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CLASS RETREAT FROM MASS DECEIT: ASSESSING CLASS ACTION COMPATIBILITY WITH TRUTH IN LENDING ACT RESCISSION

*Jeffrey A. Payne**

The Truth in Lending Act (TILA) provides two primary civil remedies for aggrieved borrowers who received misleading loan disclosures: damages and rescission. While the damages remedy expressly caps class-action damages recoveries, TILA's rescission remedy is completely silent as to class-action treatment. Despite a split on the district-court level regarding the applicability of the class-action device to TILA rescission, the only two federal Circuit Courts of Appeal to consider the issue have foreclosed the right of borrowers to seek class-wide rescissory relief for TILA disclosure errors. This Article examines the judicial analysis in these two cases and finds that both courts erroneously construed TILA rescission in favor of lender rights and overstepped their constitutionally delegated power by completely foreclosing a right absent clear congressional intent.

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INTRODUCTION

Meet the Andrews family. Bryan Andrews is self-employed, and his income varies monthly. Bryan and his wife, Susan, know a fair amount about mortgages, having taken out several for residential and investment properties. The Andrews family has good credit, a traditional thirty-year fixed-rate mortgage with a reasonable interest rate of 5.75 percent, and two children nearing college age. In June 2004, a lender approaches the Andrews family touting a unique loan-refinancing product with multiple payment options. The lender tells Mr. Andrews that such a loan will provide tremendous flexibility in monthly payments, which would be a perfect fit for a self-employed man putting his children through college. More importantly, the loan documents also profess a tempting 1.95 percent annual percentage rate (APR) and fixed monthly payments of $700 for five years. The monthly payments will readjust to a fully amortizing amount at the end of the five-year period or if the outstanding loan balance negatively amortizes to exceed 110 percent of the original loan amount before then. The Andrewses, beside themselves over the supposed bargain that just fell into their laps, accept the refinance loan offered by the lender.

In August 2004, two months after closing, the Andrews family realizes something is wrong. According to the Andrewses' second monthly statement, their interest rate has more than doubled from 1.95 percent to 4.375 percent. While confused, they figure the loan is still a good one; the payments remain fixed, and the interest rate appears to remain lower than that of their original mortgage.

However, by February 2006, the Andrews family's interest rate has soared to 7.5 percent, which constitutes a 385 percent increase from the initial teaser rate advertised less than two years ago. Before the Andrewses' first child has completed college, their low, fixed monthly payments combined with ever-increasing interest rates have pulled their loan principal to the 110 percent negative amortization point. Suddenly the Andrews family's payments have increased to nearly $1,000, and the life of the loan has been extended by years. Not only are the Andrewses having trouble paying tuition, but they are also in serious danger of losing their home.

Roughly based on the facts of a recent Seventh Circuit case,[1] this scenario represents an unfortunately common dilemma facing many borrowers. Realizing they had been deceived into a risky loan, the Andrewses brought suit in federal district court seeking a judicial declaration that the misleading disclosure they received from the lender entitled them to rescind their loan. Like several borrowers before them, the Andrewses sought relief for themselves and for the nearly seven thousand similarly situated borrowers convinced to take the same or similar loan products. Also like some of the borrowers bringing such cases, the Andrews family was successful at the trial level. On appeal, however, the Seventh Circuit became the second federal circuit court to overturn such a victory, thereby foreclosing the right of borrowers in the Seventh Circuit to seek rescission on a class-wide basis.

The *Andrews* case illustrates an emerging trend in the treatment of Truth in Lending Act (TILA) claims brought by a class of aggrieved borrowers. It also begs the issue of why courts failed to help stem mortgage disclosure violations that ultimately contributed to the current home mortgage crisis. One reason was that many courts shied away from granting class-wide rescission as a remedy for systemic TILA violations, invoking substantive and procedural reasoning that showed remarkable deference to lenders' unsupported claims. Substantively, these courts accepted arguments that lenders would face "crushing liability" if rescission were granted on a class-wide basis[2] despite the lack of factual evidence to support that conclusion. In addition to lacking a factual basis, this lender argument lacks a statutory basis. Although TILA's damages provision allows courts to consider a lender's resources in determining a class-action damages award, the statute nowhere makes "crushing liability" a defense to disclosure violations. To the contrary, forcing consumers to bear the risk of loss for inadequate disclosure of the terms of a loan is contrary to the consumer-protection purpose of TILA.[3] By allowing this new defense to class certification for TILA disclosure violations, the courts have enabled lenders to continue violating the law.

1. Andrews v. Chevy Chase Bank, 545 F.3d 570, 571–72 (7th Cir. 2008).
2. McKenna v. First Horizon Home Loan Corp., 475 F.3d 418, 426 (1st Cir. 2007).
3. *See infra* Part I.A.

Procedurally, courts have also accepted the argument that class-wide rescission is incompatible with the class-action device because rescission is a purely personal remedy intended to operate privately between the lender and the debtor. Yet borrowers are not generally seeking outright class-wide rescission in TILA-disclosure-violation cases. Rather, they typically request a class-wide judicial declaration that an infirmity in the lenders' standardized documents common to all members of the class entitles each class member individually to seek rescission ("declaration of rescindability").[4] Although each member who subsequently chooses to rescind would require individualized judicial attention, the determination of the right to rescind itself is a fact-intensive analysis common to the class. A class-wide judicial determination of rescindability would be more efficient in light of the thousands of consumers who received identical standardized disclosures than would multiple identical suits brought by individual consumers.

Part I of this Article advances the purposes and policies behind TILA and details TILA's rescission remedy. Part II outlines the development of a judicial split at the federal trial level on whether to certify class actions for TILA rescission. Part III demonstrates that attempts so far to divine congressional intent from the text of TILA's rescission remedy ignore the plain language of the statute. Moreover, even if courts do find the language of TILA ambiguous, evidence beyond the statutory text lends strong support to the notion that the class-action device is compatible with TILA rescission. Part IV weighs courts' asserted concerns regarding lender liability in class-certified TILA rescission against the benefits of rescission in this context and finds that the latter outweigh the former. Part V analyzes possible procedural barriers to TILA rescission actions based on standing and Federal Rule of Civil Procedure Rule 23 ("Rule 23") and proposes that TILA rescission claims are appropriate in federal court under Rule 23(b)(2) or (b)(3). The Article concludes that it is beyond the proper scope of judicial power to preclude class-action amenability to rescission entirely. Instead, the separation of powers doctrine dictates that it is the courts' duty to apply the law as written

4. *See, e.g.*, Andrews v. Chevy Chase Bank, FSB, 240 F.R.D. 612, 621 (E.D. Wis. 2007), *rev'd*, 545 F.3d 570 (7th Cir. 2008).

and allow Congress to address any perceived flaws in the statutory scheme.

I. TILA RESCISSION'S PURPOSE AND THE DEVELOPING FORECLOSURE OF TILA CLASS ACTION RESCISSION RIGHTS

Congress enacted TILA to give borrowers a more meaningful basis to shop for and compare available various credit options.[5] TILA requires lenders to disclose accurately and uniformly the costs inherent in borrowing, and it provides civil and criminal remedies as a means of enforcement. TILA's rescission provision attempts to deter and remedy certain TILA disclosure violations by allowing borrowers to cancel their loans, thereby returning each party to the position it occupied prior to the transaction. Unlike TILA's damages remedy, however, TILA's provision regarding rescission is silent as to the applicability of the class-action device. While some district courts have certified TILA rescission classes, the only two circuit courts to review such certifications have held that Rule 23 class actions cannot be used to obtain TILA rescission.

A. The Truth in Lending Act: Purposes and Remedies

Prior to the enactment of TILA,[6] consumers experienced a great deal of confusion regarding the cost of credit. Lenders' inconsistent disclosures and wildly variable methods of computing interest made it nearly impossible for consumers to understand the true cost of credit, much less compare the terms of credit offered by different lenders in the marketplace.[7] As a result, Congress enacted TILA in 1968 to protect consumers against the uninformed use of credit by requiring a meaningful disclosure of credit terms so that consumers could more readily compare the various credit terms available in the marketplace.[8]

TILA imposes an affirmative obligation on the part of lenders to disclose the cost and relevant terms of obtaining credit to

5. 15 U.S.C. § 1601(a) (2006).

6. Congress enacted TILA in 1968. Truth in Lending Act, Pub. L. No. 90-321, 82 Stat. 146 (1968) (codified as amended at 15 U.S.C. §§ 1601–1667f (2006 & Supp. II 2008)). Congress authorized the Federal Reserve Board to issue regulations that would carry out the purposes of TILA. *See* 15 U.S.C. § 1604(a). The Board responded by promulgating Regulation Z. *See* 12 C.F.R. pt. 226 (2009).

7. *See* H.R. REP. NO. 90-1040, at 13 (1967), *reprinted in* 1968 U.S.C.C.A.N. 1962, 1970.

8. 15 U.S.C. § 1601(a).

consumers.[9] Congress did not design TILA to limit what a creditor could charge, but rather to promote uniformity in the disclosure and computation of credit terms.[10] TILA achieves this aim by demanding clear and conspicuous disclosure of the APR and the finance charges[11] upon which the APR is based. The APR expresses the total annual cost of borrowing in a uniform way to enable consumers to comparison shop more easily between loans.[12]

To incentivize lender compliance and consumer enforcement of the law, TILA offers consumers two primary civil[13] remedies for TILA violations: damages[14] and rescission.[15] Section 1640 of TILA provides a private right of action for aggrieved mortgage borrowers to seek actual damages plus statutory damages between $400 and $4,000.[16] However, monthly mortgage payments are often close to, if not more than, $1,000 a month. If a lender sells a borrower an unaffordable loan by providing a loan disclosure with certain deceptive material loan terms, a single $4,000 damages award—the statutory maximum—could amount to a handful of monthly

9. *See* H.R. REP. NO. 90-1040, at 1.

10. *Id.* at 7.

11. Regulation Z defines a finance charge as "any charge payable directly or indirectly by the consumer and imposed directly or indirectly by the creditor as an incident to or a condition of the extension of credit." 12 C.F.R. § 226.4(a). The finance charge as defined by Regulation Z is quite broad and encompasses not only interest, but also service charges; points; appraisal, investigation, and other report fees; and various other charges involved in the extension of credit. *Id.* § 226.4(b).

12. *See* Lauren E. Willis, *Decisionmaking and the Limits of Disclosure: The Problem of Predatory Lending: Price*, 65 MD. L. REV. 707, 744 (2006) ("The APR is intended to express the total annual cost of borrowing . . . so that borrowers can comparison price shop between a loan with a higher interest rate but lower up-front costs and a loan with lower initial costs but a higher interest rate.").

13. TILA also subjects lenders to criminal penalties of a fine of up to $5,000, or imprisonment up to one year, or both for willful and knowing violations. 15 U.S.C. § 1611. However, criminal penalties have largely failed as an effective TILA enforcement tool. *See, e.g.*, Raymond H. Brescia, *Trust in the Shadows: Law, Behavior, and Financial Re-Regulation*, 57 BUFF. L. REV. 1361, 1435 (2009).

14. 15 U.S.C. § 1640.

15. *Id.* § 1635. Non-purchase-money security interests in a borrower's principal dwelling include, for example, home-improvement loans, home-equity lines of credit, and refinancing transactions with a lender other than the original lender. *See id.* § 1635(e) (exempting "residential mortgage transaction[s]" and transactions "constitut[ing] a refinancing or consolidation . . . of an existing extension of credit by the same creditor secured by an interest in the same property"); 12 C.F.R. § 226.23(f) (same).

16. 15 U.S.C. § 1640(a) (Supp. II 2008); *see also* ELIZABETH RENUART & KATHLEEN KEEST, TRUTH IN LENDING § 8.6.2.2, at 596 (6th ed. 2007) ("TILA provides a $[4]00 floor and a $[4],000 ceiling on statutory damages for transactions secured by real estate or a dwelling . . . .").

payments towards a loan the borrower otherwise still must pay. This will not significantly improve the situation and will therefore fail to provide any true incentive for the borrower to take remedial action against the lender. Moreover, the statute of limitations on TILA damages is only one year from the date of the occurrence of the violation.[17] For many borrowers, it can be difficult to determine that a legal right, such as the right to rescind, exists within one year. Consequently, Congress implemented an alternate remedy for consumers under TILA—the right to rescission.

B. The TILA Rescission Remedy

TILA provides borrowers with the right to rescind loans involving a non-purchase-money security interest in the borrower's principal dwelling.[18] Unlike damages, which can only provide limited relief, "[r]escission under TILA is potentially a highly effective means for a consumer ensnared in a bad loan to avoid its worst effects, which may include bankruptcy, and even loss of one's home through foreclosure."[19]

Regardless of the clarity or accuracy of the underlying loan terms, every borrower of eligible loans begins with an unqualified right to rescind the loan for the first three days after closing.[20] This is commonly referred to as the initial three-day "cooling off" period.[21] TILA's three-day rescission right can extend for up to three years if a lender fails to provide the borrower with clear notice of the three-day right to rescind or if the lender fails to provide the borrower with accurate material disclosures,[22] although minor errors are tolerated.[23]

Importantly, TILA rescission not only puts the borrower in the position she would have been in had the loan not been made, but it

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17. 15 U.S.C. § 1640(e).

18. *Id.* § 1635(a).

19. Robert Murken, *Can't Get No Satisfaction? Revising How Courts Rescind Home Equity Loans Under the Truth in Lending Act*, 77 TEMP. L. REV. 457, 457 (2004).

20. 15 U.S.C. § 1635(a); 12 C.F.R. § 226.23(a)(1)–(3).

21. *See, e.g.*, Andrews v. Chevy Chase Bank, 545 F.3d 570, 573 (7th Cir. 2008); McKenna v. First Horizon Home Loan Corp., 475 F.3d 418, 421 (1st Cir. 2007).

22. 15 U.S.C. § 1635(f); 12 C.F.R. § 226.23(a)(3). Regulation Z defines "material disclosures" as "the required disclosures of the annual percentage rate, the finance charge, the amount financed, the total payments, [and] the payment schedule . . . ." 12 C.F.R. § 226.23(a)(3) n.48.

23. *See* 12 C.F.R. § 226.18(d)(1)(i) (treating the disclosed finance charge as accurate as long as it is not understated by more than a $100 tolerance level).

also serves as a significant deterrent by forcing the lender to disgorge all benefits if it fails to comply with TILA.[24] The lender must return to the borrower all fees and interest paid as of the date of rescission. However, TILA rescission can be largely ineffective against predatory lending on an individual basis because most borrowers will be unaware of their right to rescind for inaccurate TILA disclosures.[25] This is because the TILA-mandated disclosure itself, which explains the borrower's right to rescind, is too complicated for the average borrower to understand.[26] Even if the lender gives the borrower the required notice of the right to rescind, that notice only discusses the three-day absolute right to rescission, not the three-year extended right to rescind for incorrect material disclosures.[27] Class actions for TILA rescission could inform potentially misled borrowers of this three-year extended right to rescission. TILA rescission in a class-action context could therefore serve as a powerful tool to combat the TILA violations that contributed to the foreclosure crisis.

C. TILA Class Actions

Congress expressly approved the use of Rule 23 class actions by borrowers to redress TILA violations common to the class and has only ruled out class-action recovery for minor, technical TILA violations. As initially enacted in 1968, TILA was entirely silent as to the compatibility of Rule 23 class actions with TILA remedies. Enacted as part of the Rules Enabling Act of 1934,[28] Rule 23 provides background procedural law applicable to any new substantive statute, including TILA. Explicit consideration of the class-action device did not appear until Congress enacted an amendment to TILA in 1974 ("1974 Amendment").[29] Spurred by a desire "to protect *small business firms* from catastrophic judgments" as a result of class-wide recovery of the statutory-minimum damages

24. Murken, *supra* note 19, at 458.

25. *See id.* at 461–63.

26. *Id.*

27. *See* 12 C.F.R. § 226.23 app. H-8.

28. Rules Enabling Act of 1934, ch. 651, 48 Stat. 1064 (codified as amended at 28 U.S.C. § 2072 (2006)).

29. Act of October 28, 1974, Pub. L. No. 93-495, 88 Stat. 1500 (codified as amended in scattered sections of 15 U.S.C.).

award for technical disclosure errors,[30] Congress used the 1974 Amendment to cap *damages* recoverable in a class action to the lesser of $100,000 or 1 percent of the creditor's net worth.[31] However, no similar cap was added to TILA's rescission remedy. Notably, the 1974 Amendment did not create a class-action right under TILA. Instead, Congress's first mention of TILA's class-action compatibility appeared as a cap rather than an affirmative grant, demonstrating that Congress merely intended to limit a previously conferred right.[32]

TILA's $100 minimum-statutory-damages provision (now $400)[33] was designed to encourage enforcement by private litigation.[34] However, Congress apparently did not foresee the problem that class actions could present when each class member would be entitled to at least $100. Congress therefore created the 1974 Amendment to maintain the private incentive to enforce TILA's provisions without rendering such enforcement unduly burdensome for creditors.[35] Congress later raised the cap in a 1976 amendment[36] from $100,000 to $500,000 in order to increase the award's deterrent effect on creditors (although Congress has not

30. H.R. REP. NO. 93-1429, at 37 (1974) (Conf. Rep.), *reprinted in* 1974 U.S.C.C.A.N. 6148, 6153 (emphasis added); *see* S. REP. NO. 93-278, at 14–15 (1973) ("The purpose of the civil penalties section under [TILA] was to provide creditors with a meaningful incentive to comply with the law without relying upon an extensive new bureaucracy. However, the Committee feels this objective can be achieved without subjecting creditors to enormous penalties for violations which *do not involve actual damages and may be of a technical nature.* Putting a reasonable limit on a creditor's maximum class action liability would seem to be in the best interests of both creditors and consumers." (emphasis added)).

31. Act of October 28, 1974 sec. 408, § 1640(a), 88 Stat. 1500, 1518.

32. Nicholas G. MacInnis, *Commercial and Consumer Credit Law—Class Action Remedy Unavailable in First Circuit for Plaintiffs Seeking Rescission Under Truth in Lending Act—* McKenna v. First Horizon Home Loan Corp., *475 F.3d 418 (1st Cir. 2007)*, 41 SUFFOLK U. L. REV. 321, 327–28 (2008); *see also* Johnson v. W. Suburban Bank, 225 F.3d 366, 371 (3d Cir. 2000) ("Though the statute clearly contemplates class actions, there are no provisions within the law that create a right to bring them . . . . The 'right' to proceed to a class action, insofar as the TILA is concerned, is a procedural one that arises from the Federal Rules of Civil Procedure.").

33. 15 U.S.C. § 1640(a)(2)(A)(iii) (Supp. II 2008).

34. *See, e.g.*, Parker v. DeKalb Chrysler Plymouth, 673 F.2d 1178, 1181 (11th Cir. 1982); *Class Actions Under the Truth in Lending Act*, 83 YALE L.J. 1410, 1410 (1974) [hereinafter *Class Actions Under TILA*].

35. *See Class Actions Under TILA*, *supra* note 34, at 1410.

36. Consumer Leasing Act of 1976, Pub. L. No. 94-240, 90 Stat. 257. The statute currently provides that in the case of a class action for damages, "the total [damages] recovery under this subparagraph in any class action or series of class actions arising out of the same failure to comply by the same creditor shall not be more than the lesser of $500,000 or 1 per centum of the net worth of the creditor." 15 U.S.C. § 1640(a)(2)(B).

adjusted that figure to account for inflation since that amendment's enactment).[37]

In 1995, Congress reacted again to concerns about lender liability for technical TILA violations following the Eleventh Circuit's decision in *Rodash v. AIB Mortgage Company*.[38] In *Rodash*, the court held that the lender's failure to include a $22 express-delivery charge and a $204 intangible state tax as part of the finance charge violated TILA because they were material disclosures under the statute.[39] The practical result of the *Rodash* decision was to open the door to TILA remedies for minor technical disclosure errors. In the context of home loans, which are often in excess of $100,000, Congress's concern was that *Rodash* would enable borrowers to obtain a windfall by bringing suit for statutory damages or rescission based on harmless disclosure errors. Indeed, over fifty class-action suits were filed shortly after *Rodash*, the majority of which sought TILA's rescission remedy.[40]

Fearing for the liquidity of the mortgage market should these claims proceed, Congress enacted a six-month moratorium on class actions so that it had time to craft a solution.[41] During that time, Congress considered various proposals to limit damages and the right to rescission.[42] However, in a TILA amendment enacted later that year ("1995 Amendment"), Congress ultimately chose only to increase the TILA-violation tolerance level for understated finance charge disclosures from $10 to $100.[43] Therefore, with full

37. S. REP. NO. 94-590, at 8 (1976) ("The recommended $500,000 limit, coupled with the 1% formula, provides, we believe, a workable structure for private enforcement. Small businesses are protected by the 1% measure, while a potential half million dollar recovery ought to act as a significant deterrent to even the largest creditor."). Since 1976, the $500,000 cap has been left untouched, despite the fact that the value of 500,000 1976 dollars in 2010 is $1,915,738.14. CPI Inflation Calculator, http://data.bls.gov/cgi-bin/cpicalc.pl (last visited Jul. 21, 2010). Furthermore, banks have grown significantly in size since 1976. In this light, 500,000 2010 dollars likely do not have the deterrent effect on large lenders that Congress intended when it enacted the 1976 Amendment.

38. Rodash v. AIB Mortg. Co., 16 F.3d 1142 (11th Cir. 1994).

39. *Id.* at 1147.

40. 141 CONG. REC. 26896 (1995) (statement of Sen. D'Amato).

41. Truth in Lending Class Action Relief Act of 1995, Pub. L. No. 104-12, sec. 2, § 1640(i), 109 Stat. 161, 161–62; *see also* 141 CONG. REC. 11171–72 (statements of Sens. Mack, D'Amato, and Bond).

42. *See* 141 CONG. REC. 26897 (statement of Sen. Sarbanes).

43. Truth in Lending Act Amendments of 1995, Pub. L. No. 104-29, sec. 3, § 1605(f), 109 Stat. 271, 272–76.

knowledge of dozens of pending class-action TILA-rescission cases, Congress elected not to ban such actions.[44] Instead, Congress raised the tolerance level for which a TILA-disclosure error would merit liability, whether in the form of damages or rescission. Moreover, Congress's motive here was not to limit lender liability for violations of TILA broadly, but rather to create a safe harbor from massive lender liability *for minor disclosure errors* affecting material disclosure figures by less than $100.[45]

D. Emerging Trends in Judicial Treatment of Class-Wide TILA Rescission

Early TILA jurisprudence addressing rescission in a class-wide context involved consumers bringing claims for wholesale rescission en masse for all putative class members.[46] In these cases, the class representatives sought the rescission remedy for a TILA-disclosure infirmity shared by all class members who received identical standardized loan documents. But TILA requires a borrower to give the lender notice of any decision to rescind individually;[47] therefore, the putative class members may not yet have had a justiciable case or controversy for which automatic rescission would provide redress. Furthermore, there is a possibility that some, if not many, of the putative class members did not want to rescind their individual loans, and might have chosen a damages remedy for the TILA violations they suffered. As such, a court ruling in favor of the named plaintiff might not favor class members who did not wish to rescind their loans.

Subsequent class-wide rescission claimants have sought a modified remedy to circumvent the lender's lack of notice of each individual borrower's invocation of rescission and the borrower's

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44. The 1995 Amendment makes explicit Congress's intention not to limit the right of rescission in any way: "This legislation that we are considering here today addresses the Rodash problem by exempting a number of charges from inclusion in the finance charge and provides a tiered tolerance approach on finance charge miscalculations. The bill does not extend any exemptions from the right of rescission." 141 CONG. REC. 26575 (statement of Rep. Roukema).

45. 141 CONG. REC. 11172 (statement of Sen. D'Amato) ("The potential for massive rescissions, based on technical disclosures [sic] errors of as little as $10, creates a potential for liability that has been estimated to be as high as $217 billion.").

46. *See* James v. Home Constr. Co. of Mobile, Inc., 621 F.2d 727 (5th Cir. 1980); Mayo v. Sears, Roebuck & Co., 148 F.R.D. 576 (S.D. Ohio 1993); Nelson v. United Credit Plan, Inc., 77 F.R.D. 54 (E.D. La. 1978).

47. 15 U.S.C. § 1635(a) (2006).

election of rescission over a damages award. Rather than asking for a declaration of rescission for all putative class members, these suits pursue a declaration of the *right* to rescind.[48] The difference between this type of claim and a declaration of rescindability is that the named plaintiff does not seek a declaration of rescission for the class members en masse. Instead, the class representative asks the court for a declaration of rescindability for each class member for three years after closing because of a common TILA violation in the loan documents tendered at closing. Such a declaration occurs after the liability stage of the litigation—a fact-intensive analysis of whether the lender had committed a TILA violation triggering the right of rescission for all borrowers in the class. This would not rescind every borrower's loan but instead declare that every borrower has an assertable right to rescind her loan. Those borrowers who choose to pursue such a right can then assert it as part of the relief phase of the litigation, as long as the right is asserted within the statutory three-year window beginning at the time the borrowers entered into the transaction.[49]

48. Federal district courts are divided on whether this approach should be allowed to proceed. For district courts granting class certification for declarations of rescindability, see *In re Ameriquest Mortgage Co. Mortgage Lending Practices Litigation*, No. 05-CV-7097, 2007 WL 1202544 (N.D. Ill. Apr. 23, 2007); *Andrews v. Chevy Chase Bank, FSB*, 240 F.R.D. 612 (E.D. Wis. 2007), *rev'd*, 545 F.3d 570 (7th Cir. 2008); *McKenna v. First Horizon Home Loan Corp.*, 429 F. Supp. 2d 291 (D. Mass. 2006), *rev'd*, 475 F.3d 418 (1st Cir. 2007); *Rodrigues v. Members Mortgage Co.*, 226 F.R.D. 147 (D. Mass. 2005); *Latham v. Residential Loan Centers of America*, No. 03 C 7094, 2004 WL 1093315 (N.D. Ill. May 6, 2004); *McIntosh v. Irwin Union Bank & Trust Co.*, 215 F.R.D. 26 (D. Mass. 2003); *Williams v. Empire Funding Corp.*, 183 F.R.D. 428 (E.D. Pa. 1998); and *Hickey v. Great Western Mortgage Corp.*, 158 F.R.D. 603 (N.D. Ill. 1994). For courts denying class certification, including federal circuit courts, see *Andrews v. Chevy Chase Bank*, 545 F.3d 570 (7th Cir. 2008); *McKenna v. First Horizon Home Loan Corp.*, 475 F.3d 418 (1st Cir. 2007); *Murray v. America's Mortgage Banc, Inc.*, Nos. 03 C 5811, 03 C 6186, 2005 WL 1323364 (N.D. Ill. 2005); *Gibbons v. Interbank Funding Group*, 208 F.R.D. 278 (N.D. Cal. 2002); and *Jefferson v. Security Pacific Financial Services, Inc.*, 161 F.R.D. 63 (N.D. Ill. 1995).

Currently only one state appellate court has considered this issue. In *LaLiberte v. Pacific Mercantile Bank*, 53 Cal. Rptr. 3d 745, 751 (Ct. App. 2007), the California Court of Appeal affirmed a trial court's denial of class certification.

49. *See, e.g.*, *Williams*, 183 F.R.D. at 435 ("[T]he instant case is distinguishable from cases in which courts have refused to certify a class which sought rescission as a remedy in that, in this case, plaintiffs do not seek to rescind each contract as a remedy. Rather, plaintiffs only seek a declaration that the notices of rescission in the sales and financing contracts violate TILA, and thus that each member of the class is entitled to seek rescission. Should the Court declare that, indeed, plaintiffs are entitled to seek rescission because of certain infirmities in the TILA disclosure documents, then each class member, individually, and not as a member of the class, would have the option to exercise his or her right to seek rescission.").

The first case dealing with declaration of rescindability to reach the appellate level was *McKenna v. First Horizon Home Loan Corp.*[50] The plaintiff-borrowers in *McKenna* alleged that the forms tendered by defendant First Horizon at closing had inaccurately disclosed the borrowers' statutory right to rescind.[51] In addition to claims for individual relief, the borrowers asserted that First Horizon's practices had affected "countless others" and sought a class-wide "declaration that any class member who elected to do so could rescind his or her credit transaction with First Horizon at any time during the extended three-year statutory default period."[52]

The borrowers succeeded in the district court,[53] but the U.S. Court of Appeals for the First Circuit reversed,[54] becoming the first circuit court to foreclose class-wide declarations of rescindability under TILA. The First Circuit held that Congress had not intended class actions to be a vehicle for rescission under TILA because it was "nose-on-the-face plain that unrestricted class action availability for rescission claims would open the door to vast recoveries."[55] In coming to this conclusion, the court acknowledged the 1976 damages cap and stated that "[t]he notion that Congress would limit liability to $500,000 with respect to one remedy while allowing the sky to be the limit with respect to another remedy for the same violation strains credulity."[56] The court grounded its holding further on the notion that rescission is a "personal remedy" incompatible with the class-action device and should be available only to individuals on a case-by-case basis.[57]

Andrews v. Chevy Chase Bank[58] is the second case—and the only other circuit decision to date—to address whether a declaration of rescindability is available in a TILA class action.[59] The U.S. Court

50. 475 F.3d 418.

51. *Id.* at 420.

52. *Id.*

53. *McKenna*, 429 F. Supp. 2d 291.

54. *McKenna*, 475 F.3d at 427.

55. *Id.* at 424.

56. *Id.*

57. *Id.* at 423–25.

58. 545 F.3d 570 (7th Cir. 2008).

59. The California Court of Appeal is currently the only state appellate court to have considered this issue and accords with the First and Seventh Circuits in holding that plaintiff-borrowers cannot assert class claims for TILA rescission. *See* LaLiberte v. Pac. Mercantile Bank, 53 Cal. Rptr. 3d 745 (Ct. App. 2007).

of Appeals for the Seventh Circuit *Andrews* court largely followed the *McKenna* court's lead, quoting the *McKenna* language throughout its own opinion. The *Andrews* court relied heavily on the assertion that TILA rescission is a purely personal remedy of a character that "makes it procedurally and substantively unsuited to deployment in a class action."[60] Like *McKenna*, *Andrews* relied on § 1640(a)(2)(B)'s cap on statutory damages to find that "the absence of a similar cap in § 1635 strongly suggests that class actions are not available for rescission."[61]

The *Andrews* court also suggested an alternative procedural rationale "that the fundamental incompatibility between the rescission remedy under TILA and the class-action device raises serious questions as to whether a TILA rescission class could ever be properly certified under Federal Rule of Civil Procedure 23(b)."[62] While this observation is only dicta, it reflects an ongoing debate at the trial level as to whether class actions for declarations of rescindability comply with Rule 23.[63]

The court decided *McKenna* in 2006, just before the mortgage crisis took hold of the nation and the folly of putting so many Americans into mortgages they poorly understood became clear. *Andrews* was decided in 2008 but largely tracked the *McKenna* decision. Now that the devastating effects of borrowers' lack of knowledge about the terms of their home loans have been seen, we are at an opportune moment to reconsider the operation of TILA, including the rescission remedy's application to class-wide declaratory relief.

60. *Andrews*, 545 F.3d at 574. The court also linked TILA rescission to equitable rescission and commented that "[r]escission is a highly individualized remedy as a general matter, and rescission under TILA is no exception." *Id.*

61. *Id.* at 575.

62. *Id.* at 576.

63. Currently, there is still a wide split at the district-court level on the issue of class certification for declarations of rescindability. Nevertheless, as a likely result of the current agreement among the circuit courts, the Supreme Court has thus far denied certiorari in two cases seeking a final review of the controversy. Andrews v. Chevy Chase Bank, 129 S. Ct. 2864 (2009); LaLiberte v. Pac. Mercantile Bank, 552 U.S. 951 (2007).

II. TILA RESCISSION'S COMPATIBILITY WITH RULE 23 CLASS ACTIONS IS CONSISTENT WITH THE STATUTORY LANGUAGE AND LEGISLATIVE INTENT

Is TILA's rescission right compatible with the class-action device? As with any question of statutory interpretation, courts must start with the statutory text. To the extent that the text may be opaque, courts may then move to congressional history and intent in writing the statute as Congress did.[64] Here, although a careful reading indicates that both inquiries lean toward a finding that Congress authorized class-wide declarations of the right to TILA rescission, the courts have not interpreted the plain meaning of the statute or the congressional history and intent in this manner. However, to deter the TILA violations that have plagued the mortgage market in recent years, courts must uniformly embrace Congress's language and intent when interpreting TILA.

A. Statutory Interpretation Principles Support Rule 23 Compatibility with TILA Rescission

The rules of statutory construction require courts to start with the text of the statute before considering legislative history and intent.[65] If the court finds no ambiguities in the plain meaning of the statutory language, then it must presume that Congress expressed its intent in that language and cease further inquiry.[66] The court must determine the clarity or ambiguity of the statutory language by examining "the language itself, the specific context in which that language is used, and the broader context of the statute as a whole."[67] An investigation of TILA's statutory language and the context in which it is used reveals no ambiguity regarding class-action pursuit of TILA rescission.

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64. *E.g.*, Blum v. Stenson, 465 U.S. 886, 896 (1984) ("Where . . . resolution of a question of federal law turns on a statute and the intention of Congress, we look first to the statutory language and then to the legislative history if the statutory language is unclear.").

65. *Id.*

66. *E.g.*, Robinson v. Shell Oil Co., 519 U.S. 337, 340–41 (1997); Am. Tobacco Co. v. Patterson, 456 U.S. 63, 68 (1982); Andrews v. Chevy Chase Bank, 545 F.3d 570, 578 (7th Cir. 2008) (Evans, J., dissenting) ("[W]e must start with the language of the statute itself. If the statute is unambiguous, it controls, and a court has no business substituting its view of good policy for that of Congress. Indeed, unambiguous language must be given effect unless it produces results that are 'absurd.'" (citing Evans *ex rel.* Evans v. Lederle Labs., 167 F.3d 1106, 1111 (7th Cir. 1999); United States v. Thomas, 77 F.3d 989, 992 (7th Cir. 1996))).

67. *Robinson*, 519 U.S. at 341.

Nothing in TILA's text expressly precludes the use of class actions to obtain a declaration that an infirmity in the tendered loan document common to all class members entitles each member of the class to seek rescission on an individual basis.[68] Indeed, the majority of district courts certifying TILA-rescission classes have expressly relied on this observation in their analysis.[69] Moreover, the Federal Rules of Civil Procedure make class actions available in any federal civil suit absent a direct expression by Congress to the contrary.[70]

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68. Andrews v. Chevy Chase Bank, FSB, 240 F.R.D. 612, 621 (E.D. Wis. 2007), *rev'd*, 545 F.3d 570 (7th Cir. 2008); McKenna v. First Horizon Home Loan Corp., 429 F. Supp. 2d 291, 303 (D. Mass. 2006), *rev'd*, 475 F.3d 418 (1st Cir. 2007) (citing Rodrigues v. Members Mortg. Co., 226 F.R.D. 147, 153 (D. Mass. 2005); Williams v. Empire Funding Corp., 183 F.R.D. 428, 436 (E.D. Pa. 1998)); *see also In re* Ameriquest Mortg. Co. Mortg. Lending Practices Litig., No. 05-CV-7097, 2007 WL 1202544, at *3 (N.D. Ill. Apr. 23, 2007) ("Plaintiffs are simply seeking a declaration to facilitate their respective pursuits of an individual remedy, and neither the plain language of TILA nor Fed. R. Civ. P. 23 prohibits plaintiffs from doing so on a class-wide basis.").

69. *See, e.g.*, *In re Ameriquest Mortg. Co. Mortg. Lending Practices Litig.*, 2007 WL 1202544, at *3; *Andrews*, 240 F.R.D. at 621; *McKenna*, 429 F. Supp. 2d at 303; *Rodrigues*, 226 F.R.D. at 153; McIntosh v. Irwin Union Bank & Trust, Co., 215 F.R.D. 26, 32–33 (D. Mass. 2003); *Williams*, 183 F.R.D. at 435–36. The only other case certifying a class action, *Hickey v. Great Western Mortgage Corp.*, 158 F.R.D. 603 (N.D. Ill. 1994), failed to address statutory-construction principles and instead decided the case on the Federal Rule of Civil Procedure Rule 23 elements alone.

70. Califano v. Yamasaki, 442 U.S. 682, 700 (1979). The *Andrews* and *McKenna* courts both dismissed *Yamasaki*'s applicability to § 1635 by distinguishing it from the statute at issue in *Yamasaki*. As the *Andrews* court explained,

> *Yamasaki* concerned a statute setting forth the procedure by which judicial review of an administrative decision could be obtained, [42 U.S.C. § 405(g)]. The Court rejected the argument that the statute's language authorizing a suit for judicial review by "any individual" meant that individual suits only—not class actions—could be brought. The Court held that this "any individual" language, without more, did not preclude the use of class actions in this category of suit.

Andrews, 545 F.3d at 575 (citing *Yamasaki*, 442 U.S. at 698–700). The courts that decided *Andrews* and *McKenna* both explained that "TILA's rescission remedy 'is written with the goal of making the rescission process a private one, worked out between creditor and debtor without the intervention of the courts.'" *Andrews*, 545 F.3d at 575 (quoting Belini v. Wash. Mut. Bank, FA, 412 F.3d 17, 25 (1st Cir. 2005)); *McKenna*, 475 F.3d at 425 (same). Section 405(g), on the other hand, was a "jurisdictional statute specifying the rules by which judicial review may be sought." *Andrews*, 545 F.3d at 575. Therefore, these courts argued, the differences between the statutes indicate that the lack of an express prohibition against class actions in § 1635 is not dispositive. However, this analysis appears to give "unduly short shrift" to the Court's mandate in *Yamasaki*. RENUART & KEEST, *supra* note 16, § 6.9.9, at 487. Both courts ignored the broader context in which the Court stated its rule:

> 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 court, *including those* seeking to overturn determinations

Thus, absent an express prohibition in TILA or elsewhere that TILA's rescission cannot be sought on a class-wide basis, courts must accept that TILA rescission is compatible with Rule 23 class actions.

Section 1640 mentions class actions in the context of limiting the size of damages awards in class actions.[71] At most, this limitation renders conspicuous § 1635's corresponding silence regarding class actions and TILA rescission, the portion of TILA providing for the remedy of rescission.[72] However, this silence does not create ambiguity within the TILA-remedy context in which the discrepancy appears or the larger context of the statute as a whole. Instead, a truly plain reading of the statute leads to the simple presumption that the rescission remedy is allowed in class actions without limitation whereas damages in class actions are limited. As one commentator notes, "The absence of a cap on rescission class actions signifies only that—that there is no cap."[73]

B. Legislative History and Congressional Intent Support Rule 23 Compatibility with TILA Rescission

Only if courts legitimately find the text of § 1635 ambiguous should they look for evidence beyond the statutory text to determine congressional intent.[74] In looking beyond the plain language of a statute, courts must employ canons of statutory construction to resolve textual ambiguities and proceed to legislative history only if the statute remains unclear.[75] Here, canons of construction and

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> of the departments of the Executive Branch of the Government in cases where judicial review of such determinations is authorized.

Yamasaki, 442 U.S. at 700 (emphasis added). Had the Court intended to limit this rule to the facts and circumstances in *Yamasaki*, the Court's "including those" language would have been unnecessary. Moreover, the Court refers broadly to civil actions in federal court without distinguishing between types of civil cases. Attempts by the *Andrews* and *McKenna* courts to limit *Yamasaki*'s application to TILA rescission are thus misguided efforts to preclude the application of a general rule to a specific circumstance in which the courts wish to issue holdings inconsistent with the rule.

71. 15 U.S.C. § 1640(a)(2)(B) (Supp. II 2008).

72. *See id.* § 1635.

73. RENUART & KEEST, *supra* note 16, § 6.9.9, at 487.

74. *See, e.g.*, *In re* N.Y. Times Co. to Unseal Wiretap & Search Warrant Materials, 577 F.3d 401, 406 (2d Cir. 2009) ("Where the statutory language remains ambiguous [after considering the language itself and the context in which it is used], we resort to canons of construction and, if the meaning remains ambiguous, to legislative history." (internal quotation marks omitted)).

75. *Id.*

legislative history both further support the compatibility of the class-action device with TILA rescission. First, the statutory-construction principle *expressio unius est exclusio alterius*[76] dictates that Congress's explicit expression of a cap on class-action TILA damages recovery excludes the possibility of a similar cap for TILA rescission because of Congress's silence as to a class-action restraint on this remedy. Second, the difference between the remedial natures of damages and rescission suggests that Congress intended to limit the remedy at law but not the remedy in equity. Third, the 1995 Amendment indicates that Congress was not concerned with the extent of lender liability resulting from rescission actions brought for TILA-disclosure violations beyond the increased $100 threshold imposed post-*Rodash*. Finally, considerations of public policy and separation of powers advise against judicial preclusion of rescission class actions.

1. *Expressio Unius Est Exclusio Alterius*

The *Andrews* and *McKenna* courts both noted that TILA's damages provision specifically mentions a cap on class-action recovery.[77] Because widespread borrower exercise of rescission rights can also be costly for lenders, these courts reasoned that Congress made a mistake by not including a similar cap for rescission.[78] Other courts have found that Congress's failure to add class-action language to § 1635 in the 1974 Amendment merely reflects its intent to treat rescission as a purely personal remedy not subject to class treatment.[79] However, these attempts to extract implied and circumstantial congressional rationales for failing to cap class-action rescission in TILA ignore the application of the well-established statutory-construction principle *expressio unius est exclusion alterius*. Rather than presuming congressional intent based

76. Black's Law Dictionary defines *expressio unius est exclusio alterius* as "[a] canon of construction holding that to express or include one thing implies the exclusion of the other, or the alternative." BLACK'S LAW DICTIONARY 620 (8th ed. 2004).

77. Andrews v. Chevy Chase Bank, 545 F.3d 570, 575 (7th Cir. 2008); McKenna v. First Horizon Home Loan Corp., 475 F.3d 418, 423–24 (1st Cir. 2007).

78. *Andrews*, 545 F.3d at 575; *McKenna*, 475 F.3d at 423–24.

79. Murray v. Am.'s Mortg. Banc, Inc., Nos. 03 C 5811, 03 C 6186, 2005 WL 1323364, at *10–11 (N.D. Ill. May 5, 2005) (citing Jefferson v. Sec. Pac. Fin. Servs., Inc., 161 F.R.D. 63, 68 (N.D. Ill. 1995)).

on the possible consequences of the alternatives, this principle exposes clear congressional intent in the text of the statute itself.

The U.S. Supreme Court has consistently held that judicial inquiry into the meaning of congressional silence is a dangerous and disfavored endeavor in statutory construction.[80] On the other hand, the Supreme Court has also held that where Congress has placed a provision in one section of a statute and remained silent in another, this silence can be interpreted as an affirmative decision by Congress *not* to apply the same provision to both parts of the statute: "Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion."[81] Thus, by limiting the class-action right in one section while remaining silent in another, the correct assumption under this rule of construction is that Congress acted deliberately in omitting any restraint on class actions for TILA rescission when it capped class-action TILA-damages recoveries in the 1974 Amendment.

A key factor in the *expressio unius* analysis is that class actions appeared for the first time in TILA in 1974 as a cap on damages awardable in class-action suits. The 1974 Amendment, therefore, did not *affirmatively grant* class-action rights under TILA, but rather *capped a preexisting right.*[82] This is a strong indication that Congress originally intended TILA to be broadly subject to the class-action device. Moreover, Congress knew the full range of TILA remedies available when it drafted the 1974 Amendment, but it chose to limit only class-action damages awards. Thus, the presumption must favor allowing rescission class actions. Had Congress meant to limit class actions for rescission as it did with damages, it would have said so.[83]

80. *See, e.g.*, Zuber v. Allen, 396 U.S. 168, 185 (1969); Scripps-Howard Radio v. F.C.C., 316 U.S. 4, 11 (1942) ("The search for significance in the silence of Congress is too often the pursuit of a mirage. *We must be wary against interpolating our notions of policy in the interstices of legislative provisions.*" (emphasis added)); Helvering v. Hallock, 309 U.S. 106, 120–21 (1940).

81. Bates v. United States, 522 U.S. 23, 29–30 (1997).

82. *See* Johnson v. W. Suburban Bank, 225 F.3d 366, 371 (3d Cir. 2000) ("Though [TILA] clearly contemplates class actions, there are no provisions within the law that create a right to bring them . . . . The 'right' to proceed to a class action, insofar as the TILA is concerned, is a procedural one that arises from the Federal Rules of Civil Procedure.").

83. *See Andrews*, 545 F.3d at 578 (Evans, J., dissenting) ("The fact that there is a cap on damages in class actions may, in the abstract, suggest Congress sought to shield lenders from massive liability. But we don't address the matter in the abstract. Congress wrote a statute, and if

In the absence of such an expression, it must be understood that Congress intended to limit *only* class-action damages recoveries while not restraining class actions available for TILA rescission.

2. Damages Are a Legal Remedy While Rescission Is an Equitable Remedy

That TILA limits lender liability for damages in the class-action context yet allows for unrestrained rescission class actions does not create an inconsistency in the statutory scheme. Instead it illustrates a fundamental difference between damages and rescission as remedies. Damages are a legal while rescission is an equitable remedy.[84] Given this distinction, it makes sense that Congress would choose to leave the court's equitable powers unrestrained. Because damages are meant only to compensate an injured party,[85] a statutory-damages cap is an appropriate measure to ensure that a class-action damages award does not become unduly punitive. In an equitable context, however, the court should be given more latitude to consider the broader equities at stake. This could include allowing class-wide rescission to return borrowers to their *status quo ante*, even if that rescission would have a punitive effect on lenders. Thus, the equitable nature of rescission as a remedy further supports a finding that failure to restrain TILA-rescission classes was neither a mistake nor an indication that rescission class actions should be precluded entirely.

3. 1995 Amendment

The 1995 Amendment does not support the idea that Congress intended to exempt TILA rescission from class-action amenability. As previously mentioned, the *McKenna* and *Andrews* courts both reasoned that the presence of a class-action damages cap from the 1970s is inconsistent with allowing unrestrained class-wide TILA rescission because of the potential costs lenders could incur as a result.[86] This reasoning ignores that Congress knew of more than

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it sought to further such a policy in the rescission context, we should assume it would have said so.").

84. *See, e.g.*, 13 AM. JUR. 2D *Cancellation of Instruments* § 2 (2010); 25 WILLISTON ON CONTRACTS § 67:8 (4th ed. 2009).

85. *See* 25 WILLISTON, *supra* note 84, § 67:8.

86. *Andrews*, 545 F.3d at 575; McKenna v. First Horizon Bank, 475 F.3d 418, 424 (1st Cir. 2007) ("It is nose-on-the-face plain that unrestricted class action availability for rescission claims

fifty pending class-action TILA-rescission cases when it amended TILA in 1995.[87] At that time, Congress could have broadened its limitations on class actions from the existing damages cap to a broader ban on class actions or a ban on class-wide rescission. Congress chose instead to raise the tolerance level for TILA violations. It is inappropriate to infer more from congressional history than Congress's actions actually demonstrate. Had Congress wanted to ban class-action rescission, it could have done so explicitly.

4. Public Policy Considerations

Circuit Judge Terence Evans's dissent in *Andrews* raises several policy considerations regarding attempts to read congressional intent into an arguably unambiguous statute. Judge Evans asks, "If the statute is unclear . . . [w]ho should pay the price of Congress's sloppy drafting?"[88] Rather than penalizing those who violated the law, the First and Seventh Circuits have instead placed the burden of arguably sloppy drafting on the victims of TILA violations.[89] This result is especially unfair in view of TILA's express consumer-protection mandate.[90] In concluding that "it is better to acknowledge ambiguity and construe the statute in the way most supported by the statute's language and in a fashion that protects the innocent, not the guilty,"[91] Judge Evans recognizes that court preclusion of class-wide TILA rescission not only ignores the statutory interpretation most in

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would open the door for vast recoveries. . . . The notion that Congress would limit liability to $500,000 with respect to one remedy while allowing the sky to be the limit with respect to another remedy for the same violation strains credulity.").

87. *See* RENUART & KEEST, *supra* note 16, § 6.9.9, at 486 ("In *McKenna v. First Horizon Loan Corp.*, the First Circuit held that a rescission class action—even one that sought only a declaratory judgment—could not be maintained. Its main rationale was that a rescission class action could be costly to the creditor, and that this would be contrary to the *Rodash* amendments adopted in 1995. But in fact the *Rodash* amendments compel the opposite conclusion: since Congress was faced with industry complaints regarding rescission class actions and chose not to ban them, but only to limit the grounds for rescission, it should be even clearer that rescission class actions are allowed.").

88. *Andrews*, 545 F.3d at 579 (Evans, J., dissenting).

89. *See id.*

90. *See supra* Part I.A.

91. *Andrews*, 545 F.3d at 579 (Evans, J., dissenting); Jo Carillo & Paul Kofoed, *The Sound of Silence: The Continuing Legal Debate over Class Action Rescission Under TILA*, 6 HASTINGS BUS. L.J. 1, 11–12 (2010).

tune with TILA's language but also weakens TILA's underlying purpose.

Judicial attempts to construe a statute perceived as ambiguous also raise important separation-of-powers considerations. Prior to the Seventh Circuit's decision, the Andrews family's attorney expressed concern that lenders were attempting to scare the judiciary into rewriting TILA to exclude class actions for TILA rescission because they were unable to convince Congress to do so in the 1990s.[92] However, the Constitution vests only Congress with the power to draft statutes.[93] Therefore, had Congress in fact intended to preclude rescission class actions, it is Congress's duty, not the courts', to amend the statute and correct its error.[94] Any attempt by the courts to read absent language into TILA's text would effectively expand the powers of the judiciary at the expense of the legislative branch's. Moreover, when courts attempt to rewrite ambiguous statutes, sloppy drafting is encouraged.[95] "And if the court gets it wrong—a hazard of judicial guesswork—then all suffer."[96]

By misconstruing the addition of class-action language to TILA in the 1974 Amendment, courts have failed to appropriately apply well-established and self-imposed statutory-construction principles. Moreover, because rescission is an equitable remedy, it makes sense to allow rescission without constraint. Nevertheless, courts have confused congressional concern for significant lender liability (in the face of *technical* TILA violations reflected in the 1995 Amendments) with congressional intent that lenders be shielded from severe liability for any TILA violation. The congressional record does not support this interpretation. Instead, public policy and the separation of powers doctrine dictate that Congress, not the courts, should be charged with correcting any perceived problems with TILA as currently written.

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92. Gina Keating, *Mortgage Rescission Could Be Class Action Nightmare for U.S. Banks*, INS. J., Jul. 7, 2008, *available at* http://www.insurancejournal.com/news/national/2008/07/07/91590.htm ("If (banks) get relief (from the appeals court), it's activist judges trying to give [banks] what they could not get legislatively.").

93. U.S. CONST. art. 1, § 1 ("All legislative Powers herein granted shall be vested in a Congress of the United States . . . .").

94. *See id.*

95. Andrews v. Chevy Chase Bank, 545 F.3d 570, 579 (7th Cir. 2008).

96. *Id.*

III. COURT PROTECTION AGAINST "CRUSHING LENDER LIABILITY" IS INAPPROPRIATE AND PERPETUATES DANGEROUS LENDING PRACTICES

Lenders whose repeated TILA violations create sufficiently numerous borrower victims to warrant class treatment should be held accountable for their actions, not protected out of concern for their financial stability. Nevertheless, courts have transformed TILA's allowance for the consideration of lender resources for class-action damages awards into a broad "crushing liability"[97] defense. Even if such an interpretation were warranted, prudential limitations exist to constrain its blanket use. Moreover, the true effect on lender balance sheets of certified declaration-of-rescindability classes is unknown, but likely not terribly threatening. Even if lenders did face significant liability, it would likely advance TILA's consumer-protection purpose by more accurately exposing the true cost of credit. However, by coddling lender concerns over potential liability, courts have perpetuated illegal activities, thereby abdicating their responsibility to enforce laws and protect the public.

A. "Crushing Liability" Is Not an Acceptable Defense to Material TILA Disclosure Violations

While TILA does allow courts to consider creditors' financial resources in determining the amount of a class-action *damages* award,[98] "crushing liability" is still not a defense to TILA-violation lawsuits.[99] To the extent that a court may consider a lender's financial status in certifying TILA-rescission classes, the court should limit such a defense to those lenders for whom insolvency is a real possibility. Courts should not use the defense as a vehicle to preclude the class-action device altogether.

"Crushing liability" is not a per se defense to TILA violations, regardless of the remedy sought. In assessing damages, TILA directs the courts to consider "the frequency and persistence of failures of compliance by the creditor" and "the extent to which the creditor's

97. McKenna v. First Horizon Home Loan Corp., 475 F.3d 418, 426 (1st Cir. 2007).

98. 15 U.S.C. § 1640(a) (2006).

99. *Cf.* Jo Carrillo, *This Little Loan Went to Market: The Consumer-Lender-Investor Equation of Federal Truth in Lending*, 28 NO. 8 BANKING & FIN. SERV.'S POL'Y REP. 7, 11 (2009) ("Only Congress should have the power to shield lenders from liability under TILA, since only Congress has the full information of how best to balance the three-part consumer-lender-investor equation that animates TILA.").

failure of compliance was intentional."[100] Section 1640 also expressly allows the court to consider a lender's resources in determining the amount of a damages award in any class action.[101] That courts can consider lender resources does not give them discretion to award damages that fail to reflect the extent of harm caused by the lender. These are different things. Consideration of lender resources gives courts discretion to determine the amount of a damages award that will best deter the lender from committing future violations.[102] Sometimes lender resources can weigh in favor of lowering damages. However, the same consideration may also increase a damages award. The language of the statute is neutral. If the defendant is financially strong and a small award of damages would not deter further wrongdoing, then the language of the statute could justify a higher award. Even if some members of Congress did not intend this result when adding this language to the statute, such a result is possible within the statute's plain language.

Moreover, to the extent that courts take issue with TILA's plain language, it must be re-emphasized that *only* Congress is empowered to rewrite TILA. In response to arguments "that the cost of defending consumer class actions will have a potentially ruinous effect on small businesses in particular and will ultimately be paid by consumers," the Supreme Court has explicitly stated that "[t]hese are not unimportant considerations, but they are policy considerations more properly addressed to Congress than to" the courts.[103] Thus, the creation of a new "crushing liability" defense to class-action TILA rescission is the sole province of Congress, not the judiciary.

Courts' concerns over imposing potentially catastrophic liability are particularly unfounded because putative class members seek only declarations of rescindability, which do not create new rights for those members but merely notify them of pre-existing rights under federal law. Because TILA imposes strict liability on lenders for each violation, it would be illogical to allow each plaintiff to sue for rescissory relief individually while prohibiting them from doing so as

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100. 15 U.S.C. § 1640(a).

101. Section 1635 contains no comparable language. *See id.* § 1635. Following the *expressio unius* rationale discussed *supra* at Part II, this omission would indicate that lender resources are not available for consideration at all in the TILA-rescission context.

102. *Id.* § 1640(a).

103. Reiter v. Sonotone Corp., 442 U.S. 330, 344–45 (1979).

a class. The only real difference would be that class actions may inform more injured borrowers that their rights were violated. Ultimately, denying TILA-rescission class actions allows lenders to violate TILA while limiting rescission to sophisticated borrowers who sue individually. Meanwhile, the unsophisticated masses—unaware that their rights have been violated—suffer the effects of an unaffordable loan.

Where lenders have actually violated the law, risk of insolvency should not preclude plaintiffs from recovering for strict-liability violations, regardless of whether suit is brought individually or as a class.[104] The Supreme Court has found that the Eighth Amendment's Excessive Fines Clause does not apply to civil damages awards between private parties, but only to criminal process and cases brought by the government to inflict punishment.[105] Just as "a [criminal] defendant's poverty in no way immunizes him from punishment,"[106] so too a civil defendant should be held accountable for actions in violation of the law. Businesses that violate the law over the course of many transactions are often rendered insolvent by the ensuing litigation, but well they should be.[107] A business dependent on violating the law to make a profit should not be allowed to continue to operate.

Furthermore, the benefits that businesses confer on society and the economy must be balanced against the harm that those businesses do to those who depend on their services. Some have suggested that "in return for granting businesses their franchise to operate, society

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104. *See* Haynes v. Logan Furniture Mart, Inc., 503 F.2d 1161, 1164 (7th Cir. 1974) ("[W]hile procedural fairness with respect to protecting defendants from crushing damages predicated on the statutory minimum recovery is an important consideration in determining the superiority of the class-action mode of adjudication, it is at least equally important to prevent violators of the Act from limiting recovery to a few individuals where actual, wide-spread noncompliance is found to exist.").

105. Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc., 492 U.S. 257, 259–60 (1989).

106. Bearden v. Georgia, 461 U.S. 660, 669 (1983).

107. *See, e.g.*, Bruce V. Bigelow, *S.D. Diocese Follows Lead of Others in Bankruptcy*, SAN DIEGO UNION TRIB., Mar. 18, 2007, at F1 (discussing notable bankruptcy filings made by companies threatened with mass-tort litigation); *cf.* MELVIN ARON EISENBERG, CORPORATIONS AND OTHER BUSINESS ORGANIZATIONS 237 (9th ed. 2005) ("As a practical matter, piercing [the corporate veil] is normally important only where the corporation lacks sufficient assets to pay the creditor's claims. That is not a frequent occurrence in the case of publicly held corporations—although it does happen, and in a handful of cases, tort claims themselves have resulted in the bankruptcy of such corporations.").

has expectations of what businesses will provide and how they will behave."[108] TILA embodies the expectation that businesses will offer transparent consumer information and will protect consumers.[109] Under this theory, a lender's social and economic legitimacy deteriorates once the lender begins systematically violating TILA. In this context, harsh sanctions—including insolvency—are justified in order to renew that legitimacy and diminish the costs that the lender imposes on society.

Finally, even if "crushing liability" were a defense to TILA-disclosure violations, it should not categorically preclude TILA-rescission classes. While large rescission classes could result in substantial lender liability,[110] especially for small lenders, not every class would be a large one.[111] Most lenders are large enough that, for example, a lender facing a fifty-person class action because it violated TILA fifty times could not reasonably argue that class-wide rescission would put it out of business. In fact, in neither *McKenna* nor *Andrews* was there a strong empirical basis for the courts' concern about "crushing liability": a liberal estimate of the cost of rescission in *McKenna* is \$200 million[112] for a lender with \$26 billion in assets,[113] and the cost of rescission in *Andrews* would have been around \$210 million[114] for a lender with \$15 billion in assets.[115]

108. William Arthur Wines & J. Brooke Hamilton III, *Observations on the Need to Redesign Organizations and to Refocus Corporation Law to Promote Ethical Behavior and Discourage Illegal Conduct*, 29 DEL. J. CORP. L. 43, 56 (2004).

109. *Id.* at 57.

110. For example, the *McKenna* court noted that First Horizon Bank's exposure in that case would be approximately \$200 million if the court allowed the class to proceed. McKenna v. First Horizon Bank, 475 F.3d 418, 424 (1st Cir. 2007). The court further noted that "[t]he \$200,000,000 estimate appear[ed] to be based on a recovery of approximately \$22,000 for each of the estimated 8,900 members of the putative class." *Id.* at 424 n.2.

111. While the *McKenna* class had an estimated 8,900 putative class members, the class in *Tower v. Moss*, for example, only contained 143 class members. Tower v. Moss, 625 F.2d 1161, 1163 (5th Cir. 1980). While 143 members could still be considered a relatively large class, a comparison with the *McKenna* class illustrates the vast disparity in potential class sizes.

112. *See supra* note 110.

113. *E.g.*, *First Horizon Closes 2009 with Asset Quality Improvements, Repositions for Strength*, GLOBAL NEWSWIRE, Jan. 19, 2010, http://www.globenewswire.com/newsroom/news.html?d=182073.

114. Brief for Plaintiff-Appellees Susan and Bryan Andrews and the Class at 39 n.13, Andrews v. Chevy Chase Bank, 545 F.3d 570 (7th Cir. 2008) (No. 07-1326).

115. *E.g.*, CHEVY CHASE BANK, 2007 ANNUAL REPORT 13 (2007), *available at* https://www.chevychasebank.com/pdf/2007_annual; Bryant Ruiz Switzky, *Chevy Chase Bank Sale Leaves Trust Unit Alone*, WASH. BUS. J., Apr. 10–16, 2009, *available at* http://www.chevychasetrust.com/pdfs/28158%20Chevy%20Chase%20Trust.pdf.

Where a lender would not be rendered insolvent or otherwise severely financially handicapped by a rescission class, the lender should not be permitted to use a "crushing liability" defense, and the class action should be permitted to proceed. Even if courts *could* consider the risk of lender insolvency in certifying TILA-rescission classes, such a consideration should be limited to those lenders for whom crushing liability is a real possibility. The potential for crushing liability in *some* hypothetical cases does not justify barring TILA-rescission class actions completely.

B. Class Certification for TILA Rescission Is Unlikely to Cause Crushing Liability and Will Ensure Safer Lending Practices

There is no evidence that lenders with legitimate concerns about insolvency and only small-scale TILA violations would face "crushing liability" if subjected to a class-wide declaration of rescission rights. A lender would face insolvency only if violations are so routine that the lender's entire portfolio consists of loans sold without proper disclosures. Furthermore, the small added cost of complying with TILA regulations should justify strict liability, regardless of its financial impact, to create a more transparent lending industry, even if such strict liability means putting more lenders out of business and increasing the cost of home-refinance loans and second mortgages.

There is also insufficient evidence to suggest that every—or even most—class members would actually seek rescission if courts certified classes for a declaration of rescindability. Existing evidence actually indicates the contrary. For example, in *Tower v. Moss*,[116] the Fifth Circuit allowed class-action rescission as part of a settlement agreement. The agreement entitled class members to elect between rescinding their loans or recovering damages in the form of a 15 percent reduction in their loan principal.[117] Out of 143 class members, only 40 chose rescission.[118] Furthermore, in the present economic climate, the drop in home values makes it less likely that a

116. 625 F.2d 1161 (5th Cir. 1980).

117. *Id.* at 1163.

118. *Id.* at 1163–64.

borrower would seek rescission as a remedy.[119] It would therefore appear that estimates of lender liability based on projected losses in the event that every class member elects to rescind are drastically overstated.

Some members of the lending industry insist that the threat of enormous liability posed by class-action rescission would make credit more costly and difficult to obtain.[120] However, the expense of complying with TILA is not large, and borrowers benefit from being told the actual terms of loans rather than receiving misleading TILA disclosures. Additionally, imposing strict liability could itself benefit borrowers by exposing the potential dangers and accurate costs of obtaining home-refinance loans. As an analogy, the automotive industry does not forego crash safety precautions for cheaper cars because manufacturers face potentially devastating liability if their cars do not meet crash safety standards. Although the next potential buyer suffers the price of a subsequent lawsuit to some extent, the resulting increase in the product's price will reflect the danger in the product.[121] The same is true for the lending industry: should a lender go out of business and cause the cost of lending to increase, that increase will simply reflect the potential danger in borrowing that the lender failed to accurately disclose. If the lender stays in business, borrowers will go to another lender offering lower prices because that lender never violated the law in the first place. As a result, lenders are held more accountable for their lending practices; also,

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119. To illustrate, imagine a borrower obtained a $300,000 mortgage backed by the value of her home. After a year of making payments, the borrower's home has dropped in value to $200,000. Now imagine this borrower receives a notice of her right to rescind her mortgage as a member of a class of certified borrowers. The borrower may have the right to rescind but will likely choose not to because she will be unable to return the principal as required by the TILA rescission process. Because the borrower will only be able to obtain another mortgage at a value of $200,000, she will be $100,000 shy of completing her end of the rescission process.

120. *E.g.*, Brief for Respondent in Opposition at 11–12, Andrews v. Chevy Chase Bank, 129 S. Ct. 2864 (2009) (No. 08-1206) ("The threat of such devastating liability from just one rescission class action would inevitably make credit more costly and difficult to obtain, an outcome squarely at odds with Congress's efforts to protect both borrowers and the credit industry, as reflected in TILA's text and history.").

121. This justification for strict products liability is often referred to as "enterprise liability" or "risk-spreading" in tort law. By manufacturing a product, manufacturers are thought to assume a special responsibility to the general public who may be injured by the product. Because the public is often forced to rely on the seller for certain goods, and the seller is often in a better position to prevent injuries caused by its products, public policy dictates that sellers should bear the risk of liability as a cost of doing business for which liability insurance can be obtained. *See, e.g.*, RESTATEMENT (SECOND) OF TORTS § 402A cmt. c (1977).

loans that appear cheaper on their faces because of misleading terms are more likely to be eliminated, thereby more accurately representing the true cost of borrowing. While there may be some short-term costs of lender insolvency, such costs will be outweighed by the long-term benefits of greater honesty and loan-term transparency.

IV. BORROWERS HAVE STANDING AS A CLASS TO SEEK REDRESS FOR INADEQUATE TILA DISCLOSURES

An examination of the *Andrews* and *McKenna* rationales for disallowing class certification in suits seeking declarations of rescindability reveals that these courts erred in precluding TILA-rescission class actions by misinterpreting TILA's statutory language, TILA's legislative history, and the underlying equities. What remains to be determined is whether procedural standing and Rule 23 class-certification requirements stand in the way of allowing class-wide declarations of rescindability. This part concludes that standing and class certification should be easily surmountable obstacles for class-wide declarations of rescindability. Courts suggesting that borrowers lack standing to seek a class-wide declaration of rescindability overlook the fact that TILA provides these borrowers with a right to contract with full disclosure. Lenders that give borrowers inadequate or misleading TILA disclosures violate this right, thereby creating a justiciable controversy. Furthermore, borrowers seeking class certification to redress their subsequent injuries have framed the relief they seek consistent with Rule 23's class-certification requirements. Class-wide declaration-of-rescindability actions should not merely be permitted to proceed; rather, such actions are ideal candidates for class certification.

A. Inadequate TILA Disclosures Create an Injury in Fact Redressable by a Declaration of Rescindability

TILA provides that a party seeking rescission must notify the lender of her intent to rescind.[122] Upon receipt of such notice, the lender has twenty days to respond.[123] Pursuant to this framework, some courts reason that TILA requires borrowers to assert rescission

122. 15 U.S.C. § 1635(b) (2006).

123. *Id.*

rights "on an individual basis and within individual time frames, before filing suit."[124] Therefore, these courts hold that no actual controversy exists between the parties where borrowers file suit as a class before individually completing TILA's statutorily required steps.[125]

In contrast, other courts hold that the filing of a complaint itself serves as the requisite notice of the borrowers' exercise of the right to rescind.[126] According to these courts, all putative class members are deemed to have given written notice of rescission once the complaint has been filed. Consequently, each class member has a live controversy for which the remedy sought—a declaration of each class member's right to rescind—would redress the controversy.

The problem with the latter construction, however, is that it conflates the declaration of rescindability with rescission en masse by allowing the complaint to effectively tender rescission notices. The borrower's notice to the lender of his or her exercise of the right to rescind sets the rescission process in motion. As one court noted:

> [C]onstru[ing] the mere filing of a class action complaint as a statutory notice of rescission . . . would trigger the lender's obligation to terminate its security interest in all of the class members' property, and could trigger the class members' obligation to tender the money or property received back to the lender.[127]

Interpreting the filing of the complaint as notice to constitute standing also obscures the fact that these classes are only seeking a declaration of the *right to rescind*, not rescission itself.

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124. Gibbons v. Interbank Funding Grp., 208 F.R.D. 278, 285 (N.D. Cal. 2002) (internal quotations omitted) (citing Jefferson v. Sec. Pac. Fin. Servs., Inc., 161 F.R.D. 63, 69 (N.D. Ill. 1995)).

125. *Id.* ("It is undisputed that the purported class members . . . have not submitted notices to rescind. Thus, plaintiff is effectively asking for an advisory opinion. Without any rescission requests, nor subsequent denials by defendants, it is not at all clear that a justiciable controversy exists between the class and defendants."); *see also Jefferson*, 161 F.R.D. at 69.

126. Taylor v. Domestic Remodeling, 97 F.3d 96, 99–100 (5th Cir. 1996); McKenna v. First Horizon Home Loan Corp., 429 F. Supp. 2d 291, 304 (D. Mass. 2006), *rev'd*, 475 F.3d 418 (1st Cir. 2007); McIntosh v. Irwin Union Bank & Trust, Co., 215 F.R.D. 26, 32 (D. Mass. 2003); Eveland v. Star Bank, NA, 976 F. Supp. 721, 726 (S.D. Ohio 1997); Elliott v. ITT Corp., 764 F. Supp. 102, 105–06 (N.D. Ill. 1991); Hunter v. Richmond Equity, No. CV 85-P-2734-S, 1987 WL 109703, *4 (N.D. Ala. 1987); *In re* Rodrigues, 278 B.R. 683, 689 (Bankr. D.R.I. 2002) ("Filing a complaint against the Mortgagor serves as proper notice of recission [sic] of a TILA/HOEPA mortgage, if timely filed, and if it specifically addresses rescission [sic].").

127. LaLiberte v. Pac. Mercantile Bank, 53 Cal. Rptr. 3d 745, 751 (2007).

Other authority presents a simpler and more workable standing theory. At the outset, it should be noted that while TILA's statutory-notice requirement may be a statutory "precondition to filing a claim[, it] does not restrict a federal court's subject-matter jurisdiction."[128] Further, in initially certifying the requested class, the trial court in *McKenna* pointed out that "[t]he Supreme Court has long recognized that '[t]he actual or threatened injury required by Art[icle] III may exist solely by virtue of statutes creating legal rights, the invasion of which creates standing . . . .'"[129] The Fourth Circuit applied this reasoning specifically to TILA when it stated:

> It is essential to note that Congress in creating this statutory scheme did not impose simply a general duty of "adequate disclosure" upon creditors and provide for suit only by debtors able to show that they were "aggrieved" by the creditor's inadequate performance. Rather, Congress gave the debtor a right to specific information and therefore defined "injury in fact" as the failure to disclose such information.[130]

The proposed classes at issue consist only of those borrowers who received disclosures with the same error. Each of these class members had a right to contract with full disclosure. The lenders' failure to provide adequate disclosures violated this right, thereby constituting an injury-in-fact that establishes legal standing. Therefore, under this argument, each class is necessarily confined to those borrowers who already have standing. As such, the declaration of rescindability that each class member may choose to act upon will redress the specific injury being addressed—the underlying disclosure error.

128. Reed Elsevier, Inc. v. Muchnick, 130 S. Ct. 1237, 1241 (2010).

129. *McKenna*, 429 F. Supp. 2d at 304 (quoting Havens Realty Corp. v. Coleman, 455 U.S. 363, 373 (1982)).

130. White v. Arlen Realty & Dev. Corp., 540 F.2d 645, 649 (4th Cir. 1975).

B. TILA Declaration of Rescindability Claims Are Appropriate for Class Certification Under Federal Rule of Civil Procedure 23

Where the elements of Federal Rule of Civil Procedure 23(a) are met,[131] Rule 23(b) outlines three methods by which a class action may be certified. Of those three, only two have been sought in the TILA-rescission context: 23(b)(2) and 23(b)(3).[132] Plaintiffs seeking a class-wide declaration of rescindability can satisfy the elements of both 23(b)(2) and 23(b)(3) classes. Although courts may be justified in refusing to certify 23(b)(2) classes in certain circumstances depending on the nature of the TILA violation, it is appropriate for courts to certify 23(b)(3) classes for any putative class seeking a declaration of rescindability.

1. Rule 23(b)(2)

Rule 23(b)(2) certification requires that the party opposing certification act or refuse to act on grounds applicable to the class, thereby making appropriate to the class as a whole final injunctive or "corresponding declaratory relief."[133] To be directed at a class, action or inaction need only generally apply to the class; it is sufficient that one or a few members of the class have been affected or threatened.[134] In the context of TILA rescission, therefore, a lender's policy of tendering inadequate TILA disclosures to borrowers need not have adversely affected all members of the class; the policy need not even be opposed by all members of the class. Rather, the legally inadequate TILA disclosures at issue need only to have been

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131. Rule 23(a) sets forth the four prerequisites for class certification, commonly referred to as numerosity, commonality, typicality, and adequacy of representation. FED. R. CIV. P. 23(a). While these elements are often disputed in TILA-rescission cases, the bulk of court analysis turns primarily on the specific requirements of the type of class sought rather than on the 23(a) requirements. Therefore, this Article is limited to the distinction between relevant 23(b) classes.

132. Rule 23(b)(1) classes have likely not been sought in this context because borrowers bringing individual rescission claims would not create a substantial risk of inconsistent adjudications creating incompatible standards of conduct for lenders or impeding the interests of other borrowers with identical disclosure errors. *See* FED. R. CIV. P. 23(b)(1). Because TILA disclosure regulations are objectively framed, a determination that a disclosure does or does not contain a TILA infirmity should not create incompatible standards of conduct. Furthermore, individual rescission actions do not depend upon the success or failure of similar actions brought by other borrowers.

133. FED. R. CIV. P. 23(b)(2).

134. FED. R. CIV. P. 23(b)(2) advisory committee's note.

tendered to the putative class members for the first element to be met.

A 23(b)(2) class requires cohesiveness among its members. This means that all class members must have a uniform interest in the suit and that none of the named class members' situations present a legally relevant factual difference from other class members.[135] Cohesiveness is necessary largely because 23(b)(2) classes, unlike 23(b)(3) classes, do not compel mandatory notice to all individual class members that the action is pending[136] and do not give class members the opportunity to opt out.[137] Instead, the court is given discretion to direct appropriate notice to the class,[138] and all class members are bound by the final judgment. The absence of notice and opt-out requirements in 23(b)(2) classes presents a significant cost advantage for borrowers in difficult financial situations. The time involved in locating every potential class member and the cost of effecting proper notice could deter many plaintiffs from bringing TILA-rescission claims on a class-wide basis. This is especially true for larger classes where notice could be "so expensive and time-consuming as to render valid claims unworthy of pursuit," even for plaintiffs of decent means.[139] However, the trade-off for this cost advantage is that class members must be sufficiently cohesive such that unnamed class members (without notice) bound to the class share a common-enough interest in the suit that a determination in their absence would not jeopardize their legal interests.[140] Cohesiveness also ensures that individual issues do not overwhelm the action and make it unmanageable.[141]

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135. STUART T. ROSSMAN & CHARLES DELBAUM, CONSUMER CLASS ACTIONS § 9.4.2, at 125 (6th ed. 2006).

136. *Compare* FED. R. CIV. P. 23(c)(2)(A) (allowing the court to direct appropriate notice to the class) *with* FED. R. CIV. P. 23(c)(2)(B) (requiring "the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through a reasonable effort").

137. *Compare* FED. R. CIV. P. 23(c)(2)(B)(v) (providing that notice to 23(b)(3) class members must include a statement that the court will exclude any member who requests exclusion) *with* FED. R. CIV. P. 23(c)(2)(A) (containing no comparable provision).

138. FED. R. CIV. P. 23(c)(2)(A).

139. ROSSMAN & DELBAUM, *supra* note 135, § 9.4.1, at 125.

140. Williams v. Empire Funding Corp., 183 F.R.D. 428, 434 (E.D. Pa. 1998) (quoting Barnes v. Am. Tobacco, 161 F.3d 127, 142–44 (3d Cir. 1998).

141. *Id.* (quoting *Barnes*, 161 F.3d at 143).

In the TILA class-action rescission context, cohesiveness exists because the classes each have the same primary issue: whether the documents tendered to borrowers at closing violated TILA. Consequently, the certifying judge need only narrow the class to those borrowers who received the same standard loan forms containing the alleged infirmity. Since Regulation Z requires lenders to keep records of compliance for at least two years,[142] this determination is relatively simple. Because the discovery of a TILA violation is an objective inquiry and the class can be narrowed to those receiving the disclosure at issue, no individual issues will be presented at the class-certification stage.

With respect to the express requirements of 23(b)(2) certification, the purpose of the injunctive or declaratory relief sought must be to "settl[e] the legality of the behavior with respect to the class as a whole."[143] The borrowers seek a declaration that the lender's behavior was illegal and that such behavior entitles each class member to relief. Thus, the necessary purpose of the requested declaratory relief in 23(b)(2) actions is also met in TILA declaration-of-rescindability cases.

A significant difficulty with 23(b)(2) classes in the TILA-rescission context, however, is determining whether the declaration of rescindability plaintiff-borrowers seek is appropriate for 23(b)(2) certification. The Advisory Committee Notes state that "[d]eclaratory relief 'corresponds' to injunctive relief when as a practical matter it affords injunctive relief or serves as a basis for later injunctive relief."[144] Thus, declaratory relief is only appropriate for 23(b)(2) classes in those limited circumstances where it has the effect of granting or laying the foundation for injunctive relief.[145] The rationale for Rule 23(b)(2)'s focus on the injunctive nature of the relief sought is that cohesiveness deteriorates when the class seeks

142. 12 C.F.R. § 226.25.

143. FED. R. CIV. P. 23(b)(2) advisory committee's note.

144. *Id.*

145. The trial-level *Andrews* court appears to have overlooked this distinction when it found that a "declaratory judgment would settle the issue of whether defendant violated TILA and, if so, whether such violation gives rise to the right to rescind." Andrews v. Chevy Chase Bank, FSB, 240 F.R.D. 612, 623–24 (E.D. Wis. 2007), *rev'd*, 545 F.3d 570 (7th Cir. 2008). While this analysis appropriately determines the legality of the lender's behavior with respect to the class as a whole, the court failed to address how the declaratory relief sought corresponded to injunctive relief.

damages requiring individual determinations based on individual injuries.[146] It also protects the interests of those plaintiffs who may want to pursue monetary claims individually rather than being bound to a class-wide rescission judgment on the issue.[147]

Many courts, including the Supreme Court,[148] have stated that plaintiffs may seek either injunctive or declaratory relief under Rule 23(b)(2). Because declaratory relief must correspond to injunctive relief, however, the type of declaratory relief available under the rule depends largely on the effect of the judicial directive.[149] Therefore, a declaration that a lender's practice of tendering inadequate disclosures violates TILA would have the effect of enjoining the lender from tendering those disclosures.[150] On the other hand, if the declaration sought by the class of plaintiffs would simply lay the basis for a future damages award *instead of* injunctive relief, then 23(b)(2) certification would likely be inappropriate.[151]

One strong argument against class certification for a declaration of rescindability under Rule 23(b)(2) is that the declaration sought appears to create a basis for future monetary relief and is thus improper for 23(b)(2) purposes. However, the declaration could also serve as the basis for an injunction against future use of the inadequate disclosures.[152] Before a court may grant a declaration of rescindability to a class of borrowers, it must find that the lender's

146. 1 JOSEPH M. MCLAUGHLIN, MCLAUGHLIN ON CLASS ACTIONS: LAW AND PRACTICE § 5:15, at 5-58 (3d ed. 2006) ("Actions for class-wide injunctive or declaratory relief are intended for (b)(2) certification precisely because they involve uniform group remedies. Such relief may often be awarded without requiring a specific or time-consuming inquiry into the varying circumstances and merits of each class member's individual case.") (quoting McManus v. Fleetwood Enter., Inc., 320 F.3d 545, 553 (5th Cir. 2003)); *see also* Young v. Meyer & Njus, P.A., 183 F.R.D 231, 235 (N.D. Ill. 1998) (certifying a 23(b)(2) class for declaratory relief as well as monetary damages under the Fair Debt Collection Practices Act where the damages flowed directly from the declaratory judgment and were readily calculable on a class-wide basis).

147. MCLAUGHLIN, *supra* note 146, § 5:15 at 5-57 (citing United States v. Murphy, 254 F.3d 511, 572 (4th Cir. 2001)).

148. Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 614 (1997) ("Rule 23(b)(2) permits class actions for declaratory or injunctive relief where 'the party opposing the class has acted or refused to act on grounds generally applicable to the class.'").

149. ROSSMAN & DELBAUM, *supra* note 135, § 9.4.2.4, at 127 (citing 7AA WRIGHT, MILLER & KANE, FEDERAL PRACTICE & PROCEDURE § 1775 (3d ed. 2005)).

150. *Id.*

151. *Id.*

152. *E.g.*, *id.* ("If the requested relief is a declaration . . . that a business practice is unfair or deceptive, the resulting judicial declaratory directive would have the effect of 'enjoining' . . . the commitment of the offending practice.").

practices violate TILA. Such a declaration would thus establish that the lender's disclosures are illegal, which would serve as the basis for future injunctive relief should the lender continue to use the offending disclosures.[153] Although plaintiffs frame the declaration they seek in terms of the remedy that would become available, declaration of rescindability would nevertheless satisfy the 23(b)(2) requirement that any declaratory relief sought afford injunctive relief.

Assuming that plaintiffs can establish that a declaration of rescindability corresponds to injunctive relief, plaintiffs seeking 23(b)(2) certification still face difficulties when damages are also available. The Advisory Committee Notes state that Rule 23(b)(2) classes "do[] not extend to cases in which the appropriate final relief relates exclusively or predominantly to money damages."[154] Courts have generally denied class certification in cases seeking only declaratory relief for claims in which the plaintiff could normally ask for money damages.[155] Courts have rejected these sorts of claims "because it appears that the plaintiff is really attempting to lay the foundation for a later damages action while avoiding the additional requirements of notice and opt-out, which are attendant to a [23](b)(3) class action."[156] As explained in Part V.B.3, *infra*, this is a policy consideration applicable only to cases in which the borrowers seek a declaration of rescindability for a disclosure error unrelated to

153. The declaratory relief sought need not *actually* afford injunctive relief. Recall that the rationale for Rule 23(b)(2)'s injunctive relief requirement is to prevent situations where plaintiffs seek to certify a 23(b)(2) class in order to avoid the added costs of 23(b)(3) certification but doing so would require individualized assessments that would destroy cohesiveness among class members. *See supra* notes 136–41, 145–47 and accompanying text. In light of this purpose, the fact that a declaratory judgment against a defunct lender necessarily could not result in *actual* injunctive relief, for example, should not prevent the class from proceeding where the effect of the declaratory relief would not undermine the cohesiveness of the class. For a discussion of situations where a declaration of rescindability in the TILA context *would* have such an effect, see Part V.B.3, *infra*.

154. FED. R. CIV. P. 23 advisory committee's note. The Fifth Circuit's decision in *Allison v. Citgo Petroleum Corp.*, 151 F.3d 402 (5th Cir. 1998), is the leading authority on determining whether a class seeks predominantly equitable or monetary relief. The court held that monetary relief may not be sought in a 23(b)(2) class action "unless it is incidental to requested injunctive or declaratory relief." *Id.* at 415. The court narrowly construed "incidental" to include only damages flowing "directly from liability to the class *as a whole* on the claims forming the basis of the injunctive or declaratory relief." *Id.*

155. Andrew Bradt, *"Much to Gain and Nothing to Lose": Implications of the History of the Declaratory Judgment for the (b)(2) Class Action*, 58 ARK. L. REV. 767, 805 (2006).

156. *Id.*

the disclosure of the right to rescind (because damages are an available remedy for failure to disclose the right to rescind). The simple response to this difficulty is that plaintiff classes seeking a declaration of rescindability for disclosure errors unrelated to the right to rescind should be precluded from 23(b)(2) certification.[157] This is because damages awardable to plaintiffs redressing injuries emanating from TILA-disclosure violations do not flow directly from the declaratory relief sought.[158]

2. Rule 23(b)(3)

While 23(b)(2) classes should be certifiable for a declaration of rescindability, certain circumstances and potential interpretive problems may make 23(b)(3) classes a more appropriate vehicle for class certification in the TILA-rescission context. Rule 23(b)(3) class actions require that "questions of law or fact common to class members predominate over any question affecting only individual members" and that a class action be "superior to other available methods for fairly and efficiently adjudicating the controversy."[159] These requirements are commonly referred to as predominance and superiority, respectively.

Certification of 23(b)(3) classes for a declaration of rescindability typically turns on the predominance requirement.[160] TILA violations are objectively determined based on the representations contained in the relevant disclosure.[161] Therefore, the issue is not whether each individual plaintiff understood his or her loan document, but whether the standardized loan document provided to all class members contained the same facially apparent TILA infirmity.

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157. For further discussion on this point, see Part V.B.3, *infra*.

158. *See supra* note 146.

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

160. *See* Jefferson v. Sec. Pac. Fin. Servs., Inc., 161 F.R.D. 63, 68 (N.D. Ill. 1995) (denying certification of a 23(b)(3) class for failure to meet 23(b)(3)'s predominance requirement because TILA rescission is a personal remedy requiring a creditor to act on a consumer's notice of rescission before a claim can be filed in court); Rodrigues v. Members Mortg. Co., Inc., 226 F.R.D. 147, 152 (D. Mass. 2005) (certifying a 23(b)(3) class but noting that the real class-certification dispute concerned predominance).

161. *E.g.*, Zamarippa v. Cy's Car Sales, Inc., 674 F.2d 877, 879 (11th Cir. 1982) ("An objective standard is used to determine violations of the TILA, based on the representations contained in the relevant disclosure documents; it is unnecessary to inquire as to the subjective deception or misunderstanding of particular consumers.").

Efficiency is the primary focus in determining whether a proposed 23(b)(3) class meets the superiority requirement. The court must determine the best available method for resolving the controversy consistent with principles of judicial integrity, convenience, and economy. The Seventh Circuit *Andrews* court maintained that declarations of rescindability would undermine judicial economy because they necessarily open the door to individual remedy-stage proceedings for consumers seeking to rescind.[162] This, however, overlooks the benefits of efficiency that a declaration of rescindability would actually provide.

The determination of whether a disclosure contains a TILA violation can be fact intensive. If every borrower who received the same erroneous loan document had to bring suit individually, courts would have to repeatedly review that document each time the lender contested the alleged violation. This would create a substantial risk of inconsistent judgments, would be far less efficient than a single suit designed to determine whether a lender had violated TILA, and would likely encourage the parties to resolve the dispute efficiently via settlement.

3. Appropriateness of 23(b)(2) and 23(b)(3) Class Certification

As shown, plaintiffs seeking a class-wide declaration of rescindability generally satisfy the required elements for both 23(b)(2) and 23(b)(3) class certification. However, the specific nature of the TILA violation at issue may render one of these class-certification standards more appropriate than the other.

Recall that TILA rescission may be granted either where a lender fails to provide a borrower with clear notice of the three-day

162. Andrews v. Chevy Chase Bank, 545 F.3d 570, 574 (7th Cir. 2008) ("[A] host of individual proceedings would almost certainly follow in the wake of the certification of a class whose loan transactions are referable to rescission. . . . In short, the rescission remedy prescribed by TILA is procedurally and substantively incompatible with the class-action device."); *see also* McKenna v. First Horizon Home Loan Corp., 475 F.3d 418, 427 (1st Cir. 2007) ("[A]bsent class members would have the same right to seek rescission after a declaratory judgment was rendered as they had previously. Thus, should the need arise for an absent class member to resort to the courts for enforcement of his or her right to rescind, the declaratory judgment would serve that end no more effectively than would a non-class-action suit brought by named plaintiffs alleging identical TILA violations. So viewed, a class declaratory judgment would work against judicial economy and disserve efficiency concerns."). *Andrews* did not address the Rule 23(b)(3) superiority context, but the court's argument regarding declarations of rescindability implicates the same policy concerns.

right to rescind or where a lender tenders an inaccurate disclosure (beyond tolerances) of material loan terms.[163] TILA's rescission provision only allows damages as an additional remedy in a TILA-rescission action where the lender has made a faulty disclosure *unrelated to the borrower's right to rescind.*[164] Therefore, borrowers could seek 23(b)(2) certification as a means of foregoing the added costs of 23(b)(3) certification in these cases. Accordingly, courts are likely justified in refusing to certify a 23(b)(2) class for plaintiffs seeking a class-wide declaration of rescindability for TILA-disclosure infirmities related to the underlying terms of the borrowers' loans.[165] In situations where 23(b)(2) class certification is inappropriate, however, 23(b)(3) class certification would nevertheless be available. Moreover, because the 23(b)(3) elements are met, courts would not be justified in refusing 23(b)(3) certification under any circumstances, regardless of the nature of the TILA violation.

Another viable class-certification mechanism available to courts is hybrid certification. Hybrid certification is a recognized and innovative solution for plaintiffs seeking 23(b)(2) certification where damages are also available. Hybrid certification means that a court certifies a class for equitable relief as a 23(b)(2) class, and the class later seeks separate certification under 23(b)(3) for damages.[166] This

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163. *See supra* Part II.B.

164. 15 U.S.C. § 1635(g) (2006) ("In any action in which it is determined that a creditor has violated this section, in addition to rescission the court may award relief under section 1640 . . . for violations . . . not relating to the right to rescind.").

165. Some plaintiffs in TILA declaration-of-rescindability cases apparently already have recognized this concern—the majority of cases seeking 23(b)(2) rescission concern an obscured right to rescind. *See In re* Ameriquest Mortg. Co. Mortg. Lending Practices Litig., No. 05-CV-7097, 2007 WL 1202544 (N.D. Ill. Apr. 23, 2007); Gibbons v. Interbank Funding Grp., 208 F.R.D. 278 (N.D. Cal. 2002); Williams v. Empire Funding Corp., 183 F.R.D. 428 (E.D. Pa. 1998). *But see* Andrews v. Chevy Chase Bank, FSB, 240 F.R.D. 612 (E.D. Wis. 2007), *rev'd*, 545 F.3d 570 (7th Cir. 2008) (seeking 23(b)(2) certification for misleading loan terms); LaLiberte v. Pac. Mercantile Bank, 53 Cal. Rptr. 3d 745, 746 (Ct. App. 2007) (seeking 23(b)(2) certification for failure to disclose a $450 closing fee). The majority of cases seeking 23(b)(3) certification, on the other hand, almost entirely have been cases where the lender incorrectly disclosed material terms relating to the cost of the loan. *See* Murray v. Am.'s Mortg. Banc, Inc., Nos. 03 C 5811, 03 C 6186, 2005 WL 1323364 (N.D. Ill. May 5, 2005); McIntosh v. Irwin Union Bank & Trust Co., 215 F.R.D. 26 (D. Mass. 2003); Jefferson v. Sec. Pac. Fin. Servs., Inc., 161 F.R.D. 63 (N.D. Ill. 1995); Hickey v. Great W. Mortg. Corp., 158 F.R.D. 603 (N.D. Ill. 1994). *But see* McKenna v. First Horizon Home Loan Corp., 429 F. Supp. 2d 291 (D. Mass. 2006), *rev'd*, 475 F.3d 418 (1st Cir. 2007) (seeking 23(b)(3) for receipt of a misleading right to cancel); Rodrigues v. Members Mortg. Co., Inc., 226 F.R.D. 147 (D. Mass. 2005) (same).

166. ROSSMAN & DELBAUM, *supra* note 135, § 9.4.4.3, at 132.

approach has the advantage of deferring the added costs of 23(b)(3) actions until a liability determination has been made, thereby making otherwise cost-prohibitive 23(b)(3) actions more feasible.[167] Under this model, borrowers affected by inadequate TILA disclosures of any sort could pursue equitable relief both as a tool for enjoining the lender's continued use of the forms and as a preliminary determination of liability. While damages could later be sought by those plaintiffs with disclosure violations unrelated to the right to rescind, the 23(b)(2) declaration's sole purpose is not to lay the basis for future relief. Instead, any future damages actions could be seen as incidental actions that plaintiffs could bring if they were both entitled to damages and had not surpassed the one-year statute of limitations.

In sum, plaintiffs seeking a declaration of rescindability for lender-disclosure errors generally meet all of the requisite procedural requirements for bringing a class-action suit in federal court. When lenders fail to disclose the information statutorily required by TILA, they cause an injury in fact for which the borrowers may seek redress. Borrowers generally fulfill the class certification requirements of both Rules 23(b)(2) and 23(b)(3). The extent of court discretion in refusing to certify such classes should properly be limited to whether the plaintiff class has sought the appropriate Rule 23 class certification for the specific type of TILA-disclosure error the class seeks to redress.

CONCLUSION

TILA class actions for a declaration of rescindability may—and should—be certified as long as the procedural prerequisites are met. If class-wide declarations of rescindability become unworkable or invite rampant abuse, the separation of powers doctrine dictates that Congress, not the judiciary, has the duty to address any perceived flaws in TILA's statutory language. Court involvement in TILA class actions should properly be limited to monitoring class certification to ensure that plaintiff-borrowers have standing and meet the proper Rule 23 class-certification requirements. Courts may acknowledge any statutory ambiguities, but must interpret TILA consistent with its language and, if necessary, legislative history and intent. Courts should not, however, entirely preclude the class-action device for

167. *Id.*

TILA-rescission actions based on an overly broad and largely unjustified concern for lender resources, especially when the plain language of the statute, legislative history, and legislative intent are consistent with allowing TILA class actions for a declaration of rescindability.