
**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.)	

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

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Appellate Court No: 07-1326

Short Caption: Andrews v. Chevy Chase Bank

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
JURISDICTIONAL STATEMENT	1
STATEMENT CONCERNING ORAL ARGUMENT.....	1
ISSUES PRESENTED FOR REVIEW	2
STATEMENT OF THE CASE	2
STATEMENT OF FACTS	3
SUMMARY OF ARGUMENT	11
STANDARD OF REVIEW.....	14
ARGUMENT	15
I. The Only Two Courts Of Appeals To Address This Issue Have Held That TILA Rescission Classes May Not Be Certified.....	15
II. Certification Of Rescission Classes Would Be Inconsistent With The Text, History, And Purpose Of TILA’s Remedy Provisions.....	18
A. Certification of rescission classes would be inconsistent with the text of TILA’s remedy provisions	18
B. Certification of rescission classes would be inconsistent with the history and purpose of TILA’s remedy provisions	22
III. Alternatively, The Proposed Class Does Not Satisfy The Requirements Of Rule 23.....	29
A. The district court erred by certifying this class under Rule 23(b)(2)	30
B. Plaintiffs have not satisfied the predominance and superiority requirements of Rule 23(b)(3)	33
1. Individual issues would predominate over common issues in any class-wide rescission.....	33
2. A class action is not the superior means to adjudicate rescission claims.....	39
CONCLUSION	43

TABLE OF AUTHORITIES

	Page(s)
Cases	
<i>AFS Fin., Inc. v. Burdette</i> , 105 F. Supp. 2d 881 (N.D. Ill. 2000)	36
<i>Amchem Prods., Inc. v. Windsor</i> , 521 U.S. 591 (1997).....	29, 33
<i>American Mortgage Network v. Shelton</i> , 2006 U.S. Dist. LEXIS 23180 (W.D.N.C. Apr. 6, 2006)	34
<i>Anderson v. Capital One Bank</i> , 224 F.R.D. 444 (W.D. Wis. 2004).....	22
<i>Anderson v. Rizza Chevrolet, Inc.</i> , 9 F. Supp. 2d 908 (N.D. Ill. 1998).....	3
<i>Beach v. Ocwen Fed. Bank</i> , 523 U.S. 410 (1998)	19
<i>In re Bridgestone/Firestone, Inc.</i> , 288 F.3d 1012 (7th Cir. 2002)	37, 39
<i>Brown v. Payday Check Advance, Inc.</i> , 202 F.3d 987 (7th Cir. 2000).....	21, 25
<i>Carmichael v. The Payment Center, Inc.</i> , 336 F.3d 636 (7th Cir. 2003).....	41
<i>Castano v. American Tobacco Co.</i> , 84 F.3d 734 (5th Cir. 1996).....	37
<i>Cirone-Shadow v. Union Nissan</i> , 955 F. Supp. 938 (N.D. Ill. 1997)	3
<i>Clay v. Johnson</i> , 264 F.3d 744 (7th Cir. 2001).....	41
<i>Crawford v. Equifax Payment Servs., Inc.</i> , 201 F.3d 877 (7th Cir. 2000).....	22
<i>Dailey v. Leshin</i> , 792 So. 2d 527 (Fla. App. 2001)	35
<i>Doe v. Smith</i> , 470 F.3d 331 (7th Cir. 2006).....	19
<i>Eisen v. Carlisle & Jacquelin</i> , 417 U.S. 156 (1974)	39
<i>Frahm v. Equitable Life Assurance Soc’y</i> , 137 F.3d 955 (7th Cir. 1998).....	40

<i>General Home Capital Corp. v. Campbell</i> , 800 N.Y.S.2d 917 (Dist. Ct. Nassau County 2005)	36
<i>Gibbons v. Interbank Funding Group</i> , 208 F.R.D. 278 (N.D. Cal. 2002).....	31, 32, 37
<i>Goldman v. First Nat’l Bank</i> , 532 F.2d 10 (7th Cir. 1976).....	17
<i>Gombosi v. Carteret Mortgage Corp.</i> , 894 F. Supp. 176 (E.D. Pa. 1995)	35
<i>Granholm v. Heald</i> , 544 U.S. 460 (2005).....	16
<i>Handy v. Anchor Mortgage Corp.</i> , 464 F.3d 760 (7th Cir. 2006).....	41
<i>Hardy v. City Optical Inc.</i> , 39 F.3d 765 (7th Cir. 1994).....	39
<i>Harris v. Tower Loan</i> , 609 F.2d 120 (5th Cir. 1980)	37
<i>Haynes v. Logan Furniture Mart, Inc.</i> , 503 F.2d 1161 (7th Cir. 1974).....	17
<i>Hefferman v. Bitton</i> , 882 F.2d 379 (9th Cir. 1989)	35
<i>Highsmith v. Chrysler Credit Corp.</i> , 18 F.3d 434 (7th Cir. 1994).....	32
<i>Humphries v. CBOCS West, Inc.</i> , 474 F.3d 387 (7th Cir. 2007).....	16
<i>James v. Home Constr. Co.</i> , 621 F.2d 727 (5th Cir. 1980)	15, 16
<i>Jefferson v. Security Pac. Fin. Servs., Inc.</i> , 161 F.R.D. 63 (N.D. Ill. 1995)	34, 38
<i>Johnson v. West Suburban Bank</i> , 225 F.3d 366 (3d Cir. 2000).....	17, 42
<i>Kovalik v. Delta Inv. Corp.</i> , 611 P.2d 955 (Ariz. App. 1980).....	35
<i>LaLiberte v. Pacific Mercantile Bank</i> , 53 Cal. Rptr. 3d 745 (App. 2007).....	19, 25, 38
<i>Large v. Conseco Fin. Serv. Corp.</i> , 292 F.3d 49 (1st Cir. 2002).....	36
<i>Lemon v. International Union of Operating Eng’rs</i> , 216 F.3d 577 (7th Cir. 2000)	33
<i>Livingston v. Associate Fin., Inc.</i> , 339 F.3d 553 (7th Cir. 2003).....	17, 29

<i>Mace v. Van Ru Credit Corp.</i> , 109 F.3d 338 (7th Cir. 1997)	14
<i>Matter of Sinclair</i> , 870 F.2d 1340 (7th Cir. 1989)	16
<i>Mayo v. Sears, Roebuck & Co.</i> , 148 F.R.D. 576 (S.D. Ohio 1993).....	41
<i>McKenna v. First Horizon Home Loan Corp.</i> , 475 F.3d 418 (1st Cir. 2007)	<i>passim</i>
<i>Mortgage Source, Inc. v. Strong</i> , 75 P.3d 304 (Mont. 2003)	36
<i>Murry v. America’s Mortgage Banc, Inc.</i> , 2005 WL 1323364 (N.D. Ill. May 5, 2005), <i>aff’d</i> , 2006 WL 1647531 (N.D. Ill. June 5, 2006)	19, 31, 34
<i>Nagel v. ADM Inv. Servs., Inc.</i> , 217 F.3d 436 (7th Cir. 2000).....	33, 40
<i>Nelson v. United Credit Plan</i> , 77 F.R.D. 54 (E.D. La. 1978)	32, 41
<i>Ortiz v. Fibreboard Corp.</i> , 527 U.S. 815 (1999)	29
<i>Oshana v. Coca-Cola Co.</i> , 472 F.3d 506 (7th Cir. 2006)	29
<i>Payton v. County of Kane</i> , 308 F.3d 673 (7th Cir. 2002).....	32
<i>Regency Sav. Bank v. Chavis</i> , 776 N.E.2d 876 (Ill. App. 2002)	37
<i>In re Rhone-Poulenc Rorer, Inc.</i> , 51 F.3d 1293 (7th Cir. 1995).....	40
<i>Rockford League of Women Voters v. United States Nuclear Regulatory Comm’n</i> , 679 F.2d 1218 (7th Cir. 1982).....	17
<i>Rodash v. AIB Mortgage Co.</i> , 16 F.3d 1142 (11th Cir. 1994).....	26
<i>Ruiz v. R&G Fin. Corp.</i> , 383 F. Supp. 2d 318 (D.P.R. 2005)	34
<i>Semar v. Platte Valley Fed. Sav. & Loan Ass’n</i> , 791 F.2d 699 (9th Cir. 1986)	34
<i>South Austin Coalition Community Council v. SBC Communications, Inc.</i> , 274 F.3d 1168 (7th Cir. 2001)	16
<i>Swain v. Brinegar</i> , 517 F.2d 766 (7th Cir. 1975).....	32
<i>Szabo v. Bridgeport Machs., Inc.</i> , 249 F.3d 672 (7th Cir. 2001)	29
<i>Transamerica Mortgage Advisors, Inc. v. Lewis</i> , 444 U.S. 11 (1979).....	24

<i>United States v. Neal</i> , 46 F.3d 1405 (7th Cir. 1995), aff'd, 516 U.S. 284 (7th Cir. 1996)	18
<i>United States v. Ron Pair Enters.</i> , 489 U.S. 235 (1989).....	22
<i>Universities Research Ass'n v. Coutu</i> , 450 U.S. 754 (1981).....	18
<i>Washington v. CSC Credit Servs., Inc.</i> , 199 F.3d 263 (5th Cir. 2000).....	22
<i>Weiss v. Regal Collections</i> , 385 F.3d 337 (3d Cir. 2004)	22
<i>Westbank v. Maurer</i> , 658 N.E.2d 1381 (Ill. App. 1995).....	37
<i>Wilcox v. Commerce Bank</i> , 474 F.2d 336 (10th Cir. 1973)	17
<i>Williams v. Homestake Mortgage Co.</i> , 968 F.2d 1137 (11th Cir. 1992).....	38
<i>Yamamoto v. Bank of N.Y.</i> , 329 F.3d 1167 (9th Cir. 2003).....	36, 38

Statutes, Regulations, and Rules

15 U.S.C. § 1601	1, 2, 3
15 U.S.C. § 1602(w).....	4
15 U.S.C. § 1607	42
15 U.S.C. § 1635	<i>passim</i>
15 U.S.C. § 1640	<i>passim</i>
28 U.S.C. § 1292(e)	1
28 U.S.C. § 1331	1
Consumer Leasing Act of 1976, Pub. L. No. 94-240, 90 Stat. 257	24
Rules Enabling Act, 28 U.S.C. § 2072(b).....	29
Truth in Lending Act Amendments, Pub. L. No. 93-495, tit. IV, § 407, 88 Stat. 1500 (1974)	23

Truth in Lending Act Amendments of 1995, Pub. L. No. 104-29, 109 Stat. 271	26
Truth in Lending Class Action Relief Act of 1995, Pub. L. No. 104-12, 109 Stat. 161	26
Truth in Lending Simplification and Reform Act, Pub. L. No. 96-221, tit. VI, § 615(a)(1), 94 Stat. 132 (1980).....	25
Federal Reserve Board, Official Staff Interpretations, 12 C.F.R. Part 226 Supp. 1	35, 36, 37
12 C.F.R. Part 226	5, 35
Fed. R. App. P. 5(a).....	1
Fed. R. Civ. P. 23	<i>passim</i>
 Other Authorities	
141 Cong. Rec. H4120-04, 4121 (Apr. 4, 1995).....	26
141 Cong. Rec. H9513-01, 9515 (Sept. 27, 1995)	27
141 Cong. Rec. S14566, 14567 (Sept. 28, 1995).....	26
H.R. Rep. No. 104-193 (1995).....	26
<i>Joint Policy Statement on Administrative Enforcement of the Truth in Lending Act – Restitution (1999), in TRUTH IN LENDING COMPTROLLER’S HANDBOOK 105 (2006)</i>	<i>42</i>
Office of Thrift Supervision, <i>Consumer Affairs Laws and Regulations</i> § 1310 & App. A	42
Ralph J. Rohner & Fred H. Miller, TRUTH IN LENDING (2000 & Supp. 2006)	19, 26, 27, 32, 36, 37
S. Rep. No. 93-278 (1973)	23
S. Rep. No. 94-590 (1976), reprinted in 1976 U.S.C.C.A.N. 431	24
S. Rep. No. 96-368 (1979), reprinted in 1980 U.S.C.C.A.N. 236	25, 34
7AA Charles A. Wright, Arthur R. Miller, & Mary K. Kane, FEDERAL PRACTICE & PROCEDURE (3d ed. 2005)	30

JURISDICTIONAL STATEMENT

The district court had jurisdiction over this matter pursuant to 28 U.S.C. § 1331 because plaintiffs' claims arise under federal law, namely, the Truth in Lending Act, 15 U.S.C. § 1601 *et seq.* The district court entered an order certifying a class on January 16, 2007. Chevy Chase filed a timely Petition for Leave to Appeal Pursuant to Rule 23(f) on January 25, 2007, which this Court granted on January 31, 2007. This Court has jurisdiction over this appeal pursuant to Fed. R. Civ. P. 23(f), Fed. R. App. P. 5(a), and 28 U.S.C. § 1292(e).

STATEMENT CONCERNING ORAL ARGUMENT

Pursuant to Circuit Rule 34(f), defendant-appellant respectfully requests oral argument. This appeal raises an important issue of federal law that this Court has not previously addressed and that has divided district courts in this Circuit. Oral argument will enable the parties adequately to address these issues and respond to the Court's questions and concerns.

ISSUES PRESENTED FOR REVIEW

1. Whether, in a Truth in Lending Act case, a class may be certified to seek rescission of the putative class members' mortgages.
2. If so, whether the district court erroneously ruled that plaintiffs' proposed class satisfies the requirements of Fed. R. Civ. P. 23.

STATEMENT OF THE CASE

In April 2005, plaintiffs-appellees Susan and Bryan Andrews ("plaintiffs" or "the Andrews") filed this purported class-action lawsuit against defendant-appellant Chevy Chase Bank, F.S.B. ("Chevy Chase"), claiming, *inter alia*, violations of the Truth in Lending Act, 15 U.S.C. § 1601 *et seq.* ("TILA"). R.1. After twice amending their complaint, plaintiffs filed a Third Amended Complaint ("Complaint"), containing a single count alleging TILA violations, on June 22, 2006. R.75. On January 16, 2007, the district court granted plaintiffs' motion for summary judgment and certified a class of thousands of borrowers whom it authorized to rescind their mortgages. A1-A24. On January 25, 2007, this Court granted Chevy Chase's petition for leave to appeal pursuant to Rule 23(f). R.88. On February 5, 2007, the district court granted Chevy Chase's motion for a stay of district court proceedings pending the appeal. A25-A26. On February 14, 2007, the district court

issued a separate memorandum explaining its decision to grant Chevy Chase's motion for a stay of proceedings. A27-A34.

STATEMENT OF FACTS

Statutory Framework. The purpose of TILA is to promote “meaningful disclosure of credit terms.” 15 U.S.C. § 1601(a). Toward that end, TILA requires lenders to make specified disclosures by specified means when making loans to consumers.

Creditors who violate certain disclosure requirements may be ordered to pay statutory damages. 15 U.S.C. § 1640(a). In an individual action relating to a mortgage loan, the court may award statutory damages of at least \$200 and no more than \$2,000. In a class action or series of class actions arising out of the same disclosure violation, no minimum recovery of statutory damages applies to individual class members, but the court may award in the aggregate no more than the lesser of \$500,000 or one percent of the creditor's net worth. *Ibid.*¹

TILA also provides borrowers with a right of rescission in the case of certain types of mortgage loans. 15 U.S.C. § 1635(a). Rescission is available only on certain consumer mortgage loans secured by the

¹ TILA also authorizes the recovery of actual damages. 15 U.S.C. § 1640(a)(1). However, plaintiffs in this case did not seek such damages, which would have required them to demonstrate, *inter alia*, “detrimental reliance.” See, *e.g.*, *Anderson v. Rizza Chevrolet, Inc.*, 9 F. Supp. 2d 908 (N.D. Ill. 1998); *Cirone-Shadow v. Union Nissan*, 955 F. Supp. 938 (N.D. Ill. 1997).

borrower's principal residence. *Id.* § 1635(a), (e). It is not available for mortgage loans to finance the acquisition or initial construction of a residence. *Id.* §§ 1635(e), 1602(w). Thus, the right to rescind arises most commonly with respect to refinancings of purchase money mortgage loans and to home equity and home improvement loans. TILA authorizes the borrower to rescind the transaction until midnight of the third day following consummation of the loan, assuming the lender has delivered the required notice of the right to rescind and all material disclosures. *Id.* § 1635(a). To provide the lender with an incentive to provide those materials promptly, the right to rescind can be extended until the lender provides them, but not beyond three years after consummation of the loan. *Id.* § 1635(f).

If the borrower exercises his or her right to rescind by providing notice to the creditor, the creditor has 20 days in which to return all the interest, charges, and fees collected from the borrower. In particular, it “shall return to the obligor any money or property given as earnest money, downpayment, or otherwise, and shall take any action necessary or appropriate to reflect the termination of any security interest created under the transaction.” 15 U.S.C. § 1635(b). Once the creditor has done so, the borrower must tender any property delivered by the creditor back to the creditor, “except that if return of the property in kind would be impracticable or inequitable, the obligor shall tender its reasonable

value.” *Ibid.* In most cases, this provision requires the borrower to return the loan principal. By providing that these procedures “shall apply except when otherwise ordered by a court” (*ibid.*), section 1635 makes clear that courts may tailor the terms of a rescission to the particular factual context.²

Factual Background. Chevy Chase is a federally chartered savings institution that offers a variety of mortgage loan products to residential customers throughout the country. It offers these loans both directly and through independent mortgage brokers who serve as the borrower’s agent and offer products from a variety of lenders. R.45, Exh. 1 ¶¶ 2-3. If the borrower chooses a Chevy Chase product, the mortgage broker sends the application to Chevy Chase, which then agrees to fund the loan if the borrower meets its credit requirements. *Id.* ¶ 3.

In June 2004, the Andrews refinanced their mortgage on a property located in Cedarburg, Wisconsin, obtaining a new loan from Chevy Chase through a broker. R.45, Exh. 1 ¶ 7. Mr. Andrews runs his own home remodeling business and the Andrews are experienced mortgagors,

² The TILA remedy provisions, 15 U.S.C. §§ 1635 and 1640, are set forth in full in the attached addendum to this brief. The Federal Reserve Board has implemented and interpreted TILA through its Regulation Z (12 C.F.R. Part 226) and through its Official Staff Interpretations (“Commentary”) (*id.* Supp. 1). The provisions of Regulation Z that govern rescission for closed-end loans (such as the mortgage loans at issue here) are found at 12 C.F.R. § 226.23.

having taken out eleven original or refinancing mortgage loans on their various residential and investment properties. R.58 at 11, 13-24, 29-44.

The Andrews opted for a “cashflow payment option” loan, one of a number of innovative types of mortgage loans available in today’s market that provide borrowers with greater flexibility than more traditional fixed or adjustable rate mortgage loans. Chevy Chase’s cashflow payment option loan fixes the minimum monthly payment for an initial term, such as five years in the case of the Andrews’ loan, based on a low initial interest rate. That interest rate adjusts each month based on an established index, but the minimum monthly payment remains fixed until the initial term expires or the outstanding principal balance exceeds 110% of the original principal balance, whichever occurs first. R.45, Exh. 1 ¶ 4.³ Borrowers also have the option each month to make payments larger than the minimum. *Id.* ¶ 5. By offering multiple payment options, these loans provide flexibility for borrowers, such as self-employed individuals like Mr. Andrews, whose monthly cash flow can be subject to significant fluctuations.

The Andrews, who planned to sell their home within five years (R.57 at 36, 43-44), obtained a mortgage loan in the amount of

³ The outstanding principal balance can exceed the original principal balance through “negative amortization,” which adds unpaid interest to the principal of the loan.

\$147,597. Each month, the Andrews received a statement allowing them to choose one of four options for that month's payment. They could make the required minimum monthly fixed payment based on the initial 1.95% interest rate (an option available for the first five years of the loan or until the 100% negative amortization limit was met); an interest-only payment based on the fully-indexed interest rate; a payment sufficient to amortize the loan over a 15-year period; or a payment sufficient to amortize the loan over a 30-year period. R.45, Exh. 1 ¶ 5; R.78, Att. 1 ¶ 2.

Shortly after their broker submitted the Andrews' loan application, Chevy Chase provided them with the documents and disclosures required by TILA, including a Truth in Lending Disclosure Statement ("TILDS"). A24; R.58 at 120-21. At closing, the Andrews again were provided with a full package of disclosure documents, including the required notice of their right to rescind. R.45, Exh. 3 at Exhs. 13-19. These documents disclosed a minimum monthly payment capped at \$701.21 for the first 60 months of the loan, which was based on an initial 1.95% adjustable interest rate, and a fully amortizing monthly payment of \$983.49 for the final 300 months, which (as required by TILA and Regulation Z) was based on the 4% fully indexed interest rate in effect at the time the loan was consummated. R.45, Exh. 1 ¶¶ 9-13.

Because Chevy Chase offers several dozen different mortgage products, its loan origination system was programmed to include a

product tracking notation in the upper right-hand corner of the TILDS. The product tracking notation in the TILDS provided to the Andrews stated:

DATE 06/08/2004
LOAN NO. 554067397
Type of Loan WS Cashflow 5-year Fixed
Note Interest Rate: 1.950%.

A24. The court found that this optional tracking notation rendered misleading certain of the required disclosures that were accurately set forth in the TILA-mandated disclosure format (the boxes that appear on the TILDS). A5-A6, A12-A13.

District Court Proceedings. Plaintiffs filed suit against Chevy Chase in April 2005. The operative Third Amended Complaint (“Complaint”) contains a single count for “selling and originating mortgages in violation of the Truth in Lending Act.” R.75 at 4. The Complaint alleges that certain of Chevy Chase’s disclosures to the Andrews were misleading or unclear, particularly as to whether the initial interest rate was fixed and whether mortgage payments were due monthly.

In a January 16, 2007 Order, the district court granted plaintiffs’ motion for summary judgment. The court ruled that Chevy Chase violated TILA’s disclosure requirements because it failed to disclose “clearly and conspicuously” that mortgage “payments were due monthly”

(A5-A6); its “disclosure of the cost of the loan as an annual percentage rate was unclear” because of a supposed discrepancy between the correctly computed APR and the product tracking notation (A11); although Chevy Chase checked the required box indicating that “[t]his loan has a variable rate feature,” it did not clearly disclose that the loan had a variable interest rate feature (A11-A12); and it added information to its TILDS (namely, the product tracking notation referenced above) that was not “directly related to required information” (A12-A13). As a remedy, the court declared that “plaintiffs may avail themselves of the remedy of rescission” pursuant to 15 U.S.C. § 1635. A15.

In that same order, the district court granted plaintiffs’ motion for class certification under Rule 23(b)(2). A21. The court certified a class that includes all persons who obtained an adjustable rate mortgage from Chevy Chase on their primary residence between April 20, 2004 and January 16, 2007 and who received a TILDS containing any of the language that the court found deficient. A22.

The district court declared that all class members would have the right to rescind their mortgages. A15-A22. Recognizing that other courts have barred class-wide rescission, the court nevertheless concluded that “a TILA plaintiff seeking a declaration that she may rescind a loan may represent a class.” A16. The court reasoned that TILA contains no language precluding the use of class actions; did “not find it significant”

that Congress had referenced class actions when amending the TILA damages provision but not when it amended the TILA rescission provision; and opined that “public policy strongly favors allowing class actions in cases like the present one.” *Ibid.* The court then ruled that notice must be provided to all members of the certified class of their right to rescind and established a briefing schedule to enable the parties to address the form and content of that notice. A22.

After this Court granted Chevy Chase’s petition for leave to appeal pursuant to Rule 23(f), the district court stayed its proceedings pending the appeal. In a subsequent memorandum, the district court explained that it granted the stay based on “the need to clarify whether a court could certify a class whose members have a right to rescind.” A34. The district court defended its class certification order, notwithstanding the subsequent decision by the First Circuit in *McKenna v. First Horizon Home Loan Corp.*, 475 F.3d 418 (1st Cir. 2007), which held that TILA rescission classes may not be certified. The district court recognized that “the Seventh Circuit may disagree with me and agree with a sister circuit.” A33.

The district court also recognized that it “likely defined the class too broadly, and that if the class action survives, the class definition will have to be narrowed” to include “only borrowers who refinanced a loan

with a different lender or refinanced a loan with the same lender but secured it with different collateral.” A33-A34.

SUMMARY OF ARGUMENT

As the only two courts of appeals to address this issue have held, the text, history, and purpose of the TILA remedy provisions demonstrate that TILA rescission classes may not be certified. Declaring that a class of thousands of borrowers may rescind their mortgages and thereby obtain an interest-free loan for up to three years would impose intolerable liability on lenders for violations of TILA’s technical disclosure requirements and confer unwarranted windfalls on thousands of borrowers. In addition, rescission is a personal remedy that by its very nature requires highly individualized inquiries, which cannot be avoided by issuing a declaratory judgment. For these and other reasons, the class certified by the district court fails to satisfy the requirements set forth in Fed. R. Civ. P. 23.

I.A

The only two appellate courts to address this issue have held that TILA rescission classes may *not* be certified. Both the First and Fifth Circuits have rejected such classes as inconsistent with the TILA text, history, and purpose and with the personal character of the rescission

remedy. In the face of these well-reasoned opinions, this Court should not create a circuit split.

I.B

Certification of a TILA rescission class would not be compatible with the plain meaning of the text of TILA sections 1635, which governs rescission, and 1640(a), which governs damages. Whereas section 1640(a) expressly references class actions, section 1635 makes no mention of them. Moreover, class actions are addressed in section 1640(a) with respect to a damages cap that prevents disproportionate liability for violations of TILA’s complex disclosure requirements. The omission of any comparable reference or cap in section 1635 demonstrates that Congress did not contemplate class-wide rescissions and thus saw no need to cap rescission liability. The fact that section 1635 confers equitable authority on courts to modify the rescission process described in TILA — and makes the details of that process depend on what is “appropriate,” “practicable,” and “equitable” — confirms that rescission is a personal remedy not suitable for a class-wide award.

Furthermore, TILA limits available relief for statutory violations to damages and rescission. It does not authorize declaratory relief, even in individual actions. Thus, the district court’s declaration of a class-wide right to rescind is incompatible with TILA.

I.C

Although the plain meaning of the statutory text is sufficient to show that TILA does not authorize rescission classes, the amendment history of the TILA remedy provisions confirms that conclusion. In amendment after amendment, Congress has sought to protect the credit industry against disproportionate TILA liability. Allowing a court to impose the enormous liability that would result from a rescission class action, which would authorize the refund of three years' worth of interest, finance charges, and fees to thousands of borrowers at the stroke of a pen, would defeat Congress's intent.

II.

The certified class does not satisfy the requirements of Rule 23. Even if all the putative class members received disclosures with the same alleged deficiencies, implementing the awarded remedy would require separate courts to engage in individualized inquiries into a variety of facts and circumstances. Thus, the district court proceeding was not a class action within the meaning of Rule 23 but rather, pursuant to the district court's declaration, a mere launching pad for a host of new individual proceedings.

A class action cannot be concocted merely by issuing a declaration and certifying a class under Rule 23(b)(2), as the district court did in this case. Declaratory relief is not available even to individual plaintiffs under

TILA and thus cannot be appropriate with respect to the class as a whole, as Rule 23(b)(2) requires. Nor was the declaration announced by the district court tantamount to an injunction or “final,” as Rule 23(b)(2) further requires. Instead, that declaration *initiated* a rescission process that will require individualized tailoring in potentially thousands of future proceedings.

Nor may a class be certified under Rule 23(b)(3). The many individualized disputes to which the rescission process gives rise, as well as the varying circumstances of the putative class members and the varying state laws that would be implicated, ensure that individual issues would predominate over common ones. That same host of individualized issues would make a class action unmanageable.

Moreover, this is not a case where a class action is necessary. Rescission provides those borrowers who desire rescission with sufficient incentive to bring individual lawsuits, as many do every year.

STANDARD OF REVIEW

Although a class certification ruling is generally reviewed for abuse of discretion, any “purely legal” determinations made in support of that ruling are reviewed *de novo*. *Mace v. Van Ru Credit Corp.*, 109 F.3d 338, 340 (7th Cir. 1997).

ARGUMENT

I. The Only Two Courts Of Appeals To Address This Issue Have Held That TILA Rescission Classes May Not Be Certified.

The only two courts of appeals to address the propriety of TILA rescission classes have held that they may not be certified. See *McKenna v. First Horizon Home Loan Corp.*, 475 F.3d 418 (1st Cir. 2007); *James v. Home Constr. Co.*, 621 F.2d 727 (5th Cir. 1980). There is no valid reason for this Court to depart from those rulings and create a conflict among the circuits where none now exists.

In *McKenna*, the First Circuit held, on a Rule 23(f) appeal, that “as a matter of law, class certification is not available for rescission claims, direct or declaratory, under the TILA.” 475 F.3d at 423. That holding rested on the court’s conclusion that “Congress did not intend rescission suits to receive class-action treatment.” *Ibid.* The First Circuit noted that class actions are specifically addressed in the TILA section providing a right to damages (§ 1640(a)(2)(B)) but not in the TILA section providing a right to rescission (§ 1635). *Ibid.* The court also found it “plain that unrestricted class action availability for rescission claims would open the door for vast recoveries,” which would be “considerably in excess of the cap [that] Congress painstakingly established for damages class actions.” *Id.* at 424. In addition, the court found that the relevant TILA amendment history confirms that Congress “had not intended that

lenders would be made to face overwhelming liability for relatively minor violations,” as would be the case if rescission were available as a class remedy. *Ibid.* In addition, the court explained, “[t]he highly individualized character of this process and the range of variations that may occur render rescission largely incompatible with a sensible deployment of the class-action mechanism.” *Id.* at 424-25.⁴

In *James*, the Fifth Circuit held that rescission is “a purely personal remedy” and that certifying a rescission class “would contradict what would seem to be the Congressional intent about the nature of this action.” 621 F.2d at 730-31. The court explained:

The language of Section 1635(b), it seems clear, gives the creditor ten days in each case in which to go through the steps of rescission before the matter can be brought to court. This is a right which the creditor has with each individual obligor. Thus the notion of a class action in this sort of context would contradict what would seem to be the Congressional intent about the nature of this action.

⁴ In its stay opinion, the district court criticized the First Circuit’s use of legislative history, relying on *Matter of Sinclair*, 870 F.2d 1340, 1342 (7th Cir. 1989). A31. But the Court in *Sinclair* explained that “[l]egislative history may be invaluable in revealing the setting of the enactment and the assumptions its authors entertained about how their words would be understood.” 870 F.2d at 1342. This Court and the Supreme Court continue to use legislative and amendment history to illuminate and confirm the textual meaning of statutes. *E.g.*, *Granholm v. Heald*, 544 U.S. 460, 476 (2005); *Humphries v. CBOCS West, Inc.*, 474 F.3d 387, 398 (7th Cir. 2007); *South Austin Coalition Community Council v. SBC Communications, Inc.*, 274 F.3d 1168, 1172 (7th Cir. 2001). Thus, the district court’s criticism of the First Circuit analytical framework, which used legislative history as “confirmatory evidence” to support its textual reading (475 F.3d at 424), was misplaced.

Ibid. (citations omitted). The district court expressed its disagreement with *James* but did not offer any critique of the above analysis. See A16.

Instead, in its stay opinion, the district court relied on several cases for the proposition that TILA does not bar class actions. *Wilcox v. Commerce Bank*, 474 F.2d 336 (10th Cir. 1973); *Haynes v. Logan Furniture Mart, Inc.*, 503 F.2d 1161 (7th Cir. 1974); *Goldman v. First Nat'l Bank*, 532 F.2d 10 (7th Cir. 1976); *Johnson v. West Suburban Bank*, 225 F.3d 366 (3d Cir. 2000). A29-A30. Significantly, however, each of those cases involved only claims for damages, not rescission, and thus can have no bearing on the issue at hand. Moreover, *Johnson* held that arbitrating TILA claims individually is consistent with both TILA and Rule 23. *Johnson*, 225 F.3d at 373-75; accord *Livingston v. Associate Fin., Inc.*, 339 F.3d 553, 558 (7th Cir. 2003). It follows, *a fortiori*, that litigating TILA rescission claims individually cannot be inconsistent with TILA or Rule 23.

In short, this Court should agree with the First and Fifth Circuits that rescission class actions are not available under TILA. Given the text, amendment history, and purpose of the TILA remedy provisions, as explained more fully below, there is no viable reason to create a circuit split over this issue. See *Rockford League of Women Voters v. United States Nuclear Regulatory Comm'n*, 679 F.2d 1218, 1221 (7th Cir. 1982) (“Even if we were somewhat inclined as an original matter to come out

the other way, we much prefer where possible to avoid creating a conflict among circuits”); accord *United States v. Neal*, 46 F.3d 1405, 1411 (7th Cir. 1995), aff’d on other grounds, 516 U.S. 284 (7th Cir. 1996).

II. Certification Of Rescission Classes Would Be Inconsistent With The Text, History, And Purpose Of TILA’s Remedy Provisions.

The First and Fifth Circuits reached the right conclusion. The text, history, and purpose of TILA’s remedy provisions refute the district court’s view that TILA authorizes class-wide rescission. *McKenna*, 475 F.3d at 423-26; see *Universities Research Ass’n v. Coutu*, 450 U.S. 754, 784 (1981) (looking to a statute’s “language, history, [and] purpose” to determine whether Congress intended a private right of action).

A. Certification of rescission classes would be inconsistent with the text of TILA’s remedy provisions.

A review of the applicable TILA text refutes the district court’s view that “nothing in the text of TILA supports the proposition that TILA bars courts from certifying classes whose members seek rescission.” A28.

TILA contains two remedy sections. Section 1640(a), which governs actual and statutory damages, expressly provides for class actions. In contrast, section 1635, which governs rescission, contains no language authorizing or even mentioning class actions. The district court erred by assuming that such an omission carries no meaning. “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 purposefully in the disparate inclusion or exclusion.” *Beach v. Ocwen Fed. Bank*, 523 U.S. 410, 418 (1998); *Doe v. Smith*, 470 F.3d 331, 355 (7th Cir. 2006). As the First Circuit concluded, “the variation in the treatment of class actions in the two relevant sections of the TILA strongly suggests that Congress did not intend to include a class-action mechanism within the compass of section 1635.” *McKenna*, 475 F.3d at 423; accord *Murry v. America’s Mortgage Banc, Inc.*, 2005 WL 1323364, at *10 (N.D. Ill. May 5, 2005), *aff’d*, 2006 WL 1647531 (N.D. Ill. June 5, 2006); *LaLiberte v. Pacific Mercantile Bank*, 53 Cal. Rptr. 3d 745, 751 (App. 2007). Commentators too have recognized that the lack of any mention of class actions in section 1635 shows that the TILA “does not contemplate rescission as a class remedy.” Ralph J. Rohner & Fred H. Miller, *TRUTH IN LENDING* ¶ 12.08[5], at 881 (2000) (“*TRUTH IN LENDING*”).

Moreover, class actions are addressed in section 1640 in relation to a cap on awardable damages. The lack of any comparable cap on amounts to be rescinded pursuant to section 1635 confirms that Congress did not contemplate rescission being awardable other than in individual proceedings. As the First Circuit explained, “[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.” *McKenna*, 475 F.3d at 424.

The description of the rescission process in section 1635 further confirms that Congress did not contemplate rescission class actions. Section 1635 gives borrowers who received the required disclosures a three-day “cooling-off” period after closing on their loans to change their minds. 15 U.S.C. § 1635(a). Borrowers do not change their minds as a class. Thus, borrowers wishing to rescind must provide notice of that intent to the creditor, a requirement that is inherently individual. *Ibid.* Moreover, the actions prescribed for both the creditor and borrower during the rescission process depend on what is “appropriate,” “impracticable,” and “inequitable.” *Ibid.* The application of such terms is inherently specific to the context of each creditor-borrower relationship and thus inconsistent with class-action treatment. See *infra* Part III.B.1.

Indeed, section 1635(b) expressly authorizes case-by-case treatment by providing that “[t]he procedures prescribed by this subsection shall apply except when otherwise ordered by a court.” That provision confers equitable authority on courts to tailor the rescission process to fit the specific context of each creditor-borrower relationship. Such case-by-case tailoring cannot be reconciled with the district court’s view that section 1635(b) authorizes class-wide rescission.

The district court relied on the fact that TILA does not say in so many words that rescission class actions are barred. But as the First Circuit explained, “TILA contains no language describing the process by

which parties may sue in federal court to enforce rescission rights. We would not expect Congress expressly to exempt from class-action rules a process for which it never fully delineated an individual right of action.” *McKenna*, 475 F.3d at 425-26. This Court’s opinion in *Brown v. Payday Check Advance, Inc.*, 202 F.3d 987, 991 (7th Cir. 2000), further refutes the district court’s expansive reading of the TILA remedy provisions. The question before the Court was whether statutory damages are available for a violation of section 1632(a) of TILA, where TILA nowhere expressly states that such damages are barred for a violation of section 1632(a). The Court held that the omission of section 1632(a) from the provisions listed in section 1640(a) as giving rise to statutory damages was sufficient to show that statutory damages are unavailable for a violation of section 1632(a). Here, too, the omission of any reference to class actions in section 1635, especially in light of their express reference in section 1640, signifies that rescission class actions are unavailable under TILA.

Finally, the declaration issued by the district court also conflicts with the TILA text, which authorizes damages and rescission as the sole remedies for violation of its provisions. Neither section 1635 nor section 1640 (nor any other TILA provision) authorizes a borrower to obtain declaratory relief. Courts construing similar provisions in similar statutes — the Fair Debt Collection Practices Act and Fair Credit

Reporting Act — have refused to allow private litigants (as opposed to government agencies) to seek declaratory or equitable relief not specified in the statute. *E.g.*, *Crawford v. Equifax Payment Servs., Inc.*, 201 F.3d 877, 882 (7th Cir. 2000) (“all private actions under the Fair Debt Collection Practices Act are for damages”); *Weiss v. Regal Collections*, 385 F.3d 337, 341 n.7 (3d Cir. 2004) (“most courts have found declaratory or equitable relief is not available to private litigants under the FDCPA”); *Washington v. CSC Credit Servs., Inc.*, 199 F.3d 263, 268 (5th Cir. 2000) (equitable or declaratory relief is not available to private parties under the FCRA); *Anderson v. Capital One Bank*, 224 F.R.D. 444, 448-49 (W.D. Wis. 2004) (same). Because TILA bars an individual borrower from obtaining declaratory relief, the district court erred by granting declaratory relief to the Andrews and to all the other individual borrowers in the certified class.

B. Certification of rescission classes would be inconsistent with the history and purpose of TILA’s remedy provisions.

As demonstrated in the prior section, the plain meaning of the TILA remedy provisions is that TILA does not authorize courts to award rescission on a class-wide basis. See *United States v. Ron Pair Enters.*, 489 U.S. 235, 240-41 (1989). Any doubt on that score is refuted by the amendment history of those provisions, which confirms their plain meaning.

Permitting TILA rescission classes would defeat Congress's intent to limit lenders' liability. Before 1974, TILA did not mention class actions. Congress amended section 1640 in 1974 to adopt caps on statutory damages, including an aggregate cap of \$100,000 in class actions, without making any change to section 1635. Truth in Lending Act Amendments, Pub. L. No. 93-495, tit. IV, § 407, 88 Stat. 1500 (1974). This was the first (and remains the only) reference to class actions in TILA. Congress adopted the 1974 amendments "to place an aggregate limitation on a creditor's class action liability for violations not involving actual damages." S. Rep. No. 93-278, at 14-15 (1973). The fact that Congress adopted no similar limitation on rescission liability suggests that it did not contemplate class action rescissions, given the devastating impact that wholesale rescissions would have on the mortgage lending industry.

The district court did not find this different treatment of statutory damages and rescission in the 1974 amendments to be "significant," opining that it was "just as likely that Congress did not intend to limit rescission claims in any way." A16. But as the First Circuit explained, it is "much more likely" in light of the cap on statutory damages that Congress "intended rescission to be totally unavailable as a class remedy in the TILA milieu" than to be "available unrestrainedly in TILA cases,

not subject to any special limiting conditions.” *McKenna*, 475 F.3d at 423-24.

Responding to *McKenna* in its stay memorandum, the district court suggested that the 1974 amendment did not address rescission class actions either because Congress “did not regard such actions as posing the same economic threat to the credit industry as class actions involving damages” or because Congress “never considered the issue.” A30. But a Congress that was sufficiently concerned about economic impact on the lending industry to impose a statutory damages cap cannot have been oblivious to the economic threat posed by allowing enormous classes of borrowers to rescind their mortgages at one fell swoop. The district court should not have deemed meaningless the distinction Congress drew between statutory damages and rescission with respect to class actions. See *Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11, 20 (1979) (“In view of these express provisions for enforc[ement], it is highly improbable that Congress absentmindedly forgot to mention an intended private action”).

Congress raised the statutory damages cap to \$500,000 in 1976, explaining that it viewed that cap as both appropriate to protect against devastating liability and sufficient to “act as a significant deterrent to even the largest creditor.” S. Rep. No. 94-590, at 8 (1976), reprinted in 1976 U.S.C.C.A.N. 431, 438; see Consumer Leasing Act of 1976, Pub. L.

No. 94-240, 90 Stat. 257. Again, it defies belief that Congress, in executing such a balancing act, would have completely disregarded rescission if it thought that remedy was available in class actions. As one court recently explained, it is unlikely “that Congress would carefully balance the deterrent effect of class actions under TILA against the potential harm to businesses in the context of statutory damages, and yet allow class action rescission to proceed without any safeguard for the affected business.” *LaLiberte*, 53 Cal. Rptr. 3d at 751.

Congress again amended section 1640(a) in 1980 “to curtail damages awards for picky and inconsequential formal errors.” *Brown*, 202 F.3d at 991. The amendment also barred aggregate recoveries from exceeding the cap in a “series of class actions arising out of the same failure to comply by the same creditor.” Truth in Lending Simplification and Reform Act, Pub. L. No. 96-221, tit. VI, § 615(a)(1), 94 Stat. 132 (1980); see *supra* p. 3. The Senate Report immediately followed its discussion of class actions, where only statutory damages are mentioned as available relief, with a discussion of changes to the TILA rescission provisions, stating that the amendment “makes explicit that *a consumer* may institute suit [to] enforce the right of rescission” (S. Rep. No. 96-368, at 32 (1979), reprinted in 1980 U.S.C.C.A.N. 236, 268 (emphasis added)), again showing Congress’s understanding that rescission is an inherently individual remedy.

In 1995, Congress further limited the potential for expansive TILA liability, first, by temporarily suspending all TILA class actions and then by increasing the tolerance levels for minor deviations from disclosure obligations. See Truth in Lending Class Action Relief Act of 1995, Pub. L. No. 104-12, 109 Stat. 161; Truth in Lending Act Amendments of 1995, Pub. L. No. 104-29, 109 Stat. 271. Congress adopted those amendments in response to concerns about potentially devastating lender liability following a flurry of class action lawsuits filed in the wake of *Rodash v. AIB Mortgage Co.*, 16 F.3d 1142, 1147 (11th Cir. 1994), in which the court held (in a non-class-action case) that minor violations of TILA triggered a mortgagor’s right to rescind. Congress acted to prevent the ensuing class actions from imposing “disastrous losses” on the mortgage industry. TRUTH IN LENDING ¶ 6.01[2], at 359-60; see, e.g., 141 Cong. Rec. S14566, 14567 (Sept. 28, 1995) (statement of Sen. Banking Committee Chairman D’Amato). The House Report estimated that the potential cost of rescinding three years’ worth of refinanced mortgage loans would be \$217 billion (H.R. Rep. No. 104-193, at 52 (1995)), a figure repeatedly cited by proponents of the legislation. E.g., 141 Cong. Rec. H4120-04, 4121 (Apr. 4, 1995) (statement of chief House sponsor Rep. Roukema).

In response to *Rodash*, Congress narrowed the circumstances in which a borrower could seek rescission. In doing so, not a single participant in the floor debate ever suggested that rescission would be

available to an entire class of consumers. To the contrary, as one proponent explained, the amendments “largely preserved” the right of rescission for “*the consumer [in] particular circumstances*” (141 Cong. Rec. H9513-01, 9515 (Sept. 27, 1995) (statement of Rep. Gonzalez)), a formulation incompatible with class resolution. As the First Circuit explained in *McKenna*:

Amendment of the TILA’s substantive provisions was a predictable reaction to *Rodash* — one that promised to ameliorate “the threat of wholesale rescissions.” Every indication is that Congress, while making no provision for class actions in the rescission context, intended to keep at bay the ominous prospect of large-scale liability that would be inherent in rescission class actions.

475 F.3d at 425 (citation omitted).

Rescission class actions would conflict with this consistent Congressional effort to prevent disproportionate liability for lenders charged with TILA violations. By protecting lenders from intolerable liability, Congress recognized that complying with the complex TILA disclosure provisions is not easy and that a failure to do so should not be disproportionately punished. Despite clarifying amendments over the years, “it remains the case with regard to real estate transactions that it is not a simple matter to know when and how to apply statutory and regulatory provisions regarding what to disclose, how to calculate the

necessary disclosures, and when to give those disclosures.” TRUTH IN LENDING ¶ 6.01[5], at 365.

This case provides a telling example. Chevy Chase is not charged with failing to disclose required material information but primarily for *including* product tracking language in the TILDS. A9-12. The district court also ruled that Chevy Chase did not make clear that mortgage payments would be due monthly (A6), even though the TILDS states that “this loan program allows you to select the type of payment you make *each month*” (A24, emphasis added), and there was no evidence that plaintiffs or any other Chevy Chase borrower ever thought that his or her mortgage payment would be due at any different interval. Under the district court’s class-wide rescission ruling, Chevy Chase could be forced to provide thousands of borrowers with a three-year interest-free loan and a refund of properly charged finance charges and fees — a burden that here (and in most class actions) would amount to tens of millions of dollars and thus greatly exceed TILA’s \$500,000 cap on aggregate damages. That is just the type of crushing sanction that Congress sought to limit in its series of amendments from 1974 through 1995. See *Jefferson v. Security Pac. Fin. Servs., Inc.*, 161 F.R.D. 63, 69 (N.D. Ill. 1995) (contrary to the intent of Congress, classwide rescission “would turn Section 1635(b) into a penal provision”).

III. Alternatively, The Proposed Class Does Not Satisfy The Requirements Of Rule 23.

The district court incorrectly opined that only Rule 23, not TILA, governs the propriety of its class certification order. A30. But even if TILA did not bar rescission classes (it does, as demonstrated in Part II, *supra*), Rule 23 does not rescue the district court's order because plaintiffs have not satisfied the Rule's requirements.

“Class certification requires a rigorous investigation into the propriety of proceeding as a class.” *Livingston*, 339 F.3d at 558 (rejecting class certification in TILA suit in favor of individual remedy). A court may certify a class only if it finds that “all of the prerequisites” of Rule 23 have been satisfied. *Szabo v. Bridgeport Machs., Inc.*, 249 F.3d 672, 676 (7th Cir. 2001). “[I]t is the plaintiff's burden to prove the class should be certified.” *Oshana v. Coca-Cola Co.*, 472 F.3d 506, 513 (7th Cir. 2006). A class may not be certified when a class action would entail “sacrificing procedural fairness” and “abridg[ing]” the “substantive right” of defendants to raise and present evidence on individualized defenses. *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 615 (1997) (citing Rules Enabling Act, 28 U.S.C. § 2072(b)); accord *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 845 (1999). Applying these principles, the district court should have denied plaintiffs' class certification motion.

A. The district court erred by certifying this class under Rule 23(b)(2).

The district court should not have certified a class under Rule 23(b)(2). A (b)(2) class may be certified only if it is “appropriate” to issue “final injunctive relief or corresponding declaratory relief with respect to the class as a whole.” Fed. R. Civ. P. 23(b)(2). “Declaratory relief ‘corresponds’ to injunctive relief when as a practical matter it affords injunctive relief or serves as a basis for later injunctive relief.” Advisory Committee Note to 1966 Amendment to Rule 23. Whether styled as injunctive or declaratory relief, it must be “final.” 7AA Charles A. Wright, Arthur R. Miller, & Mary K. Kane, FEDERAL PRACTICE & PROCEDURE § 1775, at 41 (3d ed. 2005). The declaratory relief ordered by the district court does not satisfy these standards.

First, as explained above in Part II.A, TILA does not authorize a private action for declaratory relief at all, much less in a class action. Second, the district court’s declaration does not correspond to injunctive relief. It does not order Chevy Chase to do anything specific, nor could it do so because, as described in the next section, the course of each rescission necessarily varies from transaction to transaction depending on individual circumstances. Third, the district court’s declaration was far from “final.” Even if all the disclosures provided to the putative class members were deficient, the court’s declaration merely initiated the

rescission process and the inevitable disputes to which it gives rise, which will have to be resolved in separate actions in different courts. As the First Circuit noted in *McKenna*, a declaration to seek rescission “plainly would not settle the controversy” because “the equitable nature of rescission generally entitles the affected creditor to judicial consideration of the individual circumstances of the particular transaction.” *McKenna*, 475 F.3d at 427 n.6.

The district court defended its declaration on the ground that “the personal aspects of rescission do not come into play in a declaratory action but only after a borrower actually attempts to rescind.” A33. But the court thereby recognized that the actual rescission process will involve “personal aspects” that would require further court actions in multiple courts, effectively refuting its own view that a declaration somehow avoids the problems inherent in a rescission class action. As the First Circuit noted, a “professed distinction between a suit for a declaratory judgment that rescission is possible and a suit for rescission simpliciter elevates form over substance.” *McKenna*, 475 F.3d at 426; accord *Murry*, 2005 WL 1323364, at *11; *Gibbons*, 208 F.R.D. at 285.

Indeed, the district court issued its declaration without any evidence that any of the absent class members even wishes to rescind a mortgage. “Not all members of a class may have the desire or the ability to rescind,” which requires them in most cases to refinance their

mortgage. TRUTH IN LENDING ¶ 12.08[5], at 881. As one court noted, many class members “may be perfectly satisfied with the work done on their homes and the loan transactions in their entirety.” *Nelson v. United Credit Plan*, 77 F.R.D. 54, 58 (E.D. La. 1978) (concluding that “it may be better to allow each member to sue individually if he wishes”).

Declaring a right to rescind on the part of borrowers who have no wish to rescind therefore amounts to an impermissible “advisory opinion” because “it is not at all clear that a justiciable controversy exists between the class and defendants.” *Gibbons*, 208 F.R.D. at 285; accord *Jefferson*, 161 F.R.D. at 69 (citing *Highsmith v. Chrysler Credit Corp.*, 18 F.3d 434, 436-37 (7th Cir. 1994)). Because “Article III standing requirements must be assessed with reference to the class as a whole, not simply with reference to the individual named plaintiffs” (*Payton v. County of Kane*, 308 F.3d 673, 680 (7th Cir. 2002)), borrowers who have never indicated a desire to rescind their mortgages lack standing to seek a right to rescind. See *Swain v. Brinegar*, 517 F.2d 766, 780 (7th Cir. 1975) (rejecting class action where absent class members would not be affected by proposed relief).

For all these reasons, the court’s certification of a class under Rule 23(b)(2), based on a declaration of a right to seek rescission, cannot be sustained.

B. Plaintiffs have not satisfied the predominance and superiority requirements of Rule 23(b)(3).

Class-wide rescission would require Chevy Chase to reimburse vast amounts of interest, points, finance charges, and application fees received over several years from thousands of borrowers. Accordingly, if a class action were available at all, monetary relief would predominate, requiring that any class be certified under Rule 23(b)(3) and satisfy the predominance and superiority elements of that provision. See *Lemon v. International Union of Operating Eng'rs*, 216 F.3d 577, 582 (7th Cir. 2000) (vacating Rule 23(b)(2) certification where requested monetary damages were more than “incidental”).

The predominance and superiority requirements of Rule 23(b)(3) are “far more demanding” than the Rule 23(a) requirements for class certification. *Amchem*, 521 U.S. at 624. As demonstrated below, plaintiffs cannot satisfy those (b)(3) requirements because individual issues would predominate in any rescission class action, and a class action would not be the superior means of adjudicating the putative class members’ claims.

1. Individual issues would predominate over common issues in any class-wide rescission.

A class may not be certified under Rule 23(b)(3) where individual issues would predominate. *Nagel v. ADM Inv. Servs., Inc.*, 217 F.3d 436, 443 (7th Cir. 2000). That would certainly be the case if the thousands of

class members were to seek rescission. As noted *supra* p. 20, section 1635(b) expressly recognizes the individualized character of the rescission process by authorizing courts to modify the rescission procedures it prescribes. See also S. Rep. No. 96-368, *supra* p. 25, at 29 (“the courts, at any time during the rescission process, may impose equitable conditions to insure that the consumer meets his obligations after the creditor has performed his obligations as required under the Act”). That authorization of equitable court intervention shows that Congress viewed rescission as “a personal, rather than a class, remedy” (*Murry*, 2005 WL 1323364 at *10), requiring “factual findings too numerous to manage as a class action.” *Jefferson*, 161 F.R.D. at 68-69.

The judicial intervention authorized by section 1635(b) occurs frequently. *E.g.*, *Ruiz v. R&G Fin. Corp.*, 383 F. Supp. 2d 318 (D.P.R. 2005); *American Mortgage Network v. Shelton*, 2006 U.S. Dist. LEXIS 23180 (W.D.N.C. Apr. 6, 2006). It is not surprising, for example, that the borrower and lender often disagree over the precise amount to be reimbursed to the borrower. *E.g.*, *Semar v. Platte Valley Fed. Sav. & Loan Ass’n*, 791 F.2d 699, 705 (9th Cir. 1986). Disputes also frequently arise over eligibility for rescission. For example, since rescission applies only to a principal residence, courts often must resolve disputes over whether the property securing the loan is in fact the borrower’s principal residence as opposed to a vacation home or investment property. *E.g.*,

Kovalik v. Delta Inv. Corp., 611 P.2d 955, 957-58 (Ariz. App. 1980).⁵ Similarly, disputes can arise over whether the loan was for business purposes, in which case the loan would not be subject to rescission or even to TILA at all. See *Gombosi v. Carteret Mortgage Corp.*, 894 F. Supp. 176 (E.D. Pa. 1995). Or a dispute may arise over whether the mortgaged property had been sold, such as where a contract for sale has been executed but the sale has not occurred, which too would make the loan ineligible for rescission. See 15 U.S.C. § 1635(f); 12 C.F.R. § 226.23(e); *Hefferman v. Bitton*, 882 F.2d 379, 383-84 (9th Cir. 1989); *Dailey v. Leshin*, 792 So. 2d 527, 531-32 (Fla. App. 2001). Such disputes can be resolved only by delving into the particular circumstances of each case.

Yet another example involves whether the borrower will be able to return the principal once the creditor voids the security interest. In practice, most borrowers do not have sufficient funds on hand to tender back the principal, or they may be barred from doing so due to a bankruptcy or wage earner proceeding (see S. Rep. No. 96-368, *supra* p. 25, at 29), and they therefore arrange for alternative financing. Accordingly, lenders frequently seek judicial intervention so that they are not left completely unprotected before the borrower tenders back the

⁵ In fact, borrowers can have an incentive to misrepresent the status of the property because a loan secured by the borrower's principal residence typically qualifies for a lower interest rate.

principal. *E.g.*, *Yamamoto v. Bank of N.Y.*, 329 F.3d 1167, 1171 (9th Cir. 2003); *Large v. Conseco Fin. Serv. Corp.*, 292 F.3d 49, 55 (1st Cir. 2002); *AFS Fin., Inc. v. Burdette*, 105 F. Supp. 2d 881, 881-82 (N.D. Ill. 2000). In these circumstances, courts often use their modification authority to require the borrower to repay the principal before the lien is released. “[T]here is a strong trend in favor of conditioning rescission and the voiding of the creditor’s security interest upon tender of the remaining principal, *according to the individual factual equities of the transaction.*” TRUTH IN LENDING ¶ 8.04[2][b], at 303 (Supp. 2006) (citing cases) (emphasis added). These “individual factual equities” do not fit into the single-class framework.

Individualized issues also arise regarding payments to third parties. While a creditor generally must refund fees that the rescinding borrower paid to a third party, such as for a title search or appraisal, the creditor need not return amounts paid to a third party “outside of the credit transaction,” such as costs incurred for a building permit or zoning variation. Commentary ¶ 226.23(d)(2)-2. Disputes thus may arise over whether a particular payment to a third party must be refunded. *E.g.*, *General Home Capital Corp. v. Campbell*, 800 N.Y.S.2d 917, 918-19 (Dist. Ct. Nassau County 2005) (dispute over fee paid to mortgage broker); *Mortgage Source, Inc. v. Strong*, 75 P.3d 304, 307 (Mont. 2003) (same). Who is responsible, for example, for casualty and credit life insurance

payments made prior to rescission? The Commentary does not say. See Commentary ¶¶ 226.15(d)(2)-2, 226.23(d)(2)-2; TRUTH IN LENDING § 8.04[2][c], at 652. If the issue is disputed, a court must resolve it based on the case-specific facts and circumstances.

Parties also dispute the timeliness of rescission. Because such disputes depend on “the date of consummation of the transaction” (§ 1635(f)), the outcome necessarily depends on facts specific to each loan transaction. *E.g.*, *Gibbons v. Interbank Funding Group*, 208 F.R.D. 278, 284 n.8 (N.D. Cal. 2002); *Westbank v. Maurer*, 658 N.E.2d 1381, 1389 (Ill. App. 1995). Other disputes may concern whether the creditor may set off the amount to be rescinded from the principal it provided to the borrower (see *Harris v. Tower Loan*, 609 F.2d 120, 123 (5th Cir. 1980)), or whether the borrower may condition its tender of the money or property received from the lender (see *Regency Sav. Bank v. Chavis*, 776 N.E.2d 876, 868 (Ill. App. 2002)).⁶

⁶ What is more, implementing the rescission process often requires courts to look to state law. What constitutes a security interest, for example, as well as its scope, “is basically a matter of state law,” including “state real estate, contract, or other law.” TRUTH IN LENDING § 8.02[1][b], at 607. Class-wide rescission would implicate the varying laws of many states in this nationwide class action, confirming that individual issues would predominate. See *In re Bridgestone/Firestone, Inc.*, 288 F.3d 1012, 1018 (7th Cir. 2002); *Castano v. American Tobacco Co.*, 84 F.3d 734, 741 (5th Cir. 1996).

As these many examples make abundantly clear, the rescission process involves individual circumstances, choices, and time frames that inevitably give rise to disputes that can be resolved only through individualized judicial resolution. “Under Section 1635, individuals must choose to assert the right to rescind, on an individual basis and within individual time frames, before filing suit.” *Jefferson*, 161 F.R.D. at 68-69. By its very nature, this process cannot take place in a single class action. The course of the entire rescission process “lies within the court’s equitable discretion, taking into consideration all the circumstances,” and “must be determined on a *case-by-case* basis.” *Yamamoto*, 329 F.3d at 1173 (emphasis added); accord *Williams v. Homestake Mortgage Co.*, 968 F.2d 1137, 1140-41 (11th Cir. 1992). No wonder courts have concluded that TILA rescission is “a personal remedy not suitable for class treatment.” *LaLiberte*, 53 Cal. Rptr. 3d at 751.

For all these reasons, individual issues would predominate in the multiplicity of separate proceedings to which the district court’s declaration would give rise. As the district court itself recognized in its stay opinion, “rescission is an equitable remedy, and in determining whether to grant rescission and on what terms, courts may consider the *individual circumstances* of the case before them.” A32 (emphasis added). The court offered no plausible explanation as to how the class action device can account for such “individual circumstances.”

2. A class action is not the superior means to adjudicate rescission claims.

The wealth of transaction-specific rescission issues precluding predominance also precludes a class action from being the superior means of resolving all the class members' rescission claims. Any attempt to adjudicate all these individual issues in one proceeding would be unmanageable as a practical matter. See *In re Bridgestone/Firestone, Inc.*, 288 F.3d 1012, 1018-19 (7th Cir. 2002) (reversing class certification due to unmanageability); *Hardy v. City Optical Inc.*, 39 F.3d 765, 771 (7th Cir. 1994) (same). Such a rescission class action would be a “Frankenstein monster posing as a class action.” *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 169 (1974).

In light of these difficulties, a class action is not the efficient way to proceed. The “central planning model” advocated by the district court would not work in a multi-factor rescission case but rather would “suppress[] information that is vital to accurate resolution.” *Bridgestone/Firestone*, 288 F.3d at 1020. The district court’s solution — issuing a declaration that authorizes a multiplicity of separate actions in a variety of courts — is not a solution at all and certainly not what Rule 23 contemplates.

Public policy does not support a class action in these circumstances, as the district court opined (A16). This Court has warned

that large class actions create “intense pressure to settle” even meritless claims. *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1298 (7th Cir. 1995). TILA rescission class actions in particular would pose the risk of devastating lender liability and thereby risk coercing settlements regardless of the merits. The costs of such meritless settlements inevitably would be passed on to borrowers.

Nor is a class action necessary. This is not the type of case where small recoveries negate any incentive to bring individual actions. If each class member has “a sufficiently large stake to be able to afford to litigate on his own,” that “weighs against allowing a suit to proceed as a class action.” *Nagel*, 217 F.3d at 443; accord *Frahm v. Equitable Life Assurance Soc’y*, 137 F.3d 955, 957 (7th Cir. 1998).

TILA “facilitates” the bringing of individual rescission claims (*McKenna*, 475 F.3d at 426) by authorizing borrowers to obtain up to three years’ worth of free interest, finance charges, points, and other fees. To take a simple example: On a typical mortgage of \$300,000, originated for one point and \$500 of additional loan charges at a 6% interest rate, rescission after three years would provide the consumer with at least \$57,500 — \$3,000 in points, \$500 in additional loan costs,

and \$54,000 in interest.⁷ On top of this rescission amount, plaintiffs in some TILA cases may seek actual and statutory damages as well. See 15 U.S.C. § 1640. Thus, it is not true, as the district court opined, that denial of class action status would “reward” TILA violators and leave wronged borrowers “uncompensated.” A16.

In addition, TILA provides for the recovery of attorneys’ fees (15 U.S.C. § 1640(a)(3)), effectively removing another common obstacle to individual suits. See *Mayo v. Sears, Roebuck & Co.*, 148 F.R.D. 576, 583 (S.D. Ohio 1993) (availability of attorneys’ fees makes individual actions a viable alternative to rescission class actions); accord *Nelson*, 77 F.R.D. at 58. The availability of a substantial recovery, “when combined with the attorneys’ fees normally awarded to successful plaintiffs in TILA rescission cases, afford a powerful incentive to debtors to sue individually.” *McKenna*, 475 F.3d at 426 (citations omitted). Accordingly, there is no shortage of cases where individual TILA plaintiffs have sought rescission. *E.g.*, *Handy v. Anchor Mortgage Corp.*, 464 F.3d 760 (7th Cir. 2006); *Carmichael v. The Payment Center, Inc.*, 336 F.3d 636 (7th Cir. 2003); *Clay v. Johnson*, 264 F.3d 744 (7th Cir. 2001).

⁷ This example also confirms that class action rescission would have an extraordinary impact on lenders. Indeed, in *McKenna*, the First Circuit noted that certification of the class to seek rescission in that case would have required the lender to refund roughly \$200 million. 475 F.3d at 424.

Even apart from individual actions, TILA provides “significant incentives for creditor compliance with its strictures.” *McKenna*, 475 F.3d at 426; see *Johnson*, 225 F.3d at 373 (rejecting TILA plaintiff’s contention “that class actions are necessary to provide deterrence or fulfill any of the other goals of the Act”). Federal agencies have full authority to enforce TILA and to order restitution of interest and finance charges to consumers, including for “pattern and practice” violations. 15 U.S.C. § 1607. In the case of federal savings banks, including Chevy Chase, those powers are exercised by the Office of Thrift Supervision (*id.* § 1607(a)(2)), which takes that task seriously. See Office of Thrift Supervision, *Consumer Affairs Laws and Regulations* § 1310 & App. A, <http://www.ots.treas.gov/CL.CFM?DON=422225&AN=11>; *Joint Policy Statement on Administrative Enforcement of the Truth in Lending Act – Restitution* (1999), in TRUTH IN LENDING COMPTROLLER’S HANDBOOK 105 (2006), <http://www.occ.treas.gov/handbook/til.pdf>.

In sum, the unmanageability of resolving thousands of individualized rescission claims via a single class action, the likelihood that certifying such a class would risk coercing settlement regardless of the merits, and the strong incentives to bring individual suits for rescission demonstrate that plaintiffs’ class certification motion should have been denied for failure to satisfy the superiority requirement of Rule 23(b)(3).

CONCLUSION

For the foregoing reasons, this Court should reverse the district court's order certifying a class in this matter.

Dated: March 26, 2007

Respectfully submitted.

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STATUTORY ADDENDUM

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C), the undersigned hereby certifies that the foregoing opening 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 9,578 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: March 26, 2007

CIRCUIT RULE 31(e) CERTIFICATE

The undersigned attorney certifies that he has filed electronically, pursuant to Circuit Rule 31(e), the brief and all of the appendix items that are available in non-scanned PDF format.

Dated: March 26, 2007

One of appellant's attorneys

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that on March 26, 2007 he caused two copies of the foregoing Brief for Plaintiff-Appellant Ameritech Corporation 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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APPENDIX

CIRCUIT RULE 30(d) CERTIFICATE

Pursuant to Circuit Rule 30(d), the undersigned counsel hereby certifies that all materials required by Circuit Rules 30(a) and (b) are included in the Appendix.

One of appellant's attorneys

TABLE OF CONTENTS OF THE REQUIRED APPENDIX

	Page
Decision and Order (Dkt. 81; Jan. 16, 2007)	A1
Order (Dkt. 91; Feb. 5, 2007)	A25
Memorandum (Dkt. 92; Feb. 14, 2007).....	A27