action filed his own lawsuit, “the sum of actual damages suffered by a class of plaintiffs [would] be the same regardless of whether their claims are prosecuted as a single class action or as a myriad of individual suits.”¹¹ In the abstract, it is true that if every plaintiff pursued his own lawsuit, the aggregated damages would be the same (the number of plaintiffs multiplied by the statutory damages). But this ignores the fact that the potent combination of statutory damages and the class action procedure creates a double incentive for plaintiffs’ class action lawyers to file suit; imposes enormous pressure on defendants to settle even relatively meritless or overblown claims; and results in a gross disproportionality between the reprehensibility of defendant’s alleged misdeeds and the damages imposed.

A. AN UNNECESSARY DOUBLE INCENTIVE FOR PLAINTIFFS TO FILE SUIT

The combination of minimum statutory penalties and the class action mechanism “distorts the purpose of both statutory damages and class actions,”¹² because they both aim to encourage plaintiffs to file suit for small claims that otherwise would not be brought because of the costs of litigation. And when the two are combined in a single lawsuit, the result is grossly excessive penalties that are completely out of proportion to any actual damages and that punish defendants far in excess of what the legislature intended when it enacted the statutory penalty.¹³ Essentially, the class treatment

turn[s] the per-customer statutory damages in the [statute] into a hammer so heavy as to be beyond any plausible account of the underlying remedial scheme. . . .

11. *In re Napster, Inc. Copyright Litig.*, No. C MDL-00-1369 MHP, C 04-1671 MHP, 2005 WL 1287611, at *11 (N.D. Cal. June 1, 2005). See also *Phillips Randolph Enters. LLC v. Rice Fields*, No. 06 C 4968, 2007 WL 129052, at *3 (N.D. Ill. Jan. 11, 2007); *Murray v. Cingular Wireless II, LLC*, 242 F.R.D. 415, 420–21 (N.D. Ill. 2005).

12. *Parker v. Time Warner Entm’t Co.*, 331 F.3d 13, 22 (2d Cir. 2003).

13. Richard A. Nagareda, *Aggregation and Its Discontents: Class Settlement Pressure, Class-Wide Arbitration, and CAFA*, 106 COLUM. L. REV. 1872, 1878 (2006).

Because Congress already had set the remedial scheme to make claims worthwhile on a disaggregated basis, that scheme did not plausibly tolerate class certification.¹⁴

The double incentive leads to awards for statutory penalties that are often grossly out of proportion to the alleged misconduct and do not reflect the kind of penalty Congress intended to impose for violations of the statute at issue. While an award of \$100 or \$1,000 against a defendant company could be a fair and sufficient punishment for a technical violation, an award that pushes the company toward the brink of bankruptcy or serious financial ruin would in most circumstances be unfair and excessive in light of the conduct committed by the defendant company. This is especially true when the company did not intentionally violate the statute or did not cause any real actual harm.

B. BLACKMAIL SETTLEMENTS

Staggering aggregated penalties in class actions also “create[] a potentially enormous aggregate recovery for plaintiffs, and thus an *in terrorem* effect on defendants, which may induce unfair settlements.”¹⁵ Commentators have argued that “[c]ombining the litigation incentives of statutory damages and the class action in one suit, . . . creates the potential for absurd liability, . . . over-deterrence,”¹⁶ a windfall to plaintiff’s lawyers,¹⁷ and double counting.¹⁸

Several noted jurists, including Henry Friendly and Richard Posner, have discussed this effect and have likened the immense pressure to settle class actions with such high potential exposure as “blackmail.”¹⁹ Blackmail settlements gen-

14. *Id.* at 1903. For example, in 1974, Congress amended TILA to limit the amount of damages plaintiffs can recover in a class action. The Report of the Senate Committee on Banking, Housing, and Urban Affairs stated that TILA should not subject defendants “to enormous penalties for violations which do not involve actual damages and may be of a technical nature.” *Watkins v. Simmons & Clark, Inc.*, 618 F.2d 398, 400 n.6 (6th Cir. 1980) (citing S. REP. NO. 93-278, at 14–15 (1973)). Congress expressed a similar concern when it enacted the Portal-to-Portal Act amendments to the FLSA. Congress created an opt-in requirement, 29 U.S.C. § 216(b), for FLSA class actions because of “a dramatic influx of litigation, involving vast alleged liability” against defendant employers. 93 CONG. REC. 2,087 (1947). Congress “was concerned that employers would face ‘financial ruin’ and employees would receive ‘windfall payments, including liquidated damages.’” *Tomlinson v. Indymac Bank, F.S.B.*, 359 F. Supp. 2d 898, 900 (C.D. Cal. 2005) (quoting 29 U.S.C. § 251(a)(1), (a)(4)).

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

16. Sheila B. Scheuerman, *Due Process Forgotten: The Problem of Statutory Damages and Class Actions*, 74 MO. L. REV. 103, 111 (2009).

17. Victor E. Schwartz & Cary Silverman, *Common-Sense Construction of Consumer Protection Acts*, 54 U. KAN. L. REV. 1, 61 (2005).

18. Nagareda, *supra* note 13. Cf. Richard A. Epstein, *Class Actions: Aggregation, Amplification, and Distortion*, 2003 U. CHI. LEGAL F. 475, 505 (“Combining the two mechanisms thus creates a form of double counting which could easily lead to overdeterrence.”).

19. *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1298–99 (7th Cir. 1995) (Posner, C.J.); HENRY J. FRIENDLY, *FEDERAL JURISDICTION: A GENERAL VIEW* 120 (1973). In addition, several prominent legal scholars have detailed the intense pressure defendants feel when facing huge potential liabilities in class actions.

erally occur when defendants face huge potential liabilities and choose to settle instead of litigate the suit, “even when the plaintiff’s probability of success on the merits is slight.”²⁰

Defendants often are forced to settle class action lawsuits because of their low tolerance for risk. It is “widely recognized”²¹ that defendants in class action lawsuits tend to be risk-averse. Because of pressures such as reputation and stock price,²² companies cannot assume “the sheer *magnitude* of the risk” to which they are exposed when the outcome of many claims depends on one trial instead of many.²³ When the expected value of a claim is \$0, a risk-neutral person will pay nothing to settle the claim, even if the actual award could be as much as \$1 million. But if an individual is risk-averse, he so fears the potential loss of \$1 million that he is willing to pay some amount of money to settle the claim and avoid the risk, even though the claim’s expected value is \$0. By aggregating all of the claims into one all-or-nothing gamble, class actions create a huge risk of potential loss, forcing risk-averse defendants to settle them for amounts much larger than the claims, when disaggregated, may actually be worth.²⁴ Defendants simply do “not wish to roll these dice.”²⁵

In addition, defendants are forced to settle because class certification can “skew[] trial outcomes.”²⁶ Empirical studies show that as the number of plaintiffs

See, e.g., Milton Handler, *The Shift from Substantive to Procedure Innovations in Antitrust Suits—The Twenty-Third Annual Antitrust Review*, 71 COLUM. L. REV. 1, 9 (1971). But see Bruce Hay & David Rosenberg, “Sweet-heart” and “Blackmail” Settlements in Class Actions: Reality and Remedy, 75 NOTRE DAME L. REV. 1377, 1378 (2000).

20. *Blair v. Equifax Check Servs., Inc.*, 181 F.3d 832, 834 (7th Cir. 1999) (emphasis added); see also, e.g., *In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Prod. Liab. Litig.*, 55 F.3d 768, 784–85 (3d Cir. 1995); *In re Lorazepam & Clorazepate Antitrust Litig.*, 289 F.3d 98, 102 (D.C. Cir. 2002); see also *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 476 (1978) (“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.”); *Vasquez-Torres v. McGrath’s Publick Fish House, Inc.*, No. CV 07-1332 AHM (CWx), 2007 WL 4812289, at *7 (C.D. Cal. Oct. 12, 2007) (class treatment “would serve as an invitation for clever attorneys to bludgeon defendants into settlement in order to avoid ruination”).

21. Michael E. Solimine & Christine Oliver Hines, *Deciding to Decide: Class Action Certification and Interlocutory Review by the United States Courts of Appeals Under Rule 23(f)*, 41 WM. & MARY L. REV. 1531, 1546 n.74 (2000); see also Julian W. Poon, Blaine H. Evanson & William K. Pao, *Interlocutory Appellate Review of Class-Certification Rulings Under Rule 23(f): Do Articulated Standards Matter?*, CERTWORTHY (DRI Appellate Advocacy Comm.), Winter 2009, at 8, available at <http://www.dri.org/ContentDirectory/Public/Newsletters/0010/2009%20Appellate%20Advocacy%20Committee%20Certworthy%20Winter.pdf>.

22. Scheuerman, *supra* note 16, at 150.

23. *In re Rhone-Poulenc*, 51 F.3d at 1297 (emphasis in original).

24. Charles Silver, “We’re Scared to Death”: *Class Certification and Blackmail*, 78 N.Y.U. L. REV. 1357, 1371 (2003).

25. *In re Rhone-Poulenc*, 51 F.3d at 1298.

26. *Castano v. Am. Tobacco Co.*, 84 F.3d 734, 746 (5th Cir. 1996) (citing Kenneth S. Bordens & Irwin A. Horowitz, *Mass Tort Civil Litigation: The Impact of Procedural Changes on Jury Decisions*, 73 JUDICATURE 22 (1989); MANUAL FOR COMPLEX LITIGATION (THIRD) § 33.26 n.1056 (1995); see also Steven B. Hantler & Robert

increases, juries become more likely to find fault and also tend to impose higher damages per plaintiff.²⁷ Defendants settle because of the risk that juries may view their case differently depending on whether the claim is presented alone or in combination with many other similar claims.

III. *Challenging and Limiting the Size of Aggregated Statutory Penalties Under Rule 23*

Rule 23 provides several grounds for defendants to challenge potentially staggering aggregated statutory penalties. Such penalties undermine the superiority of the class action mechanism and often destroy any predominance of common over individual issues. Moreover, many courts have been receptive to such arguments, holding that Rule 23's superiority requirement is not satisfied and refusing to certify the class when aggregated penalties could impose an excessive financial burden on a defendant company and its shareholders, workers, and neighboring communities.

A. RULE 23 SUPERIORITY

Rule 23(b)(3) requires that a class action be "superior to other available methods for fairly and efficiently adjudicating the controversy."²⁸ The Advisory Committee notes to Rule 23 state that the superiority requirement allows the court to exercise considerable discretion in deciding whether to certify a class²⁹ because courts must ensure that class actions are used only in appropriate cases.³⁰ Indeed, many courts have emphasized that under the superiority analysis, fairness and due process concerns make class actions the exception to the normal rule.³¹

Rule 23(b)(3) provides four criteria to aid courts in determining whether a class action satisfies the superiority requirement:

E. Norton, *Coupon Settlements: The Emperor's Clothes of Class Actions*, 18 GEO. J. LEGAL ETHICS, 1343, 1353 (2005).

27. Bordens & Horowitz, *supra* note 26.

28. FED. R. CIV. P. 23(b)(3).

29. See *Kamm v. Cal. City Dev. Co.*, 509 F.2d 205, 210 (9th Cir. 1975); *Spikings v. Cost Plus, Inc.*, No. CV 06-8125-JFW (AJWx), 2007 U.S. Dist. LEXIS 44214, at *7-8 (C.D. Cal. May 29, 2007); 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] 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.").

30. *Legge v. Nextel Commc'ns, Inc.*, No. CV 02-8676DSF(VNKX), 2004 WL 5235587, at *13 (C.D. Cal. June 25, 2004).

31. See *Blanco v. CEC Entm't Concepts L.P.*, No. CV 07-0559 GPS (JWJx), 2008 WL 239658, at *1 (C.D. Cal. Jan. 10, 2008) (quoting *Legge*, 2004 WL 5235587, at *13); 5 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE, § 23.02 (3d ed. 1999).

(A) the class members' interests in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already begun by or against class members; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and (D) the likely difficulties in managing a class action.³²

In addition, courts have the discretion to consider, and often do rely on, other factors.³³

Courts often deny class certification based on a lack of superiority when statutory damages are disproportionate to the actual harm allegedly suffered by members of the putative class. This may be the most common reason for a putative class to fail the superiority requirement. Other factors courts consider are whether the defendant complied with the statute, whether certification might lead to attorney abuse, and whether individual actions are feasible.³⁴ Determining whether the superiority requirement is satisfied typically requires a case-by-case analysis.³⁵

1. Damages Disproportionate to Actual Harm

One of the earliest and most frequently cited decisions rejecting certification of a class seeking sizable aggregated statutory damages is *Ratner v. Chemical Bank New York Trust Co.*,³⁶ in which Judge Frankel, the principal architect of Rule 23, held that paying the statutory minimum of \$100 to each of the 130,000 class members for violations of TILA “would be a horrendous, possibly annihilating punishment, unrelated to any damage to the purported class or to any benefit to defendant, for what is at most a technical and debatable violation”³⁷ The court further held that “the allowance of thousands of minimum recoveries like plaintiff’s would carry to an absurd and stultifying extreme the specific and essentially inconsistent remedy Congress prescribed as the means of private enforcement.”³⁸

32. FED. R. CIV. P. 23(b)(3).

33. *Price*, 2007 WL 4812281, at *2 (citing *Walco Invs., Inc. v. Thenen*, 168 F.R.D. 315, 337 (S.D. Fla. 1996)).

34. See *Saunders v. Louise’s Trattoria*, No. CV 07-1060 SJO (PJWx), 2007 WL 4812287, at *1 (C.D. Cal. Oct. 23, 2007).

35. See *Shroder v. Suburban Coastal Corp.*, 729 F.2d 1371, 1377 (11th Cir. 1984); *Watkins*, 618 F.2d at 402; *Ashby v. Farmers Ins. Co. of Or.*, No. CV 01-1446-BR, 2004 WL 2359968, at *7-8 (D. Or. Oct. 18, 2004); *Wilson v. Am. Cablevision of Kansas City, Inc.*, 133 F.R.D. 573, 577 (W.D. Mo. 1990); *Brame v. Ray Bills Fin. Corp.*, 85 F.R.D. 568, 575 (N.D.N.Y. 1979) (citing *Boggs v. Alto Trailer Sales, Inc.*, 511 F.2d 114, 117 (5th Cir. 1975)).

36. 54 F.R.D. at 414; see *Parker*, 331 F.3d at 26 n.4 (stating that denying class certification “drew major support, if not its origin” from *Ratner*); *Haynes v. Logan Furniture Mart, Inc.*, 503 F.2d 1161, 1164 (7th Cir. 1974) (describing *Ratner* as the “seminal case on denial of class action status”); *Legge*, 2004 WL 5235587, at *16 (describing *Ratner* as an “oft-cited and seminal” case).

37. *Ratner*, 54 F.R.D. at 416.

38. *Id.* at 414.

A number of courts have followed the reasoning in *Ratner*. For example, in *Kline v. Coldwell Banker & Co.*, the Ninth Circuit held that class actions are not superior when the damages would be so great that certification would lead to an “ad absurdum result” and would “shock the conscience.”³⁹ Some courts reason that the class action device is not “superior” when “the defendant’s potential liability would be enormous and completely out of proportion to any harm suffered by the plaintiff.”⁴⁰ Other courts hold that the class action procedure is not superior when damages are “grossly disproportionate to the conduct at issue.”⁴¹

In determining whether damages are disproportionately large, courts often consider the impact of the award on the defendant. Damages can be found disproportionately large when, for example, the amount of damages exceeds the defendant’s net worth, putting the defendant out of business.⁴² But even if the damages would not put the defendant out of business, courts can still find the exposure to be disproportionately high and therefore deny class certification.⁴³ In *Hillis v. Equifax Consumer Services, Inc.*, for example, the court denied certification because although the \$200 million in potential statutory damages would likely not put the defendant out of business, such a large award was still disproportionate to the defendant’s alleged misconduct.⁴⁴ Other courts have emphasized, however, that certification is not inappropriate solely because of ruinous damages, “but based on the *disproportionality* of a damage award that has little relation to the harm actually suffered by the class.”⁴⁵

Disproportionality is assessed based on the harm that defendant’s alleged misconduct has caused plaintiffs, and courts are more likely to deny class certification in cases where there is no *actual* harm to the putative class members (i.e., the violation is only technical in nature).⁴⁶ Courts have also held that a slight increase in the risk of harm is insufficient to warrant class certification.⁴⁷ For example, in

39. 508 F.2d 226, 233–35 (9th Cir. 1974); see *Soualian v. Int’l Coffee & Tea LLC*, No. CV 07-502-RGK (JCx), 2007 WL 4877902, at *3 n.8 (C.D. Cal. June 11, 2007).

40. *London v. Wal-Mart Stores, Inc.*, 340 F.3d 1246, 1255 n.5 (11th Cir. 2003) (citing *Kline*, 508 F.2d at 234–35); see also *Price*, 2007 WL 4812281, at *4.

41. *Dilley v. Acad. Credit, LLC*, No. 2:07CV301DAK, 2008 WL 4527053, at *8–9 (D. Utah Sept. 29, 2008); *Helms v. Consumerinfo.com, Inc.*, 236 F.R.D. 561, 568 (N.D. Ala. 2005).

42. See, e.g., *Leysoto v. Mama Mia I, Inc.*, 255 F.R.D. 693, 697–98 (S.D. Fla. 2009) (damages range from \$4.6 million to \$46 million, but defendant’s net worth is only \$40,000); *Dilley*, 2008 WL 4527053, at *9; *Vasquez-Torres*, 2007 WL 4812289, at *7 (damages range from \$54.15 million to \$541.53 million, but defendant’s net worth is only \$3.83 million); *Spikings*, 2007 U.S. Dist. LEXIS 44214, at *12 (damages range from \$340 million to \$3.4 billion, but defendant’s net worth is only \$316 million).

43. See, e.g., *Hillis v. Equifax Consumer Servs., Inc.*, 237 F.R.D. 491, 507 (N.D. Ga. 2006).

44. *Id.*

45. *Spikings*, 2007 U.S. Dist. LEXIS 44214, at *9 (emphasis added).

46. See *Watkins*, 618 F.2d at 403–04.

47. See *Bateman v. Am. Multi-Cinema, Inc.*, 252 F.R.D. 647, 651 (C.D. Cal. 2008); *Blanco*, 2008 WL 239658, at *2 (distinguishing the potential threat of identity theft from actual harm); *Forman v. Data*

Bateman v. American Multi-Cinema, Inc., the court concluded, in reliance on the superiority requirement, that a slight increase in the risk of identity theft caused by printing a few extra digits of a credit card number did not justify certifying the class.⁴⁸

The lack of any actual harm has been held to preclude certification even in cases where a statute specifies that it is appropriate for class treatment, as does TILA. These courts recognize that Congress did not intend to make class actions mandatory under TILA,⁴⁹ and one court even noted that Congress did not intend to allow class actions in most TILA cases.⁵⁰ Thus, even when a statute specifically provides for class actions, the Rule 23 analysis still applies as in any other case, and plaintiffs must establish that a class action would be superior to individual lawsuits.⁵¹ As a result, even when damages are capped at \$500,000, some courts have denied class certification because the damages are disproportionate when there is no actual harm.⁵²

Several courts have pointed to the Advisory Committee notes' statement that class certification should not "bring[] about other undesirable results."⁵³ Putting a company out of business, or forcing layoffs or a significant loss of share value, for a technical violation resulting in no real harm is precisely the kind of undesirable result against which the Advisory Committee warned.⁵⁴

There are many other statutes besides the statutes mentioned above where plaintiffs may encounter difficulty in satisfying the superiority requirement. For example, many states' laws provide for so-called waiting-time penalties for employers' failure to pay final wages in a full and timely manner.⁵⁵ If an employer violates the statute, the employer can be assessed penalties equal to the amount of wages owed for each day it fails to pay the employee, for up to 30 days.⁵⁶ And when these penalties are aggregated over a class of hundreds or thousands of plaintiffs, employers can incur enormous and staggering statutory penalties. Such damages can be crippling and in many cases would be clearly disproportionate to the harm that

Transfer, Inc., 164 F.R.D. 400, 404 & n.3 (E.D. Pa. 1995).

48. 252 F.R.D. at 651.

49. See *Watkins*, 618 F.2d at 402.

50. See *Agostine v. Sidcon Corp.*, 69 F.R.D. 437, 444 (E.D. Pa. 1975).

51. See *Boggs*, 511 F.2d at 117; *Agostine*, 69 F.R.D. at 444.

52. *Shroder*, 729 F.2d at 1378 (holding that "violations may be too technical to form the basis for maintaining a class action under TILA"); *Watkins*, 618 F.2d at 404 (stating that "class certification should be denied only in a case involving technical violations and only where the district court . . . believes that certification is unwarranted").

53. *Price*, 2007 WL 4812281, at *4.

54. *Id.*

55. See, e.g., CAL. LAB. CODE § 203; OR. REV. STAT. § 652.150.

56. See, e.g., CAL. LAB. CODE § 203; OR. REV. STAT. § 652.150.

may have been caused.⁵⁷ In many cases, states have enacted waiting-time penalties specifically to encourage individual lawsuits, and therefore class actions aggregating these penalties raise the same concerns addressed in cases brought under statutes such as TILA and FACTA.

Some courts nonetheless have suggested that certification should be allowed unless the legislature expressly prohibits class treatment.⁵⁸ These courts have relied on the Supreme Court's decision in *Califano v. Yamasaki* for the proposition that class relief is allowed unless Congress expressly restricts it,⁵⁹ reasoning that, because many statutes, such as the FCRA, do not restrict class action relief, class action claims are available under those statutes.⁶⁰ But many courts have squarely rejected this notion,⁶¹ holding that *Califano* applies only if a class is otherwise certifiable under the requirements of Rule 23.⁶² Finally, some plaintiffs have argued that potential damages are not excessive where a defendant would suffer the same ruinous damages from summing up the damages awarded in individual suits.⁶³ But this argument may prove too much because, as at least one court has explained, it suggests that each member of the class would bring an individual action.⁶⁴

2. Defendant's Substantial Compliance with the Statute

The next factor weighing against class certification is the defendant's substantial compliance with the statute. Courts recognize that one of the purposes of class actions is to deter unlawful conduct,⁶⁵ and that deterrence is unnecessary when defendants are already in compliance with the relevant statute.⁶⁶ Relatedly, courts look at whether the defendant knew of the violation, as statutory damages were

57. See *London*, 340 F.3d at 1255 n.5 (citing *Kline*, 508 F.2d at 234–35); see also *Dilley*, 2008 WL 4527053, at *8–9; *Price*, 2007 WL 4812281, at *4; *Helms*, 236 F.R.D. at 568; *Ratner*, 54 F.R.D. at 414.

58. See, e.g., *In re Farmers Ins. Co., FCRA Litig.*, No. CIV-03-158-F, MDL 1564, 2006 WL 1042450, at *10 (W.D. Okla. Apr. 13, 2006); *Ashby*, 2004 WL 2359968, at *8.

59. See, e.g., *In re Farmers Ins. Co.*, 2006 WL 1042450, at *10 (citing *Califano v. Yamasaki*, 442 U.S. 682, 700 (1979)).

60. *Id.*

61. See, e.g., *Azoiani v. Love's Travel Stops & Country Stores, Inc.*, No. EDCV 07-90 ODW (OPx), 2007 WL 4811627, at *5 n.1 (C.D. Cal. Dec. 18, 2007); *Saunders*, 2007 WL 4812287, at *3; *Price*, 2007 WL 4812281, at *5 n.6.

62. *Saunders*, 2007 WL 4812287, at *3.

63. *Id.*

64. *Id.*

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

66. See *Watkins*, 618 F.2d at 402–03 (stating that the class action was unnecessary because the defendant had already complied with the statute); *Blanco*, 2008 WL 239658, at *2 (stating that allowing aggregation of statutory penalties “would be grossly disproportionate to the harm, especially when Defendant immediately rectified this technical problem after the lawsuit was filed”); *Price*, 2007 WL 4812281, at *5 (“immediate action to comply with FACTA . . . upon notice of Plaintiff's Complaint demonstrates Defendant's good faith while precluding future violations and nullifying any specific deterrence benefit that might have derived from class certification in the absence of such compliance”).

not meant to punish an “unwary violator.”⁶⁷ A defendant’s compliance with the applicable statute prior to the class certification hearing may make it more likely that the trial court will deny certification.⁶⁸

3. Attorney Abuse

An additional factor weighing against certification is the potential for attorney abuse.⁶⁹ Courts recognize that Rule 23(b)(3) class actions are commonly used as a “device for the solicitation of litigation . . . which is clearly an ‘undesirable result’ which cannot be tolerated.”⁷⁰ This factor can be particularly weighty when plaintiff’s counsel have filed similar class actions with the same representative plaintiff.⁷¹

4. Individual Class Members’ Ability to Bring Their Own Action

Another important consideration is whether the statute provides incentives for individuals to bring their own individual lawsuits. As a general rule, class actions are superior when there are “multiple claims for relatively small individual sums,”⁷² and the superiority requirement is therefore met when “a large number of plaintiffs may have been injured, but not to an extent to induce the instigation of individual litigation.”⁷³ In other words, the class action is superior when “no realistic alternative exists.”⁷⁴

Courts have found that, in many instances, attorney fees, punitive damages, and payment of costs give individuals sufficient incentive to sue such that individual actions are realistic alternatives to class adjudication. A number of courts have specifically focused on fee-shifting provisions in finding that individual actions are a feasible alternative.⁷⁵ For example, FACTA authorizes the recovery of attorney fees and punitive damages, and courts recognize that the litigant-friendly scheme

67. See *Shroder*, 729 F.2d at 1377.

68. See, e.g., *Watkins*, 618 F.2d at 402-03; *Blanco*, 2008 WL 239658, at *2; *Price*, 2007 WL 4812281, at *5.

69. See *Najarian v. Avis Rent A Car Sys.*, No. CV 07-588-RGK (Ex), 2007 WL 4682071, at *5 (C.D. Cal. June 11, 2007); *Spikings*, 2007 U.S. Dist. LEXIS 44214, at *16-17.

70. *Rodriguez v. Family Publ’ns Serv., Inc.*, 57 F.R.D. 189, 195 (C.D. Cal. 1972) (quoting *Buford v. Am. Fin. Co.*, 333 F. Supp. 1243, 1251 (N.D. Ga. 1971)).

71. See, e.g., *Saunders*, 2007 WL 4812287, at *2 n.5 (noting that plaintiff’s counsel has filed 37 FACTA class actions with *Saunders* as plaintiff in 11 of the cases); *Price*, 2007 WL 4812281, at *5 (noting that plaintiff’s counsel has been involved in at least 20 FACTA cases with *Price* as plaintiff in six of the cases).

72. *Legge*, 2004 WL 5235587, at *12 (quoting *Local Joint Executive Bd. of Culinary/Bartender Trust Fund v. Las Vegas Sands, Inc.*, 244 F.3d 1152, 1163 (9th Cir. 2001)).

73. *Forman*, 164 F.R.D. at 404 (citing *Green v. Wolf Corp.*, 406 F.2d 291, 296 (2d Cir. 1968)).

74. *Valentino v. Carter-Wallace, Inc.*, 97 F.3d 1227, 1235 (9th Cir. 1996).

75. See *Dilley*, 2008 WL 4527053, at *10; *Hillis*, 237 F.R.D. at 507; see also *Castano*, 84 F.3d at 748 (recognizing that access to attorney fees often leads to finding the class action mechanism is not superior); *Cooper v. Sunshine Recoveries, Inc.*, No. 00CIV8898LTSJCF, 2001 WL 740765, at *5 (S.D.N.Y. June 27, 2001); *Maguire v. Sandy Mac, Inc.*, 145 F.R.D. 50, 53 (D.N.J. 1992). But see *In re Farmers Ins. Co.*, 2006 WL 1042450, at *11.

Congress created in enacting FACTA makes individual actions fully feasible.⁷⁶ Consequently, a class action may not be considered to be superior even though some individuals may choose not to pursue their individual claims.⁷⁷

In addition, statutes providing for treble damages may already create sufficient incentives for individuals to bring suit on their own. At least one federal court has found that the minimum recovery of \$500 and treble damages authorized under the TCPA⁷⁸ give plaintiffs adequate incentives to file an individual lawsuit.⁷⁹ However, when a statute specifically provides for class actions, such as TILA, courts are less willing to find that individuals have incentives to sue on their own.⁸⁰

5. *De Minimis Recovery*

When statutes place a limit on class action statutory damages, individual class members may receive less from the class action than they would have received had they sued on their own. For example, a statute may allow individual plaintiffs to recover statutory damages ranging from \$100 to \$1,000, but place a limit on class action damages of \$500,000.⁸¹ If 600,000 class members seek the \$100 minimum, this leaves a recovery of approximately \$1 per class member.⁸² This aspect of the statute may pose problems under both the superiority and adequacy of representation prongs of Rule 23(b)(3).⁸³ A procedural mechanism that requires class members to surrender the lion's share of their damages cannot be characterized as superior.⁸⁴ Moreover, there is a concern that the class representative may not have adequate incentive to pursue the class action vigorously when the dollar amount he could hope to recover is so small.⁸⁵

Although class actions can generate lesser recoveries, class actions should not be certified when there is "absolute certainty that such recovery will be essentially eliminated altogether."⁸⁶ In *Boggs v. Alto Trailer Sales, Inc.*, the Fifth Circuit suggested that a reduction to \$42 per plaintiff from a potential award ranging from

76. See *Blanco*, 2008 WL 239658, at *1–2; *Price*, 2007 WL 4812281, at *4–6; *Najarian*, 2007 WL 4682071, at *4–5.

77. *Serna v. Big A Drug Stores, Inc.*, No. SACV 07-0276 CJC (MLGx), 2007 U.S. Dist. LEXIS 82023, at *15 (C.D. Cal. Oct. 9, 2007).

78. 47 U.S.C. § 227(b)(3).

79. *Forman*, 164 F.R.D. at 404.

80. See *Agostine*, 69 F.R.D. at 447–48.

81. See, e.g., TILA, 15 U.S.C. § 1640(a)(2)(A), (B).

82. See *Shelley v. Amsouth Bank*, No. CIV.A.97-1170-RV-C, 2000 WL 1121778, at *14–15 (S.D. Ala. July 24, 2000).

83. See *Boggs*, 511 F.2d at 118; *Jones v. CBE Group, Inc.*, 215 F.R.D. 558, 570 (D. Minn. 2003); *Shelley*, 2000 WL 1121778, at *15–16; *Rollins v. Sears, Roebuck & Co.*, 71 F.R.D. 540, 545 (E.D. La. 1976). But see *Jancik v. Cavalry Portfolio Servs., LLC*, No. 06-3104 (MJD/AJB), 2007 WL 1994026, at *11 (D. Minn. July 3, 2007).

84. See *Shelley*, 2000 WL 1121778, at *15–16.

85. See *Jones*, 215 F.R.D. at 570.

86. See *Shelley*, 2000 WL 1121778, at *15.

\$100 to \$1,000 may alone suffice to warrant denying class certification.⁸⁷ And in *Rollins v. Sears, Roebuck & Co.*, the court found that a reduction from \$427 to \$331 was enough to deny certification of a class action.⁸⁸ The *Rollins* court reached this conclusion even after taking into account that class members with higher individual claims may choose to opt out.⁸⁹

B. RULE 23 PREDOMINANCE

Courts have also denied class certification in aggregated statutory damages cases brought under Rule 23(b)(3) because plaintiffs have failed to satisfy the predominance requirement, which mandates that “questions of law or fact common to class members predominate over any questions affecting only individual members.”⁹⁰ The court must consider all claims, defenses, and related issues to determine whether they can be proven on a classwide basis,⁹¹ and plaintiffs must establish that common issues outweigh individual ones.⁹²

1. *Due Process Review Necessitates an Individualized Class-Member-by-Class-Member Inquiry*

Defendants opposing certification of classes seeking large aggregated statutory penalty awards can argue that the predominance requirement is not satisfied because due process necessitates individual inquiries into each person’s damages award. In *State Farm Mutual Auto Insurance Co. v. Campbell*, the Supreme Court held that due process requires that a punitive award “have a nexus to the specific harm suffered by the plaintiff.”⁹³ The Court made clear that such review calls for a fact-specific inquiry that depends on each individual’s compensatory damages award and the harm actually suffered by each individual.⁹⁴ Several courts of appeals have held that such an individualized inquiry precludes certification of claims for such punitive awards. In *Allison v. Citgo Petroleum Corp.*, for example, the Fifth Circuit denied certification under Rule 23(b)(2), holding that “punitive damages must be reasonably related to the reprehensibility of the defendant’s conduct and to the

87. See 511 F.2d at 118.

88. 71 F.R.D. at 545.

89. *Id.* at 545 n.4.

90. FED. R. CIV. P. 23(b)(3).

91. See, e.g., *Brown v. Am. Honda*, 522 F.3d 6, 20 (1st Cir. 2008); *Wachtel v. Guardian Life Ins. Co. of Am.*, 453 F.3d 179, 185 (3d Cir. 2006); *Castano*, 84 F.3d at 744–45.

92. See *Valentino*, 97 F.3d at 1234.

93. 538 U.S. 408, 422 (2003). *State Farm* involved an award for punitive damages, not statutory penalties, but as discussed below that distinction should not be relevant for purposes of due process review of punitive awards.

94. *Id.* at 423–24; see also Sheila B. Scheuerman, *Two Worlds Collide: How the Supreme Court’s Recent Punitive Damages Decisions Affect Class Actions*, 60 BAYLOR L. REV. 880, 905 (2008); see also *Cooper v. Southern Co.*, 390 F.3d 695, 721 (11th Cir. 2004); *Lemon v. Int’l Union of Operating Eng’rs*, 216 F.3d 577, 581 (7th Cir. 2000); *Allison v. Citgo Petroleum Corp.*, 151 F.3d 402, 418 (5th Cir. 1998).

compensatory damages awarded to the plaintiffs.”⁹⁵ The court further stated that recovery of compensatory and punitive damages can vary depending on each class member’s individual circumstances.⁹⁶ In *Lemon v. International Union of Operating Engineers*, the Seventh Circuit noted that due process review of punitive awards involves “a fact-specific inquiry into that plaintiff’s circumstances.”⁹⁷ And in *Cooper v. Southern Co.*, the Eleventh Circuit concluded that determining the permissible amount of punitive damages “would require detailed, case-by-case fact finding, carefully calibrated for each individual employee.”⁹⁸ Because any statutory damages award must be in proportion to the actual harm suffered by each individual class member, and because any award of statutory damages to absent class members would be arbitrary and unconstitutional if not based on such individualized review, defendants may be able to successfully argue that common questions do not predominate in cases involving aggregated penalties based on individualized harm. The due process analysis for each claim of statutory damages must be conducted on an individualized, class-member-by-class-member basis—necessarily entailing a comparison, for each class member, of the degree of reprehensibility of the defendant’s conduct to the actual harm allegedly suffered by that particular plaintiff.

2. Other Examples of a Lack of Predominance Involving Penalties

In a related context, courts have denied class certification because individual inquiries predominate when a statute, such as the FCRA or FACTA, requires a finding of willfulness.⁹⁹ In *Barnett v. Experian Information Solutions*,¹⁰⁰ for example, the plaintiffs alleged that the defendant failed to adopt reasonable procedures to guarantee the accuracy of defendants’ consumer credit reports. The court held that the predominance requirement was not met, because “a determination of willfulness [under the FCRA] is itself a fact-bound inquiry . . . [that] examines the totality of the circumstances involved in a consumer’s interaction with a credit reporting agency.”¹⁰¹ In *Glatt v. PMI Group Inc.*, the plaintiffs were allegedly forced to obtain mortgage insurance at a high rate because of a poor credit report.¹⁰² Plaintiffs alleged violations of the FCRA because they did not receive proper notice of the

95. 151 F.3d at 417.

96. *Id.* at 418.

97. 216 F.3d at 581.

98. 390 F.3d at 721.

99. See *Najarian*, 2007 WL 4682071, at *4; *Barnett v. Experian Info. Solutions*, No. 2:00CV174, 2004 U.S. Dist. LEXIS 28855, at *16 (E.D. Tex. Sept. 30, 2004); *Glatt v. PMI Group Inc.*, No. 2:03-CV-326-FtM-29SPC, 2004 U.S. Dist. LEXIS 28927, at *2–3 (M.D. Fla. Sept. 7, 2004). But see *Williams v. LexisNexis Risk Mgmt. Inc.*, No. 3:06CV241, 2007 WL 2439463, at *6 (E.D. Va. Aug. 23, 2007); *Bruce v. KeyBank Nat’l Ass’n*, No. 2:05-CV-330, 2006 WL 2334846, at *4 (N.D. Ind. Aug. 7, 2006). For examples of statutes, see 15 U.S.C. § 1681n; CAL. LAB. CODE § 203; OR. REV. STAT. § 652.150.

100. 2004 U.S. Dist. LEXIS 28855.

101. *Id.* at *16.

102. 2004 U.S. Dist. LEXIS 28927, at *2–3.

adverse action taken against them.¹⁰³ The court denied class certification, holding that damages under the FCRA must be determined on an individual basis because plaintiffs can recover different damages depending on whether the defendants' conduct was negligent or willful.¹⁰⁴ Finally, in *Najarian v. Avis Rent A Car System*, the plaintiffs alleged that the defendant willfully violated FACTA by printing prohibited information on receipts.¹⁰⁵ The court found that "willfulness . . . does not give rise to liability independent of individualized factual determinations as to which customers were 'consumers' and which obtained 'receipts' containing Prohibited Information."¹⁰⁶ Thus, plaintiffs could not satisfy the predominance requirement.

IV. Challenging Statutory Damages Before and After Class Certification

Although many courts consider, at the class-certification stage, whether statutory damages are proportional to the actual alleged harm, some courts reject this approach. Judge Easterbrook, in *Murray v. GMAC Mortgage Corp.*, observed that concerns about an unconstitutionally excessive award are best considered after class certification.¹⁰⁷ Delaying consideration of due process concerns until after certification is problematic, however, because defendants are often forced to settle to avoid an intolerably high risk of financial ruin even in cases of questionable or dubious merit.¹⁰⁸ Further, after the case has been settled, the amount of the statutory penalties obviously cannot be reviewed for unconstitutional excessiveness or reduced.¹⁰⁹ Moreover, courts have a duty to resolve questions regarding superiority

103. *Id.* at *3; see 15 U.S.C. § 1681m.

104. *Glatt*, 2004 U.S. Dist. LEXIS 28927, at *15-16.

105. 2007 WL 4682071, at *4.

106. *Id.*

107. 434 F.3d 948, 954 (7th Cir. 2006); see also *Chakejian v. Equifax Info. Serv. LLC*, 256 F.R.D. 492, 502 (E.D. Pa. 2009); *Beringer v. Standard Parking Corp.*, Nos. 07 C 5027, 07 C 5119, 2008 WL 4390626, at *5 (N.D. Ill. Sept. 24, 2008); *Cicilline v. Jewel Food Stores, Inc.*, 542 F. Supp. 2d 831, 839 (N.D. Ill. 2008); *Harris v. Best Buy Co.*, 254 F.R.D. 82, 90 (N.D. Ill. 2008); *Redmon v. Uncle Julio's of Ill., Inc.*, 249 F.R.D. 290, 297 (N.D. Ill. 2008); *Meehan v. Buffalo Wild Wings, Inc.*, 249 F.R.D. 284, 288 (N.D. Ill. 2008); *Troy v. Red Lantern Inn, Inc.*, No. 07 C 2418, 2007 WL 4293014, at *4 (N.D. Ill. Dec. 4, 2007); *Bernal v. Keybank*, No. 06-C-8, 2007 WL 2050405, at *4 (E.D. Wis. July 11, 2007); *Forrest v. C.M.A. Mortgage, Inc.*, No. 06-C-14, 2007 WL 188979, at *2 (E.D. Wis. Jan. 19, 2007); *Pavone v. Aegis Lending Corp.*, No. 05 C 5129, 2006 WL 2536632, at *6 (N.D. Ill. Aug. 31, 2006); *Bruce*, 2006 WL 2334846, at *3; *Murray v. Sunrise Chevrolet, Inc.*, No. 04 C 7668, 2006 WL 862886, at *5 (N.D. Ill. Mar. 30, 2006); *In re Napster*, 2005 WL 1287611, at *11.

108. See *Vasquez-Torres*, 2007 WL 4812289, at *7; *Serna*, 2007 U.S. Dist. LEXIS 82023, at *17; see also *Leysoto*, 255 F.R.D. at 699.

109. *Vasquez-Torres*, 2007 WL 4812289, at *7; *Serna*, 2007 U.S. Dist. LEXIS 82023, at *17.

and predominance before certifying a class,¹¹⁰ and to the extent due process concerns militate against a finding of superiority or predominance, addressing these concerns should not be postponed.

A. BEFORE THE CLASS CERTIFICATION STAGE

Defendants may present their due process concerns before plaintiffs file a motion for class certification through a preemptive motion to deny or preclude class certification,¹¹¹ a motion to dismiss, a motion to strike, or a motion for judgment on the pleadings.¹¹² At this stage, defendants generally argue that the court should dismiss the claim for statutory damages because a class award of even the minimum statutory damages would be so disproportionate to any actual harm that may have been suffered as to run afoul of due process. Unreceptive courts have responded that such claims are “premature,” and that they will not dismiss a claim “merely because [plaintiff] requested damages in an amount that might hypothetically be excessive.”¹¹³ For example, one court held that “it is conceivable that in the future a party with actual harm that is difficult to compute will bring a case seeking statutory damages. In such a case, the actual harm might be very close to the statutory damages. This mere possibility of a constitutional application is enough to defeat a facial challenge to the statute.”¹¹⁴

Some courts hold that defendants should raise the due process claim after more discovery has taken place or in the context of a motion for class certification, after evidence of the size of the class and the amount of actual and statutory damages has been submitted.¹¹⁵ Other courts hold that they will not consider due process challenges regarding punitive awards until after the court has rendered a final judgment against the defendant.¹¹⁶

110. See, e.g., *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305, 320 (3d Cir. 2008) (district court must “make a definitive determination that the requirements of Rule 23 have been met before certifying a class”); see also *id.* at 319 (noting that the 2003 amendments to Rule 23 “eliminated the language that had appeared in Rule 23(c)(1) providing that a class certification ‘may be conditional’”).

111. E.g., *Vinole v. Countrywide Home Loans, Inc.*, 571 F.3d 935, 944 (9th Cir. 2009).

112. See, e.g., *Phillips Randolph Enters.*, 2007 WL 129052, at *1.

113. *Arcilla v. Adidas Promotional Retail Operations, Inc.*, 488 F. Supp. 2d 965, 973 (C.D. Cal. 2007).

114. *Harris v. Mexican Specialty Foods, Inc.*, 564 F.3d 1301, 1313 (11th Cir. 2009) (internal citation omitted).

115. *Follman v. Vill. Squire, Inc.*, 542 F. Supp. 2d 816, 821–22 (N.D. Ill. 2007); *Ramirez v. MGM Mirage, Inc.*, 524 F. Supp. 2d 1226, 1232 (D. Nev. 2007); *Arcilla*, 488 F. Supp. 2d at 973.

116. *Parker*, 331 F.3d at 22; *Irvine v. 233 Skydeck, LLC*, 597 F. Supp. 2d 799, 804 (N.D. Ill. 2009); *Ramirez v. Midwest Airlines, Inc.*, 537 F. Supp. 2d 1161, 1169 (D. Kan. 2008); *Centerline Equip. Corp. v. Banner Pers. Serv., Inc.*, 545 F. Supp. 2d 768, 778 (N.D. Ill. 2008); *Troy v. Home Run Inn, Inc.*, No. 07 C 4331, 2008 WL 1766526, at *3 (N.D. Ill. Apr. 14, 2008); *Klingensmith v. Max & Erma's Rests., Inc.*, No. 07-0318, 2007 WL 3118505, at *3 (W.D. Pa. Oct. 23, 2007); *Pirian v. In-N-Out Burgers*, No. SACV061251DOCMLGX, 2007 WL 1040864, at *3 (C.D. Cal. Apr. 5, 2007).

B. POST-JUDGMENT

After the court renders final judgment, the defendant can argue that the award is unconstitutionally excessive because it is disproportionate to the harm plaintiffs actually suffered and ask the court to lower the award to comport with due process. A number of courts have held that the judge can reduce statutory penalties or damages if disproportionate damages have been awarded to the class.¹¹⁷ One court noted that constitutional limits are best considered after class certification because “[t]hen a judge may evaluate the defendant’s overall conduct and control its total exposure.”¹¹⁸ For example, in *Perez-Farias v. Global Horizons, Inc.*, the district court vacated an earlier judgment and reduced the damages award because of due process concerns.¹¹⁹

The ratio between the statutory penalties and compensatory damages in any large class action generally should be no higher than 1:1. Although the Supreme Court has established benchmarks of 4:1 and 9:1 for single-plaintiff punitive damages awards, “[w]hen compensatory damages are substantial,” then a smaller ratio of 1:1 is the highest allowed by the due process clause,¹²⁰ and in determining whether a damage award in a class action is “substantial” (and thus subject to the 1:1 ratio) courts should consider the aggregate class recovery and not the size of the award to each class member.¹²¹ Although courts are divided on when an award is “substantial,” a classwide award will usually qualify because class awards are often in the multi-million-dollar range.¹²²

V. *The Proper Standard for Scrutinizing the Maximum Permissible Amount of Statutory Damages*

There are two major lines of Supreme Court cases regarding the due process limits on statutory penalty awards. The first line of cases began in 1909 with *Waters-Pierce Oil Co. v. Texas*, which explicitly dealt with statutory damages.¹²³ Under this line of cases, a statutory penalty violates due process when it is “so severe and oppressive

117. *Murray*, 434 F.3d at 953–54; see also cases cited *supra* note 107.

118. *Murray*, 434 F.3d at 954.

119. No. CV-05-3061-RHW, 2009 WL 1011180, at *5–6 (E.D. Wash. Apr. 15, 2009). Cf. *Texas v. Am. Blastfax, Inc.*, 164 F. Supp. 2d 892, 900–01 (W.D. Tex. 2001) (holding it would be “inequitable and unreasonable to award” minimum statutory damages against a small company, and awarding seven cents per violation instead).

120. *State Farm*, 538 U.S. at 425; *Exxon Shipping Co. v. Baker*, 128 S. Ct. 2605, 2634 n.28 (2008).

121. *Exxon Shipping*, 128 S. Ct. at 2634 n.28.

122. In *State Farm*, the Court held that \$1 million awarded in compensatory damages was “substantial,” and “likely would justify a punitive damages award at or near the amount of compensatory damages.” 538 U.S. at 429.

123. 212 U.S. 86, 111 (1909) (establishing “grossly excessive” standard).

as to be wholly disproportioned to the offense and obviously unreasonable,” which includes consideration of “due regard for the interests of the public.”¹²⁴ The second line of cases built upon these earlier cases,¹²⁵ extending the reasoning to limit the size of punitive damage awards.¹²⁶ Under this line of cases, the Court articulated a more exacting standard of review by setting forth the three well-known guideposts of *Gore*.¹²⁷ The Court elaborated on those limits in *State Farm*¹²⁸ and *Philip Morris USA v. Williams*.¹²⁹

Courts are not in complete agreement about which line of cases to apply when assessing whether a statutory damage award violates due process. Many courts explicitly apply the *Gore* and *State Farm* due process limitations to statutory damages in class action lawsuits.¹³⁰ However, in what one scholar aptly described as “an ironic twist,”¹³¹ a few courts have refused to apply the later due process cases to class actions involving statutory damages.¹³² This disagreement is significant for two reasons. First, the earlier line of cases permits consideration of harm to third parties, including the general public,¹³³ while under *Philip Morris* consideration of

124. *St. Louis*, 251 U.S. at 66–67.

125. *See, e.g., Gore*, 517 U.S. at 575 (citing *St. Louis*, 251 U.S. at 66–67); *TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443, 454 (1993) (quoting *Waters-Pierce*, 212 U.S. at 111, and *St. Louis*, 251 U.S. at 66–67); *Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 276 (1989) (citing *St. Louis*, 251 U.S. at 66–67).

126. *TXO Prod.*, 509 U.S. at 458; *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 18–19 (1991).

127. 517 U.S. at 575 (listing the three guideposts as the reprehensibility of the defendant’s conduct; the relationship between the punitive award and the actual or potential harm plaintiff suffered; and the ratio between the punitive award and the civil or criminal penalties authorized in comparable cases).

128. 538 U.S. at 425.

129. 549 U.S. 346, 353–54 (2007).

130. *Parker*, 331 F.3d at 22; *Perez-Farias*, 2009 WL 1011180, at *5; *In re Napster*, 2005 WL 1287611, at *10.

In addition, some courts have applied *Gore* and *State Farm* to cases involving statutory damages without explicit discussion of the differences between statutory and punitive damages. *See, e.g., Murray*, 434 F.3d at 953; *Chakejian*, 256 F.R.D. at 502; *Arcilla*, 488 F. Supp. 2d at 972; *Follman*, 542 F. Supp. 2d at 821–22; *Blanco*, 2008 WL 239658, at *2; *Azoiani*, 2007 WL 4811627, at *4; *Troy*, 2007 WL 4293014, at *4; *Price*, 2007 WL 4812281, at *4; *Najarian*, 2007 WL 4682071, at *4; *Pirian*, 2007 WL 1040864, at *3; *White v. E-Loan, Inc.*, No. C 05-02080 SI, 2006 WL 2411420, at *8 (N.D. Cal. Aug. 18, 2006); *ABT Bldg. Prod. Corp. v. Nat’l Union Fire Ins. Co.*, No. 5:01CV100-V, 2005 WL 6124840, at *5 (W.D.N.C. May 31, 2005).

131. Scheuerman, *supra* note 16, at 116.

132. *See, e.g., Centerline Equip.*, 545 F. Supp. 2d at 778 n.6; *Arrez v. Kelly Servs., Inc.*, 522 F. Supp. 2d 997, 1008 (N.D. Ill. 2007); *Accounting Outsourcing LLC v. Verizon Wireless Pers. Commc’n, L.P.*, 329 F. Supp. 2d 789, 808–09 (M.D. La. 2004); *Holtzman v. Caplice*, No. 07 C 7279, 2008 WL 2168762, at *6 (N.D. Ill. May 23, 2008); *Sadowski v. Med1 Online, LLC*, No. 07 C 2973, 2008 WL 489360, at *5 (N.D. Ill. Feb. 20, 2008); *Phillips Randolph Enters.*, 2007 WL 129052, at *2–3. Other cases apply *St. Louis* without discussion. *See, e.g., Ramirez*, 537 F. Supp. 2d at 1169; *Am. Blastfax*, 121 F. Supp. 2d at 1090–91; *Italia Foods Inc. v. Marino v. Enters., Inc.*, No. 07 C 2494, 2007 WL 4117626, at *4 (N.D. Ill. Nov. 16, 2007).

133. *St. Louis*, 251 U.S. at 66–67 (explaining that statutory damages need not be “confined or proportioned to [actual] loss or damages; for, as it is imposed as a punishment for the violation of a public law, the

such harm is barred.¹³⁴ This means that the damage award may be much higher under the earlier line of cases because it need only be proportional to the actual damages suffered by society as a whole. Second, the standard of review under the earlier line of cases “is extraordinarily deferential—even more so than in cases applying abuse-of-discretion review.”¹³⁵ Indeed, courts have required that the statutory damage award “only bear some relationship to the offense’s gravity [because] this is *not* a proportionality inquiry.”¹³⁶

Courts refusing to apply *Gore* and its progeny to statutory damages raise a number of concerns. First, they note that the *Gore* line of cases refers to punitive damages, not statutory damages.¹³⁷ However, these courts ignore the fact that the later line of cases extends the reasoning of the earlier statutory damages cases to punitive damages.¹³⁸ They also ignore the fact that courts, including the Supreme Court, have emphasized that due process protections apply to civil penalties generally, not just those expressly labeled as punitive damages.¹³⁹ Furthermore, damages that go beyond compensation for actual injury are punitive-in-fact,¹⁴⁰ because the

Legislature may adjust its amount to the public wrong rather than the private injury, just as if it were going to the state”).

134. 549 U.S. at 353–54.

135. *Zomba Enters., Inc. v. Panorama Records, Inc.*, 491 F.3d 574, 587 (6th Cir. 2007).

136. *Arrez*, 522 F. Supp. 2d at 1008 (quoting *United States ex rel. Tyson v. Amerigroup Ill., Inc.*, 488 F. Supp. 2d 719, 744 (N.D. Ill. 2007) (emphasis added; internal quotation marks omitted)).

137. See, e.g., *Accounting Outsourcing*, 329 F. Supp. 2d at 809 (holding that because the cases do not explicitly refer to statutory damages, applying their due process limits to statutory damages would “extend the holdings of *Gore* and *Campbell* beyond their intended application”).

138. See *supra* note 125.

139. See *State Farm*, 538 U.S. at 416 (due process “prohibits the imposition of grossly excessive or arbitrary punishments on a tortfeasor”); *Gore*, 517 U.S. at 574 n.22 (“[T]he basic protection against ‘judgments without notice’ afforded by the Due Process Clause is implicated by civil *penalties*.” (emphasis in original; internal citation omitted)); see also *United States v. Halper*, 490 U.S. 435, 448 (1989), *overruled on other grounds by Hudson v. United States*, 522 U.S. 93, 101 (1997) (“[T]he labels affixed either to the proceeding or to the relief imposed . . . are not Controlling and will not be allowed to defeat the applicable protections of federal constitutional law.” (quoting *Hicks v. Feiock*, 485 U.S. 624, 631 (1988) (alterations in original))). Cf. *Exxon Shipping*, 128 S. Ct. at 2622 (likening federal treble damages statute and state penalty statutes to a punitive damages award, and finding such statutes have a “broadly analogous object”); *Tull v. United States*, 481 U.S. 412, 422 n.7 (1987) (“[T]he remedy of civil penalties is similar to the remedy of punitive damages.”); *Gilbert v. DaimlerChrysler Corp.*, 685 N.W.2d 391, 400 n.22 (Mich. 2004) (“While *State Farm* dealt with punitive damage awards, the due process concerns articulated in *State Farm* are arguably at play regardless of the label given to damage awards.”).

140. See, e.g., *Halper*, 490 U.S. at 448 (“[A] civil sanction that cannot fairly be said solely to serve a remedial purpose, but rather can only be explained as also serving either retributive or deterrent purposes, is punishment, as we have come to understand the term.”); *Fitzgerald Publ’g Co. v. Baylor Publ’g Co.*, 807 F.2d 1110, 1117 (2d Cir. 1986) (“[S]tatutory damages serve two purposes—compensatory and punitive.”).

Whether a statute goes beyond compensation for actual injury to become punitive-in-fact may vary by statute. For example, the California Supreme Court has held that the purpose of California Labor Code § 203 is solely “to compel the prompt payment of earned wages,” and thus § 203 is punitive in nature.

potential statutory damages are so much greater than actual damages that they “come to resemble punitive damages.”¹⁴¹ This is of particular concern with respect to statutory damages because they “are often[] motivated in part by a pseudo-punitive intention to ‘address and deter overall public harm.’”¹⁴²

Courts applying the earlier, more deferential standard also note that statutory damages are different from punitive damages because they are assessed by Congress, not juries, and the Supreme Court focused on the bias, passion, and prejudice of juries when holding that due process limits apply to punitive awards.¹⁴³ But the Supreme Court has noted that it “is not correct to assume that the safeguards in the legislative process have no counterpart in the judicial process” because juries make decisions through deliberations based on the arguments of adversaries, as does the legislature.¹⁴⁴ In addition, some courts have refused to apply *Gore* to statutory damages, reasoning that they should give deference to legislative determinations of the appropriate amount of damages to be awarded for the violation of a given statute.¹⁴⁵ These courts usually rely on the third *Gore* guidepost, which states that the reviewing court “should accord substantial deference to legislative judgments concerning appropriate sanctions for the conduct at issue.”¹⁴⁶ However, the Supreme Court has held that when a penalty is challenged as constitutionally excessive, courts must “engage[] in an independent examination of the relevant

Oppenheimer v. Sunkist Growers, Inc., 315 P.2d 116, 118 (Cal. 1957); *Murphy v. Kenneth Cole Prods., Inc.*, 155 P.3d 284, 293 (Cal. 2007); see also *Austin v. United States*, 509 U.S. 602, 621 (1993) (stating a “civil sanction that cannot fairly be said *solely* to serve a remedial purpose, but rather can only be explained also as serving either retributive or deterrent purposes, is punishment” (emphasis in original; internal quotation marks and citation omitted)). Similarly, courts have found that FACTA is punitive-in-fact because the purpose “is to require a FACTA defendant to pay for willful violations of the truncation provision, not to compensate the claimants for any actual monetary or physical loss. Said damages are akin to punitive in nature.” *Whole Enchilada, Inc. v. Travelers Prop. Cas. Co.*, 581 F. Supp. 2d 677, 704 (W.D. Pa. 2008). But see *Harris*, 564 F.3d at 1313 (explaining that damages provision is not tantamount to a punitive damages provision “[b]ecause the FCRA already contains a punitive damages provision and specifies that statutory damages may only be awarded in lieu of actual damages”). Courts have made similar arguments with respect to the Credit Repair Organizations Act, *Hillis*, 237 F.R.D. at 507 (reasoning “damages sought here are functionally equivalent to statutory penalties”), and the Washington Farm Labor Contract Act, *Perez-Farias*, 2009 WL 1011180, at *4 n.5 (explaining statutory minimum “would necessarily result in a punitive award because the amount of damages would have no relationship to the harm caused by the wrongful conduct”).

141. *In re Napster*, 2005 WL 1287611, at *10 (internal citation and quotation marks omitted).

142. *Parker*, 331 F.3d at 27 (Newman, J., concurring) (quoting *Am. Blastfax*, 121 F. Supp. 2d at 1090); see also *DirecTV, Inc. v. Braun*, No. CIV 3:03CV937(SRU), 2004 WL 288805, at *1 (D. Conn. Feb. 9, 2004).

143. *Kenro, Inc. v. Fax Daily, Inc.*, 962 F. Supp. 1162, 1165 (S.D. Ind. 1997).

144. *TXO Prod.*, 509 U.S. at 456–57.

145. *Phillips Randolph Enters.*, 2007 WL 129052, at *2; *Lowry's Reports, Inc. v. Legg Mason, Inc.*, 302 F. Supp. 2d 455, 460 (D. Md. 2004) (“The unregulated and arbitrary use of judicial power that the *Gore* guideposts remedy is not implicated in Congress[s] carefully crafted and reasonably constrained statute.”).

146. *Gore*, 517 U.S. at 583 (internal quotation marks and citations omitted).

criteria”¹⁴⁷ and not give legislatures free rein to violate defendants’ due process rights.

Courts have also found that *Gore* is not relevant to statutory damages because damages under a statute provide adequate notice to defendants. They explain, “[a]t the heart of the Court’s rulings in [*State Farm* and *Gore*] was the concern that persons receive fair notice regarding the nature and severity of the punishment inflicted upon them” and that defendants receive “fair notice” by virtue of the statute.¹⁴⁸ But other courts have found that “[*Gore*]’s guideposts are applicable even when the defendant has adequate notice of the amount at issue.”¹⁴⁹

Finally, courts reason that statutory damages are reserved for cases where actual damages would be difficult to quantify, such that it would be impossible to meaningfully apply the *Gore* guideposts.¹⁵⁰ For example, the TCPA was created to address “the difficult to quantify business interruption costs imposed upon recipients of unsolicited fax advertisements.”¹⁵¹ However, *State Farm* explicitly recognized that the constitutional limits apply even in cases where “the monetary value” of the harm “might have been difficult to determine.”¹⁵²

VI. Conclusion

Aggregated statutory damages present serious problems for defendants in class action lawsuits. The combination of statutory damages and the class action mechanism creates a double incentive for plaintiffs to file suit, increases the potential for blackmail settlements, and often results in grossly disproportionate penalties. The potential for enormous damages has led many courts to recognize the unintended and devastating effect these damages may have on defendants and to deny class certification under the superiority and predominance requirements of Rule 23.

147. *Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 435 (2001). See also *Perez-Farias*, 2009 WL 1011180, at *5 (“[A]ny damage award must meet . . . substantive constitutional requirements.”).

148. *Accounting Outsourcing*, 329 F. Supp. 2d at 808–09 (M.D. La. 2004) (internal citations omitted).

149. *VF Corp. v. Wrexham Aviation Corp.*, 686 A.2d 647, 661 (Md. Ct. Spec. App. 1996), *aff’d in part and rev’d in part on other grounds* by 715 A.2d 188 (Md. 1998). See also 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, 542 (2004).

150. *Centerline Equip.*, 545 F. Supp. 2d at 777–78; *Accounting Outsourcing*, 329 F. Supp. 2d at 809; *Native Am. Arts, Inc. v. Bundy-Howard, Inc.*, 168 F. Supp. 2d 905, 914 (N.D. Ill. 2001); *Am. Blastfax*, 121 F. Supp. 2d at 1090–91; *Kenro*, 962 F. Supp. at 1165; *Sadowski*, 2008 WL 489360, at *4.

151. *Kenro*, 962 F. Supp. at 1166.

152. 538 U.S. at 425 (internal quotation marks and citation omitted).

But Rule 23 is only one part of the solution. Courts should also recognize that certifying classes involving aggregated penalties violates a defendant's due process rights.¹⁵³ In the meantime, it is advisable for defendants to raise due process objections at every stage of the litigation and assert every possible challenge under Rule 23 to prevent or limit the certification of classes seeking massive aggregated penalty awards.

153. The need to attack aggregated penalties under Rule 23 or federal due process principles is all the more important after the Supreme Court's decision in *Shady Grove Orthopedic Assocs. v. Allstate Ins. Co.*, No. 08-1008, 2010 U.S. LEXIS 2929 (U.S. 2010), which held that a New York procedural rule prohibiting class actions seeking penalties does not apply to federal courts sitting in diversity. *Shady Grove* held that because the New York procedural rule conflicts with Rule 23, which "creates a categorical rule entitling a plaintiff whose suit meets the specified criteria to pursue his claim as a class action," Rule 23 governs. *Id.* at *11.

Whether the Court's fractured opinion will be applied to invalidate other similar state rules remains unclear. Defendants in federal class actions should cite Justice Stevens's concurring opinion, which controls because his vote was necessary to the majority and his was the narrowest opinion concurring in the Court's judgment. See *Marks v. United States*, 430 U.S. 188, 193 (1977). In Justice Stevens's view, a federal procedural rule, as applied, can violate the Rules Enabling Act by effectively abridging, enlarging, or modifying a state-created right or remedy. When a federal rule cannot be construed in a way to avoid such an outcome, "federal courts cannot apply the rule." *Shady Grove*, 2010 U.S. LEXIS 2929, at *55. While the New York restriction at issue is not the sort of procedural rule that is sufficiently interwoven with substantive rights to avoid the application of Rule 23, Justice Stevens emphasized that each case must be addressed on its own merits:

In some instances, a state rule that appears procedural really is not. A rule about how damages are reviewed on appeal may really be a damages cap. A rule that a plaintiff can bring a claim for only three years may really be a limit on the existence of the right to seek redress. A rule that a claim must be proved beyond a reasonable doubt may really be a definition of the scope of the claim. These are the sorts of rules that one might describe as "procedural," but they nonetheless define substantive rights. Thus, if a federal rule displaced such a state rule, the federal rule would have altered the State's "substantive rights."

Id. at *57 n.8.