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THE SOUND OF SILENCE: THE CONTINUING LEGAL DEBATE OVER CLASS ACTION RESCISSION UNDER TILA

Jo Carrillo* and Paul Kofoed**

I. THE SOUND OF SILENCE

This paper analyzes federal law on the issue of whether consumers of mortgage products can sue as a class to rescind a mortgage loan under the Truth in Lending Act ("TILA"). Embedded in this question are deeper economic issues about the cost and availability of credit in the United States, and about who should bear the risk of faulty mortgage disclosures. The TILA governs these matters as an existing statutory scheme that provides pre-bankruptcy and pre-default remedies to consumers of credit.

In 1994, the Fifth Circuit Court of Appeal certified a rescission class action in Rodash v. AIB Mortgage, a case involving fees of $223 dollars per loan. Congress responded to Rodash by enacting a moratorium on class action cases. The moratorium was eventually lifted on October 1, 1995, but during the moratorium period, Congress set out to respond to the so-called Rodash problem. The

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6. 141 Cong. Rec. S 14567 (daily ed. Sept. 28, 1995)(statement of Senator D’Amato) ("H.R. 2399 is intended to curtail the devastating liability that threatens our housing finance system in the wake of the Eleventh Circuit Court of Appeals’ recent decision in Rodash versus AIB Mortgage Co.");
ensuing debates led to a set of 1995 amendments to TILA.

The post-Rodash 1995 Amendments (Amendments) raised TILA's tolerance bar from $10 to $100.2 The Amendments also barred class action rescission cases in which the lead plaintiff alleged errors below TILA's $100 low-tolerance limit. Claims that alleged errors above TILA's tolerance bar—what are herein called no- or alternately above-tolerance rescission claims—were not discussed explicitly in the Amendments, but neither were they barred.4 Indeed federal courts continued to certify rescission class actions well past 1995 and into 2007.9

The TILA gives homeowners a right to rescind mortgage loans.10 A homeowner has three business days after the later of consummation of the transaction,11 delivery of notice of the right to rescind, and delivery of all Truth in Lending Disclosures (“TILDs”) to rescind, meaning that when all three of these events occur, TILA’s so-called cooling off period goes into effect.12 The homeowner also has a continued right of rescission for cause—this right can be invoked when a lender’s mandatory TILDs are improper, inaccurate, or absent.13 Thus the rescission right can be belated for up to three-years, even after consummation, if the consumer can show that the lender failed to meet its notice or disclosure obligations under

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(statement of Senator Sarbanes) (H.R. 2399 is “a solution to the so called Rodash problem. . . . in which “small violations of the disclosure requirements of the Truth in Lending Act triggered the right of rescission provided by that act.”).

7. 141 CONG. REC. S14567-08 (daily ed. Sept. 28, 1995) (statement of Senator Sarbanes discussing the difference in legal treatment under the 1995 TILA Amendments between low tolerance rescission claims and what are herein called “above tolerance rescission claims,” meaning rescission claims that are brought for lapses improper disclosure resulting in errors over $100. TILA 1995 Amendments raised the TILA tolerance bar from $10 to $100. Nevertheless, the legislative history makes clear that while the House raised the tolerance limit above $100, the final Senate legislation lowered it back to $100 on the ground that “a low tolerance is needed to ensure that consumers are receiving accurate information about the cost of credit.”).

8. See also Califano v. Yamasaki, 442 U.S. 682, 701 (1979)(holding that FED. R. CIV.P.23(b)(2) allows federal statutory claims to be brought as class actions unless directly and expressly banned by Congress).

9. See infra notes 133-141 and accompanying text.


13. See, e.g., Exercising the Right of Rescission, TRUTH IN LENDING, 640, 648 (2000) (discussing, for example, that if an closed-end transaction is consummated on a Friday, June 1 and notice of the right to rescind plus all material disclosures are also given on that date, then the right to rescind expires on midnight of the following Tuesday, June 5. But if a creditor makes a mistake in providing notice of the right to rescind or a mistake in a material disclosure, then the right to rescind does not end three business days after consummation, but rather the right to rescind continues to exist despite consummation and even though the parties have moved forward on the transaction).
TILA.\textsuperscript{14} Section 1635(b) of the TILA explicitly addresses the mechanical process by which rescission is to take place, at least during the three-day rescission period. It provides that when a homeowner sends a notice to rescind, the lender has twenty calendar days after receipt of the consumer’s rescission notice to return any money to the consumer and to terminate the security interest.\textsuperscript{15} Regulation Z adds that when a consumer rescinds, the security interest is rendered void and the consumer is no longer liable on the transaction.\textsuperscript{16}

In the case where consummation, notice of rescission, and material disclosures all fall on the same day, rescission is a relatively mechanical process, since it occurs during the three-day cooling off period.\textsuperscript{17} But in a belated rescission case, the process of rescission is considerably less mechanical and thus, by comparison, far more uncertain than it would have been had it occurred during the cooling off period.\textsuperscript{18}

Therein lies one key question raised by the current debate over class action rescission claims. If the consumer invokes his or TILA right to rescind in a belated rescission case, how should the rescission process move forward? Should the rescission process protect the consumer, as it would if it were exercised during the three-day cooling off period when restoring the parties to the status quo ante is still a straightforward matter? Or is there an “equitable” consideration that might recalibrate the TILA process more toward protecting the lender’s interests?\textsuperscript{19} In a belated rescission case, should the courts steer their procedural holdings by the concept of consumer rights or creditors’ rights?\textsuperscript{20}

\begin{enumerate}
\item \textsuperscript{14} 15 U.S.C. § 1635(b) (2005) (extending the rescission period to 3 years for cause); Beach v. Ocwen, 523 U.S. 410, 417 (1998); Andrews v. Chevy Chase Bank, FSB, 243 F.R.D. 313, 315 (E.D. Wis. 2007) (“The provision extending the period of rescission is a statute of repose rather than a statute of limitations.”).
\item \textsuperscript{15} 15 U.S.C. § 1635(b) (2005) (detailing the rescission process); Reg. Z, 12 C.F.R. § 226.23(d)(2) (2008) (Upon rescission, the creditor must “return any money or property that has been given to anyone in connection with the transaction.”); Reg. Z, 12 C.F.R. § 226.4(d)(1) (2008) (certain security interests must be refunded to the consumer).
\item \textsuperscript{17} See, e.g., EXERCISING THE RIGHT OF RESCISSION: TRUTH IN LENDING 645-647 (2000).
\item \textsuperscript{18} Id.
TILA and Regulation Z provide that the security interest is voided when the consumer rescinds. The creditor has a twenty-day period after receipt of the consumer’s notice to rescind to return any money to the consumer and to begin the process of terminating the security interest (though it be void). The question of how a belated rescission process might work is a question on the merits. Still, it has steered the courts as a shadow concern on the question of whether to certify a rescission class. Obviously concerns on the merits get amplified in class actions.

Questions about the relationship between class certification and rescission were addressed in TILA’s 1995 post-Rodash legislative history. In that history, Congress concluded that during the three-day rescission period, Section 1635(b) envisions a self-executing deterrent whereby the lender is to release its security interest before the consumer tenders the loan principal. If the security interest is voided before the consumer repays the borrowed funds, then the mortgage lender becomes an unsecured creditor — this evidently is TILA’s built-in deterrent against lender disregard for the disclosure process—at least in the three-day cooling off period. If however TILA rescission is conditioned on tender, as lenders today argue that it should be, then the lender wins a protection vis-a-vis the consumer that the literal language of 1635(b) does not grant.

creditors’ rights under section 1635(b)).

23. See, e.g., Evans dissent in Andrews, 545 F.3d 570, 578-80 (7th Cir. 2008).
26. H.R. REP NO. 104-93 at 52 (1995) (statement of Rep. Roukema)("When a mortgage is rescinded, the borrower is released from the mortgage lien leaving the lender with an unsecured loan, and the borrower is entitled to repayment of interest and all other payments made on the loan.").

Of late, lenders have argued against a hard-line rule that obligates them to go first in the rescission process.28 Ironically, they have also argued against conditional rescission, which would allow them to go second in that same process.29 The span of these opposing legal arguments is over-inclusive—it covers both poles of Section 1635(b). Moreover, it taps into a powerful cultural vein, one in which liability is a stand-in for factors that lenders argue are out of their control—factors like improvident consumer spending,30 the (mis)use of rescission to palliate economic woes caused by consumer overspending,31 judicial disregard for the realities of mortgage lending32 and, ultimately, the current volatility of the nation's economy.33

Important to the current debate is the historical debate that occurred in 1995 over the post-Rodash TILA Amendments.34 In the


28. See, e.g., McKenna v. First Horizon Home Loan Corporation, 475 F.3d 418, 422 (1st Cir. 2006) (noting that the mechanics of rescission are uncomplicated in any given individual case and that a creditor can seek "equitable modifications," presumably such as requiring tender before a security interest is canceled).

29. Id. at 424. (acknowledging the economic problem for lenders if wholesale rescission were to occur).


31. This has been a recurrent theme in the national media. See, e.g., Becky Yerak, Distressed homeowners fight foreclosure by taking their lenders to court, CHI. TRIB., Feb. 22, 2009 at (Business); Lew Sichelman, Document review could save home, CHI. TRIB., Oct. 3, 2008 at (Chicago Homes) 8; Ilyce Glink, Sometimes, Loans Should Be Unlocked, WASH. POST, Jan. 31, 2009, at F04; A better bailout, L.A. TIMES, Sept. 23, 2008 at A18; Gretchen Morgenson, The Silence of the Lenders, N.Y. TIMES, July 13, 2008 BU 1; Tom Bayles, Fallout from CCI deals continues, SARASOTA HERALD TRIB., July 28, 2008 at D12.

32. See, e.g., Ruth Simon, Ruling Faults Lender in Option ARM Suit, WALL. ST. J. (E. ED.), Jan. 18, 2007, at D6 (quoting Chevy Chase General Counsel,Thomas McCormick, as saying that Chevy Chase plans to appeal and that "[t]his is a very technical and complicated area, and I simply believe the judge came to some legal conclusions that are not correct.").

33. Robert D. Manning, CREDIT CARD NATION: THE CONSEQUENCES OF AMERICA'S ADDICTION TO CREDIT 299-301 (1999) for the same point from the historical record).

1995 amendment debates, the meaning of rescission was clear. Rescission was a right created by TILA (not by the agreement of the parties) according to which the lender was to return money to the consumer and cancel the security interest before the consumer tendered the mortgage principal.\(^3\) Congress intended for this process to leave the lender in an unsecured position. Today, lenders are recycling Congressional arguments from 1995 that were made in relation to fifty class action low tolerance lawsuits filed after Rodash was decided.\(^6\) The strategy has been effective in barring consumers from courts, but it skirts around the fact that today's class action rescission lawsuits clearly fall above (not below) the adjusted TILA tolerance level that was set in 1995.\(^7\)

This strategy has also forced the federal circuits (and courts in states that have been hard hit by the mortgage crisis) to address the question of whether consumers have the right under TILA Section 1635 to bring above—tolerance rescission claims in class form. The issue could divide the federal circuits.\(^8\)

Our goal in this article is to offer a straightforward analysis of the recent decisional law on class action rescission claims. To that end, Part Two introduces the competing legal rationales for denying or supporting class action rescission under Section 1635. Part Three examines the rationale that would bar class action claims for rescission—the framework that the First Circuit Court of Appeal adopted in McKenna. Part Four examines the rival rationale that would allow class action claims for rescission—the rationale that the United States District Court for the Seventh Circuit adopted in Andrews. Part Five analyzes decisional law that the McKenna Court of Appeal and the Andrews District Court cases relied on. Finally, Part Six concludes that the courts should allow class action rescission claims for legal, economic, and social policy reasons.

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37. See cases cited infra note 38.
II. FIXING THE RODASH PROBLEM: WHAT ABOVE-TOLERANCE CLASS ACTION RESCISSION IS AND ISN'T

To determine whether TILA permits above tolerance class action rescission claims, federal courts interpret 15 U.S.C. Section 1635, TILA’s rescission provision. On its face 15 U.S.C. Section 1635 is silent on any and every question surrounding class actions claims. But, in the context of its post-Rodash legislative history, Section 1635 appears to implicitly permit class action rescission claims. By contrast, 15 U.S.C. Section 1640, the TILA provision governing money damages, allows class actions cases since it caps class action damages for a single violation at the lesser of $500,000 or one percent of the creditor’s net worth. Section 1635 has no analogous cap on liability other than the 1995 post-Rodash amendments that limit rescission to new money borrowed. This makes a Section 1635 class action rescission claim a potentially broader remedy than a TILA Section 1640 claim for statutory damages.

As far back as 1995, lender reports to Congress claimed that the cost of rescinding all refinanced mortgages over a three-year period could be as high as $217 billion. At that time, Congress spoke directly to the lender liability issue. Legislative history notes that fifty class action rescission cases were filed after Rodash. In response to those cases Congress passed a time sensitive moratorium on class action claims under TILA. As to the fifty class action cases, Congress discussed the relationship between minor errors in disclosure and massive potential liability. Congress concluded that

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41. Id. See Rohner, supra note 13, at 617-667. See also 141 Cong. Rec. S14566-03 (1995), (statement of Sen. Mack) (“Moreover, as is currently set forth in the Federal Reserve regulations, when a borrower refinances an existing loan and takes out new money, only the new money is subject to rescission.”).
43. H.R. Rep. No. 104-193, at 52 (1995) (comments of Rep. Roukema)(“The potential cost of rescinding all refinanced mortgages made in the last 3 years – the time allowed under the Truth in Lending Act to exercise the rescission right – has been estimated to be as high as $217 billion.”); 141 Cong. Rec. S5614-02 (comments of Sen. D’Amato)(“The potential for massive rescissions, based on technical disclosures errors of as little as $10, creates a potential for liability that has been estimated to be as high as $217 billion.”).
the way to deal with the problem of size of error relative to liability was to raise the tolerance bar, which meant that only those cases among the fifty that did not meet the raised tolerance bar could no longer go forward on the merits—whether in class or individual form.

In other words, Congress was not concerned just with bare liability. Rather it had a more nuanced concern over how technical disclosure errors of small amounts relate as a matter of law to estimates of potentially high lender liability. To address that concern over this relationship, Congress raised the TILA tolerance level from $10 to $100. In doing so Congress barred low-tolerance cases in whatever form—whether individual or class—but left unaffected rescission class action claims in above-tolerance cases where the lender error rose above the new $100 level. Additionally, the 1995 amendment debates contain passages that demonstrate concern with preventing foreclosure. In sum, the entirety of the 1995 amendment debates clarified Congress's intent to allow above tolerance claims in whatever form—whether individual or class. The Federal Reserve thought so as well; as to the class action claims that fell above the tolerance level, the 1995 Annual Report of the Federal Reserve concluded, “those lawsuits will now proceed under the new law, which limits the lenders’ liability.”

Today, similar concerns about lender liability get voiced. Looking at individual cases, lenders offer estimates of liability to courts as part of their advocacy efforts; they do so in the law review literature as well. In Andrews, the lender’s estimate of liability was $210 million. In McKenna, the lender’s estimate was $200 million. In the California Court of Appeal case of LaLiberte, the lender’s
estimate of its potential liability was $37 million. These numbers are indeed daunting, but missing from the lenders’ appeals are the counterbalances that Congress concerned itself most with in the 1995 post-Rodash amendment debates. In 1995, Congress was concerned with the relationship between small errors and large estimates of potential liability. In 2007, lenders are recycling the 1995 debates as the basis for requesting that courts forget about the size of the error alleged and concern themselves only with large estimates of potential lender liability.

It is important to point out that TILA rescission is corrective right created by statute, not by the contract. In light of this, recent liability estimates, by contrast, incorrectly imply that TILA rescission is contractual. Put in context, these estimates lose their relevance, as discussed earlier, insofar as they fail to explicitly acknowledge that (1) rescission is a statutory remedy created by Congress, not a penalty allowed by the agreement of the parties, and (2) when Congress discussed rescission class action liability it was in relation to the size of the triggering error. In 1995, Congress was concerned that small errors would trigger class action rescission; Congress was not concerned only with class action rescission. Congress considered rescission as the return of the parties to the status quo ante, meaning as a right “more akin to a unilateral right to cancel, than to rescission in the traditional equity sense.” It was Congress’s view then and it remains the law today that consumers retain a statutory right of rescission in the appropriate circumstances; in some cases that right of rescission will be exercised in the three-day cooling off period, in other cases that right will be exercised belatedly.

That said: rescission is a statutory right that obligates both consumer and lender. Recession is a return of the contracting parties to the position they would have been in had they never entered into the contract. The fact that the arithmetic involves daunting numbers does not and should not change the nature of what rescission means.

52. 141 CONG. REC. S14566-03 (1995).
53. Truth in Lending Class Action Relief Act, H.R. 1380, 104th Cong. (1995) (Congress was concerned with class action in the moratorium legislation, but that moratorium was lifted on October 1, 1995). See also 82nd ANN. REP. OF THE FED. RESERVE, 227 (providing “[a] number of class action lawsuits filed subsequent to Rodash alleged violations for the failure to disclose certain fees as financial charges and sought the remedy of rescission for thousands of loans. Many of these lawsuits were put on hold in May 1995, when the Congress enacted a temporary moratorium on such litigation. The moratorium expired October 1, 1995, and has now been replaced by the TILA amendments. Those lawsuits will now proceed under the new law, which limits the lenders’ liability.”).
55. Id.
as a legal matter;\(^{56}\) it simply means that the borrower tenders the loan principal in full, and in exchange the lender returns to the buyer any fees and interest paid on the ill-gotten loan contract. True, rescission is a deterrent against the accumulation of profits gained at the expense of federal disclosure law, but rescission is not a penalty per se.\(^{57}\)

The main statutory issue with TILA’s rescission provision is that Section 1635 does not explicitly allow rescission class actions. But neither does it explicitly prohibit them. Instead, Section 1635 explicitly grants consumers a right of rescission under subsection (a), explicitly speaks to the order in which TILA rescission is to proceed in subsection (b), but is silent on whether class action rescission claims—direct or declaratory—are permitted. There are competing theories for how best to interpret this textual gap.

Moreover, there is the question of what the gap in Section 1635 means or should mean as a social policy matter.\(^{58}\) Rule 23 of the Federal Rules of Civil Procedure and its interpretation is of course implicated too.\(^{59}\) Lenders want courts to hold that 1635 is restrictive. They want to keep their profits to above-tolerance loans (assuming the plaintiffs’ disclosure allegations are established), and they want to simultaneously hold the consumer to the risk of default for these same products.\(^{60}\) TILA does not create such a wide anything-goes field of play for lenders.

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56. See *The Right of Rescission Under Truth in Lending*, *Truth in Lending* 595, 599 (2000) (“When consumers exercise the right in precisely the manner envisioned by Congress, the result probably accords with the law dictionary definition of ‘rescission of contract.’ But with the unique requirements of the TIL Act, and in the hands of courts that exercise broad remedial powers, the truth in lending (TIL) rescission rules sometimes produce strange results, occasionally amounting to a forfeiture that puts one party far ahead of the status quo.”).

57. Id.

58. See, e.g., Andrews, 545 F.3d at 578-79 (Evans, C.J., dissenting).

59. See, e.g., Califano v. Yamasaki, 442 U.S. 682 (1979)(F.R.C.P. 23 allows class action claims unless directly and expressly banned by Congress). Congress has banned class actions. See, e.g., Soc. Sec. Disability Benefits Reform Act of 1984, Pub. L. No. 98-460, § 2(d)(5). 98 Stat. 1794, 1798 (“No class in a class action relating to medical improvement may be certified . . . ”). Securities Litigation Uniform Standards Act of 1998, 15 U.S.C. § 77(b) (“no covered class action based upon the statutory or common law of any State or subdivision thereof may be maintained by any State or Federal court by any private party alleging (1) an untrue statement or omission of a material fact in connection with the purchase or sale of a covered security; or (2) that the defendant used or employed any manipulative or deceptive device or contrivance in connection with the purchase or sale of a covered security.”).

60. See generally, Mark Zandi, *Financial Shock: A 360° Look at the Subprime Mortgage Implosion, and How to Avoid the Next Financial Crisis* (2009)(Chief Economist and Cofounder of Moody’sEconomy.com rating agency linking together disparate threads of housing/credit crisis to discuss how the effects of the fallout are felt by consumer and investor); Robert J. Shiller, *The Subprime Solution: How Today’s Global Financial Crisis Happened, and What to Do About It* (2008)(explaining the origins of the subprime lending crisis and how the effects fall on the consumer).
Indeed if TILA is to retain any semblance of being a consumer protection statute, then the rationales that restrict class action rescission must be scrutinized. Excusing lenders from federal truth in lending disclosure requirements because of a fear of lender liability is far less tolerable to society and markets than rescission class actions would be. Rescission class actions can potentially rein in unbridled lending practices—and indeed some members of Congress have said as much.61 They can also provide consumers with an affordable way to assert their rights. And, class actions can shield the courts from being overburdened by thousands of plaintiffs—all with identical computer-generated TILDs—who must seek rescission on an individual basis simply because lenders have succeeded in barring rescission in class form.62

If Congress wants to restrict class action rescission cases it has two options. It can ban class action rescission cases outright, something Congress did not do in 1995. Or, it can raise the TILA tolerance bar from $100 to a higher number, a solution the House considered but that the Senate later rejected.63 Both of these options, if selected in the future, would favor lenders, not consumers.

Only Congress, not the courts, can do away with rescission in its class form, just as only Congress, and not the courts, can raise the

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61. Truth in Lending Act Amendments, 141 Cong. Rec. H9513-01 (1995) (Remarks of Rep. Gonzalez) (“I am also heartened that consumers will retain the so-called cooling-off period. . . . With this right, consumers can walk away from a bad deal within 3 days).


See also, Truth in Lending Class Action Relief Act (1995), 141 Cong. Rec. S5614-02 (Remarks of Sen. Mack) (“I do not believe that the authors of the Truth in Lending Act intended to stifle creative lending and punish the mortgage industry for technical violations of its complex disclosure provisions. If the courts were to permit borrowers to rescind loans [for technicalities] as part of class action lawsuits, the impact could be felt from the financial institutions and the secondary markets all the way to the Federal deposit insurance funds, which are ultimately backed by the U.S. taxpayer.”).


“(R)ecognizing the highly technical nature of the Truth in Lending Act, the bill raises the tolerance level for understated disclosures, going forward, from $10 to $100 for civil liability purposes. Regarding the tolerance related to the award of statutory damages under section 130 of the act, the finance charge will be considered accurate on a prospective basis if the disclosed amount is within $100 of the actual amount; the accuracy tolerance for civil liability on [a] past transaction is set at $200. Overstatements continue to be allowed without imposing liability. For errors which can lead to rescission of the loan, which is a much more extreme penalty, the tolerance is one-half of 1 percent of the loan amount. However, for certain refinance loans where the refinancing borrower did not receive additional new advances from the creditor . . . tolerance is 1 percent of the loan amount.”
tolerance bar and thus make TILA claims harder for consumers to bring. As a parallel matter, if Congress decides to deprive the American consumer of the right of rescission in class form, then Congress should explain itself. "[A] company which wrongfully exacts a dollar from each of millions of customers will reap a handsome profit; the class action is often the only way effective way to halt and redress such exploitation." That used to be the U.S. Supreme Court's view, and apparently it was Congress's view when it set the TILA bar first at $10 and later at $100. The consumer can only hope that this view still holds.

The recent cases discussed in this article stem from an unprecedented diversification of product in the mortgage industry. This diversification led to brisk business for lenders in a low interest rate/boom housing market. Today, however, as markets demonstrate that they can twist precipitously downward, lenders implore the federal courts to err on the side of caveat emptor in lending rescission cases despite the fact that TILA rights are created by federal law, not by the parties' agreement.

Until Congress clarifies the silence in Section 1635, the courts have the unenviable front guard job of deciding where to place the burden of liability given the existing TILA regime. Are lenders accountable as a matter of law for the widespread harms that could follow in the wake of mortgage products whose costs were not accurately disclosed? TILA would say yes, under certain conditions. Can the loans that those lenders consummated be rescinded if material terms were not properly disclosed to consumers? Again, TILA would say yes. Can consumers sue as a class for the right to rescind loans that are covered by TILA? This is the unanswered question before the courts today. It is a question that should be answered in the affirmative, since a yes answer is consistent with TILA's language, legislative history, and consumer protection purpose. Finally, it is a question that ideally should be answered by

66. Zandi, supra note 60, at 5 (observing that "federal regulatory structures had difficulty responding" because "after regulators finally began to speak up about subprime and the other types of mortgage loans that had spun out of control, such lending was already on its way to extinction. What regulators had to say was all but irrelevant.").
67. See, e.g., Andrews v. Chevy Chase Bank, FSB, 474 F. Supp. 2d 1006, 1007 (E.D. Wis. 2007) (citing Wilcox v. Commerce Bank of Kansas City, 474 F.2d 336, 344 (10th Cir. 1973) and quoting same to say that "the Tenth Circuit rejected the notion that TILA prohibited class actions, concluding that 'there is nothing on the Act itself, the Rule [Rule 23] or the notes of the Advisory Committee on Rules of Civil Procedure with respect to it which expressly or impliedly precludes class actions of this type of case.'").
TILA represents the best private remedy in existence for (still solvent) consumers at this time. On its face TILA is silent on the class action issue. But TILA’s 1995 legislative history is replete with discussion and debate over class action rescission in low-tolerance cases. Indeed TILA’s material term language turns on the low-tolerance/above-tolerance distinction. Additionally, as the rescission right must be raised by the consumer in a timely manner or else lost, policy dictates that courts interpret TILA to allow consumers to preserve their TILA rescission remedy. TILA rescission is one of the only viable private remedies that consumers can invoke at this nascent stage of a massive foreclosure crisis. In our opinion, it would be wise, at least until Congress has clearly said otherwise, to keep consumer options open rather than to prematurely close them.

Two frameworks typify the split in the federal courts over class action rescission claims under Section 1635. McKenna, a First Circuit Court of Appeals case, reverses the U.S. District Court for the District of Massachusetts to hold that Section 1635’s silence bars rescission class action cases. Andrews, a U.S. District Court case arising in the Eastern District of Wisconsin but just recently reversed by the Seventh Circuit Court of Appeals, preserves consumer rights to rescission class actions under TILA also by citing to Section 1635’s silence. Both decisional frameworks discussed herein make clear that there is a world of meaning in the sound of 1635’s silence; but Congress’s post-Rodash Amendment debates suggest that there is but one correct way to interpret that silence.

III. THE RATIONALE AGAINST CLASS ACTION RESCISSION CLAIMS

The First Circuit Court of Appeals decision in McKenna was decided before the U.S. District Court for the Seventh Circuit handed

down its 2007 decision in *Andrews*. A comparison of the competing frameworks in *McKenna* and *Andrews* demonstrates the difference between their interpretations. These two frameworks agree in their application of the 1995 post-*Rodash* Amendments to TILA. They agree that there is a line between low-tolerance and above-tolerance cases. But they differ in their view of why Congress disallowed class action rescission in low-tolerance cases in the first place.

In the current foreclosure crisis, the rationale against declaratory class action rescission claims in mortgage origination cases was first stated in *McKenna*. In that case, the plaintiffs alleged that the lender failed to disclose accurate information during the origination phase about the plaintiff’s right to rescission. Plaintiffs filed a federal court claim to rescind their mortgage loans; shortly thereafter they filed a motion for declaratory judgment seeking class certification. U.S. District Court Judge Reginald C. Lindsay (now deceased) referred the class certification issue to Magistrate Judge Judith Gail Dein. Magistrate Judge Dein recommended certification of the class by a “declaration that any class member who so desires may seek to rescind their transaction.”

Defendants challenged the recommendation: they argued that general statutory construction principles required Judge Lindsay to conclude that Congress acted with a single intention when it limited class action lawsuits in TILA Section 1640 (damages) in 1974 but then—in the same amendment process—kept silent about the class action issue as it relates to Section 1635 (rescission). Defendants took the view that the 1640 limitation on class action damages claims carried over to any 1635 class related rescission claims. Defendants ignored the function of time in their analysis in the sense that the defendants failed to explain why 1974 amendments, and not 1995 post-*Rodash* amendments, ought to decide a 2007 TILA case.

Judge Lindsay ruled against the defendants’ motion to decertify the class. Judge Lindsay also conceptualized the relief as a “declaratory judgment” so that “any class member who so desires

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71. *Id.* at 294 (D. Mass. 2006).
72. *Id*.
73. *Id*.
74. *Id*.
75. *Id.* at 295.
may seek their transaction. Defendants appealed.

According to plaintiff-consumers, the defendant-lender inaccurately disclosed rescission related information on the TILDs, and in so doing violated TILA and the Massachusetts Consumer Protection Law as to approximately 8,900 consumers. This laid the basis for a Rule 23 case. On appeal, the McKenna defendant attacked the idea that Rule 23, TILA Section 1635, and Massachusetts' consumer protection law intersect. The loans involved in McKenna were option ARM loans, but the TILA basis of the lawsuit turned on whether the lender had adequately explained statutory (Section 1635) rescission rights in its standard disclosures. The defendant-lender urged the court to decertify the class out of concern for massive liability—a theme recycled from the 1995 post-Rodash TILA Amendment debate.

TILA serves the nearly impossible purpose of providing the Davids of the residential mortgage world with the information they need to prudently negotiate with the Goliaths of that world. Plus, TILA goes a step further to deter providers of credit from misleading consumers of credit, a link that is of importance to proper securitization. TILA does this by giving consumers of credit the substantive right of rescission in strict liability form: If a lender fails to meet its disclosure obligations, then the consumer can invoke TILA remedies.

In light of this background, the McKenna defendants argued that the federal court should decertify the class and thus require that each

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78. Id.
79. McKenna, 475 F.3d 418.
80. MASS. ANN. LAWS ch. 140D, § 1 (LexisNexis 2007).
81. McKenna, 475 F.3d at 420-421 (“With respect to the putative class, the plaintiffs sought a declaration that any class member who elected to do so could rescind his or her credit transaction with First Horizon at any time during the extended three-year statutory default period.”).
82. Id. at 420 (“What makes [this action] unusual is that, in addition to their claims for individualized relief, the plaintiffs asserted that First Horizon’s practices had victimized countless others.”) Plaintiffs’ allegation tracks Rodash v. AIB Mortgage Co., 16 F.3d 1142 (11th Cir. 1994), but it enhances it with the additional allegation that the defendant failed to respond to plaintiffs’ rescission requests.
83. McKenna, 475 F.3d at 420. (“This interlocutory appeal requires us to explore, for the first time, the crossroads at which class-action rules intersect with the rescission provisions of the federal Truth in Lending Act (TILA).”)
84. Id. ("Specifically, the plaintiffs contended that First Horizon had inaccurately disclosed information pertaining to consumers' statutory rescission rights and, subsequently, had failed to respond appropriately to requests for the rescission of residential refinancings." In the plaintiffs' view, these violations of the TILA and the MCCCDA entitled them to rescission of their loans and statutory damages.)
one of the 8,900 class members approach the court on an individual basis. The rationale for this solution was only the potential for massive estimated liability should a class of 8,900 consumers be allowed to seek rescission on identical documents; it was not an assessment of the size of the triggering error in relation to the estimates of liability.

Judge Reginald C. Lindsay had, at the district court level, rejected this recycled liability argument. Instead he correctly read TILA to protect consumers and to further the interests of judicial efficiency. The First Circuit Court of Appeal opinion in McKenna, however, took the opposite view. It even went so far as to suggest that rescission class action lawsuits are filed by greedy plaintiffs lawyers—a theme that got a fair amount of play in the 1995 post-Rodash TILA amendments—or alternatively by wishful consumers who did not read their contract documents—a theme new to the debate as of this most recent housing crisis.

Loaded language illustrates the First Circuit's misunderstanding of how TILA protects consumers, but so too do more subtle markers. For example, the McKenna court of appeal opinion states it is "nose-on-the-face plain that unrestricted class action availability for rescission claims would open the door to vast recoveries," and that plaintiffs’ attempts to read the statute otherwise is "wishful thinking." The McKenna rationale also confuses damages with rescission, arguing that rescission is a personal remedy that should be available only on an individual, case-by-case basis. Additionally, it regards consumer protection and economic stabilization as competing rather than as cooperative policies.

In terms of media-capturable images, the McKenna rationale implies that mortgage default is a problem caused by consumers, not by lenders. Specifically, the McKenna rationale supports the view that mortgage default is the result of individuals who acted in bad faith—consumers who presumably reached beyond their fiscal means, or who failed to read their mortgage contract, or who overstated (lied about) their income for the purpose of getting a mortgage loan. Because the McKenna rationale frames the dispute in this way, it necessarily simplifies the problem of errors in mortgage disclosure by creating a disabling certitude—a place where analysis cannot occur.

86. McKenna, 475 F.3d at 424-25 ("It is nose-on-the-face plain that unrestricted class action availability for rescission claims would open the door for vast recoveries," and, at 424, "This is wishful thinking.") (cited in Zambrano and Barnett, supra note 48, at 165 as a clear "effect on the banking industry.").

87. McKenna, 475 F.3d at 425.

88. Jo Carrillo, Disabling Certitudes: An Introduction to the Role of Mythologies of Conquest in
From this troubling point it is but a short step to the incorrect (authors' view) conclusion that federal law can be set aside by judges in order to shield lenders from the mathematics involved in returning fees and interest that were gained in violation of federal disclosure law.

It bears repeating that TILA rescission is not a penalty. Rather it returns the parties to the position they would have been in had the loan not been consummated: The borrower tenders the loan principal in exchange for a return of fees and interest paid. This is TILA rescission. This is one remedy—the other being damages—that Congress contemplated for violations of TILA. If truth in lending remedies and rules are diminished, it should be by the pen of Congress, not piecemeal by the federal courts.

In sum, the First Circuit Court of Appeal decision in McKenna turns on a skeptical question: Won't TILA "open the door for vast recoveries?" That question leads to another: how specifically is it that returning loan principal to lenders on a class basis might result in further "financial disaster in the mortgage industry?" And why are the courts concerned with the lending industry at the expense of consumers, investors, or their own interests in efficiency?

Astonishingly the First Circuit Court of Appeal framed the problem in McKenna as one caused by consumers who attempt to cancel the loans of lenders who made "honest mistakes?" This is astonishing because it appropriates the concerns of the 1995 post-Rodash amendments for low-tolerance claims to the above-tolerance claims of today. In 1995 Congress was concerned that class action rescission would harm lenders who made technical errors that were of no financial consequence to either party. Could an $11 lender error lead to rescission? Prior to the 1995 Amendments the answer was (theoretically) yes, but after 1995, Congress wisely closed that door by raising the bar to $100, not by denying the remedy of rescission in whatever form.

When Congress closed the door to low-tolerance rescission cases in individual and class action form, it did not close the door to

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89. McKenna, 475 F.3d at 424 (Proposing that in response to Rodash, Congress amended TILA "to provide higher tolerance for what it viewed as honest mistakes in carrying out disclosure obligations" and thus "in taking this step, Congress made manifest that although it had designed the TILA to protect consumers, it had not intended that lenders would be made to face overwhelming liability for relatively minor violations.").

90. Id.

91. Id. at 424 (noting that TILA amendments are meant to signal "higher tolerance levels" for "honest mistakes" on the part of mortgage lenders).
rescission in individual or class form for above tolerance errors. Moreover, when Congress closed the rescission door on low-tolerance errors it did not do so with the intent of excusing lenders from TILA compliance. It was never Congress's intent to create a shield behind which lenders could distribute identical computer-generated TILDs that contained material above-tolerance errors in disclosure.

TILA has never been optional for lenders. TILA is not optional now. But the First Circuit Court of Appeal's rationale in McKenna has the practical effect of making TILA disclosures optional insofar as it limits rescission to consumers on a case-by-case basis. After the McKenna decision, TILA becomes a hit or miss law, reminding us of the old joke about schools issuing pencils without erasers since students no longer make mistakes.

On its facts, McKenna is an important case; it is the first federal circuit court of appeal case to rule against class action rescission in 27 years. It is also the first federal circuit court of appeal to rule against class action rescission in the context of the worst foreclosure crisis on record. But the McKenna rationale is unpersuasive insofar as it gives great weight to lender estimates of liability without linking those estimates to the egregiousness of the disclosure error. What the opinion fails to observe is that when Congress raised concerns in 1995 about excessive rescission liability, those concerns were about excessive (aggregate) liability in relation to low-tolerance mistakes that—unaddressed—would have had no financial consequence to the consumer. Without empirical data it is difficult to tell whether the failure to disclose rescission rights in McKenna was a lender mistake of financial consequence to any one consumer. Certainly the failure to disclose would most likely inure to the benefit of the lender, not to the consumer, and not to the investor, whose securitized position was made even riskier as the law blocked consumer efforts to address the dangers caused by the complex mortgage products that they had obtained in up-market days.

IV. THE RATIONALE IN FAVOR OF CLASS ACTION RESCISSION CLAIMS

The Seventh Circuit was briefed and heard oral arguments on September 26, 2007, on the appeal of the TILA class rescission certification in Andrews. On September 24, 2008, the Seventh Circuit

92. McKenna, 475 F.3d at 425. The only other federal circuit court to deny TILA rescission class certification was James v. Home Constr. Co. of Mobile, Inc., 621 F.2d 727 (5th Cir. 1980).
Court of Appeal handed down its decision to decertify the consumer class. Unfortunately, the Seventh Circuit Court of Appeal's decision exacerbates the problem identified in this paper, namely: what does Section 1635's facial silence on the issue of class action rescission mean for home owners who are facing mortgage default?

Going back in time to the year 2007, the U.S. District Court in *Andrews* allowed declaratory class action rescission in an opinion that explicitly rejected the First Circuit Court of Appeal's rationale in *McKenna*. In *Andrews*, the alleged TILA violation went to the core of TILA's protections. *Andrews*, was a challenge to the lender's Annual Percentage Rate ("APR") cost disclosures of its option ARM product. The central allegation in *Andrews* went to the core of the current mortgage crisis as well because in *Andrews*, the plaintiffs alleged that at origination the lender disclosed the option ARM as a fixed (payment) low cost mortgage when in fact the loan was an adjustable (and thus potentially high cost) product.

The lender's disclosure called its option ARM product a "WS Cashflow 5-year fixed." The "note interest rate" was listed as 1.950%. The number of payments was listed at 60, at the minimum payment of $701.21, or alternatively at 300 payments at the minimum payment of $983.49. The APR was defined as "the cost of your credit as a yearly rate, which is subject to change," and it was listed at 4.047% per month for five years.

Plaintiffs stated that they took the option ARM product because they "believed that the payments and the interest rate on the WS Cashflow 5-year fixed were fixed for five years at the lowest stated interest rate of 1.950% and became variable thereafter." In point of fact, this 1.950% rate was a teaser rate that applied only to the first monthly payment, after that the initial and variable 4.047% applied, but it too was subject to change, meaning it was adjustable. Indeed, there was nothing fixed about the WS Cashflow 5-year fixed product despite the TILD's suggestion otherwise. For that reason the TILD raised the legal issue: did the TILD clearly convey to the ordinary consumer that the WS Cashflow 5-year fixed product was an adjustable rate mortgage with a one-month discount rate?

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95. *Id.*
96. *Id.*
97. *Id.*
98. *Id.* at 615.
As it happened, the Andrews' minimum fixed payment of $701.21 became insufficient to cover the interest accruing on the loan; the loan went into negative amortization. This in turn led to an increase in the actual APR of the product. The Andrews' five-year option ARM loan was scheduled to reset in its fifth year to a new rate that reflected the loan's principal balance at that point. But as early as May 2007, only three years into the repayment period, the loan hit its 110% negative amortization cap. At that point, the minimum payment on the Andrews' loan got slated to climb from $701.21 to $1,628.32 at a new 8.25% interest rate—an increase in monthly payments of $927 on a loan that was negatively amortizing for a total package that was at an APR higher enough than the original APR to have warranted a new disclosure. The Andrews' mortgage was secured by the family's home.

In a 2007 class action claim for rescission the Andrews alleged that Defendant Chevy Chase failed to disclose the true cost and variable nature of its option ARM product. The class included 7,000 borrowers with WS Cashflow 5-year fixed mortgages, all originated by Chevy Chase Bank and all with material terms disclosed to the consumer with the same, as in with the identical, computer-generated TILD.

Under TILA, the standard for testing the clarity of a TILD disclosure is the ordinary consumer standard, with the question being whether an ordinary consumer would find the disclosures reasonably understandable. The ordinary consumer standard is a strict objective standard; compliance depends upon the contents of the disclosure form, not upon how the form affects any individual (empirical) reader. Therefore, mandated disclosures only meet current federal TILA standards if those disclosures convey accurate and clear information about the loan under the ordinary consumer

100. Id.; see also 12 C.F.R. § 226.22(a)(2) (LEXIS through 2007 legislation).
102. Id.
103. Id.
104. Id. at 616 (failure to disclose variable nature of loan's payment schedule); Id. at 617 (failure to disclose payment period); Id. at 617-20 (conflicting information on discount interest rate versus annual percentage rate); Id. at 619-21 (failure to disclose variable interest rate feature of the loan); Id. at 620 (insufficient disclosure on negative amortization).
105. Id. at 620.
106. Id. at 616.
standard. The ordinary consumer standard scrutinizes TILDs from "the standpoint of an ordinary consumer, not the perspective of a Federal Reserve Board member, federal judge or English professor."\textsuperscript{108}

Moreover under TILA, a disclosure is clear if it is subject to no more than one interpretation. A disclosure is unclear—and thus in violation of TILA’s mandatory disclosure provision—if it is subject to more than one interpretation from the standpoint of an ordinary consumer.\textsuperscript{109} Litigation that results in improved disclosures down the line is an important part of how TILA is designed to promote market stability over time.\textsuperscript{110} The idea is that lenders will use Federal Reserve Forms and/or amend their forms in response to actual consumer complaints, the net result being that forms will in fact get clearer—for the consumer—with each amendment process.

On January 16, 2007, Judge Lynn Adelman of the U.S. District Court for the Eastern District of Wisconsin denied defendant’s summary judgment motion and instead allowed the class certification to stand.\textsuperscript{111} Defendant Chevy Chase Bank immediately challenged the ruling, citing McKenna\textsuperscript{112} for the proposition that TILA Section 1635 precludes class action rescission cases.\textsuperscript{113}

In a separate opinion handed down on February 14, 2007, Judge Adelman granted Chevy Chase Bank’s motion for a stay pending appeal, but concluded that the bank should not prevail on appeal based on McKenna.\textsuperscript{114} Judge Adelman explicitly rejected the holding and the reasoning of the First Circuit in McKenna, noting that while Congress amended 15 U.S.C. Section 1640 in 1974 to set a damages cap, Congress did not make a comparable reference to class actions when it amended 15 U.S.C. Section 1635, meaning that “[i]t is just as likely that Congress did not intend to limit rescission claims in any way.”\textsuperscript{115} No discussion was had of the 1995 post-Rodash amendments.

The Seventh Circuit Court of Appeal took an interlocutory appeal on the class rescission issue. Judge Sykes wrote the Court of Appeal opinion. She concluded that 1635’s silence on “the class form

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\textsuperscript{108} Andrews, 240 F.R.D. at 616 (citing Smith v. Cash Store Mgmt., 195 F.3d 325, 328 (7th Cir. 1999)).

\textsuperscript{109} Id.

\textsuperscript{110} McKenna, 475 F. 3d at 426.


\textsuperscript{112} McKenna, 475 F.3d at 425.

\textsuperscript{113} Andrews, 474 F. Supp. 2d at 1007.

\textsuperscript{114} Id. at 1010.

\textsuperscript{115} Andrews, 240 F.R.D. at 621.
of action” and the “fundamental incompatibility between the statutory-rescission remedy and the class form of action” barred consumers from joining together to seek declaratory action.116

The Seventh Circuit Court of Appeals’ reversal had many troubling points. It assumed that the lead plaintiffs were experienced mortgage borrowers: thus Judge Sykes reasoned that the consumer, not the lender, should be scrutinized when discrepancies in a mortgage’s disclosed costs come to light since the consumer was experienced.117 Second, the Seventh Circuit Court of Appeal’s reversal conflated common law rescission and TILA rescission.118 Common law rescission is an equitable remedy; TILA rescission is a statutory remedy granted by Congress to the consumer.119 Equitable rescission is allowed when a loan is voidable; TILA rescission is allowed if the lender fails to meet its duties of disclosure. TILA rescission is triggered not by the loan’s voidability, but by the lender’s failure to meet a standard of disclosure set by Congress.

In light of the foundational weaknesses of the Seventh Circuit Court of Appeal reversal, U.S. District Court Judge Lynn Adelman’s opinion in Andrews and U.S. District Court Judge Reginald C. Lindsay’s opinion in McKenna remain important for how they assess the problem of class action rescission in cases alleging substandard mortgage disclosures.

Moreover, in terms of its understanding of the policy concerns at hand Judge Adelman’s U.S. District Court opinion is superior to Judge Sykes’ Court of Appeals opinion. Judge Adelman wrote, for example, that the class certification was valid because the Andrews case involved “public wrongs and widespread injuries.”120 Judge Adelman wrote that public policy ultimately dictated his decision to certify a class whose claims arose from infirmities in the same in the loan TIL documents.121 Indeed, in Judge Adelman’s analysis, the disregard of TILA’s mandates would “reward defendants who may have committed wrongs and leave victims who may have been wronged uncompensated.”122

116. Andrews, 545 F.3d at 571.
117. Andrews, 545 F.3d at 574.
118. Id.
119. See Williams v. Homestake Mortgage Co., 968 F.2d 1137, 1140 (11th Cir. 1992) (“The sequence of rescission and tender set forth in § 1635(b) is a reordering of common law rules governing rescission.”).
121. Id.
122. Id. (“Denial of class action status would reward defendants who may have committed wrongs and leave victims who may have been wronged uncompensated.” Citing Note, Class Actions Under the Truth in Lending Act, 83 YALE L.J. 1416, 1435 (1974).)
Judge Sykes Court of Appeal opinion, by sharp contrast, was not informed by the current context in which these cases are and will continue to arise. Judge Sykes wrongly blamed the plaintiff (not the lender) for failing to detect the loan disclosure problems because the plaintiff "runs his own home-remodeling business, and... [has] previously taken out many original and refinancing mortgage loans for various residential and investment properties." Indeed, she went against TILA's ordinary consumer mandate to recast the Andrews and their thousands of class members, ordinary people, as actors on par in the mortgage lending industry with Chevy Chase Bank and thus as actors who should have detected the problems of Chevy Chase Bank's misleading disclosures.

Judge Sykes opinion gives the Andrews—our consumer everyman and everywoman—the burden of repeat-player-status without the benefit of economies of scale. In so doing Judge Sykes excused the true repeat player, Chevy Chase Bank, from complying with TILA. TILA, with its ordinary consumer disclosure standard, disallows or should disallow this sort of blame-the-consumer bias on the part of federal judges, who—as Judge Evans’ dissent in Andrews argues—are interpreting a silence in a consumer protection statute in the absence of clear direction from Congress itself. “If Congress intended to preclude rescission class actions,” wrote Judge Evans, “it should amend the statute and correct the error itself. When a court cleans up Congress’s mess, it only encourages poor drafting. And if the court gets it wrong—a hazard of judicial guesswork—then all suffer.”

Due to the weaknesses of the Seventh Circuit court of appeal opinion, it is the earlier U.S. District Court opinion in Andrews that hews closer to the public record on TILA, a record that is comprised of the statute, the post-Rodash amendment debates, and the decisional law discussed herein. Therefore the lower court opinion must continue to serve as guidance for plaintiffs and courts in other jurisdictions, where class action rescission has not yet been addressed. Andrews raises the social policy issue of whether courts

124. Andrews, 545 F. 3d at 578-79.
125. Id.
126. Marc Galanter, Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change, 9 LAW & SOC'Y REV. 95-160 (1974) (hypothesizing about the importance of repeat player status in determining courtroom victories); see also Richard Lempert, A Classic at 25: Reflections on
have the power in the words of Judge Adelman "to shield lenders from liability in ways that Congress has not." And it is this issue that should animate the outcome in those states that are facing widespread fallout from massive mortgage foreclosures.

On a social policy level, the question becomes where to place the blame for faulty mortgage disclosures. The McKenna court of appeal rationale focuses on the excessive liability estimates of the lender to support its idea that consumer class action rescission claims will harm the economy. The Andrews district court opinion, on the other hand, implied—correctly in our view—that the mortgage crisis was a function of systemic factors. Judge Adelman refused to blame the consumer in light of TILA’s consumer protection purpose. Instead he took the view that the courts’ refusal to certify a class would punish the victims of TILA violations while rewarding unscrupulous lenders for their unlawful practices. Judge Evans, in his dissent in the Andrews court of appeal, ratified the lower court view taken by Judge Adelman.

The trial court in Andrews and the Seventh Circuit dissent in Andrews come full circle to assert that any deviation from TILA’s exacting standard of clarity is a violation of TILA; and any violation of TILA gives the consumer the right to invoke the statutory rights of rescission. This consumer-friendly rationale downplays concerns about aggregated liability from class actions on the lending industry, particularly as Defendant repeated the aggregate liability arguments from the 1995 post-Rodash TILA amendment debates. Instead, the Andrews district court rationale focuses on the benefits to consumers and to the legal system of permitting class action rescission suits in cases that exceed TILA’s post-Rodash tolerance level.

In conclusion, the McKenna First Circuit Court of Appeals’ rationale articulates a rule to protect lenders. By contrast, the Andrews U.S. District Court rationale articulates a rule that is consistent with the consumer protection purpose set out by Congress in its TILA legislation. For that reason alone, the two opinions are rival responses to the current mortgage crisis. Both cases ask whether declaratory rescission in its class form is a private remedy that can be available to consumers now when they most need rescission to

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Galanter’s Haves Article and Work It Has Inspired, 33 LAW & SOC’Y REV. 1099 (1999).
128. McKenna, 475 F.3d at 425.
130. Andrews, 545 F. 3d at 578-579.
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prevent foreclosure. Both cases opine on TILA's consumer protection purpose. Both cases are cognizant of the fact that important policy issues of where to place blame for faulty disclosures are at stake. Yet, the McKenna court of appeals rationale (now buttressed by the Seventh Circuit Court of Appeals opinion in Andrews) collapses into a normative individualistic analysis that blames the consumer, whereas the Andrews district court rationale (now buttressed by the seventh Circuit Court of Appeal's dissent in Andrews) holds firm to idea that TILA disclosure mandates are the law of the land in above-tolerance cases notwithstanding the systemic events that have taken place to roil real estate markets, credit markets, and investment markets.

V. OTHER COURTS PERMITTING CLASS ACTION RESCISSION

A number of other courts have certified rescission classes only to be reversed on appeal. On April 23, 2007 the U.S. District Court for the Northern District of Illinois issued two rulings in a consolidated group of consumer class actions against Ameriquest and its affiliates. In Ameriquest, the court distinguished between a class action that seeks to rescind loans and a class action that seeks a declaratory judgment that loans are rescindable to hold that a class can be certified for declaratory judgment purposes. The court thought that class certification might be inappropriate in a direct rescission case, but it held that since declaratory rescission only affirms the class members' right to initiate rescission claims on an individual basis within the three-year for-cause repose period declaratory class action rescission could be workable. This theme did not get discussed in the 1995 post-Rodash amendment debates in Congress.

Among federal district courts of the Seventh Circuit, the trend had been towards certifying declaratory rescission in class form. This trend was abruptly halted by the Seventh Circuit Court of Appeal 2008 decision in Andrews. In addition to the 2007 Ameriquest case, in 2004, in Latham v. Residential Loan Centers Of America, Inc., the District Court for the Northern District of Illinois agreed with the line

134. Id.
of cases holding that a class action claim for rescission can be maintained under TILA Section 1635.136

A variety of other federal district courts across the country have certified classes for rescission. In Rodrigues v. Members Mortg. Co., the District Court of Massachusetts granted borrowers’ motion to certify a declaratory rescission class under Section 1635 of TILA—this case was eventually reversed by the Court of Appeal decision in McKenna.137 Nevertheless, the Rodrigues court reasoned that the class met the Rule 23 requirements of numerosity, commonality, typicality, adequacy, predominance, and superiority.138 The Rodrigues court also acknowledged a nascent split in the federal circuits, but agreed that class resolution is appropriate for declaratory class action rescission claims under TILA.139

The Rodrigues court responded to defendants’ excessive liability arguments. It wrote:

Defendants’ sturm und drang about the catastrophic effects of a declaration of a right to rescind is particularly unpersuasive in light of the ... fact that, as they note, few borrowers are apt to request rescission because of the hassle and likely higher interest rate involved in re-financing.140

Judge Lindsay’s First Circuit 2006 McKenna opinion, which was reversed in 2007, must also be counted in the recent cases that have interpreted Section 1635 to permit declaratory rescission claims. In that case, Judge Lindsay reasoned that declaratory class action rescission does not pose the same economic threat to the credit industry that class action damages might.141 Judge Lindsay’s rationale was consistent with TILA’s view of rescission as a corrective remedy that returns the parties to their status quo ante position with respect to the loan: the consumer tenders the loan principal in exchange for a return from the lender of interest and fees paid.

VI. OTHER COURTS DENYING RESCISSION CLASS ACTION CLAIMS

Before the First Circuit Court of Appeals decision in McKenna,

138. Id.
only one court had heretofore addressed the issue of rescission in class form.\textsuperscript{142} Since the Seventh Circuit decided \textit{Andrews}, at least two other decisions have raised the class action rescission question. A recent search turned up thousands (roughly 6,000) citations to Shepardizing the TILA rescission provision.\textsuperscript{143} \textit{Amparan v. Plaza Home Mortg., Inc.}, a California case, indicates that California consumers are beginning to seek rescission. \textit{Briscoe v. Deutsche Bank Nat. Trust Co}, another case from the Seventh Circuit issued an opinion in which the judge wrote “until such time, if any that \textit{Andrews} is appealed and an opposite conclusion reached, I am bound by the Seventh Circuit’s decision.”\textsuperscript{144}

The Seventh Circuit’s \textit{Andrews} decision relied on \textit{James v. Home Construction Co. of Mobile, Inc.}, a 1980 Fifth Circuit Court of Appeals case that disallowed class action claims for rescission; however, read in its entirety \textit{James} is simply not on point.\textsuperscript{145} \textit{James} involved a home improvement loan, not a mortgage or equity refinance loan; and the issue in \textit{James} was whether TILA rescission rights are inheritable (they are), not whether a direct consumer can sue for declaratory rescission in class form as a shield against foreclosure.\textsuperscript{146}

In holding that a TILA cause of action survives the death of the consumer as an inheritable interest, \textit{James} found that the purpose of TILA is threefold: (1) to redress individual wrongs (not public wrongs); (2) to protect individuals in credit markets (not to protect the public); and (3) to restore the status quo ante (not to penalize the lender).\textsuperscript{147} Only from there did the \textit{James} court wade into the waters of class action claims to bar the class action rescission claims of a borrower’s heir. For this reason \textit{James} is of questionable applicability

\begin{itemize}
\item \textsuperscript{143} On file with authors.
\item \textsuperscript{144} Briscoe v. Deutsche Bank Nat’l Trust, No. 08C1279, 2008 WL 4852977, at *4 (N.D. Ill. Nov. 07, 2008).
\item \textsuperscript{145} Cf. Tower v. Moss. \textit{Infra} note 170.
\item \textsuperscript{146} James, 621 F.2d 727, 729-30 (5th Cir. 1980).
\item \textsuperscript{147} Id. (This three part test was applied in part as a way to link TILA up to general law: “Traditionally, the rule has been that actions for penalties do not survive the death of the plaintiff, 110 U.S. 76, 3 S. Ct. 423, 28 L.Ed. 65 (1884). . . . [T]he Sixth Circuit Court of Appeals focused on three factors in its analysis of whether a particular statutory provision was penal. It looked at: (a) whether the purpose of the action was to redress individual wrongs or wrongs to the public; (b) whether the recovery ran to the individual or the public; (c) whether the recovery was disproportionate to the harm suffered, (citing Murphy v. Household Fin. Corp., 560 F. 2d 206, 209 (6th Cir. 1977), which relied heavily on Huntington v. Attrill, 146 U.S. 657 (1892)).
in a case like *Andrews*, which involves the rescission claims of the borrowers themselves. The part of *James* that is relied on in this round of mortgage disputes is, therefore, dicta.\(^{148}\)

*Jefferson v. Security Pacific Financial Services*, a 1995 Illinois Federal Rules Decision case, relied on *James v. Home Constr. Co. of Mobile, Inc.* and was cited by the defendant in *McKenna* as support for its anti-declaratory class action rescission argument.\(^{149}\) At issue in *Jefferson* was how to define a $90 loan disbursement “fee” under TILA. The First Circuit Court of Appeals in *McKenna* cited *Jefferson* for the point that “certification of a class seeking a declaratory judgment regarding a right of rescission for technical disclosure violations would violate Section 1635(b) of TILA, public policy and the scant (but currently existing case law on the issue).”\(^{150}\) U.S. District Judge Ruben Castillo denied a motion for class certification in *Jefferson* because he (incorrectly) thought that TILA protected creditors’ rights, and because he found that “rescission is a purely personal remedy for technical violations of TILA.”

In Judge Castillo’s view, the relevant distinction between whether the charge was a fee or interest was a minor technical matter that did not give rise to TILA remedies.\(^{151}\) This view may be correct for the Judge’s case only because the $90 fee in *Jefferson* was under TILA’s post-*Rodash* low-tolerance $100 bar. For that reason, if *Jefferson*’s value as precedent applies, it holds only in other low-tolerance cases. *Jefferson* should not dictate the outcome in above-tolerance cases like *Andrews*.

Particularly relevant to Judge Castillo’s conclusion in *Jefferson* was the language in Section 1635(b) that gives a creditor twenty days to act on a borrower’s request for rescission before the claim can be filed in court. Judge Castillo said that 1635(b) was a “requirement [that] cuts strongly in favor of treating rescission as a personal, rather than a class, remedy. Under Section 1635, individuals must choose to assert the right to rescind, on an individual basis and within individual

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148. James, 621 F.2d at 731 (relied on for comment that “it seems clear, [that section 1635.] gives the creditor ten [now twenty] days in each case in which to go through the steps of rescission [sic] 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.”) *Id.* (interpreting this exact 1635(b) language: “Within ten days after receipt of a notice of rescission, the creditor 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.”).

149. McKenna, 429 F. Supp. 2d at 294.


151. *Id.* at 67.
time frames, before filing suit.”¹⁵² In concluding as he did, Judge Castillo relied heavily on the James dicta discussed above.

Judge Castillo’s opinion, even if correct on the point that a $90 fee is a technical error to which TILA has developed a tolerance, was weakened by the view of the twenty-day cure period and its function. Judge Castillo’s rationale was that that Section 1635 set into motion an equitable process, a process that sounds, by Judge Castillo’s description of it, ominously like common law rescission, a process that gives a court authority to “tailor the rescission steps to meet the needs of each borrower and creditor.”¹⁵³ It is true that courts have equitable powers to reach the status quo ante in belated rescission cases. But it is incorrect to equate common law rescission with TILA rescission, as Judge Sykes apparently did in her 2008 Seventh Circuit Court of Appeals’ opinion in Andrews.¹⁵⁴

But even if the view that equates TILA rescission with common law rescission in a belated rescission case is correct (and this paper argues that it is not), then such an equity-based process would return consumers to a pre-TILA common law regime—a legal regime of caveat emptor in credit markets, a regime that TILA was meant to supersede with its explicit grant to consumers of a statutory rescission right that is not based on common law preconditions such as the voidability of the contract.

Mortgage lending, while not fully regulated across lenders, requires the exchange of summary disclosure forms that contain the material elements of the deal. Thus to the degree that TILA includes mortgage lending—and it most clearly does—TILA becomes a corrective to the common law. Indeed TILA is a statute whose purpose is to create standardized practices in a rights-based manner—it does this presumably by giving the benefit of certain doubts to lenders that rely on the Federal Reserve disclosure forms provided in Regulation Z. Additionally, TILA streamlines the common law by specifically waiving the precondition of contract voidability (that the common law required) before rescission could be invoked. Therefore, it seems a mistake to presume, as Judge Castillo and later Judge Sykes did (in the Andrews interlocutory appeal), that the statute is no more than a grant to courts of “equitable authority” that can be used to “tailor the rescission steps to meet the needs of each borrower and creditor.”¹⁵⁵ Judge Castillo correctly described common

¹⁵³. Id. at 68.
¹⁵⁴. Andrews, 545 F. 3d. at 577-78.
law rescission, but TILA rescission, to be sure, is not the same as common law rescission even in a belated rescission case. To return the United States economy, to which housing is a central engine, to a Dickensian caveat emptor approach is a mistake, not just for the homeowners who face serious financial consequence including foreclosure, but for investors as well.

_Murry_, a 2005 U.S. District Court case that arose in the Northern District of Illinois, is yet another case about how to classify an overcharge fee under TILA. Like _McKenna_, _Murry_ relied on _Jefferson_, which in turn relied on _James_, to conclude that Section 1635(b) does not permit class action rescission claims. The _Murry_ court placed great weight on Section 1640, the TILA section governing class actions for damages, to make sense of Section 1635. _Murry_ reasoned that when Section 1640 was amended in 1974 to expressly include class actions and to impose a cap on damages, the fact that Congress did not amend Section 1635(b) at that time (1974) evidenced Congressional intent to treat rescission as a purely personal remedy. This is a broad interpretive leap over the 1995 post-_Rodash_ amendments. Nevertheless, this view found its way to Judge Sykes Seventh Circuit Court of Appeals’ 2008 opinion in _Andrews_ where it met with sharp criticism from dissenting Judge Evans—clearly signaling that even on the Seventh Circuit itself there is a split as to whether TILA allows rescission in class action form.

Virtually every court to deny rescission class certification in the last three decades has relied on _James_—_Mayo_ in 1993, _Jefferson_ in 1995, _Gibbons_ in 2002, _Morris_ in 2004, _Murry_ in 2005, _McKenna_ in 2007, _Andrews_ in 2008, and now _Briscoe_. This reliance is questionable at best. _James_ is a pre-_Rodash_ amendment case. It is a case that addresses the lending fringe—predatory home-improvement loans; it is not a case that addresses the middle-class

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157. Id.
159. Andrews, 545 F. 3d at 577-78; Id. (Evans, J., dissenting).
165. McKenna, 475 F.3d at 422.
166. Andrews, 545 F.3d at 577-78.
heart of mortgage lending practices. Moreover—and importantly—it is a case in which a minor error gave rise to rescission. Today James would not have survived to decision as it likely would have been blocked under TILA’s low-tolerance bar.

Jefferson wrongly resurrected James in 1995, at a time when Congress was reacting to Rodash.\(^{168}\) In response to Rodash, Congress placed a temporary moratorium on some class action cases; when the moratorium expired on Oct 1, 1995, Congress responded by overruling Rodash via the 1995 post-Rodash amendments to TILA.\(^{169}\)

James is a low-tolerance claim that predates the 1995 amendment debates and thus has little or no relevance today. But even if James is still relevant on the facts like those in McKenna or Andrews, James fails to address the mechanics of class action rescission.\(^{170}\) Despite the economic hurdles faced by the consumer of tendering the loan principal, winning the right to proceed with rescission is an important strategy to forestall foreclosure. In its class form, rescission is most cost effective remedy for the consumer; it also seems the most efficient way to proceed in terms of judicial and systemic efficiency.

VII. CONCLUSION

On the topic of private legal remedies for current mortgage problems, policy makers have overlooked TILA in the rush to legislation. The stated purpose of TILA is “to assure a meaningful disclosure of credit terms”\(^{171}\). TILA and Regulation Z mandate that required (material) disclosures be made “clearly and conspicuously.”\(^{172}\) These mandates, coupled with statutory damages and rescission, is what makes TILA a consumer protection statute in more than just name.\(^{173}\)

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168. CONG. REC., supra note 6, at S14567.
170. See, e.g., Tower v. Moss, 625 F.2d 1161, 1163 (5th Cir. 1980) (decided a few months after James, allowing class action rescission as part of a settlement agreement that entitled each class member to choose between recovering damages by a 15% reduction in the amount owed to Defendant or rescinding the loan. Of the 143 class members, 103 chose the 15% reduction and only 40 chose to rescind. This suggests that in practice, a small proportion of those eligible to rescind will in fact do so.).
173. Ramadan v. Chase Manhattan Corp., 156 F.3d 499, 502 (3d Cir. 1998); accord Begala v. PNC Bank, Ohio, N.A., 163 F.3d 948, 950 (6th Cir. 1998) ("We have repeatedly stated that TILA is a remedial statute and, therefore, should be given a broad, liberal construction in favor of the consumer."); Fairley v. Turan-Foley Imps., Inc., 65 F.3d 475, 482 (5th Cir. 1995) ("The TILA is to be
Judges have written that TILA was intended by Congress to balance the scales in mortgage lending so that consumers would have enough accurate information to engage in what is aspirationally called "the informed use of credit." Information is supposed to give consumers greater bargaining power, but while information can help protect consumers against unscrupulous lenders, it cannot always correct lending problems after they have already occurred.

For that reason TILA gives consumers one important substantive right—the right of rescission. Rescission is a remedy that is currently available to the consumer. In its class form it is a remedy that allows the courts to efficiently assist consumers in the enforcement of their existing TILA rights. Rescission gives the consumer an existing tool in the arsenal of remedies that can prevent default and foreclosure. Rescission in its class form allows already economically distressed consumers to invoke TILA's rescission remedy with Rule 23 efficiencies. A bar on declaratory class action claims, on the other hand, simply makes existing TILA remedies fall out of the reach of consumers who are already stressed to the financial limit.

Indeed, to have any effect on the field of mortgage lending, TILA's rescission provision must have a deterrent effect on those mortgage lenders that would otherwise take a lax approach to their disclosure obligations under the statute, or worse, on those that would exploit unsuspecting consumers through misleading disclosures. Damages—the imposition of liability—are not enough to make a consumer whole, particularly if lenders potentially extract more money from consumers than those same lenders would pay as damages under TILA over the life of a loan were violations to go by undetected by the consumer. Rescission is the only remedy that restores the parties to the status quo ante—at least in terms of the loan itself. For this reason, the possibility of class action rescission is an important deterrent to past abuses in mortgage lending.

Class action rescission—and perhaps in declaratory form—is necessary to effectuate the deterrence function of TILA because
statutory damages alone—as distributed to class members—may be too small to address the harms perpetrated.\textsuperscript{177} Class certification serves an important function in TILA cases, where “the difficult financial situation of many litigants may inhibit individual litigation.”\textsuperscript{178} Class actions provide a mechanism that protects a litigant’s right to court access.\textsuperscript{179}

Today’s credit markets make the need for clear and accurate TILA disclosures more pressing than ever. All players in the field know this; and yet the players also know that it is the consumer—not the lender—who has the least information. One consumer lawyer pithily stated that is becoming a matter of common knowledge that loan products are now so complex that “most lawyers can’t get through [the disclosures]. For the average consumer, it mission impossible.”\textsuperscript{180} Congress worried about the same problem as early as 1995.

All indicators suggest that the litigation fallout from the mortgage/housing crisis is in its infancy. In the first quarter of 2008 alone, one reliable analyst found that 170 subprime-related lawsuits were initiated, with a record seventy-nine of those class action claims brought by home-loan borrowers against lenders and mortgage brokers.\textsuperscript{181} Of those, the principal claims of 42% alleged inadequate disclosure.\textsuperscript{182} This represents the largest category of subprime crisis-related suits filed, and an 85% increase over the previous busiest quarter.\textsuperscript{183}

Given the recent proliferation of TILA class action suits, whether courts can certify classes of borrowers who are seeking rescission is an increasingly important matter if the government is to hold back the tide of mass foreclosures. An examination of the split in the federal courts reveals that those courts that refuse to certify rescission classes primarily rely on the theory that class certification will result in catastrophic lender liability; these arguments are

\textsuperscript{177} Swanson v. Am. Consumers Indus., Inc., 415 F.2d 1326, 1333 n. 9 (7th Cir. 1969) (reversed on other grounds).
\textsuperscript{178} Williams v. Chartwell Fin. Servs., 204 F.3d 748, 760 (7th Cir. 2000).
\textsuperscript{179} Discover Bank v. Superior Court, 36 Cal. 4th 148, 156 (2005).
\textsuperscript{181} Jeff Nielsen, Subprime Mortgage and Related Litigation – First Quarter 2008 Update: Reaching New Heights, Navigant Consulting (April 2008); Amir Efrati, Subprime-Crisis Lawsuits 2008: By the Numbers, WALL ST. J. Law Blog, April 24, 2008; Prabha Natarajan, Fannie, Freddie are Pressured as Homeowners Fall Behind, WALL ST. J. Cl (April 1 2009) (reporting that the speed and the increased levels at which homeowners are falling behind on mortgage payments is putting renewed pressure on the financial reserves of Fannie Mae and Freddie Mac).
\textsuperscript{182} Jeff Nielsen, supra note 181.
\textsuperscript{183} Jeff Nielsen, supra note 181.
recycled from the 1995 amendment debates, but they are presented today in an incomplete and, thus, in an inaccurate form. When Congress considered the topic of excessive liability it was not as an absolute. It was only in relation to the problem of low-tolerance errors in disclosure.

This paper concludes that—prior to this most recent economic crisis—TILA Section 1635 allowed class action rescission for cases that fell above the limits of TILA's tolerance level. In light of current events, it is our view that TILA continues to allow class action rescission for above-tolerance claims. Indeed, TILA's economic stabilization language strongly supports a reading of Section 1635 that keeps the rescission remedy (in class form if that is what it takes) available to consumers unless and until Congress says otherwise. Not all consumers will be able to benefit from the economic stimulus legislation. Nor will all consumers seek the so-called protections of bankruptcy. Thus TILA rescission—a process whereby the consumer returns the loan principal in exchange for a return of fees and interest paid—remains a vital remedy for middle class consumers who are attempting to weather a fearsome mortgage crisis.