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CERTIFICATION

CONSUMER

Courts are divided on whether to consider the proportionality of statutory damages to actual harm in deciding whether to certify class actions under Rule 23(b)(3) stemming from technical violations of consumer protection statutes, says attorney James Michael (Mike) Walls in this BNA Insight. The author analyzes this issue, and argues the defense of a class action on this ground can be enhanced.

Rule 23(b)(3) and the Superiority of Class Actions for Statutory Damage Claims Involving Technical Violations Resulting in No Actual Damages

By James Michael (Mike) Walls

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Real World Impact of Class Actions for Technical Violations of Consumer Protection Laws

Mama Mia, a Florida restaurant, accepts credit cards as payment for meals. A customer provides his credit card to pay for his meal and receives a receipt from the restaurant. The receipt displays the customer's credit card number and expiration date. A month later the customer files a class action against the restaurant for violation of the Fair and Accurate Credit Transactions Act (FACTA) seeking statutory, but not actual damages, of not less than $100 and not more than $1,000. A month later, Mama Mia corrects its credit card receipts and truncates the credit card number on the receipt in compliance with FACTA. There is no claim that plaintiff or any other member of the proposed class suffered any actual damages because the receipts Mama Mia provided customers failed to comply with FACTA. Based on the proposed class, however, Mama Mia, a small business with about $40,000 in net assets, faces statutory damages of between $4,600,000 and $46,000,000.[1]

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

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Dr. David Jansen is a new chiropractor trying to start his business. To attract patients he purchases a list of local fax numbers from a marketing company. He emails electronic faxes to the numbers on the list informing the recipients of his office and offering a free chiropractic massage for new patients. The doctor stops sending the unsolicited faxes after three months. Two years later, a recipient files a class action against the doctor for sending unsolicited faxes in violation of the Telephone Consumer Protection Act (TCPA). The recipient demands over $3,500,000 in statutory damages for the class for approximately 7,000 unsolicited faxes that were sent by the doctor. There is no claim that plaintiff or any other recipient suffered any harm from receiving the unsolicited faxes. No recipient other than the plaintiff filed a complaint against the doctor.[2]

Should Courts Consider Disproportionate Impact of Aggregate Statutory Damages to Actual Harm in Deciding Certification Under Rule 23(b)(3)

As these examples demonstrate, the aggregation of statutory damages through the class action mechanism can create potential damage awards that are ruinous to small businesses and, in some cases, large corporations, and grossly disproportionate to any actual harm caused by the technical violations of the consumer protection statutes giving rise to the statutory damage claims.[3]

Rule 23(b)(3) provides a mechanism for courts to address the propriety of aggregating statutory damages to resolve technical violations of consumer protection statutes that result in no actual harm and no damage to the plaintiff and proposed class. Before certifying a class under Rule 23(b)(3), the court must determine if the class action is superior to other available methods for fairly and efficiently adjudicating the controversy.[4] The question is: Should courts consider the proportionality of the potential statutory damages to the actual harm to determine if the proposed class action is superior to other available methods to adjudicate claims for technical violations of consumer protection statutes?

Divergent Views on Class Certification that Aggregates Statutory Damages for Technical Violations of Consumer Protection Statutes

The federal courts are divided on whether the proportionality of potential statutory damages to actual harm is an appropriate consideration in determining if the class action is the superior method to adjudicate such statutory claims. In the first and seminal case to address this issue, *Ratner v. Chemical Bank of New York Trust Co.*,[5] Judge Frankel ruled that the proportionality of potential statutory damages to actual damage or harm is a factor to consider to determine if the class action mechanism is superior under Rule 23(b)(3). Judge Frankel's approach has been widely followed in the 40 years since *Ratner*.[6] In other federal cases, however, including Seventh and Ninth Circuit decisions, courts have ruled that the proportionality of claimed statutory damages to actual damage or harm is not an appropriate factor to determine if the class action is superior under Rule 23(b)(3).[7] The difference in these approaches results from the court's view of the discretion afforded courts under Rule 23(b)(3) to determine if the class action is the superior mechanism to adjudicate a technical statutory violation given the legislative intent of the consumer protection statute at issue in the case.

Ratner and Progeny: Proportionality of Aggregate Statutory Damages to Actual Harm Is a Factor in Determining Superiority

In *Ratner*, the plaintiff claimed that his periodic Master Card credit card statement failed to disclose the nominal annual percentage rate on the outstanding principal balance on his credit card account in violation of the Truth in Lending Act (TILA). The bank corrected its Master Charge credit card customer account statements to include the previously excluded annual percentage rate in compliance with the TILA. Plaintiff suffered no damage or, at most, an inconsequential damage amount as a result of the alleged denial of plaintiff's ability to make an informed choice regarding credit cards in a market where the annual percentage rates varied little if at all. The parties agreed that plaintiff was individually entitled to recover the statutory minimum amount of damages and his attorneys' fees and costs.[8] Plaintiff, nevertheless, sought to certify a class of approximately 130,000 Master Charge card customer account holders who were entitled, based on the minimum $100 statutory violation rate, to $13 million plus costs and attorneys' fees.[9]

Judge Frankel declined to certify the plaintiff's claim as a class action. He concluded that class certification was not the superior mechanism to resolve the TILA claim. He considered the proposed class recovery of statutory damages a ''possibly annihilating punishment'' unrelated to any actual harm to the purported class or benefit to the defendant for at most a ''technical and debatable'' violation of the TILA. The facts supporting these conclusions arguably went to the merits of the claimed violation, but they were undisputed facts before the court on the motion for class certification.

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[2] *Chiropractic and Sports Injury Center of Creve Coeur, P.C. v. All American Painting, Inc.*, 12-409 (Petition for Writ of Certiorari to S. Ct., October 1, 2012).

[3] There are several federal consumer protection statutes establishing statutory damages, including the FACTA, 15 U.S.C. § 1681, the TCPA, 47 U.S.C. § 227, the Truth in Lending Act (TILA), 15 U.S.C. § 1601, the Drivers' Privacy Protection Act, 18 U.S.C. § 2721; and the Fair Debt Collection Practices Act (FDCPA), 15 U.S.C. § 1692(a)(2).

[4] Class action plaintiffs must of course demonstrate the other prerequisites to class certification under Rule 23(a) and 23(b)(3), however, for purposes of this article that demonstration is assumed. Also, this article does not address proposed class actions, if any, for statutory damages for violations of consumer protection statutes under Rule 23(b)(1) or 23(b)(2).

[5] 54 F.R.D. 412 (S.D.N.Y. 1972).

[6] *See, e.g., Watkins v. Simmons and Clark, Inc.*, 618 F.2d 398 (6th Cir. 1980); *Wilson v. American Cablevison of Kansas City, Inc.*, 133 F.R.D. 573 (W.D. Mo. 1990); *Shroder v. Suburban Coastal Corp.*, 729 F.2d 1371 (11th Cir. 1984). *Accord Parker v. Time Warner Entertainment, Co.*, 331 F. 3d 13 (2d Cir. 2003); *Klay v. Humana, Inc.*, 382 F. 3d 1241 (11th Cir. 2004), *abrogated in part on other grounds by Bridge v. Phoenix Bond & Indemnity Co.*, 553 U.S. 639 (2008). *London v. Wal-Mart Stores, Inc.*, 340 F. 3d 1246 (11th Cir. 2003).

[7] *Murray v. GMAC Mortgage Corp.*, 434 F. 3d 948 (7th Cir. 2006); *Bateman v. American Multi-Cinema, Inc.*, 623 F. 3d 708 (9th Cir. 2010).

[8] *Ratner*, 54 F.R.D. at 413, n. 2, 414.

[9] Id.

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Judge Frankel concluded that under these circumstances there was no affirmative need or justification for the class action mechanism to augment the individual enforcement mechanism Congress provided for a $100 minimum statutory recovery, attorneys' fees, and costs in the TILA.[10]

This decision is consistent with Rule 23(b)(3). Rule 23(b)(3) provides that:

A class action may be maintained if Rule 23(a) is satisfied and if: . . . (3) the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, *and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy*. The matters pertinent to these findings *include*: (A) the class members' interests in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already begun by or against class members; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and (D) the likely difficulties in managing a class action,'' (emphasis supplied).

The courts and parties are required to assess the relative advantages of alternative procedures to the class action mechanism to resolve the controversy. *See* notes to 1966 amendments to Rule 23(b)(3). This assessment must include the factors listed in Rule 23(b)(3), but these factors are not exhaustive, rather the district courts have wide discretion to determine if the class action presents greater practical advantages to resolve the dispute than do other available dispute resolution mechanisms.[11]

Judge Frankel's decision in *Ratner* recognizes that the concentration of the litigation of the TILA claims in a class action was an undesirable mechanism to resolve the dispute consistent with Rule 23(b)(3). The aggregation of statutory damages for the class for the TILA violation was potentially ''annihilating'' for the bank, plaintiff suffered no actual damage or harm as a result of the violation, and there was no claim that the bank had profited from the violation. The claim was at most a technical violation that was admittedly corrected by the bank. No one else sued the bank for the claimed TILA violation and there was no claim for actual damages for the purposed class. The TILA provided an individual cause of action for actual or statutory damages, attorneys' fees, and court costs. At the time of *Ratner*, Congress was silent on the aggregation of statutory damages in a TILA class action.[12] The TILA neither provided for nor precluded a class action. Under these circumstances, Judge Frankel exercised his discretion to determine that a class action was not superior to an individual action to fairly and efficiently resolve this claimed TILA violation.

The Alternative View: Courts May Not Consider Proportionality of Aggregate Damages to Actual Harm in Deciding Certification

Conversely, the Seventh Circuit vacated a district court decision denying class certification in part because the district court had considered the potential liability of a defendant faced with billions of dollars in statutory damages for technical violations of the Fair Credit Reporting Act (FCRA). For the Seventh Circuit, Rule 23 was a procedural devise that must give way to congressional intent under the FCRA. For this reason, the court concluded that it was inappropriate for the district court to use Rule 23 to deny class certification because, in the court's view, the district court did not approve of aggregate damages for what the district court deemed trivial violations of the FCRA.

Plaintiff received a credit solicitation from GMAC Mortgage Corporation for a loan secured by a mortgage on her house. GMAC obtained plaintiff's name and address from a credit bureau. Plaintiff sued GMAC contending the solicitation was not a firm offer of credit and, thus, it violated the FCRA. She had only received the unsolicited mailing, she did not take the offer of credit or pay GMAC anything, and she did not claim actual damages. Instead, she demanded statutory damages ranging from $100 to $1,000 for a potential class of 1.2 million. Plaintiff and GMAC settled, but the district court refused to consider the settlement, finding that the class should not be certified.[13]

The district court found the aggregation of statutory damages potentially for billions of dollars for the class an inappropriate mechanism to resolve the alleged FCRA violations resulting in unwanted credit solicitations to the class. For the Seventh Circuit, the denial of class certification based in part on the potential effect of the aggregation of statutory damages undermined the FCRA. Congress defined the acts or omissions that violated the FCRA, provided for statutory damages for such violations when actual damages did not exist or were not proven, and failed to cap the aggregation of damages for violations in a class action. Courts were obligated to enforce the FCRA, even for what the district court deemed technical FCRA violations, therefore, the Seventh Circuit held the district court inappropriately considered the potential impact of aggregate statutory damages in denying class certification.

The consideration of disproportionate statutory damage awards, in the Seventh Circuit's view, was appropriate only after class certification, when the award may be reduced if it was unconstitutionally excessive based appropriately at that time on an evaluation of the merits of the defendant's conduct and exposure under the FCRA.[14] Apparently, for the Seventh Circuit, the consideration of the proportionality of the aggregate statutory damages to the actual damage caused by the alleged technical statutory violation was an improper merits determination.[15]

The Ninth Circuit followed the Seventh Circuit in reversing the denial of class certification for violations of

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

[11] Id. *see also, e.g., Klay*, 382 F.3d at 1251; *Castano v. American Tobacco Co.*, 84 F.3d 734, 740 (5th Cir. 1996).

[12] Congress subsequently amended the TILA to place a cap on recovery of statutory damages in a class action for violations of the TILA. 15 U.S.C. § 1640(a) (1976).

[13] *Murray v. GMAC Corporation*, 434 F. 3d 948, 953-54 (7th Cir. 2006).

[14] *Id.*

[15] *See, e.g., Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 177-78 (1974) (a court may not pass on the merits of the case in exercising its discretion under Rule 23).

the FACTA by American Multi-Cinema, Inc. (AMC).[16] AMC allegedly printed more than the last five digits of consumer credit or debit card numbers on electronically printed movie receipts. Plaintiff was not injured and claimed no actual damages for the proposed class. Plaintiff sought statutory damages between $29 million and $290 million for the proposed class. After the lawsuit was filed, AMC corrected the printing error in its receipts and complied with the FACTA. The district court refused to certify the class because the potential liability was enormous and disproportionate to any actual harm caused by a technical FACTA violation that was subsequently corrected. The Ninth Circuit held that the district court abused its discretion in considering these grounds to deny class certification. Quoting the Seventh Circuit, the Ninth Circuit stated that the FACTA ''must be enforced rather than subverted,'' until Congress amended the FACTA in response to such class actions.[17]

For the Ninth Circuit, legislative intent displaced the district court's admittedly ''wide'' discretion in deciding whether to certify a class under Rule 23.[18] Because there is a presumption that class actions are available in all federal court civil actions, the Ninth Circuit presumed further that Congress intended class relief to be available under the statute even though Congress was silent with respect to the aggregation of statutory damages in a class action. The Ninth Circuit reasoned that the class action mechanism was consistent with the legislative intent to compensate individuals for violations without requiring them to prove actual harm where statutory damages were available and that such class actions also served the purpose of deterring violations.[19] The Ninth Circuit further reasoned that if Congress intended otherwise, Congress would have imposed or could later impose a cap on the total amount of aggregate damages.[20]

Building a Case for Application of *Ratner* to Oppose Certification Under Superiority Analysis

It is difficult to reconcile these two approaches to the certification of classes under Rule 23(b)(3) in cases involving the aggregation of statutory damages for technical violations of consumer protection statutes. At least one federal court in the Ninth Circuit has tried, declining to follow, and distinguishing the Ninth Circuit decision in *Bateman* because it involved a billion-dollar movie company compared to the small municipality before it from whom plaintiff wanted to recover $15 million in statutory damages for violating the FACTA by printing credit card numbers on parking receipts.[21]

This distinction, however, ignores the fact that an award of millions of dollars in statutory damages can be just as potentially devastating to a large company as to a small one or a public entity. This district court decision in the Ninth Circuit after *Bateman* does show, nevertheless, that district courts may be willing to consider the *Ratner* approach even in the Ninth or Seventh Circuits when faced with motions to certify classes for potentially annihilating statutory damages for technical violations of consumer protection statutes.[22] The inclination can be supported by the defense to the motion for class certification in such cases.

In *Ratner*, the facts related to the TILA violation were undisputed; there was no issue that the claimed TILA violation had occurred, that it had been corrected, and that neither the plaintiff was harmed nor the defendant benefited by the claimed TILA violation.[23] In *Murray,* the parties settled the claimed FCRA violation, but there was no indication that the FCRA violation was admitted, corrected, or that the defendant did not benefit from it even though the plaintiff sought only statutory damages not actual damages for the allegedly improper credit solicitations under the FCRA.[24] This distinction favors consideration by courts of the proportionality of statutory damages to actual harm or damage for claimed violations of consumer protection statutes in determining if class certification is the superior method to resolve the controversy under Rule 23(b)(3).

To begin with, defendants should correct statutory violations if they are discovered after a class action is filed, better yet, implement or enhance an existing compliance program to detect and correct any technical statutory violations before they occur. If there was a statutory violation, however, admit it, demonstrate that it has been corrected at or by the time of class certification, and that a compliance program has been established or enhanced to ensure future compliance. Often for technical statutory requirements, the defendant will also be able to demonstrate that there was no benefit from the violation or harm to the plaintiff or class. Under these circumstances, courts arguably should consider the proportionality of the claimed statutory damages to the actual damage or harm caused to determine under Rule 23(b)(3) if the class action is the superior method to fairly resolve the controversy. In such cases, individual claims for statutory damages, attorneys' fees and costs under the statute provide an adequate and fair remedy.[25]

Rule 23(b)(3) requires district courts to consider if the class action mechanism is superior to other available means to resolve a dispute. That Rule further requires district courts to consider the ''fairness'' as well as the ''efficiency'' of the class action mechanism to determine if it is superior to available dispute resolution alternatives such as individual claims for actual or statutory damage, attorneys' fees, and costs.[26] The determination of the fairness of the aggregation of statutory damages in a class action does not inappropriately infringe on the merits of the underlying conduct when the facts related to that conduct are undisputed on the motion for class certification.

If, as the Seventh Circuit recognized, courts can consider whether the award is unconstitutionally excessive

[16] *Bateman v. American Multi-Cinema, Inc.*, 623 F.3d 708 (9th Cir. 2010).
[17] *Id.* at 715.
[18] Id. at 716.
[19] Id. at 716-719.
[20] *Id.*
[21] *Rowden v. Pacific Parking Systems, Inc.*, 282 F.R.D. 581 (C.D. Cal. 2012).
[22] It bears some emphasis that with respect to class actions under the FACTA, the Ninth Circuit's approach in *Bateman* is currently the majority view. *See, e.g., Armes v. Sogo, Inc., No. 08-C-0244* (E.D. Wis. 2011). *But cf. Ehren v. Moon, Inc.*, 2010 BL 286818 (S.D. Fla. 2010).
[23] *Ratner*, 54 F.R.D. at 413, 416, n. 6.
[24] *Murray*, 434 F.3d at 949.
[25] *Ratner*, 54 F.R.D. 416, n.6. *See also Leysoto*, 255 F.R.D. at 694.
[26] F.R.C.P. 23(b)(3).

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after certification, under such circumstances, nothing will have changed with respect to the defendant's conduct or exposure after certification.[27] Courts, therefore, should consider if the proposed statutory damage award to the class raises due process concerns in determining the fairness of the class action mechanism to analyze the superiority of the class action under Rule 23(b)(3). Indeed, the court's wide discretion on class certification includes an inquiry into the merits when necessary to determine if the requirements of Rule 23 have been satisfied.[28] As a result, as Judge Frankel recognized in *Ratner*, district courts should consider the disproportionate impact of aggregating statutory damages in a class action for demonstrated technical violations of a statute in determining if a class action is superior to alternative dispute resolution mechanisms under Rule 23(b)(3).

The courts were further divided in their views on whether consideration of the proportionality of statutory damages to the actual harm in determining if the class action was a superior dispute resolution mechanism was consistent with legislative intent. To the Seventh and Ninth Circuits, this factor undermined legislative intent because in their view the disproportionality of aggregate statutory damages to actual damages was inherent in the statute—not the certification of the class under Rule 23. They noted that Congress had limited aggregate awards in some statutes, but not in others, indicating to them an intent not to limit aggregate class awards in those statutes lacking any such limitation. They also viewed consideration of this factor in denying class certification on superiority grounds inconsistent with the purposes of the legislation.[29] None of these grounds should be insurmountable when opposing class certification for technical violations of consumer protection statutes.

It bears emphasis that in the legislation addressed by these courts, Congress neither expressly approved nor disapproved class relief. Congress, therefore, did not expressly prohibit the consideration of the disproportionate award of statutory damages to the actual harm caused by the statutory violation in the superiority analysis under Rule 23(b)(3).[30] If Congress is presumed to know that class actions are available in federal civil actions, as the Ninth Circuit held in *Bateman*, then Congress must also be presumed to know the requirements for class certification under Rule 23.[31]

As such, if by its silence Congress intended class relief to be available, it did so only if the express requirements for class certification were met as determined by the federal district courts. This includes the requirement that the claimant demonstrate that the class action mechanism was superior to the alternative methods available for the fair and efficient resolution of the dispute. In most if not all cases, this means a determination if a class action is superior to the individual cause of action that Congress expressly provided for statutory violations for actual or statutory damages, attorneys' fees, and costs. Thus, consideration of the proportionality of aggregated statutory damages to actual damage or harm should not be considered an inherent conflict with the statute that undermines legislative intent when Congress is silent with respect to the class action mechanism.

Courts have recognized that the purpose of individual remedies under consumer protection statutes is to compensate for harms caused by violations even when damages are difficult to prove and to deter statutory violations.[32] These purposes are not undermined when the proportionality of aggregate damages to actual harm is considered in determining the superiority of class action relief under circumstances involving a technical violation of the statute that has been corrected. The plaintiff can be adequately compensated by statutory damages, and attorneys' fees and costs under the statute. The difficulty in proving actual damages is addressed by the express provision for statutory damages and any disincentive to bring the action is addressed by the recovery of attorneys' fees and costs.[33]

There is no apparent reason these individual statutory remedies should be deemed inadequate absent the availability of the class action relief when Congress expressly provided this remedy. When the violation is technical, and it has been corrected, then arguably too the deterrent purpose of the statute has been satisfied.[34] The denial of class certification for class-wide technical violations does not risk ''underdeterrence,'' as the Ninth Circuit reasoned, if the technical violation is eliminated and compliance measures are enacted or enhanced to ensure the technical violation is corrected for all consumers.[35] For these reasons, courts should con-

[27] Due process concerns are not academic when defendants face aggregate statutory damages in proposed class actions for what amounts to technical violations of statutes. Such aggregate damages may be so disproportionate to the actual harm that they are no longer compensatory but rather punitive for what is essentially accidental or mistaken conduct in disregard of the statutory requirements. *Murray*, 434 F.3d at 953-54 (''An award that would be unconstitutionally excessive may be reduced.'').

[28] *Leysoto*, 255 F.R.D. at 696; *Heffner v. Blue Cross & Blue Shield of Ala. Inc.*, 443 F. 3d 1330, 1337 (11th Cir. 2006); *Love v. Turlington*, 733 F. 2d 1562, 1564 (11th Cir. 1984).

[29] *Murray*, 434 F.3d at 953-54; *Bateman*, 623 F.3d at 716-719.

[30] The Seventh Circuit failed to even reference the superiority analysis in Rule 23(b)(3) in *Murray*.

[31] *Bateman*, 623 F. 3d at 717.

[32] *See, e.g., Bateman*, 623 F. 3d at 718-19; *Harris v. Mexican Specialty Foods, Inc.,* 564 F. 3d 1301, 1312 (11th Cir. 2009).

[33] *See, e.g., Ratner*, 54 F.R.D. at 416.

[34] Id.

[35] *Bateman*, 623 F 3d at 719. The Ninth Circuit further held in *Bateman* that the district court's reliance on the movie theatre company's good faith compliance with the FACTA was inconsistent with the intent of FACTA because Congress failed to include a ''safe harbor'' for good faith compliance, failed to limit aggregate damages, and because the court presumed the company's speedy compliance was promoted at least in part by the specter of a substantial damage award. *Id*. at 723. Arguably, the Ninth Circuit reads more into what Congress did not expressly provide for in the FACTA than what Congress actually said in the Act. Again, Congress provided expressly for an individual remedy, not a class remedy, including statutory as well as actual damages, attorneys' fees, and costs. Congress was well aware of the availability of class action relief under Rule 23, consistent with the specific rule requirements, including the superiority analysis of Rule 23(b)(3). It is difficult to read more into the FACTA than this. Further, if the movie company was motivated to comply with the FACTA by the specter of the class action damages sought by plaintiff the deterrent effect intended by Congress was achieved by the company's compliance with the FACTA. Denying class certification after such compliance was brought about because the aggregate

sider compliance with the purposes of the consumer protection statute when the technical violation is corrected and the individual plaintiff has a remedy for damages, fees, and costs in determining if classwide relief is superior under Rule 23(b)(3).

Conclusion

As a practical matter, the viability of the proportionality of statutory damages to actual harm for technical violations of consumer protection statutes as a factor in determining the superiority of the class action mechanism under Rule 23(b)(3) remains an open issue with courts divided on the propriety of considering this factor. The defense of a class action on this ground, however, can be enhanced. If the conduct is not disputed and it is not disputed that the conduct is inconsistent with the requirements of the consumer protection statute, then, the conduct should be changed to eliminate the statutory violation and place the conduct in compliance with the statutory requirements. This should be demonstrated at least at the time of class certification including the lack of any benefit as a result of the conduct. This should be the case for most violations of a purely technical statutory requirement when the plaintiff claims no actual damages or harm for the plaintiff or the class. Under these circumstances on a class certification motion, the argument should be made that the class action mechanism is not the superior method to resolve the controversy over a technical violation of the consumer protection statute. Indeed, the American Law Institute has recognized that aggregation is not an end unto itself, rather, aggregation is a means by which courts may promote justice under the law more fully.[36] The consideration of the proportionality of aggregate statutory damages to actual damage or harm for technical violations of consumer protection statutes in determining if a class action is superior to alternative dispute resolution mechanisms under Rule 23(b)(3) is consistent with this principle.

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statutory damages are so far out of line with any actual harm where no actual damages were sought by plaintiff or the class does not change the fact that compliance exists and the deterrent effect of the FACTA was therefore achieved.

[36] Principles of the Law of Aggregate Litigation, § 1.03, comment a (2010).

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