
**IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT**

SUSAN and BRYAN ANDREWS and)	
a class of persons similarly situated,)	Appeal from the
)	United States District
Plaintiffs-Appellees,)	Court for the Eastern
)	District of Wisconsin
v.)	
)	No. 05-C-0454-LA
CHEVY CHASE BANK, F.S.B.)	
)	Hon. Lynn Adelman
Defendant-Appellant.)	

**REPLY BRIEF FOR DEFENDANT-APPELLANT
CHEVY CHASE BANK, F.S.B.**

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INTRODUCTION

Chevy Chase's opening brief established that 15 U.S.C. § 1635, a provision that gives an individual borrower three days to rescind a mortgage, does not allow a court to authorize an entire class of borrowers to rescind their mortgages and receive a windfall benefit of interest-free loans for up to three years, thereby imposing far greater harm on a single lender than TILA allows in a damages class action. The text, history, and purpose of TILA all support that conclusion, and the only two federal courts of appeals to address this issue have so held. In addition, we showed that, even aside from the issue of authorization under TILA, a TILA rescission class action would not comply with the requirements of Rule 23.

As demonstrated below, plaintiffs' response (as well as the brief of their amici) does violence to the TILA text, distorts the statute's history and purpose, and effectively admits that the ruling below simply ushers in a new round of individual judicial proceedings that cannot be reconciled with the class action mechanism.¹

¹ Plaintiffs also launch unwarranted rhetorical accusations that have no bearing on the propriety of class certification. *E.g.*, Pl. Br. 54 & n.17. Chevy Chase will refute such charges at the proper time, *i.e.*, on any appeal from the district court's summary judgment ruling. Plaintiffs (at 2 n.1) further assert that Chevy Chase's Rule 26.1 Statement is inaccurate. Plaintiffs are incorrect. Chevy Chase has no parent corporation (notwithstanding the technical designation of some of its shareholders as "thrift holding companies"), and no
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ARGUMENT

A. Plaintiffs' Response Cannot Be Reconciled With The Statutory Text.

Plaintiffs are wrong when they contend (at 22-23) that Chevy Chase “seeks to insert” an express bar on rescission class actions into TILA. As explained in our opening brief (at 18-22), the TILA text and structure establish that damages for a TILA violation are available on a class-wide basis (subject to a strict cap) and that rescission is available only on an individual basis.

1. Plaintiffs respond (at 24-25) with a distorted reading of the statutory text. They contend that, pursuant to sections 1635(g) and 1640(a)(3), rescission is available “in any action” and therefore must be available in class actions. But the meaning of a statute cannot be ascertained by plucking phrases out of their statutory context. One need but read the referenced provisions to see that they do not mean what plaintiffs say.

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publicly held company owns 10% or more of its stock. Plaintiffs' reference to B. F. Saul Real Estate Investment Trust as “publicly traded under the name ‘Saul Centers,’ and the symbol ‘BFS,’” is wrong. Saul Centers, Inc. is a totally different entity from B.F. Saul Real Estate Investment Trust, and, although it is an affiliate of Chevy Chase, Saul Centers holds no ownership interest, directly or indirectly, in Chevy Chase. For avoidance of doubt, we note that although B.F. Saul Real Estate Investment Trust, which owns 80% of Chevy Chase's common stock, is not a corporation and is privately held, it does have publicly held debt.

Section 1635(g) states:

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 of this title for violations of this subchapter not relating to the right to rescind.

This provision says nothing about the availability of rescission class actions. It plainly says that an award of rescission under section 1635 does not preclude an award of damages pursuant to section 1640 if there are underlying disclosure violations. That plain meaning makes perfect sense because, as plaintiffs themselves point out (at 41-42), section 1635(g) was added in response to contentions that damages for disclosure violations could not be awarded if the consumer had rescinded the underlying transaction on which that liability was based. Plaintiffs' attempt to transform that simple proposition into an express authorization for rescission class actions is baseless.

Plaintiffs' reliance on section 1640(a)(3) is equally unavailing. It provides that the relief to which a prevailing TILA plaintiff is entitled includes

in the case of any successful action to enforce the foregoing liability or in any action in which a person is determined to have a right of rescission under section 1635 of this title, the costs of the action, together with a reasonable attorney's fee as determined by the court.

Again, the phrase "in any action" says nothing about the availability of rescission class actions. The clause in which that phrase appears

provides only that “in any action” in which there is a right to rescission, a prevailing plaintiff is entitled to costs and attorney fees. Plaintiffs have to turn that clause inside-out to read it to provide a right to rescission “in any action,” including class actions.

It is not surprising, then, that no court addressing the propriety of rescission class actions under TILA has relied on the “in any action” language in either section 1635(g) or section 1640(a)(3). Although plaintiffs (at 41) cite the district court opinion in support of their “in any action” argument, the district court opinion does not even mention that phrase. Plaintiffs (at 41-42) then claim support from the TRUTH IN LENDING treatise, based on a block quote that neither mentions “in any action” nor says anything about class actions. In fact, as noted in our opening brief, that treatise maintains that TILA “does not contemplate rescission as a class remedy.” Ralph J. Rohner & Fred H. Miller, TRUTH IN LENDING ¶ 12.08[5], at 881 (2000). Plaintiffs’ primary argument is therefore unprecedented as well as contrary to the plain meaning of the provisions on which they rely.

2. Plaintiffs’ additional contentions (at 19, 25) that “[t]he primary relief in TILA is rescission” and that the damages provisions in § 1640 offer merely “additional relief” are both unsupported and irrelevant to the issue before this Court. Congress entitled section 1635(g) “Additional relief” simply to make clear that rescission is not the

exclusive relief for a violation of the underlying disclosure requirements of TILA. That sensible provision says nothing that would authorize rescission class actions.

3. The provision of section 1640 that *does* refer to class actions is subsection (a)(2)(B). As explained in our opening brief (at 18-19), the fact that no such reference appears in section 1635 supports the conclusion that TILA does not make rescission available on a class-wide basis. See also *McKenna v. First Horizon Home Loan Corp.*, 475 F.3d 418, 423 (1st Cir. 2007). Plaintiffs simply disregard that striking difference between section 1640 and section 1635.

B. Plaintiffs' Response Cannot Be Reconciled With The History And Purpose Of TILA Sections 1635 And 1640.

Plaintiffs (at 40) misconstrue the purpose of Chevy Chase's references to legislative history. They were not intended to "rewrite" TILA or engage in "imaginative reconstruction." Rather, they show that the history of the relevant TILA provisions confirms the purpose expressed by the TILA text — to both encourage lenders to make material disclosures to consumers and prevent them from incurring intolerable levels of liability for violating TILA's highly technical requirements.

1. Plaintiffs recognize (at 25) that Congress narrowed the scope of potential lender liability by placing "limiting language" in section 1640 with respect to damages class actions. Yet they insist that Congress

blithely left lenders open to potentially much greater liability from rescission class actions. They try to justify that bizarre conclusion by observing (at 37-38) that section 1640(a) specifies “the resources of the creditor” as a relevant factor in determining the amount of damages to be awarded in a damages class action and that no similar language appears in section 1635. But that difference simply highlights the fact that class actions are referenced only in section 1640 and not in section 1635. It also supports the view of the First Circuit in *McKenna* and other courts that Congress never contemplated rescission class actions and thus had no need to address “the resources of the creditor” in section 1635. Again, it defies credulity to postulate, as plaintiffs do, that if Congress had contemplated rescission class actions, it would have mandated consideration of a creditor’s “financial resources” in a damages class action, but not in a rescission class action which could result in even more devastating liability. See Def. Br. 28.

2. Plaintiffs are wrong to charge (at 36) that Chevy Chase raised its “substantial harm” argument for “the first time on appeal.” Chevy Chase expressly raised that argument in its district court brief opposing class certification. See R.44 at 25 (calling a rescission class action “disproportionate and unjustifiably punitive”). Plaintiffs also claim (at 38-39) that this argument is but a “sideshow” because there is “no record of harm to the Defendant or the industry.” Plaintiffs misunderstand our

argument, which is not based on harm to a particular lender from a particular lawsuit. Rather, the argument is that allowing rescission class actions, which would require lenders to return vast amounts of interest, finance charges, and other fees to a large class of borrowers at one fell swoop, would be wholly inconsistent with Congress's repeated efforts to limit liability for TILA violations. Although plaintiffs suggest (at 39) that the projected harm to the industry from rescission class actions is "overblown," they posit that the lender's liability in this case alone would be some \$210 million. That may not be "billions," as plaintiffs observe (*id.* at n.13), but it would not take many such cases to make "billions" a disturbing reality.²

3. Plaintiffs contend (at 44) that "[i]f Congress had wanted to ban class actions in the rescission context, it could have." But that would be true only if Congress thought that rescission class actions were available in the first place. Despite the extensive legislative record underlying the numerous amendments to TILA over the years, neither plaintiffs nor their amici offer any evidence of Congressional intent to authorize class action rescission.³

² That harm inevitably would extend to consumers as well in the form of higher rates or contracted credit. See Brief of Financial Services Amici, at 8-9.

³ Plaintiffs (at 47 n.14) contrast TILA with what they label the "ban [on] class action lawsuits" addressed in *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533 (2001). In fact, that case involved only the First Amendment
(cont'd)

In particular, plaintiffs offer no support for their assertion (at 42) that Congress's failure to ban rescission class actions in the wake of the *Rodash* case demonstrates Congressional authorization of such actions. None of plaintiffs' extensive quotes from the legislative history (at 43-45) even addresses the issue of class-wide rescission. Rather, they simply acknowledge that Congress preserved the basic underlying individual right to rescind and rejected proposed amendments that would have eliminated that right for a broader range of loans. See, *e.g.*, H.R. 1858 § 107 (1995) (expanding statutory exemptions from the right to rescind to include non-cash-out refinancings of purchase money mortgage loans), available at <http://thomas.loc.gov/cgi-bin/query/z?c104:H.R.1858.IH:>.

Furthermore, Congress temporarily suspended a broad range of TILA class actions based on the types of claims at issue, without any suggestion that rescission class actions were in fact available. None of the numerous bills introduced to amend TILA during the moratorium proposed barring rescission class actions, a fact that further refutes

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constitutionality of barring class action filings by Legal Services Corporation grantees. See *id.* at 537-38.

plaintiffs' suggestion (at 41) that Congress considered and rejected a ban on rescission class actions.⁴

4. Plaintiffs argue (at 34) that all civil actions must be subject to class certification under Rule 23. They rely on an inapplicable case, *Califano v. Yamasaki*, 442 U.S. 682, 700 (1979). As the First Circuit explained in *McKenna*, 475 F.3d at 425, *Califano* addresses a right to judicial review of administrative action under a jurisdictional statute and thus is inapposite to the question of rescission class actions under TILA. More fundamentally, plaintiffs fail to recognize the unique nature of TILA rescission and its inherent incompatibility with class treatment. As numerous courts have recognized and as explained at length in our opening brief (at 34-38), the TILA rescission process is highly individualized, requiring individual notice by the borrower to the creditor and a response by the creditor with respect to that borrower that often requires equitable tailoring by a court.

⁴ Plaintiffs' recitation of the legislative history is replete with errors. For example, they state (at 42) that "Rep. McCollum introduced H.R. 1858 to radically overhaul TILA and prevent class actions, requiring, among other things, proof of individual reliance to make TILA rescission claims." In fact, H.R. 1858 was introduced by House Banking Committee Chairman Leach and, more importantly, the addition of an explicit requirement to prove individual reliance applied to *damages*, not rescission claims. See *id.* at § 112. Plaintiffs (at 42) and their amici (at 7) also cite the *Congressional Quarterly* of April 9, 1995 in support of their legislative history argument. In fact, April 9, 1995 was a Sunday, and no *Congressional Quarterly* was issued that day. We have located nothing in any other issue published during that period that would support plaintiffs' contention that Congress considered and rejected a ban on rescission class actions.

5. The unique character of TILA rescission, which makes it fundamentally ill-suited for class-wide relief, is underscored by the fact that it was not designed to serve as a remedy for TILA violations. Section 1635 simply gives the borrower a three-day window in which to reconsider and back out of a mortgage. To address any failure by the lender to notify the borrower of that right or to provide the disclosures necessary for an informed decision, Congress specified that the three-day rescission period would not be triggered until the lender satisfies those requirements (subject to a three-year maximum). 15 U.S.C. § 1635(a), (f). Of course, as the trigger date is extended, the amount of interest the lender will have to refund increases. But the fact remains that a window of opportunity to reconsider a mortgage is very different from a typical remedy, such as damages or an injunction, which immediately redresses a legal wrong and thus may be easily applied to a class of similarly situated individuals. The unique nature of TILA rescission helps explain why so many courts have concluded that it does not fit into the Rule 23 paradigm.

C. Plaintiffs Offer No Valid Basis For Rejecting The Conclusions Of The First And Fifth Circuits.

Plaintiffs ask this Court to create a circuit split by following those district courts that have reached conclusions different from those of the First and Fifth Circuits. Pl. Br. 28. They even rely (*id.* n.7) on district

court cases from the First Circuit that are no longer good law in light of *McKenna*. But they offer no viable reason to depart from the holdings of the First and Fifth Circuits.

1. Plaintiffs (at 30) attempt to distinguish *James v. Home Constr. Co.*, 621 F.2d 727 (5th Cir. 1980), on the ground that “[t]he plaintiff in *James* sought to impose actual rescission upon the whole class rather than declaratory relief.” Plaintiffs concoct that distinction out of whole cloth — there is not a word in the *James* opinion that indicates whether the plaintiff sought a declaration or an imposition of rescission. (The same is true of the district court opinion in *James*. See 458 F. Supp. 54 (S.D. Ala. 1978).)

Plaintiffs also contend (at 29-31) that subsequent amendments to TILA during the 1980s, which made rescission, costs, and attorneys’ fees available “in any action,” superseded the *James* holding. That proposition rests on the same misreading of “in any action” explained in Part A, *supra*. Moreover, if plaintiffs were correct about the impact of those amendments, then TILA presumably would have barred rescission class actions *prior* to their adoption. Yet, Congress never so much as hinted that it intended those amendments to initiate a new era of rescission class actions, and neither has any court or commentator.

Finally, plaintiffs contend that the Fifth Circuit limited *James* a few short months after issuing that opinion. According to plaintiffs (at 31),

the Fifth Circuit recognized in *Tower v. Moss*, 625 F.2d 1161 (5th Cir. 1980), that “private enforcement of individual rescission rights was appropriate in a class action.” That is a grossly misleading summary of *Tower*. *Tower* did not address the propriety of the class that had been certified before the case was settled. Furthermore, *Tower* does not even mention rescission pursuant to section 1635. Rather, the issue in *Tower* was whether an individual class member’s claim under the settlement had been properly denied on the ground that she was not a member of the class because her transaction was a business rather than a consumer transaction. It is true that the settlement gave class members the option of recovering damages according to an agreed-upon formula or rescinding their mortgages under agreed-upon terms. *Id.* at 1163. The class member whose claim had been denied had opted for the rescission alternative. *Id.* at 1166. But there is absolutely no discussion in the opinion of the question whether a court may award TILA rescission to a class. Thus, it is hardly surprising that the *Tower* court did not even refer to the *James* holding that rescission is a personal remedy not available on a class-wide basis. Plaintiffs cannot overcome *James* by reference to this plainly inapplicable case.

2. As for *McKenna*, plaintiffs (at 35, 47) disparage the First Circuit’s comprehensive opinion as an exercise in “frustration,” claim that the First Circuit deferred to industry amici rather than engage in its

own analysis, and demeaningly reduce the opinion to a ruling that “there are too many remedies in TILA.” In fact, the First Circuit held that “Congress did not intend rescission suits to receive class-action treatment” and explained that holding at length based on the text, history, and purpose of the relevant TILA provisions. *McKenna*, 475 F.3d at 423.

Plaintiffs also claim (at 35-36) that *McKenna* “guts the primary relief afforded by TILA” by not following plaintiffs’ misreading of TILA’s references to “any action” and “additional relief.” As noted above, no court — not even any of the district courts authorizing rescission class actions — has relied on that plainly inapplicable language.

3. Plaintiffs further attempt (at 20-21) to find support for their position from class action cases where the plaintiffs sought only damages and the courts therefore did not address rescission. See *Haynes v. Logan Furniture Mart, Inc.*, 503 F.2d 1161, 1162 (7th Cir. 1974) (“This is an action for damages”); *Wilcox v. Commerce Bank*, 474 F.2d 336, 340 (10th Cir. 1973) (plaintiffs “sought damages”); *Goldman v. First Nat’l Bank*, 532 F.2d 10, 16 (7th Cir. 1976) (discussing plaintiffs’ proposed damages). These cases have no bearing on the question presented here — whether a court may certify a class to seek rescission.

4. Plaintiffs next invent support from the Federal Reserve Board, contending (at 46) that “the Federal Reserve declined to pursue a ban on

TILA class actions for rescission.” But the document they cite for that proposition does not even *mention* rescission class actions, let alone express an opinion on that subject. See Board of Governors of the Federal Reserve System, REPORT TO THE CONGRESS: FINANCE CHARGES FOR CONSUMER CREDIT UNDER THE TRUTH IN LENDING ACT 12-14 (Apr. 1996). That report addressed rescission only with respect to whether abusive refinancing practices were preventing borrowers from exercising their right to rescission, concluding that the existing statutory and regulatory structure was sufficient to protect against any abuses. *Ibid.* The long block quote from the Board’s 1995 Annual Report in plaintiffs’ brief (at 45-46) is simply a summary of the 1995 amendments and similarly expresses no view on the availability of rescission class actions.

5. Finally, plaintiffs (at 52) look to the very different statutory scheme governing securities claims. They cite *J.I. Case Co. v. Borak*, 377 U.S. 426 (1964), which was not a class action and which set forth an analysis of implied remedies that the Supreme Court subsequently rejected in *Alexander v. Sandoval*, 532 U.S. 275, 287 (2001). They also cite three securities law decisions, *Tcherepnin v. Franz*, 461 F.2d 544 (7th Cir. 1972), *Tcherepnin v. Knight*, 389 U.S. 332 (1967), and *In re MetLife Demutualization Litig.*, 156 F. Supp. 2d 254 (E.D.N.Y. 2001), none of which addresses the propriety of rescission class actions. In any event, rescission in the securities context, which involves a mere return of

purchased securities at a uniformly calculated price (see 15 U.S.C. § 77l(a)(2)), is not comparable to the necessarily individualized multi-step rescission process that Congress created specifically for TILA.

D. Plaintiffs Have Not Met Their Burden To Show That The Certified Class Complies With The Requirements Of Rule 23.

As explained in our opening brief (at 29-42), regardless of whether Congress intended class-wide rescission to be available under TILA, the class certified by the district court does not satisfy the requirements of Rule 23 for a variety of reasons. Plaintiffs offer little in response.⁵

1. Plaintiffs first contend (at 1-2) that this court lacks jurisdiction to address Rule 23 issues because those issues were supposedly not encompassed within Chevy Chase's Rule 23(f) Petition. In fact, Chevy Chase's Rule 23 argument answers the very question raised in the Petition — whether the district court erred by certifying a class to seek rescission under TILA. Chevy Chase contends both that TILA bars class-wide rescission and that the rescission class certified by the district court does not comply with the requirements of Rule 23. Plaintiffs'

⁵ Plaintiffs (at 56-57) ask this Court to order broader relief than the district court ordered, namely, certification of a class to recover statutory damages. Plaintiffs waived that request by failing to file a cross-appeal. "When an appellee wants additional relief beyond what the trial court gave him * * * he must cross-appeal." *Doll v. Brown*, 75 F.3d 1200, 1207 (7th Cir. 1996); accord *Illinois Sch. Dist. Agency v. Pacific Ins. Co.*, 471 F.3d 714, 722 (7th Cir. 2006). Furthermore, plaintiffs' request challenges the district court's summary judgment ruling that plaintiffs are ineligible for statutory damages (A14), a ruling that is not the subject of this appeal.

reliance on *In re Household Int'l Tax Reduction Plan*, 441 F.3d 500 (7th Cir. 2006), is misplaced. That opinion does not address appellate jurisdiction but rather explains why the Court considered only one of the issues raised in an ERISA plan's Rule 23(f) petition. The Court noted that only that issue met this Court's criteria for granting Rule 23(f) petitions "and so it's the only issue we shall resolve." *Id.* at 501. Here, in contrast, Chevy Chase asks the Court to resolve the question presented in the Petition on either of two applicable grounds.

2. As we demonstrated (Def. Br. 30-32), the district court erred by certifying this class under Rule 23(b)(2). Plaintiffs offer no response to our showing that the declaratory relief awarded by the district court is neither injunctive in nature nor final, as Rule 23(b)(2) requires. Plaintiffs' citation of *Allen v. International Truck & Engine Corp.*, 358 F.3d 469 (7th Cir. 2004), does not get them past those requirements. The Court in *Allen* approved a (b)(2) class on discrimination claims seeking *final injunctive* relief (*id.* at 470), precisely what Rule 23(b)(2) calls for. There was no issue involving a declaration of a class-wide right to rescind. A final injunction prohibiting discrimination against a class of employees is obviously suited to a (b)(2) class action; a declaration that merely *invites* a process of individual rescission actions in different courts is not.

3. Nor are plaintiffs able to refute our showing (Def. Br. 21-22) that declaratory relief is not available even to an individual TILA plaintiff,

much less an entire class. Plaintiffs claim (at 48) that TILA §§ 1635(g) and 1640(a)(3) are “controlling authority” for their contention that TILA authorizes declaratory relief. But neither provision says a word about declaratory relief, addressing only rescission and damages, respectively.

Plaintiffs (at 51) claim that Chevy Chase “overstates and bends” the cases holding that the analogous FDCP and FCRA statutes do not authorize declaratory relief. See Def. Br. 21-22. Plaintiffs do not elaborate other than to assert that there is not “unanimity” on this point. But any lack of unanimity among district courts would not overcome this Court’s ruling in *Crawford v. Equifax Payment Servs., Inc.*, 201 F.3d 877, 882 (7th Cir. 2000), that “all private actions under the Fair Debt Collection Practices Act are for damages.”

Moreover, the authorities cited by plaintiffs (at 48) do not support their view that TILA authorizes declaratory relief. The only declaration sought by the plaintiffs in *In re Consolidated Non-Filing Ins. Fee Litig.*, 195 F.R.D. 684, 695 (M.D. Ala. 2000), who also requested an injunction and damages, was that the defendant had violated TILA “in the past.” There was no issue involving a declaration of a right to seek relief in the future, as in this case, much less rescissionary relief. Plaintiffs’ citation of *Welmaker v. W.T. Grant Co.*, 365 F. Supp. 531, 554 (N.D. Ga. 1972), is baffling. The court in that case did not issue (or even discuss) any declaratory relief. Rather, it issued an injunction and proceeded to *deny*

the plaintiffs' request to certify a class. Finally, none of the cases cited in National Consumer Law Center, TRUTH IN LENDING § 8.4 (5th ed. 2003), involved declaratory relief.

4. Plaintiffs disregard our showing (Def. Br. 33) that their proposed class, if subject to Rule 23 at all, would have to meet the requirements of Rule 23(b)(3) and that it could not satisfy the predominance and superiority requirements of that provision.

We offered numerous examples of the many and varied types of individualized judicial proceedings that would result if the district court's certification order were upheld. Def. Br. 34-37. These examples are not fanciful, as the case citations we provided show. Yet plaintiffs do not even mention them, much less refute their import. At bottom, plaintiffs do not contest our showing that a host of individual proceedings in a variety of courts would follow inexorably from the district court's ruling. Nor do they deny that a variety of state laws would come into play in these proceedings, an additional reason why a grant of a right to rescind to this nationwide class is inappropriate. See Def. Br. 37 n.6; *Cole v. General Motors Corp.*, __ F.3d __, 2007 WL 1054697, at *8 (5th Cir. Apr. 10, 2007) (predominance requirement not satisfied due to "variations in state law").

5. Plaintiffs also offer no evidence that their proposed class satisfies the superiority requirement of Rule 23(b)(3). They do not show

how a declaration giving rise to hundreds if not thousands of individual rescission actions can be consistent with the Rule's concern about "the difficulties [in] the management of a class action." Fed. R. Civ. P. 23(b)(3). Although plaintiffs (at 53) invoke "efficiency," they acknowledge (at 32) that the district court — *after* its declaration — still must "establish individual rescission procedures that will meet the needs of individual class members, while at the same time assist Defendant in recovering loan principal without an immediate loss of security interest." Plaintiffs thereby admit that the district court's declaration has opened up a new wave of individual court proceedings. And because the putative class members reside throughout the country, those proceedings will likely take place in many different courts. This is a recipe for chaos, not efficiency.

6. Plaintiffs contend (at 53) that "[b]anning class actions will prevent many people from asserting their rights," opining without support (at 50) that "[t]he task of suing a bank in federal court is beyond the means of most borrowers." But plaintiffs offer no response to our showing (Def. Br. 40-41) that a typical prevailing borrower can expect to receive over \$57,000 in an individual rescission action, plus attorneys' fees and costs. Nor do they challenge our showing (*id.* at 41) that many borrowers do bring individual rescission actions. There is no need to

resort to class actions when the incentives to bring individual actions are so substantial.

7. Plaintiffs do not deny that not a single one of the thousands of absent class members has ever suggested that the alleged TILA violations affected their decision to enter into the mortgage or notified Chevy Chase of a desire to rescind. See Def. Br. 31-32. Plaintiffs nevertheless insist (at 51-52) that there is a “case and controversy” involving these absent class members because “TILA was violated for all class members so clearly.” Notwithstanding any purported violation, however, there is no case or controversy over a right to rescind on the part of borrowers who have never expressed any interest in rescinding. Indeed, plaintiffs acknowledge (at 39) that “many class members might decline rescission because market rates have risen.” In these circumstances, it was inappropriate for the court below to issue what amounts to an advisory opinion inviting all such borrowers to recoup all the interest, finance charges, and fees that each has paid without objection over the term of their mortgage. As explained above, the “efficiency” of such an advisory opinion is illusory. But even if it were “efficient” to hand absent class members this windfall, Rule 23 should not be misappropriated for such purposes. As the Supreme Court has cautioned, “convenience and efficiency” do not override the requirements of Article III. *Raines v. Byrd*, 521 U.S. 811, 820 (1997).

* * * * *

Plaintiffs seek an unwarranted windfall for thousands of putative class members, none of whom has sought to rescind his or her mortgage. If the class-wide rescission plaintiffs seek were granted, each of those heretofore uncomplaining borrowers, who have made their monthly mortgage payments for years, suddenly would be invited to demand reimbursement of all the interest and charges they willingly paid for up to three years and effectively obtain a free loan for that entire period. To prevent such an unintended and inappropriate result, this court should join its sister circuits in holding that borrowers seeking TILA rescission must assert their own claims and reject the notion that a court may award the right to pursue the inherently individual rescission process on a class-wide basis.

CONCLUSION

The district court's order certifying a class should be reversed.

Dated: May 17, 2007

Respectfully submitted.

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C), the undersigned hereby certifies that the foregoing reply brief of appellant Chevy Chase Bank:

(i) complies with the type-volume limitation in Fed. R. App. P. 32(a)(7)(B)(i) because it contains 5,019 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii); and

(ii) complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 97-2002 in 13-point Bookman.

One of appellant's attorneys

Dated: May 17, 2007

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that on May 17, 2007 he caused two copies of the foregoing Reply Brief for Plaintiff-Appellant Chevy Chase Bank, F.S.B. to be served by UPS overnight delivery, and a digital version of that brief to be served by e-mail, on the following:

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