

Table of Contents

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FROM THE EDITORS	231	§ 15.0 EMPLOYMENT DISCRIMINATION	291
The Legacy of <i>Ratner v. Chemical Bank: Aggregate Statutory Damages in the Class Action Context</i>	233	Equal Employment Opportunity Commission v. Kovacevich “5” Farms	291
<i>by Steve D. Larson and Mark A. Friel</i>		§ 16.0 SOCIAL WELFARE/ENTITLEMENTS	292
CATEGORIES	251	Boca Raton Community Hospital, Inc. v. Tenet Healthcare Corporation	292
DECISIONS	259	Celano v. Marriott International, Inc.	294
§§ 5-19 SUBSTANTIVE CATERGORIES OF CLASS ACTIONS	259	§ 17.0 CIVIL-POLITICAL RIGHTS/LIBERTIES ...	295
§ 5.0 SECURITIES	259	Dehoyos v. Allstate Corporation	295
Smith v. Dominion Bridge Corp.	259	National Federation of the Blind v. Target Corp.	297
In re Patterson Companies, Inc., Securities, Derivative & ERISA Litigation	260	§ 18.0 INMATE/INSTITUTIONAL RIGHTS	298
Pearce v. UBS PaineWebber, Inc.	263	Young v. County of Cook	298
Smith v. Suprema Specialities, Inc.	264	Perondi v. Schriro	299
§ 7.0 ANTITRUST	265	Jackson v. Danberg	300
In re Hydrogen Peroxide Antitrust Litigation	265	§§ 20-35 CLASS ACTION MECHANICS	301
In re Tableware Antitrust Litigation	267	§ 21.0 STANDING	301
§ 8.0 CONSUMER FRAUD/WARRANTY/ CONTRACT	268	Cole v. General Motors Corp.	301
Burgess v. Farmers Insurance Company, Inc.	268	§ 24.0 TIMING/METHOD OF CLASS CERTIFICATION	301
Cole v. General Motors Corp.	270	Murray v. E*Trade Financial Corp.	301
Mulford, et al. v. Altria Group, et al.	270	Dunkelman et al. v. Cincinnati Bengals,	301
Sonic Automotive, Inc. v. Galura	272	§ 25-26 NOTICE	302
Farmers Group, Inc. v. Lubin	273	Adams v. Inter-Con Security Systems, Inc.	302
Daccach v. Citizens Ins. Co. of America	274	Satchell v. Federal Express Corporation,	302
Citizens Insurance Company of America v. Daccach	275	Jackson v. Danberg	303
Batas v. Prudential Insurance Company of America	277	§ 28.0 STATUTE OF LIMITATIONS TOLLING	303
Maas v. The Penn Central Corporation	278	Adams v. Inter-Con Security Systems, Inc.	303
§ 9.0 CONSUMER CREDIT	279	§ 30.0 SETTLEMENTS/JUDGMENTS	303
Shovak v. Long Island Commercial Bank	279	Hernandez v. Tropical Construction & Maintenance Corp.	303
Day v. Check Brokerage Corp.	280	In re Gilat Satellite Networks, Ltd.	304
Acosta v. Trans Union, LLC	281	Satchell v. Federal Express Corporation	305
Krey v. Castle Motor Sales, Inc.	282	In re Tableware Antitrust Litigation	305
Murray v. E*Trade Financial Corp.	283	§ 31.0 JURISDICTION/FORUM CONFLICTS	306
Shellman v. Countrywide Home Loans, Inc.	285	Cole v. General Motors Corp.	306
§ 10.0 UTILITIES	286	Ferrell v. Allstate Insurance Co.	306
Rodriguez-Feliciano v. Puerto Rico Electric Power Authority	286	Escoe v. State Farm Fire and Casualty Company	307
§ 13.0 ENVIRONMENTAL POLLUTION	286	§ 50.0 ATTORNEYS FEES	307
Smith v. Illinois Central Railroad Company	286	Smith v. Dominion Bridge Corp.	307
§ 14.0 LABOR/WAGE/PENSION	289	Hernandez v. Tropical Construction & Maintenance Corp.	308
Adams v. Inter-Con Security Systems, Inc.	289	CLASS ACTION BIBLIOGRAPHY	309
Morton v. Valley Farm Transport, Inc.	290	INDEX	317
Weston v. Emerald City Pizza LLC	291		

Table of Cases Reported

[in alphabetical order]

A

Acosta v. Trans Union, LLC 281
Adams v. Inter-Con Security Systems, Inc. 289, 302, 303

B

Batas v. Prudential Insurance Company of America 277
Boca Raton Community Hospital, Inc. v. Tenet
Healthcare Corporation 292
Burgess v. Farmers Insurance Company, Inc. 268

C

Celano v. Marriott International, Inc. 294
Citizens Insurance Company of America v. Daccach 275
Cole v. General Motors Corp. 270, 301, 306

D

Daccach v. Citizens Ins. Co. of America 274
Day v. Check Brokerage Corp. 280
Dehoyos v. Allstate Corporation 295
Dunkelman et al. v. Cincinnati Bengals 301

E

Equal Employment Opportunity Commission v.
Kovacevich “5” Farms 291
Escoe v. State Farm Fire and Casualty Company 307

F

Farmers Group, Inc. v. Lubin 273
Ferrell v. Allstate Insurance Co. 306

H

Hernandez v. Tropical Construction &
Maintenance Corp. 303, 308

I

In re Gilat Satellite Networks, Ltd. 304
In re Hydrogen Peroxide Antitrust Litigation 265
In re Patterson Companies, Inc., Securities, Derivative &
ERISA Litigation 260

In re Tableware Antitrust Litigation 267, 305

J

Jackson v. Danberg 300, 303

K

Krey v. Castle Motor Sales, Inc. 282

M

Maas v. The Penn Central Corporation 278
Morton v. Valley Farm Transport, Inc. 290
Mulford, et al. v. Altria Group, et al. 270
Murray v. E*Trade Financial Corp. 283, 301

N

National Federation of the Blind v. Target Corp. 297

P

Pearce v. UBS PaineWebber, Inc. 263
Perondi v. Schriro 299

R

Rodriguez-Feliciano v. Puerto Rico Electric
Power Authority 286

S

Satchell v. Federal Express Corporation 302, 305
Shellman v. Countrywide Home Loans, Inc. 285
Shovak v. Long Island Commercial Bank 279
Smith v. Dominion Bridge Corp. 259, 307
Smith v. Illinois Central Railroad 286, 288
Smith v. Suprema Specialities, Inc. 264
Sonic Automotive, Inc. v. Galura 272

W

Weston v. Emerald City Pizza LLC 291

Y

Young v. County of Cook 298

From the Editors...

Dear Readers:

Along with our usual coverage of recent class action cases and a bibliography of recent class action literature, this edition of *Class Action Reports* includes an interesting article concerning the Southern District of New York case *Ratner v. Chemical Bank New York Trust Co.*.

Steve D. Larson and Mark A. Friel address the issue of aggregate damage awards under Rule 23 and conclude that *Ratner* was wrongly decided. The article provides a thorough analysis of the unprecedented decision itself and of the history behind Rule 23(b)(3)'s superiority requirement. Also of interest, the article includes a comprehensive presentation of decisions made post-*Ratner* and how they gradually eroded the precedent set by the decision.

*Kevin Duerinck, John A. Frey, Gerald Guidoni, Clay Mattson, Carrie Petersen,
Robert L. Potter, Scott Ratcliffe, Elaine Marie Tomko-Deluca & David Zammiello*

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THE LEGACY OF *RATNER V. CHEMICAL BANK*: AGGREGATE STATUTORY DAMAGES IN THE CLASS ACTION CONTEXT

by Steve D. Larson and Mark A. Friel*

A. INTRODUCTION

In September 1969, something happened that would dramatically alter the landscape of class action jurisprudence: Chemical Bank of New York sent Michael Ratner a periodic credit card statement that failed, in violation of the Truth in Lending Act (“TILA”), to disclose the annual rate of interest accruing on the outstanding balance.¹ Ratner was not charged any interest during the period covered by the statement², but he filed a class action in federal court against Chemical Bank almost immediately for violation of TILA’s disclosure requirements, and, on behalf of a class of potentially 130,000 cardholders, asked for statutory damages of between \$100 and \$1,000 per class member.³

In June 1971, Judge Frankel of the Southern District of New York ruled on Chemical Bank’s motion to dismiss and Ratner’s motion for summary judgment (“*Ratner I*”). Judge Frankel ruled for Ratner in all respects, rejecting Chemical Bank’s defenses and finding that Chemical Bank violated TILA and “carefully, deliberately — intentionally — omitted the disclosure in question.”⁴

Eight months later, Judge Frankel rendered an unprecedented decision on Ratner’s motion for class certification (“*Ratner II*”).⁵ In denying the motion, Judge Frankel found that a class action was not a “superior” method for resolving the controversy, as required by Rule 23(b)(3)⁶:

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. Appealing to that kind of judgment, defendant points out that (1) the incentive of class-action benefits is unnecessary in view of the Act’s provisions for a \$100 minimum recovery and payment of costs and a reasonable fee for counsel; and (2) the proposed recovery of \$100 each for some 130,000 class members would be a horrendous, pos-

sibly annihilating punishment, unrelated to any damage to the purported class or to any benefit to defendant, for what is at most a technical and debatable violation of the Truth in Lending Act. These points are cogent and persuasive. They are summarized compendiously in the overall conclusion stated earlier: the allowance of this as a class action is essentially inconsistent with the specific remedy supplied by Congress and employed by plaintiff in this case. It is not fairly possible in the circumstances of this case to find the (b)(3) form of class action ‘superior to’ this specifically ‘available [method] for the fair and efficient adjudication of the controversy.’⁷

Since it was issued, Judge Frankel’s decision, and particularly with respect to the superiority analysis under Rule 23(b)(3), has frequently appeared in briefs filed by defendants opposing certification of class actions under Rule 23(b)(3). Westlaw®’s KeyCite® service lists over 100 citations to *Ratner II* by state and federal trial and appellate courts, and more than 65 citations to *Ratner II* in secondary sources.

Ratner II is, in many ways, the Holy Grail of class action defense, because it appeals to policy and discretion, and avoids a straight-forward application of procedural rules that, the argument goes, would have harsh and inequitable consequences. Unfortunately, many courts have embraced the reasoning of *Ratner II* as grounds for denying class certification.⁸ Other courts, while ultimately finding a class action to be superior, have found it necessary to distinguish *Ratner II*, or the cases following it, on their facts.

The far-reaching impact of *Ratner II* was unintentional. Judge Frankel, in fact, hoped to avoid the “sweeping pronouncements” made by the parties briefing the issue before him, stating his “molecular purpose” to be a ruling on the “specific case at hand.”⁹ Judge Frankel’s intentions notwithstanding, *Ratner II* has had significant repercussions in class action analysis, both as to the propriety of certifying statutory damages classes under Rule 23(b)(3), and as to the potential for due process issues arising post-certification.

This article first contends that *Ratner II* was wrong when it was decided because Rule 23(b)(3)’s superiority

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requirement is concerned with procedural, and not substantive fairness, and thus the potential substantive impact of aggregate statutory damages on a defendant in a class action is irrelevant to the question of class certification. Second, this article contends that the substantive concerns underlying *Ratner II* are not concerns that should, or can, be addressed by the courts, not only because statutory damages are essentially compensatory and reflect the rational assessment of Congress as to what would fairly compensate victims of certain conduct, but also because the constitutionality of a statutory damages scheme does not depend on whether the damages are assessed on an aggregate basis.

B. THE ADOPTION OF RULE 23(B)(3)'S SUPERIORITY REQUIREMENT

Effective July 1, 1966, after six years of hard labor by the Advisory Committee on Civil Rules, the Supreme Court adopted amendments to the Federal Rules of Civil Procedure, including ambitious revisions to Rule 23. Rule 23, which had existed since 1938, when it succeeded federal equity rule 38, had proven incapable of providing clear guidance to the courts both as to the identification of actions suitable for class treatment, and as to the management of class actions allowed to proceed as such.¹⁰

“‘[T]he most adventuresome’ innovation” was the new Rule 23(b)(3).¹¹ “Framed for situations in which ‘class action treatment is not clearly called for’ as it is in Rule 23(b)(1) and (b)(2) situations, Rule 23(b)(3) permits certification where class suit ‘may nevertheless be convenient and desirable.’”¹² New Rule 23(b)(3) required that, in addition to finding the satisfaction of the prerequisites under Rule 23(a) of numerosity, commonality, typicality, and adequate representation, a court had to find that common questions “predominate” over individual ones, and that class treatment was “superior to other available methods for the fair and efficient adjudication of the controversy.” “In adding ‘predominance’ and ‘superiority’ to the qualification-for-certification list, the Advisory Committee sought to cover cases ‘in which a class action would achieve economies of time, effort, and expense, and promote . . . uniformity of decision as to persons similarly situated, without sacrificing procedural fairness or bringing about other undesirable results.’”¹³

With respect to the superiority requirement in particular, the Advisory Committee wanted courts to “assess the relative advantages of alternative procedures for handling the total controversy,” observing that, in certain circumstances, “another method of handling the litigious situation may be available which has greater practical advantages. Thus one or more actions agreed to by the parties as test or model actions may be

preferable to a class action; or it may prove feasible and preferable to consolidate actions.”¹⁴ The Reporter to the Advisory Committee, Benjamin Kaplan, further explained: “The object is to get at the cases where a class action promises important advantages of economy of effort and uniformity of result without undue dilution of procedural safeguards for members of the class or for the opposing party.”¹⁵

Although the revised Rule 23 was an improvement over the old Rule in many respects, the revisions were not received warmly by everyone. Justice Black dissented from the Supreme Court’s adoption of the 1966 amendments to the Rules, strongly objecting to the discretion afforded to trial judges:

“I have gone over all the proposed amendments carefully and while there are probably some good suggestions, it is my belief that the bad results that can come from the adoption of these amendments predominate over any good they can bring about. I particularly think that every member of the Court should examine with great care the amendments relating to class suits. It seems to me that they place too much power in the hands of the trial judges and that the rules might almost as well simply provide that ‘class suits can be maintained either for or against particular groups whenever in the discretion of a judge he thinks it is wise.’ The power given to the judge to dismiss such suits or to divide them up into groups at will subjects members of classes to dangers that could not follow from carefully prescribed legal standards enacted to control class suits.”¹⁶

Responding to Justice Black’s concerns the following year, Kaplan observed:

In the actual handling of pioneer cases under the rule, the courts have prevailingly shown good understanding in spelling out and applying the delimiting criteria; on this crucial matter the record, as far as it goes, should allay the fear expressed by Justice Black that the new rule does not afford sufficiently intelligible standards, and thus gives district judges power without bounds.¹⁷

Kaplan’s comments were made in December 1967, more than four years before Judge Frankel issued his remarkable opinion in *Ratner II*.

Had Kaplan attended the Eighth Circuit’s Judicial Conference in St. Louis in September of 1967, however, he may have predicted *Ratner II*’s outcome. During the Conference, Judge Frankel shared his views on the revised Rule 23:

The Rule — quite deliberately, I think — tends to ask more questions than it answers. It is neither a set of prescriptions nor a blue print. It is, rather, a broad outline of general policies and directions. As the commentators have said, it confides to the district judges a broad range of discretion. And this means, as you all know so well, not that we're about to get drunk with power, but that we've been challenged to piece out a huge body of procedural common law by giving all the hard labor and creative imagination we can muster for this purpose.¹⁸

Thus, far from seeing the criteria in Rule 23 as “delimiting,” Judge Frankel preferred to treat the criteria as open-ended, and believed the Rule required judges to inject “creative imagination” into the plain language.

C. THE FUNDAMENTAL FLAWS IN *RATNER II*

When he decided *Ratner II* in early 1972, Judge Frankel ruled consistently with his remarks to the Eighth Circuit Judicial Conference. However, by beginning his analysis with the flawed premise that his discretion was not clearly (or, perhaps, sufficiently) limited, Judge Frankel went beyond the plain language, and the underlying purpose, of Rule 23(b)(3).

The plain language of Rule 23(b)(3) lists four factors pertinent to the finding on superiority:

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

While these factors are, according to the Advisory Committee, “non-exhaustive,”¹⁹ the trial court’s discretion is constrained by the ultimate purpose of the superiority requirement: to ensure fairness and efficiency.

Prior to *Ratner II*, the Supreme Court, while having held that the Federal Rules of Civil Procedure were to be liberally construed,²⁰ and construed “to secure the just, speedy, and inexpensive determination of every action,”²¹ had also held that the Rules “should not be expanded by disregarding plainly expressed limitations,”²² and cautioned courts that they “have no power to rewrite the Rules by judicial interpretations.”²³ With respect to revised Rule 23 in particular, Justice Fortas, in his dissenting opinion in *Snyder v. Harris*, explained that “[u]nder the new Rule the focus shifts from the

abstract character of the right asserted to explicit analysis of the suitability of the particular claim to resolution in a class action. The decision that a class action is appropriate is not to be taken lightly; the district court must consider the full range of relevant factors specified in the Rule.”²⁴

In the years between the adoption of the amendments to Rule 23 and Judge Frankel’s decision in *Ratner II*, there were few opinions that spent any considerable time analyzing the superiority requirement of Rule 23(b)(3). For the most part, however, those courts that addressed the issue did so principally with respect to manageability. The guidance provided by the Second Circuit during this time also focused on manageability as the touchstone of superiority.²⁵

The one case that, prior to *Ratner II*, appears to have approached closest to assessing (but ultimately discounting) the impact on a defendant of class certification was *State of Illinois v. Harper & Row Publishers, Inc.*²⁶ In *Harper & Row*, the court presided over consolidated pretrial proceedings involving more than forty separate antitrust actions alleging conspiracies by the defendants to inflate the prices for children’s editions of library books. In connection with these suits, the attorneys general for several states moved for class certification under Rule 23(b)(3) on behalf of the public libraries, school districts, and boards of education within their respective jurisdictions. In opposing the motion, the defendants raised a number of arguments, including that a class action would pose “insurmountable” administrative difficulties. The defendants contended that settlement would become difficult “since the expanded number of plaintiffs will each demand compensation.”²⁷ The court rejoined: “Naturally, the publishers and wholesalers are reluctant to see their liability increase. Even with thousands of class members, however, the imaginative and resourceful attorneys handling these cases can undoubtedly devise workable settlement procedures.”²⁸ On balance, the court found a class action to be “the most efficient way to resolve the plaintiffs’ widespread claims”²⁹

As he did in his speech to the Eighth Circuit Judicial Conference,³⁰ in *Ratner II* Judge Frankel gave great weight to the concept of “fairness.” In doing so, he virtually ignored the criteria set forth in Rule 23(b)(3)³¹, and failed to square his interpretation of the Rule with the guidance available at the time. Instead, Judge Frankel agreed with Chemical Bank that it would be unfair to use the class action device to impose aggregate statutory damages on the bank for its violations of TILA, no matter how “intentional” he had already found its conduct to be.³² Judge Frankel’s opinion as to the fairness of a class action, whether justified or not, was not the proper basis for his finding on superiority. For, the “fairness” con-

templated by Rule 23(b)(3) is not *substantive* fairness, but *procedural* fairness.

The Supreme Court, which adopted the amendments to Rule 23 in 1966, was well aware of the distinction between substantive and procedural fairness as embodied by the Due Process Clause of the Fifth and Fourteenth Amendments. Where substantive due process prohibited government from exercising its power arbitrarily and oppressively,³³ procedural due process ensured that, to the extent the government's deprivation of life, liberty or property was justified, no such deprivation would occur without notice and the opportunity to be heard.³⁴

Against this backdrop, the Advisory Committee made clear that Rule 23(b)(3) was designed to balance efficiency with "procedural fairness."³⁵ A class action was "superior" when it was found to have "greater practical advantages" over other methods of litigating the controversy³⁶:

Thus one or more actions agreed to by the parties as test or model actions may be preferable to a class action; or it may prove feasible and preferable to consolidate actions. Cf. Weinstein, *supra*, 9 Buffalo L.Rev. at 438-54. Even when a number of separate actions are proceeding simultaneously, experience shows that the burdens on the parties and the courts can sometimes be reduced by arrangements for avoiding repetitious discovery or the like. Currently the Coordinating Committee on Multiple Litigation in the United States District Courts (a subcommittee of the Committee on Trial Practice and Technique of the Judicial Conference of the United States) is charged with developing methods for expediting such massive litigation. To reinforce the point that the court with the aid of the parties ought to assess the relative advantages of alternative procedures for handling the total controversy, subdivision (b)(3) requires, as a further condition of maintaining the class action, that the court shall find that the procedure is "superior" to the others in the particular circumstances.³⁷

Kaplan explained that "[t]he object is to get at the cases where a class action promises important advantages of economy of effort and uniformity of result without undue dilution of procedural safeguards for members of the class or for the opposing party."³⁸

It is not difficult to understand why the drafters of Rule 23(b)(3) intended procedural fairness to be the only kind of "fairness" relevant to a finding of superiority.

*Marbury v. Madison*³⁹ firmly established the principle that where a legal right has been violated, the law

affords a remedy. "And it is also well settled that where legal rights have been invaded, and a federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done."⁴⁰ The power to afford a remedy, moreover, "implies the power to utilize any of the procedures or actions normally available to the litigant according to the exigencies of the particular case."⁴¹ Rule 23 was certainly a normally available procedure for prosecuting civil actions, even ones claiming statutory damages. In fact, since its adoption in 1948 Rule 1 made all of the Federal Rules of Civil Procedure applicable to "all suits of a civil nature . . ."⁴²

Moreover, the Supreme Court had repeatedly held prior to *Ratner II* that, absent constitutional concerns, courts could not refuse to enforce laws simply because they found the consequences of enforcement unappealing:

It is not enough merely that hard and objectionable or absurd consequences, which probably were not within the contemplation of the framers, are produced by an act of legislation. Laws enacted with good intention, when put to the test, frequently, and to the surprise of the lawmaker himself, turn out to be mischievous, absurd, or otherwise objectionable. But in such case the remedy lies with the lawmaking authority, and not with the courts.⁴³

Contrary to then-existing authority, Judge Frankel did not weigh the procedural advantages of the class action against other available procedures. Instead, he considered the substantive effect of aggregate liability on Chemical Bank, and then denied a substantive remedy for all of the putative class members whose legal rights under TILA had been violated by Chemical Bank.

It is likely that Judge Frankel's decision resulted from the unusual procedural posture of the case. By the time *Ratner II* was decided, Judge Frankel had already ruled that Chemical Bank was liable for violating TILA's disclosure requirements.⁴⁴ Thus, a ruling on class certification was effectively a ruling as to whether Chemical Bank would be liable for \$100 in statutory damages, or \$13 million. The extent of Chemical Bank's liability, however, should have been separately analyzed as a matter of substantive due process.⁴⁵ Judge Frankel may have reduced, in any event, the award against Chemical Bank so as to avoid imposing what he perceived as unconstitutionally disproportionate damages. But to deny class certification in order to avoid addressing the constitutional question was an abuse of discretion.

D. THE GRADUAL EROSION OF *RATNER II*'S FOUNDATION

Subsequent to *Ratner II*, many courts have relied on it and its progeny to support the denial of class certification.⁴⁶ Other courts, while finding a class action to be superior despite *Ratner II*, have found it necessary to distinguish the case, or the cases following it, on their facts.⁴⁷ Fortunately, numerous courts, including the Supreme Court, the Second Circuit and the Seventh Circuit, have wholly rejected, either implicitly or explicitly, the proposition that substantive due process concerns (such as the potential for disproportionate damages) should be considered when deciding to grant or deny class certification under Rule 23(b)(3).⁴⁸

Following *Ratner II*, the Supreme Court issued three critical decisions that, while not addressing *Ratner II* itself, squarely rejected its underpinnings: *Eisen v. Carlisle & Jacquelin*,⁴⁹ *Reiter v. Sonotone Corp.*⁵⁰, and *Califano v. Yamasaki*.⁵¹

The issues on appeal in *Eisen* related to certain notice procedures imposed by the district court in connection with certifying a class of odd-lot securities traders. In deciding that 90% of the costs of notice should be borne by the defendants, the district court engaged in a preliminary inquiry into the merits of the case, and decided that the plaintiff was more than likely to prevail. The Supreme Court disapproved of the district court's attempt to assess the merits of the plaintiff's case at the class certification stage:

We find nothing in either the language or history of Rule 23 that gives a court any 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. Indeed, such a procedure contravenes the Rule by allowing a representative plaintiff to secure the benefits of a class action without first satisfying the requirements for it. He is thereby allowed to obtain a determination on the merits of the claims advanced on behalf of the class without any assurance that a class action may be maintained.⁵²

The plaintiff in *Reiter* brought a class action against the defendants for violations of federal antitrust law. She sought treble damages under section 4 of the Clayton Act. The defendants moved to dismiss the complaint on the grounds that the plaintiff, who alleged she and the other members of the class were forced to pay illegally fixed higher prices for hearing aids and related services, had not been injured in her "business or property" within the meaning of section 4. Before the Supreme Court, one of the defendants' arguments was "that the cost of defending consumer class actions would have a potentially ruinous effect on small businesses in particu-

lar and will ultimately be paid by consumers in any event."⁵³ The Court acknowledged that such considerations were not unimportant, but held that "they are policy considerations more properly addressed to Congress than to this Court."⁵⁴

Decided less than two weeks after *Reiter*, *Califano* concerned the availability of class actions under section 205(g) of the Social Security Act. The government argued that the language of section 205(g), which authorized suits by "[a]ny individual," was inconsistent with an intent to permit class relief. The Court disagreed:

Section 205(g) contains no express limitation of class relief. It prescribes that judicial review shall be by the usual type of "civil action" brought routinely in district court in connection with the array of civil litigation. Federal Rule Civ. Proc. 1, in turn, provides that the Rules "govern the procedure in the United States district courts in *all* suits of a civil nature." (Emphasis added.) Those Rules provide for class actions of the type certified in this case. Fed. Rule Civ. Proc. 23(b)(2). In the absence of a direct expression by Congress of its intent to depart from the usual course of trying "all suits of a civil nature" under the Rules established for that purpose, class relief is appropriate in civil actions brought in federal court⁵⁵

Thus, while *Califano* undermined Judge Frankel's finding that class relief was "inconsistent" with the remedial scheme under TILA, *Eisen* and *Reiter* undermined his consideration of the substantive impact on Chemical Bank resulting from class certification.⁵⁶ Surprisingly, it would be some time before the significance of the Supreme Court's holdings in these cases was fully appreciated as a repudiation of *Ratner II*.⁵⁷

Without reference to *Eisen*, *Reiter*, or *Califano*, several courts have come to the same conclusion as did the courts in *Eoaldi*⁵⁸ and *Chevalier*.⁵⁹ That assessing the potential financial impact of an aggregate damages judgment against the defendant is not a proper consideration at the class certification stage.

In *Parker v. Time Warner Entertainment Co., L.P.*,⁶⁰ cable television subscribers brought a class action alleging that the defendant violated the subscriber privacy provisions of the Cable Communications Policy Act. The plaintiff, on behalf of a class of potentially as many as 12 million subscribers⁶¹, sought statutory, actual and punitive damages, attorney fees, and declaratory and injunctive relief. Relying on *Ratner II* and its progeny, the district court granted the defendant's motion to deny certification under Rule 23(b)(3), in large part because "the liability defendant stands to incur is grossly dispro-

portionate to any actual harm sustained by an aggrieved individual.”⁶²

The Second Circuit appreciated the district court’s concern about the defendant’s potential liability, but held that its concern was premature:

We acknowledge Judge Glasser’s legitimate concern that the potential for a devastatingly large damages award, out of all reasonable proportion to the actual harm suffered by members of the plaintiff class, may raise due process issues. Those issues arise from the effects of combining a statutory scheme that imposes minimum statutory damages awards on a per-consumer basis — usually in order to encourage the filing of individual lawsuits as a means of private enforcement of consumer protection laws — with the class action mechanism that aggregates many claims — often because there would otherwise be no incentive to bring an individual claim. Such a combination may expand the potential statutory damages so far beyond the actual damages suffered that the statutory damages come to resemble punitive damages—yet ones that are awarded as a matter of strict liability, rather than for the egregious conduct typically necessary to support a punitive damages award. 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. If so, such a distortion could create a potentially enormous aggregate recovery for plaintiffs, and thus an *in terrorem* effect on defendants, which may induce unfair settlements. 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. *Cf. State Farm Mutual Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 123 S.Ct. 1513, 155 L.Ed.2d 585 (2003) (“The Due Process Clause of the Fourteenth Amendment prohibits the imposition of grossly excessive or arbitrary punishments on a tortfeasor.”); *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 580, 116 S.Ct. 1589, 134 L.Ed.2d 809 (1996) (noting that the “most commonly cited indicium of an unreasonable or excessive punitive damages award is its ratio to the actual harm inflicted on the plaintiff.”). At this point in this case, however, these concerns remain hypothetical. There has been no class certification motion filed nor any actual evidence presented that raises a reasonable possibility that principles of due process may restrict an ultimate damages award. Accordingly, we decline to consider what limits the due process clause may impose.⁶³

The Second Circuit’s sensitivity to the potentially “in terrorem” effect of class certification seems inconsistent with prior decisions by the Second Circuit and the Supreme Court holding that leverage is an inevitable by-product of class certification.⁶⁴ Nonetheless, the Second Circuit in *Parker* was clear that the potential for such an effect could not be used to prevent certification.

The plaintiffs in *In re Napster, Inc. Copyright Litigation*⁶⁵ sought certification of a class of some 27,000 music publishers in a copyright infringement action against the investor-controllers of the peer-to-peer music file-sharing network operated by Napster. The defendants argued, citing *Ratner II* and similar cases, that a class action was not superior under Rule 23(b)(3) given the statutory damages and attorney fees available under the Copyright Act.⁶⁶ The court rejected the defendants’ argument and, while noting that the Due Process Clause may be implicated in connection with an award of aggregate statutory damages, concluded that “at the class certification stage, such an inquiry would almost inevitably be speculative, based on a potential statutory maximum rather than an actual jury verdict.”⁶⁷ The court found the defendants’ “attempt to introduce concerns about excessive statutory damages into the class certification process to be impracticable as well as logically flawed”⁶⁸

The district court in *Murray v. GMAC Mortgage Corp.*,⁶⁹ relying in part on the decision in *In re Trans Union Corp. Privacy Litig.*,⁷⁰ denied the plaintiff’s motion to certify a class of 1.2 million consumers alleging that the defendant willfully violated FCRA and seeking statutory damages of \$100 to \$1,000 per person. The court based its finding on superiority on its belief that the aggregation of statutory damages would be an abuse of the class action device.⁷¹

On appeal, the Seventh Circuit was highly critical of the district court’s rationale:

The reason that damages can be substantial, however, does not lie in an “abuse” of Rule 23; it lies in the legislative decision to authorize awards as high as \$1,000 per person, 15 U.S.C. § 1681n(a)(1)(A), combined with GMACM’s decision to obtain the credit scores of more than a million persons.

Many laws that authorize statutory damages also limit the aggregate award to any class. For example, the Fair Debt Collection Practices Act says that total recovery may not exceed “the lesser of \$500,000 or 1 per centum of the net worth of the debt collector”. 15 U.S.C. § 1692k(a)(2)(B)(ii). The Truth in Lending Act has an identical cap. 15 U.S.C. § 1640(a)(2)(B) (substituting “creditor” for “debt collector”). See also 15 U.S.C. § 1693m(a)(1)(B), 12 U.S.C. § 4010(a)(2)(B),

and 12 U.S.C. § 4907(a)(2)(B). Other laws, however, lack such upper bounds. See 15 U.S.C. § 1679g(a) (Credit Repair Organizations Act); 15 U.S.C. § 1667d (Consumer Leasing Act). The Fair Credit Reporting Act is in the cap-free group.

The district judge sought to curtail the aggregate damages for violations he deemed trivial. Yet it is not appropriate to use procedural devices to undermine laws of which a judge disapproves. See *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 686, 107 S.Ct. 1476, 94 L.Ed.2d 661 (1987); *United States v. Albertini*, 472 U.S. 675, 680, 105 S.Ct. 2897, 86 L.Ed.2d 536 (1985); *Jaskolski v. Daniels*, 427 F.3d 456, 461-64 (7th Cir.2005). 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. An award that would be unconstitutionally excessive may be reduced, see *State Farm Mutual Automobile Insurance Co. v. Campbell*, 538 U.S. 408, 123 S.Ct. 1513, 155 L.Ed.2d 585 (2003), but constitutional limits are best applied after a class has been certified. Then a judge may evaluate the defendant's overall conduct and control its total exposure. Reducing recoveries by forcing everyone to litigate independently — so that constitutional bounds are not tested, because the statute cannot be enforced by more than a handful of victims — has little to recommend it.⁷²

Despite Judge Easterbrook's clear holding that the defendant's potential exposure was not relevant to the class certification determination, the appeal of *Ratner II* is so strong that, on remand in *Murray*, the defendant could not help but continue to argue that substantive fairness was a relevant consideration.⁷³

Defendants (like those in *Murray*) often feign concern for the "superiority" of the class action over other means of adjudication. In a recent case under the Telephone Consumer Protection Act (which provides for statutory damages of between \$500 and \$1,500 per violation), Judge Lasnik of the Western District of Washington, in *Kavu, Inc. v. Omnipak Corp.*, was unmoved by such pretense:

Defendant's argument ... is actually a challenge to the statutory amount of damages, set by Congress, rather than to the best method of adjudicating this case. If the claims were adjudicated individually, defendant would owe the same amount of damages. Rather, it is hoping that if no class is certified, it will avoid damages for the vast majority of its violations. The Court will not decline to certify a class on that basis. Furthermore, the class size is a direct result of

defendant's large number of violations, for which it should not be rewarded.⁷⁴

In response to constitutional concerns voiced by the defendant, the court in *Kavu*, like the courts in *Parker*, *In re Napster*, and *Murray*, held that those concerns "will not prevent the Court from certifying the class."⁷⁵

It appears that the tide may be turning, and courts have begun to understand the important distinction between the procedural (and largely managerial) concerns driving the superiority analysis under Rule 23(b)(3), and issues of substantive fairness that may only be addressed, if at all, after a defendant's liability to the class has been established.

E. THE SUBSTANTIVE FAIRNESS OF AGGREGATE STATUTORY DAMAGES

The question then becomes, can an award of aggregate statutory damages in favor of a class ever be unconstitutional? Although the answer to this question can be answered affirmatively in the abstract, whether in any given situation such an award is found to be "so severe and oppressive as to be wholly disproportionate to the offense or obviously unreasonable,"⁷⁶ and therefore a deprivation of property without due process of law,⁷⁷ is entirely fact dependent. Nevertheless, case law suggests that, to the extent the damage award is within the range prescribed by the statute, the award will almost certainly be sustained.

1. The review of statutory damages awards is extremely limited

An appellate court's review of a statutory damages award is governed by a standard no more demanding than abuse of discretion.⁷⁸ This is in stark contrast to the review of a punitive damages award which, as the Supreme Court held in *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, is *de novo*.⁷⁹ Where the statute provides a range of permissible damages, and the award is within that range, the trial court arguably has virtually unfettered discretion in making the award.⁸⁰ In fact, the Supreme Court in *L.A. Westerman Co. v. Dispatch Printing Co.* held that the district court abused its discretion in awarding *less* than the statutory minimum in damages under the Copyright Act.⁸¹

2. *BMW v. Gore* and *State Farm v. Campbell* are inapplicable

The extent the award is subject to a constitutional analysis at all (whether by the trial court or an appellate court), such analysis will not be governed by the

Supreme Court's constitutional framework under *BMW of North America, Inc. v. Gore*,⁸² and *State Farm Mut. Auto. Ins. Co. v. Campbell*,⁸³ dealing with punitive damages awards.

Punitive damages and statutory damages are fundamentally different. In *Gertz v. Robert Welch, Inc.*, the Supreme Court explained that punitive damages “are not compensation for injury. Instead, they are private fines levied by civil juries to punish reprehensible conduct and to deter its future occurrence.”⁸⁴ Statutory damages, on the other hand, not only are subject to limits established by the legislature, but they are at least partly (if not principally) designed to provide compensation to individuals where actual damages are difficult or impossible to determine.⁸⁵ Because of these differences, two of the *Gore* guideposts — the disparity between the harm and potential harm suffered and the damages awarded, and the difference between the damages and the civil penalties authorized or imposed in comparable cases⁸⁶ — cannot even be assessed. Statutory damages are awarded in lieu of actual damages, and the damages already reflect the legislative judgment of the appropriate amount of damages for the prohibited conduct.⁸⁷

Moreover, the underlying constitutional concerns articulated in *Gore*, *State Farm*, and related cases, are essentially procedural; i.e., that the defendant must have fair notice of the potential damages that could be assessed, and that the jury's discretion in awarding punitive damages is not unlimited.⁸⁸ In the case of statutory damages, the terms of the statute put potential defendants on notice of the conduct triggering the right to statutory damages, and of the potential exposure. In addition, the trier of fact's⁸⁹ discretion is already limited by the range set forth in the operative statute. For these reasons, a number of courts have refused to apply the holdings of *Gore* and *State Farm* in the context of statutory damages.⁹⁰ Other courts, while not expressly distinguishing *Gore* and its progeny, have nonetheless relied on a different line of cases — beginning with the Supreme Court case of *St. Louis, I.M. & S. Ry. Co. v. Williams*⁹¹ — to decide the constitutional question.⁹²

Decided in 1919, *Williams* was one of many cases heard by the Supreme Court during that period concerning state regulation of railroads. In *Williams*, the defendant railroad had overcharged two passengers by \$.66, in violation of Arkansas law. The statute in question allowed the passengers to recover statutory damages of between \$50 and \$300, as well as costs and attorney fees. At trial, plaintiffs were awarded \$75 a-piece in statutory damages. The defendant argued that the award violated its due process rights both as a matter of procedure and substance. The Court rejected both arguments. As to substantive due process, the Court held that the proper inquiry was not whether the award was dispro-

portionate to the actual overcharge, but whether, in light of the legislative purpose behind the statutory damages in question, the award was “so severe and oppressive as to be wholly disproportioned to the offense or obviously unreasonable.”⁹³

3. Courts afford significant deference to legislative judgments

Even assuming the Supreme Court would give *stare decisis* effect to *Williams* and similar cases⁹⁴, the Court's apparently broad holding in *Williams*, regarding the ability of courts to scrutinize statutory damages awards as a matter of substantive due process, has arguably been limited, or at least clarified, by subsequent decisions dealing with statutory damages.

In *Life & Casualty Ins. Co. of Tennessee v. McCray*,⁹⁵ the Court affirmed a judgment against an insurance company for statutory damages for wrongful refusal to pay out on a life insurance policy. In holding that the statute in question did not “outrun the bounds of reason and result in sheer oppression,” the Court noted that the legislature's judgment on the reasonableness of statutory damages was entitled to deference.⁹⁶

The Court's deference to legislative judgment, in the context of consumer statutes in particular, was reaffirmed in *Mourning v. Family Publications Service, Inc.*,⁹⁷ in which the Court upheld various aspects of the Truth in Lending Act and implementing regulations, including the provision under 15 U.S.C. § 1640 for statutory damages, which the court referred to as “modest,”⁹⁸ of between \$100 and \$1,000. “The statutory scheme,” the Court explained, “is within the power granted to Congress under the Commerce Clause. It is not a function of the courts to speculate as to whether the statute is unwise or whether the evils sought to be remedied could better have been regulated in some other manner.”⁹⁹

In *Griffin v. Oceanic Contractors, Inc.*,¹⁰⁰ the Court was called on to interpret 46 U.S.C. § 596, which provides for severe statutory penalties in the event a vessel owner or master does not promptly pay wages due and owing to a seaman after the termination of employment. The defendant, who had failed to pay the plaintiff \$412.50 in wages within the statutorily-prescribed time period, argued that a literal application of the statute would produce an absurd and unjust result in which the plaintiff would be entitled to penalties in excess of \$300,000 (a ratio of statutory to actual damages of more than 730:1). The Court, following *Reiter*, reasoned:

It is in the nature of punitive remedies to authorize awards that may be out of proportion to actual injury; such remedies typically are established to

deter particular conduct, and the legislature not infrequently finds that harsh consequences must be visited upon those whose conduct it would deter. It is probably true that Congress did not precisely envision the grossness of the difference in this case between the actual wages withheld and the amount of the award required by the statute. But it might equally well be said that Congress did not precisely envision the trebled amount of some damages awards in private antitrust actions, *see Reiter v. Sonotone Corp.*, 442 U.S. 330, 344-345, 99 S.Ct. 2326, 2333-2334, 60 L.Ed.2d 931 (1979), or that, because it enacted the Endangered Species Act, “the survival of a relatively small number of three-inch fish ... would require the permanent halting of a virtually completed dam for which Congress ha[d] expended more than \$1 million,” *TVA v. Hill*, 437 U.S. 153, 172, 98 S.Ct. 2279, 2290, 57 L.Ed.2d 117 (1978). It is enough that Congress intended that the language it enacted would be applied as we have applied it. The remedy for any dissatisfaction with the results in particular cases lies with Congress and not with this Court. Congress may amend the statute; we may not. *See Consumer Product Safety Comm’n v. GTE Sylvania, Inc.*, 447 U.S., at 123-124, 100 S.Ct., at 2063-2064; *Reiter v. Sonotone, supra*, at 344-345, 99 S.Ct., at 2333-2334.

The Supreme Court’s deference to legislative judgment is not a recent phenomenon. Beginning with *West Coast Hotel Co. v. Parrish*¹⁰¹ and the end of the *Lochner*¹⁰² era, the Supreme Court has given legislative bodies “broad scope to experiment with economic problems”¹⁰³ And even before *Parrish*, the Court had taken the view that “hard and objectionable or absurd consequences” alone were insufficient to invalidate legislation.¹⁰⁴ Such consequences could be remedied only by the legislative body itself, not by the courts.¹⁰⁵

Considering the Supreme Court’s deference with respect to legislation affecting economic interests, the very low standard of review applicable to such legislation (i.e., that it have only some rational basis), and its observation in *Mourning* that the range of statutory damages under TILA (which, in 1973, was between \$100 and \$1,000) was “modest,” in any given case, proving that a particular statutory damages scheme violates the Due Process Clause is likely to be extremely difficult, if not impossible.

4. Aggregation is irrelevant to the due process analysis

That a particular statutory damages regime is constitutional (on its face or as applied) on an individual basis should end the inquiry. In *Reiter*, the Supreme

Court rejected the defendants’ argument that class actions should not be permitted under section 4 of the Clayton Act because the cost of defending those actions would “have a potentially ruinous effect on small businesses”¹⁰⁶ Such concerns about the potential effect of aggregating damages under section 4 on a class-wide basis, the Court found, were “policy considerations more properly addressed to Congress than to this Court.”¹⁰⁷ Furthermore, “the Rules Enabling Act ... instructs that rules of procedure ‘shall not abridge, enlarge or modify any substantive right,’ 28 U.S.C. § 2072(b).”¹⁰⁸

Recently, at least two federal courts have also recognized that whether damages are assessed on an aggregate, class basis is irrelevant to the constitutional question. Judge Patel of the Northern District of California, in *In re Napster*, observed:

In the absence of any theory to explain why the amount of statutory damages awarded would expand faster than the size of the class, the assumption that class action treatment exacerbates concerns about excessive damages awards is either a product of mathematical error or based on the assumption that defendants who injure [a] large number of individuals are less culpable than those who spread the effects of their unlawful conduct less widely. While the former could be chalked up to the mathematical illiteracy of the legal profession, the latter rationale is clearly incompatible with the purpose of Rule 23, which is in part intended to serve as [a] vehicle for redressing widely dispersed harm that might otherwise go uncompensated. *See, e.g., Moeller v. Taco Bell Corp.*, 220 F.R.D. 604, 612 (N.D.Cal. 2004) (Jenkins, J.) (quoting *Kaplan v. Pomerantz*, 131 F.R.D. 118, 122 (N.D.Ill. 1990)) (observing that “[t]he class action procedure exists, in part, for the benefit of plaintiffs with small claims who could not otherwise vindicate their rights”). Under either of these premises, the conclusion that class action treatment might somehow influence the proportionality of a statutory damages award is logically flawed.¹⁰⁹

Likewise, Judge Kocoras of the Northern District of Illinois, in *Philips Randolph Enterprises*, rejected the defendant’s contrary contention:

In its reply, Rice Fields states that \$500 would be a financially feasible amount if it were imposed,¹¹⁰ but the potential damages that could result from a class action involving many separate violations would result in crippling numbers. This argument is a nonstarter. Though the amount of damages could become very high if the statute [the Telephone Consumer Protection Act] is violated numerous times, as

in the context of a class action, the purpose of the statute is to combat transmission of unsolicited fax advertisements. The statute accomplishes that purpose by making the practice prohibitively expensive, which is an acceptable means of accomplishing the statute's goal of deterrence. Contrary to Rice Fields' implicit position, the Due Process clause of the 5th Amendment does not impose upon Congress an obligation to make illegal behavior affordable, particularly for multiple violations.¹¹¹

Indeed, to "exempt a defendant from liability in a class action merely because damages are large would invite defendants to violate the law on a grand scale, with the knowledge that they could avoid liability by claiming that if they were forced to account for their wrongful conduct they would be put out of business."¹¹²

F. CONCLUSION

So long as Rule 23 exists, those who commit wrongful acts on a large scale will continue to invent new arguments as to why affording relief commensurate with the scope of their conduct would be unfair. This predisposition is most evident in class action litigation under consumer protection statutes, and most particularly under the Truth-in-Lending Act. Prior to 1974, defendants, relying on *Ratner II*, argued that class actions under TILA were inferior because of the potential for disproportionately large statutory damages. After the amendments in 1974 imposed a cap on statutory damages, defendants then argued that the cap made class certification inappropriate because each class member would receive less in damages than they would by pursuing an individual action.¹¹³

Since 1974 defendants have, in contexts outside of TILA, offered *Ratner II* as a justification for depriving injured plaintiffs of a remedy through the class action procedure. To accept that offer, however, is neither just nor pragmatic, but an abuse of the limited discretion afforded trial courts under Rule 23(b)(3).

Moreover, to the extent there exists a rational basis for enacting a particular statutory damages provision, a court should not have any constitutional basis for refusing to apply the law as written, even if its effects will be aggregated by virtue of Rule 23.

There may be arguments supporting the view that statutory damages, when awarded on a class basis in the absence of actual harm, are unfair. But, in the end, those arguments should be made to Congress, and not the courts.

ENDNOTES

1. The particular section violated by Chemical Bank was 15 U.S.C. § 1637(b)(5).

2. Ratner paid the required minimum payment reflected on the statement, and his next statement reflected a finance charge for the remaining balance. See *Ratner v. Chemical Bank New York Trust Co.*, 329 F.Supp. 270, 274 (S.D. N.Y. 1971) ("*Ratner I*").

3. See 15 U.S.C. § 1640(a).

4. *Ratner v. Chemical Bank New York Trust Co.*, 329 F.Supp. 270, 281 (S.D. N.Y. 1971) ("*Ratner I*").

5. *Ratner v. Chemical Bank New York Trust Co.*, 54 F.R.D. 412, 15 Fed. R. Serv. 2d 1015 (S.D. N.Y. 1972) ("*Ratner II*").

6. Rule 23(b)(3) permits an action to be maintained as a class action when

the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy.

Judge Frankel also ruled that class certification was unavailable under either Rule 23(b)(1) or (2). *Ratner v. Chemical Bank New York Trust Co.*, 54 F.R.D. 412, 414-15, 15 Fed. R. Serv. 2d 1015 (S.D. N.Y. 1972) ("*Ratner II*").

7. *Ratner v. Chemical Bank New York Trust Co.*, 54 F.R.D. 412, 416, 15 Fed. R. Serv. 2d 1015 (S.D. N.Y. 1972) ("*Ratner II*").

8. *Ratner II* and its progeny were relied on as recently as August 2006 to deny certification in *Hillis v. Equifax Consumer Services, Inc.*, 237 F.R.D. 491 (N.D. Ga. 2006).

9. *Ratner v. Chemical Bank New York Trust Co.*, 54 F.R.D. 412, 413, 15 Fed. R. Serv. 2d 1015 (S.D. N.Y. 1972) ("*Ratner II*").

10. See generally, Benjamin Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the*

Federal Rules of Civil Procedure (I), 81 Harv. L. Rev. 356, 385-87 (1967).

11. *Amchem Prod., Inc. v. Windsor*, 521 U.S. 591, 614, 117 S.Ct. 2231, 138 L.Ed.2d 689, 37 Fed. R. Serv. 3d 1017, 28 Env'tl. L. Rep. 20173 (1997), quoting Kaplan, *A Prefatory Note*, 10 B.C. Ind. & Com. L. Rev. 497, 497 (1969).

12. *Amchem Prod., Inc. v. Windsor*, 521 U.S. 591, 615, 117 S. Ct. 2231, 138 L. Ed. 2d 689, 37 Fed. R. Serv. 3d 1017, 28 Env'tl. L. Rep. 20173 (1997), quoting Advisory Committee's Notes on Fed. Rule Civ. Proc. 23, 28 U.S.C.App., pp. 696-97.

13. *Amchem Prod., Inc. v. Windsor*, 521 U.S. 591, 615, 117 S. Ct. 2231, 138 L. Ed. 2d 689, 37 Fed. R. Serv. 3d 1017, 28 Env'tl. L. Rep. 20173 (1997), quoting Advisory Committee Notes, 28 U.S.C.App., at 697.

14. Notes of Advisory Committee on 1966 amendments, USCS Rules of Civil Procedure, Rule 23, at 13 (1998).

15. Benjamin Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I)*, 81 Harv. L. Rev. 356, 390 (1967).

16. Statement of Justice Black, Amendments to Rules of Civil Procedure; Supplemental Rules for Certain Admiralty and Maritime Claims; Rules of Criminal Procedure, 39 F.R.D. 69, 274 (1966).

17. Benjamin Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I)*, 81 Harv. L. Rev. 356, 395-96 (1967).

18. Marvin E. Frankel, *Some Preliminary Observations Concerning Civil Rule 23*, 43 F.R.D. 39 (1967).

19. Notes of Advisory Committee on 1966 amendments, USCS Rules of Civil Procedure, Rule 23, at 13 (1998).

20. *Schlagenhauf v. Holder*, 379 U.S. 104, 121, 85 S. Ct. 234, 13 L. Ed. 2d 152, 9 Fed. R. Serv. 2d 35A.1, Case 1 (1964).

21. *Forman v. Davis*, 371 U.S. 178, 182, 83 S. Ct. 227, 9 L. Ed. 2d 222, 6 Fed. R. Serv. 2d 1234 (1962).

22. *Schlagenhauf v. Holder*, 379 U.S. 104, 121, 85 S. Ct. 234, 13 L. Ed. 2d 152, 9 Fed. R. Serv. 2d 35A.1, Case 1 (1964).

23. *Harris v. Nelson*, 394 U.S. 286, 298, 89 S. Ct. 1082, 22 L. Ed. 2d 281 (1969).

24. *Snyder v. Harris*, 394 U.S. 332, 352, 89 S. Ct. 1053, 22 L. Ed. 2d 319, 78 Pub. Util. Rep. 3d (PUR) 259, 12 Fed. R. Serv. 2d 472 (1969) (Fortas, J., *dissenting*).

25. *Eisen v. Carlisle & Jacquelin*, 391 F.2d 555, 567, 11 Fed. R. Serv. 2d 604 (2d Cir. 1968) ("Before allowing the suit to proceed, a further inquiry by the District Court is necessary in order to consider the mechanics involved in the administration of the present action."); *Green v. Wolf Corp.*, 406 F.2d 291, 301, 12 Fed. R. Serv. 2d 545, 9 A.L.R. Fed. 100 (2d Cir. 1968) ("We recommend to the district court that it make use of the freedom afforded it by Rule 23 to manage the litigation efficiently and fairly, including the creation of any necessary subclasses."); *City of New York v. International Pipe & Ceramics Corp.*, 410 F.2d 295, 300, 12 Fed. R. Serv. 2d 582 (2d Cir. 1969) ("The particular trial judges charged with the responsibility of the trial and with their eyes on its manageability should exercise their discretion in light of the particular facts presented.").

26. *State of Ill. v. Harper & Row Publishers, Inc.*, 301 F.Supp. 484, 13 Fed. R. Serv. 2d 619, 6 A.L.R. Fed. 1 (N.D. Ill. 1969).

27. *State of Ill. v. Harper & Row Publishers, Inc.*, 301 F.Supp. 484, 491, 13 Fed. R. Serv. 2d 619, 6 A.L.R. Fed. 1 (N.D. Ill. 1969).

28. *State of Ill. v. Harper & Row Publishers, Inc.*, 301 F.Supp. 484, 491, 13 Fed. R. Serv. 2d 619, 6 A.L.R. Fed. 1 (N.D. Ill. 1969).

29. *State of Ill. v. Harper & Row Publishers, Inc.*, 301 F.Supp. 484, 492, 13 Fed. R. Serv. 2d 619, 6 A.L.R. Fed. 1 (N.D. Ill. 1969).

30. Marvin E. Frankel, *Some Preliminary Observations Concerning Civil Rule 23*, 43 F.R.D. 39, 43 (1967) ("To describe it roughly, the (b)(3) category is one where common questions of law and fact predominate, and where the court makes certain basic findings showing that a class action is the fairest, most efficient, and

(in a word) the most just way over all of resolving the clash of opposed interests.”).

31. Judge Frankel did address the criterion in Rule 23(b)(3)(A) (the interest of individuals in bringing their own, separate actions) by finding that TILA’s minimum statutory damages and fee shifting provisions supplied the necessary incentive for individual suits. Many courts prior to and since *Ratner II*, including courts in the Second Circuit, have disagreed that such an incentive exists in those circumstances. See, e.g., *Eisen v. Carlisle & Jacquelin*, 391 F.2d 555, 567 n. 18, 11 Fed. R. Serv. 2d 604 (2d Cir. 1968) (“The possibility, as suggested by defendants, that a court may grant attorney’s fees in excess of the damages awarded does not provide a meaningful alternative. It is unlikely that a plaintiff with a small claim will undertake complex anti-trust litigation on the remote possibility that a court may award anything like compensatory attorney’s fees.”); *Barr v. WUI/TAS, Inc.*, 66 F.R.D. 109, 116, 1975-1 Trade Cas. (CCH) P 60198, 19 Fed. R. Serv. 2d 1318 (S.D. N.Y. 1975) (finding, in a case involving claims under the Economic Stabilization Act, that “it would be naïve in the extreme to believe that the \$100 minimum recovery would be sufficient incentive for all of the class members to prosecute individual actions, even recognizing that they will recover attorney’s fees, if successful.”); *Chevalier v. Baird Sav. Ass’n*, 72 F.R.D. 140, 156, 1976-2 Trade Cas. (CCH) P 61126, 24 Fed. R. Serv. 2d 1094 (E.D. Pa. 1976) (“ ‘While costs and reasonable attorney’s fees [under TILA] might provide an incentive to litigate where an alleged violation can be defined as an isolated incident, such is not the case where, as here, there are hundreds of alleged violations almost all of which will go unremedied but for a class action.’ “), quoting *Agostine v. Sidcon Corp.*, 69 F.R.D. 437, 447 (E.D. Pa. 1975); *White v. Imperial Adjustment Corp.*, 2002 WL 1809084 (E.D. La. 2002), *aff’d in part*, appeal dismissed in part and remanded, 75 Fed. Appx. 972 (5th Cir. 2003) (“despite the incentive of punitive damages and attorneys’ fees available under FCRA [the Fair Credit Reporting Act], the cost of investigating and trying these cases individually likely exceeds the value of any statutory and/or punitive damage award that may be due to any particular putative class claimant”); *Braxton v. Farmer’s Insurance Group*, 209 F.R.D. 654 (N.D. Ala. 2002) (quoting *White v. Imperial Adjustment*, *supra*, with approval); *In re Farmers Ins. Co., Inc., FCRA Litigation*, 2006 WL 1042450 (W.D. Okla. 2006) (“despite the incentive of attorney fees available under the FCRA, the court concludes that the potential de minimis recovery does not provide sufficient incentive for an individ-

ual to bring a solo action to prosecute the individual’s rights under the FCRA”); *White v. E-Loan, Inc.*, 2006 WL 2422420 (N.D. Cal. 2006) (“without class actions, there is unlikely to be any meaningful enforcement of the FCRA by consumers whose rights have been violated”).

32. *Ratner v. Chemical Bank New York Trust Co.*, 329 F.Supp. 270, 281 (S.D. N.Y. 1971) (“*Ratner I*”).

33. E.g., *Rochin v. California*, 342 U.S. 165, 72 S. Ct. 205, 96 L. Ed. 183, 25 A.L.R.2d 1396 (1952).

34. E.g., *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 70 S. Ct. 652, 94 L. Ed. 865 (1950).

35. Notes of Advisory Committee on 1966 amendments, USCA Rules of Civil Procedure, Rule 23, at 12.

36. Notes of Advisory Committee on 1966 amendments, USCA Rules of Civil Procedure, Rule 23, at 13.

37. Notes of Advisory Committee on 1966 amendments, USCA Rules of Civil Procedure, Rule 23, at 13.

38. Benjamin Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I)*, 81 Harv. L. Rev. 356, 390 (1967).

39. *Marbury v. Madison*, 5 U.S. 137, 2 L. Ed. 60, 1803 WL 893 (1803).

40. *Bell v. Hood*, 327 U.S. 678, 684, 66 S. Ct. 773, 90 L. Ed. 939, 13 A.L.R.2d 383 (1946).

41. *Deckert v. Independence Shares Corp.*, 311 U.S. 282, 288, 61 S. Ct. 229, 85 L. Ed. 189 (1940).

42. Fed. R. Civ. P. 1.

43. *Crooks v. Harrelson*, 282 U.S. 55, 51 S. Ct. 49, 75 L. Ed. 156, 2 U.S. Tax Cas. (CCH) P 616, 9 A.F.T.R. (P-H) P 571 (1930). The Southern District of New York, in *123 East Fifty-Fourth Street v. United States*, relied on this very language from *Crooks* in rejecting the government’s request to deny a taxpayer a refund because he would be unjustly enriched. *123 East Fifty-Fourth Street v. U.S.*, 62 F.Supp. 488, 492, 45-2 U.S. Tax Cas. (CCH) P 9383, 34 A.F.T.R. (P-H) P 444 (S.D. N.Y. 1945) (“I am aware that the plaintiff will receive a windfall and that the result is objectionable, but it is not the

function of the court to insert something into the statute which the Congress has placed there.”).

44. *Ratner v. Chemical Bank New York Trust Co.*, 329 F.Supp. 270, 282 (S.D. N.Y. 1971) (“*Ratner I*”). Interestingly, while in *Ratner I* Judge Frankel found that TILA clearly required disclosure of the information omitted by Chemical Bank (*id.*, at 275-79), and found that Chemical Bank “carefully, deliberately — intentionally omitted the disclosure in question” (*id.*, at 281), by the time he decided *Ratner II* he found “cogent and persuasive” Chemical Bank’s contention that its violation was “at most a technical and debatable violation of the Truth in Lending Act.” *Ratner II*, 54 F.R.D. at 416.

45. In fact, Judge McMillen of the Northern District of Illinois, in *Eovaldi v. First Nat’l Bank of Chicago*, expressly disagreed with Judge Frankel that substantive fairness should be considered in deciding class certification. *Eovaldi v. First Nat. Bank of Chicago*, 57 F.R.D. 545, 547, 17 Fed. R. Serv. 2d 98 (N.D. Ill. 1972) (“The question of fairness [under TILA] has been decided by Congress, and the Court’s remaining concern is whether a class action is superior to multitudinous individual actions from the standpoint of efficiency.”). On the other hand, he found Judge Frankel’s concern relevant to whether a statute providing for statutory damages unrelated to actual damages “depriv[ed] the defendant of property without due process.” *Id.*, at 548.

46. E.g., *Shields v. First Nat’l Bank of Arizona*, 56 F.R.D. 442, 16 Fed. R. Serv. 2d 254 (D. Ariz. 1972); *Berkman v. Sinclair Oil Corp.*, 59 F.R.D. 602, 17 Fed. R. Serv. 2d 1558 (N.D. Ill. 1973); *Wilcox v. Commerce Bank of Kansas City*, 474 F.2d 336, 16 Fed. R. Serv. 2d 1244 (10th Cir. 1973); *Graybeal v. American Sav. & Loan Ass’n*, 59 F.R.D. 7, 1973-1 Trade Cas. (CCH) P 74469, 17 Fed. R. Serv. 2d 314 (D.D.C. 1973); *Linn v. Target Stores, Inc.*, 61 F.R.D. 469, 17 Fed. R. Serv. 2d 1567 (D. Minn. 1973); *Kline v. Coldwell, Banker & Co.*, 508 F.2d 226, 1974-2 Trade Cas. (CCH) P 75436, 19 Fed. R. Serv. 2d 819 (9th Cir. 1974); *Fisher v. First Nat’l Bank of Omaha*, 548 F.2d 255, 1977-1 Trade Cas. (CCH) P 61266, 38 A.L.R. Fed. 792 (8th Cir. 1977); *Watkins v. Simmons and Clark, Inc.*, 618 F.2d 398, 61 A.L.R. Fed. 592 (6th Cir. 1980); *Shroder v. Suburban Coastal Corp.*, 729 F.2d 1371, 39 Fed. R. Serv. 2d 139 (11th Cir. 1984); *Wilson v. American Cablevision of Kansas City, Inc.*, 133 F.R.D. 573 (W.D. Mo. 1990); *Forman v. Data Transfer, Inc.*, 164 F.R.D. 400 (E.D. Pa. 1995); *Heaven v. Trust Co. Bank*, 118 F.3d 735, 38 Fed. R. Serv. 3d 387 (11th Cir. 1997); *Shelley v. AmSouth*

Bank, 2000 WL 1121778 (S.D. Ala. 2000); *Helms v. Consumerinfo.com*, 236 F.R.D. 561 (S.D. Ala. 2005); *Hillis v. Equifax Consumer Services, Inc.*, 237 F.R.D. 491 (N.D. Ga. 2006).

47. E.g., *Haynes v. Logan Furniture Mart, Inc.*, 503 F.2d 1161, 19 Fed. R. Serv. 2d 205, 27 A.L.R. Fed. 592 (7th Cir. 1974); *Barr v. WUI/TAS, Inc.*, 66 F.R.D. 109, 1975-1 Trade Cas. (CCH) P 60198, 19 Fed. R. Serv. 2d 1318 (S.D. N.Y. 1975); *Circle v. Jim Walter Homes, Inc.*, 535 F.2d 583, 21 Fed. R. Serv. 2d 743, 19 U.C.C. Rep. Serv. 158 (10th Cir. 1976); *Roper v. Consurve, Inc.*, 578 F.2d 1106, 25 Fed. R. Serv. 2d 1412 (5th Cir. 1978); *Braxton v. Farmer’s Ins. Group*, 209 F.R.D. 654 (N.D. Ala. 2002).

48. E.g., *Eovaldi v. First Nat. Bank of Chicago*, 57 F.R.D. 545, 17 Fed. R. Serv. 2d 98 (N.D. Ill. 1972); *Beard v. King Appliance Co.*, 61 F.R.D. 434, 440, 18 Fed. R. Serv. 2d 283 (E.D. Va. 1973) (“While the potential harm to the plaintiff class in a case such as this may not seem to some to warrant the harsh result predicted by defendants, that is, absent due process limitations, a legislative or political, and not a judicial, determination.”); *Chevalier v. Baird Sav. Ass’n*, 72 F.R.D. 140, 150, 1976-2 Trade Cas. (CCH) P 61126, 24 Fed. R. Serv. 2d 1094 (E.D. Pa. 1976) (“The class action device merely provides a procedure for adjudicating the respective rights of the parties. If defendants’ liability shocks the conscience, it is the fault of the substantive law ..., not the class action. We refuse to hold that the extent of defendants’ liability affects the superiority of the class action procedure in this case.”); *ESI Ergonomic Solutions, LLC v. United Artists Theatre Circuit, Inc.*, 203 Ariz. 94, 50 P.3d 844, 850 (Ct. App. Div. 1 2002) (“the fairness of the statutory penalty for the specific form of violation alleged here has been decided by Congress in enacting the law and ... the court’s determination that it would be unfair is an improper consideration in deciding whether a class action is the superior method of adjudication”); *Ashby v. Farmers Ins. Co. of Oregon*, 2004 WL 2359968 (D. Or. 2004) (“This Court ... is not persuaded it should follow a policy to protect defendants from potentially serious financial consequences based on their substantive violation of consumer protection statutes enacted by Congress.”); *In re Farmers Ins. Co., Inc., FCRA Litigation*, 2006 WL 1042450 (W.D. Okla. 2006) (“[T]he court notes that the potential for large damages is due to the size of the class and that the size of the class is not a fortuity (as might be true in, say, a mass casualty case) — it is essentially a function of the scale of the defendants’ insurance business. A finding

that the class action is not superior because damages are large, due to the large number of affected individuals, would invite defendants to violate the law on a grand scale.”); *White v. E-Loan, Inc.*, 2006 WL 2422420 (N.D. Cal. 2006) (“[T]he Court believes that issue [of the damages the defendant faces] is best addressed when E-Loan’s actions have been concretely defined, not in the abstract.”).

49. *Eisen v. Carlisle and Jacquelin*, 417 U.S. 156, 94 S. Ct. 2140, 40 L. Ed. 2d 732, 9 Fair Empl. Prac. Cas. (BNA) 1302, 7 Empl. Prac. Dec. (CCH) P 9374A, Fed. Sec. L. Rep. (CCH) P 94570, 1974-1 Trade Cas. (CCH) P 75082, 18 Fed. R. Serv. 2d 877, 4 Env’tl. L. Rep. 20513 (1974).

50. *Reiter v. Sonotone Corp.*, 442 U.S. 330, 99 S. Ct. 2326, 60 L. Ed. 2d 931, 1979-1 Trade Cas. (CCH) P 62688, 27 Fed. R. Serv. 2d 653 (1979).

51. *Califano v. Yamasaki*, 442 U.S. 682, 99 S. Ct. 2545, 61 L. Ed. 2d 176, 27 Fed. R. Serv. 2d 941 (1979).

52. *Eisen v. Carlisle and Jacquelin*, 417 U.S. 156, 177-78, 94 S. Ct. 2140, 40 L. Ed. 2d 732, 9 Fair Empl. Prac. Cas. (BNA) 1302, 7 Empl. Prac. Dec. (CCH) P 9374A, Fed. Sec. L. Rep. (CCH) P 94570, 1974-1 Trade Cas. (CCH) P 75082, 18 Fed. R. Serv. 2d 877, 4 Env’tl. L. Rep. 20513 (1974).

53. *Reiter v. Sonotone Corp.*, 442 U.S. 330, 344-45, 99 S. Ct. 2326, 60 L. Ed. 2d 931, 1979-1 Trade Cas. (CCH) P 62688, 27 Fed. R. Serv. 2d 653 (1979).

54. *Reiter v. Sonotone Corp.*, 442 U.S. 330, 345, 99 S. Ct. 2326, 60 L. Ed. 2d 931, 1979-1 Trade Cas. (CCH) P 62688, 27 Fed. R. Serv. 2d 653 (1979).

55. *Califano v. Yamasaki*, 442 U.S. 682, 699-700, 99 S. Ct. 2545, 61 L. Ed. 2d 176, 27 Fed. R. Serv. 2d 941 (1979).

56. *Alba Conte and Herbert B. Newberg*, 2 *Newberg on Class Actions* § 4:44 (4th ed.).

57. The first reported case to reject *Ratner II* based expressly on *Reiter* and *Califano*, was *ESI Ergonomic Solutions, LLC v. United Artists Theatre Circuit, Inc.*, 203 Ariz. 94, 50 P.3d 844, 850 (Ct. App. Div. 1 2002). The courts in *Ashby v. Farmers Ins. Co. of Oregon*, 2004 WL 2359968 (D. Or. Oct. 18, 2004), and *In re Farmers Ins. Co., Inc., FCRA Litigation*, 2006 WL 1042450

(W.D. Okla. 2006), would later rely on both Supreme Court decisions as well, and the court in *Kavu, Inc. v. Omnipak Corp.*, 2007 WL 201093 (W.D. Wash. 2007) relied on *ESI* to reject a *Ratner*-type argument made by the defendants.

58. *Eovaldi v. First Nat’l Bank of Chicago*, 57 F.R.D. 545, 17 Fed. R. Serv. 2d 98 (N.D. Ill. 1972).

59. *Chevalier v. Baird Sav. Ass’n*, 72 F.R.D. 140, 1976-2 Trade Cas. (CCH) P 61126, 24 Fed. R. Serv. 2d 1094 (E.D. Pa. 1976).

60. *Parker v. Time Warner Entertainment Co., L.P.*, 331 F.3d 13, 55 Fed. R. Serv. 3d 791 (2d Cir. 2003).

61. The case was decided on the defendant’s motion to deny certification, and the plaintiff had not indicated how many subscribers he would seek to represent. *Parker v. Time Warner Entertainment Co., L.P.*, 331 F.3d 13, 21, 55 Fed. R. Serv. 3d 791 (2d Cir. 2003).

62. *Parker v. Time Warner Entertainment Co., L.P.*, 198 F.R.D. 374, 383 (E.D. N.Y. 2001), decision vacated, 331 F.3d 13, 55 Fed. R. Serv. 3d 791 (2d Cir. 2003).

63. *Parker v. Time Warner Entertainment Co., L.P.*, 331 F.3d 13, 22, 55 Fed. R. Serv. 3d 791 (2d Cir. 2003).

64. *Hawaii v. Standard Oil Company of California*, 405 U.S. 251, 266, 92 S. Ct. 885, 31 L. Ed. 2d 184, 1972 Trade Cas. (CCH) P 73862, 15 Fed. R. Serv. 2d 1384, 2 Env’tl. L. Rep. 20133 (1972) (“Rule 23 of the Federal Rules of Civil Procedure provides for class actions that may enhance the efficacy of private actions by permitting citizens to combine their limited resources to achieve a more powerful litigation posture.”); *In re Visa Check/MasterMoney Antitrust Litig.*, 280 F.3d 124, 145, 2001-2 Trade Cas. (CCH) P 73459, 57 Fed. R. Evid. Serv. 583, 50 Fed. R. Serv. 3d 993 (2d Cir. 2001) (“The effect of certification on parties’ leverage in settlement negotiations is a fact of life for class litigants. While the sheer size of the class in this case may enhance this effect, this alone cannot defeat an otherwise proper certification.”).

65. *In re Napster, Inc. Copyright Litigation*, 77 U.S.P.Q.2d 1833, 2005 WL 1287611 (N.D. Cal. 2005).

66. 17 U.S.C. § 504(c) (\$750 to \$150,000 per copyrighted work infringed); *id.* at § 505 (permitting an award of attorney fees to the prevailing party).

67. *In re Napster, Inc. Copyright Litigation*, 77 U.S.P.Q.2d 1833, 2005 WL 1287611 (N.D. Cal. 2005).

68. *In re Napster, Inc. Copyright Litigation*, 77 U.S.P.Q.2d 1833, 2005 WL 1287611 (N.D. Cal. 2005).

69. *Murray v. GMAC Mortgage Corp.*, 2005 WL 3019412 (N.D. Ill. 2005).

70. *In re Trans Union Corp. Privacy Litig.*, 211 F.R.D. 328 (N.D. Ill. 2002).

71. *Murray v. GMAC Mortgage Corp.*, 2005 WL 3019412 (N.D. Ill. 2005).

72. *Murray v. GMAC Mortgage Corp.*, 434 F.3d 948, 953-54 (7th Cir. 2006).

73. See Defendant's Response in Opposition to Plaintiff's Renewed Motion for Class Certification, *Murray v. GMAC Mortgage Corp.*, 2005 WL 3019412 (N.D. Ill. 2005) ("the Seventh Circuit has ruled that exposure to enormous liability cannot alone result in denial of class certification, the potential for such liability in conjunction with a strict regulatory and civil enforcement mechanism like that provided for in the FCRA renders a class action proceeding a demonstrably inferior method of adjudication for claims such as those asserted by Murray"), available at Nancy R. MURRAY, Plaintiff, v. GMAC MORTGAGE CORPORATION, d/b/a Ditech.Com, Defendants., 2006 WL 2223768 (N.D. Ill. 2006). As explained supra, n. 31, the paltry minimum recoveries under most statutory damages schemes make individual enforcement unlikely. As to the potential for regulatory enforcement, Judge Illston of the Northern District of California pointed out in *White v. E-Loan, Inc.*: "While the FTC can bring a civil action against a company, however, such an action does not provide the consumer whose rights were violated with any redress. Further, as evidenced by the FCRA's authorization of statutory damages and attorneys' fees awards, FTC enforcement is not designed to be the sole mechanism for protecting consumers' rights created by the FCRA." *White v. E-Loan, Inc.*, 2006 WL 2422420 (N.D. Cal. 2006).

74. *Kavu, Inc. v. Omnipak Corp.* 2007 WL 201093 (W.D. Wash. 2007); see also *Beard v. King Appliance Co.*, 61 F.R.D. 434, 439-40, 18 Fed. R. Serv. 2d 283 (E.D. Va. 1973) ("With regard to the size of the potential judgment, the Court notes that 'while provision in the Act for the award of attorney's fees as well as costs fur-

nishes encouragement and practicality for individual actions, the cumulative consequence might be more horrendous to a defendant in view of this should all [plaintiffs] proceed and succeed individually than if they combined in a class action entailing a single fee.' *Wilcox v. Commerce Bank of Kansas City*, supra, 346 (10th Cir. 1973). Thus, defendants must in fact be contending not only that a single class recovery is inappropriate, but that total potential liability under the Act was Congressionally intended to be discounted by an amount reflective of those persons who, while fully entitled to relief, would not or could not make use of the Act's individual enforcement provisions.")

75. *Kavu, Inc. v. Omnipak Corp.* 2007 WL 201093 (W.D. Wash. 2007); see also *Beard v. King Appliance Co.*, 61 F.R.D. 434, 439-40, 18 Fed. R. Serv. 2d 283 (E.D. Va. 1973).

76. *St. Louis, I.M. & S. Ry. Co. v. Williams*, 251 U.S. 63, 67, 40 S. Ct. 71, 64 L. Ed. 139 (1919).

77. It bears noting that the Due Process Clause (as applied to the federal government and the states through the Fifth and Fourteenth Amendments, respectively) is the only potentially available basis under the Constitution for challenging the amount statutory damages, since the Excessive Fines Clause of the Eighth Amendment does not apply to damages awarded to private parties. *Browning-Ferris Industries of Vt., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 259-60, 109 S. Ct. 2909, 106 L. Ed. 2d 219, 1989-1 Trade Cas. (CCH) P 68630 (1989).

78. *Waters-Pierce Oil Co. v. Texas*, 212 U.S. 86, 112, 29 S. Ct. 220, 53 L. Ed. 417 (1909) ("Within the bounds of the [state anti-trust] statute, the penalties were left to the discretion of the jury trying the case. While the penalties imposed are large, they are within the terms of the statute."); *Yurman Design, Inc. v. PAJ, Inc.*, 262 F.3d 101, 113, 59 U.S.P.Q.2d 1813 (2d Cir. 2001) (applying abuse of discretion standard to statutory damages award under the Copyright Act); *Shields v. Zuccarini*, 254 F.3d 476, 481, 59 U.S.P.Q.2d 1207 (3d Cir. 2001) (statutory damages under the Anticybersquatting Consumer Protection Act reviewed for abuse of discretion).

79. *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 443, 121 S. Ct. 1678, 149 L. Ed. 2d 674, 58 U.S.P.Q.2d 1641 (2001).

80. *Douglas v. Cunningham*, 294 U.S. 207, 210, 55 S. Ct. 365, 79 L. Ed. 862, 24 U.S.P.Q. 153 (1935) ("the

employment of the statutory yardstick, within set limits, is committed solely to the court which hears the case, and this fact takes the matter out of the ordinary rule with respect to abuse of discretion”).

81. *L.A. Westerman Co. v. Dispatch Printing Co.*, 249 U.S. 109, 106-07, 39 S. Ct. 194, 63 L. Ed. 409 (1919) (“In other words, the court’s conception of what is just in the particular case ... is made the measure of the damages to be paid, but with the express qualification that in every case the assessment must be within the prescribed limitations, that is to say, neither more than the maximum nor less than the minimum. Within these limitations the court’s discretion and sense of justice are controlling, but it has no discretion when proceeding under this provision to go outside of them.”).

82. *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 116 S. Ct. 1589, 134 L. Ed. 2d 809 (1996).

83. *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 123 S. Ct. 1513, 155 L. Ed. 2d 585, Prod. Liab. Rep. (CCH) P 16805, 60 Fed. R. Evid. Serv. 1349, 1 A.L.R. Fed. 2d 739 (2003).

84. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350, 94 S. Ct. 2997, 41 L. Ed. 2d 789, 1 Media L. Rep. (BNA) 1633 (1974).

85. *Chicago, Burlington & Quincy Railroad Co. v. Cram*, 228 U.S. 70, 83-84, 33 S. Ct. 437, 57 L. Ed. 734 (1913); *L.A. Westerman Co. v. Dispatch Printing Co.*, 249 U.S. 100, 103-109, 39 S. Ct. 194, 63 L. Ed. 409 (1919); *Life & Casualty Ins. Co. of Tennessee v. McCray*, 291 U.S. 566, 574, 54 S. Ct. 482, 78 L. Ed. 987 (1934); *F.W. Woolworth Co. v. Contemporary Arts, Inc.*, 344 U.S. 228, 232, 73 S. Ct. 222, 97 L. Ed. 276, 95 U.S.P.Q. 396 (1952); *Mourning v. Family Publications Service, Inc.*, 411 U.S. 356, 376, 93 S. Ct. 1652, 36 L. Ed. 2d 318 (1973).

86. *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 575, 116 S. Ct. 1589, 134 L. Ed. 2d 809 (1996).

87. *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 581, 583, 116 S. Ct. 1589, 134 L. Ed. 2d 809 (1996).

88. *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 574, 116 S. Ct. 1589, 134 L. Ed. 2d 809 (1996); *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 417, 123 S. Ct. 1513, 155 L. Ed. 2d 585, Prod.

Liab. Rep. (CCH) P 16805, 60 Fed. R. Evid. Serv. 1349, 1 A.L.R. Fed. 2d 739 (2003); see also *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 18, 111 S. Ct. 1032, 113 L. Ed. 2d 1, 18 Media L. Rep. (BNA) 1753 (1991) (“One must concede that unlimited jury discretion — or unlimited judicial discretion for that matter — in the fixing of punitive damages may invite extreme results that jar one’s constitutional sensibilities.”); *Philip Morris USA v. Williams*, 127 S. Ct. 1057, 1062 (U.S. 2007) (States must require “proper standards that will cabin the jury’s discretionary authority” in awarding punitive damages).

89. Parties have the right, under the Seventh Amendment, to have a jury determine the amount of statutory damages. *Feltner v. Columbia Pictures Television, Inc.*, 523 U.S. 340, 353, 118 S. Ct. 1279, 140 L. Ed. 2d 438, 26 Media L. Rep. (BNA) 1513, 46 U.S.P.Q.2d 1161, 163 A.L.R. Fed. 721 (1998).

90. E.g., *Native American Arts, Inc. v. Bundy-Howard, Inc.*, 168 F.Supp.2d 905, 914 (N.D. Ill. 2001) (Indian Arts and Crafts Act); *Lowry’s Reports, Inc. v. Legg Mason, Inc.*, 302 F.Supp.2d 455, 460, 69 U.S.P.Q.2d 1837 (D. Md. 2004) (Copyright Act); *Accounting Outsourcing, LLC v. Verizon Wireless Personal Comm., L.P.*, 329 F.Supp.2d 789, 808-09 (M.D. La. 2004) (Telephone Consumer Protection Act); *Phillips Randolph Enterprises, LLC v. Rice Fields*, 2007 WL 129052, *2 (N.D. Ill. 2007) (TCPA).

91. *St. Louis, I.M. & S. Ry. Co. v. Williams*, 251 U.S. 63, 40 S. Ct. 71, 64 L. Ed. 139 (1919).

92. E.g., *Kenro v. Fax Daily, Inc.*, 962 F.Supp. 1162, 1165-67, 25 Media L. R ep. (BNA) 1908 (S.D. Ind. 1997) (TCPA); *Texas v. American Blastfax, Inc.*, 121 F.Supp.2d 1085, 1090-91 (W.D. Tex. 2000) (TCPA).

93. *St. Louis, I.M. & S. Ry. Co. v. Williams*, 251 U.S. 63, 67, 40 S. Ct. 71, 64 L. Ed. 139 (1919).

94. In his dissenting opinion in *Gore*, Justice Scalia asserted that the Court’s extension of substantive due process protections to punitive damages awards was supported only by “a handful of errant federal cases, bunched within a few years of one another, which invented the notion that an unfairly severe civil sanction amounts to a violation of constitutional liberties.” *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 600, 116 S. Ct. 1589, 134 L. Ed. 2d 809 (1996) (Scalia, J., dis-

senting). With respect to the Court's decision in *Williams* in particular, Justice Scalia argued that it was one of group of cases that "simply fabricated the 'substantive due process' right at issue." *Id.*, at 601.

95. *Life & Casualty Ins. Co. of Tennessee v. McCray*, 291 U.S. 566, 54 S. Ct. 482, 78 L. Ed. 987 (1934).

96. *Life & Casualty Ins. Co. of Tennessee v. McCray*, 291 U.S. 566, 571, 54 S. Ct. 482, 78 L. Ed. 987 (1934).

97. *Mourning v. Family Publications Service, Inc.*, 411 U.S. 356, 93 S. Ct. 1652, 36 L. Ed. 2d 318.

98. *Mourning v. Family Publications Service, Inc.*, 411 U.S. 356, 376, 93 S. Ct. 1652, 36 L. Ed. 2d 318.

99. *Mourning v. Family Publications Service, Inc.*, 411 U.S. 356, 377-78, 93 S. Ct. 1652, 36 L. Ed. 2d 318.

100. *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 102 S. Ct. 3245, 73 L. Ed. 2d 973, 1982 A.M.C. 2377 (1982).

101. *West Coast Hotel Co. v. Parrish*, 300 U.S. 379, 57 S. Ct. 578, 81 L. Ed. 703, 1 L.R.R.M. (BNA) 754, 1 Lab. Cas. (CCH) P 17021, 108 A.L.R. 1330 (1937).

102. *Lochner v. New York*, 198 U.S. 45, 25 S. Ct. 539, 49 L. Ed. 937 (1905).

103. *Ferguson v. Skrupa*, 372 U.S. 726, 730, 83 S. Ct. 1028, 10 L. Ed. 2d 93, 95 A.L.R.2d 1347 (1963).

104. *Crooks v. Harrelson*, 282 U.S. 55, 51 S. Ct. 49, 75 L. Ed. 156, 2 U.S. Tax Cas. (CCH) P 616, 9 A.F.T.R. (P-H) P 571 (1930).

105. *Griswold v. Connecticut*, 381 U.S. 479, 482, 85 S. Ct. 1678, 14 L. Ed. 2d 510 (1965) ("We do not sit as a super-legislature to determine the wisdom, need, and propriety of laws that touch economic problems, business affairs, or social conditions.").

106. *Reiter v. Sonotone*, 442 U.S. 330, 344, 99 S. Ct. 2326, 60 L. Ed. 2d 931, 1979-1 Trade Cas. (CCH) P 62688, 27 Fed. R. Serv. 2d 653 (1979).

107. *Reiter v. Sonotone*, 442 U.S. 330, 344-45, 99 S. Ct. 2326, 60 L. Ed. 2d 931, 1979-1 Trade Cas. (CCH)

P 62688, 27 Fed. R. Serv. 2d 653 (1979). In his concurring opinion, Justice Rehnquist commented on the Court's observation that "the treble-damages remedy of § 4 took on new practical significance for consumers with the advent of Fed. Rule Civ. Proc. 23," "and agreed that "the problem, if there is one, is for Congress and not for the courts." *Id.* at 346 (Rehnquist, J., concurring), quoting *id.* at 343, n. 6.

108. *Amchem Prod., Inc. v. Windsor*, 521 U.S. 591, 613, 117 S. Ct. 2231, 138 L. Ed. 2d 689, 37 Fed. R. Serv. 3d 1017, 28 *Env'tl. L. Rep.* 20173 (1997).

109. *In re Napster, Inc. Copyright Litigation*, 77 U.S.P.Q.2d 1833, 2005 WL 1287611 (N.D. Cal. 2005). The Ninth Circuit case of *Six (6) Mexican Workers v. Arizona Citrus Growers*, 904 F.2d 1301, 116 Lab. Cas. (CCH) P 35375, 107 A.L.R. Fed. 779 (9th Cir. 1990), is not to the contrary. The court, in assessing the magnitude of an aggregate damage award under the Farm Labor Contractor Registration Act (which allows for damages of "up to \$500" per plaintiff per violation, with no minimum), found that the award both exceeded what was necessary to compensate any potential injury from the violations, and exceeded what was necessary to enforce the act or deter future violations. *Six Mexican Workers*, 904 F.2d at 1309. However, the court did not reduce the award because of constitutional considerations. Instead, the court's decision was based on FLCRA jurisprudence that calls for a court to consider various factors (including the amount awarded to each plaintiff, and the total award) in order to determine "whether a particular award serves FLCRA's deterrence and compensation objectives." *Id.* Moreover, unlike the Copyright Act, and many other statutes providing for statutory damages, the FLCRA has no statutory minimum, thus allowing the court far more discretion in fashioning a particular remedy. The Ninth Circuit in *Six Mexican Workers* remitted the damages award, but still allowed each of the 1,349 class members statutory damages of between \$150 and \$600, before attorney fees. *Id.*, at 1310.

110. The defendant was alleged to have sent to the plaintiff an unsolicited fax in violation of the Telephone Consumer Protection Act, which provides for statutory damages of at least \$500 per violation.

111. *Phillips Randolph Enterprises, LLC v. Rice Fields*, 2007 WL 129052, *3 (N.D. Ill. 2007).

112. 2 Newberg on Class Actions § 4:43; see also *In re Farmers Ins. Co., Inc., FCRA Litigation*, 2006 WL 1042450 (W.D. Okla., 2006) (quoting this passage with approval).

113. E.g., *Sarafin v. Sears, Roebuck and Co., Inc.*, 73 F.R.D. 585, 587 (N.D. Ill. 1977); *Fetta v. Sears, Roebuck and Co., Inc.*, 77 F.R.D. 411, 413 (D.R.I. 1977).