THE SOUND OF SILENCE: DECLARATORY RESCISSION CLASS ACTION CLAIMS UNDER THE TRUTH IN LENDING ACT

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The Sound of Silence:  
Class Action Declaratory Rescission 
Under the Truth in Lending Act 

by 

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Abstract:  
In this past decade, the mortgage industry has inserted an array of lending products (mortgage loans) into the market.  These products are difficult for consumers to understand, much less to predict in terms of cost, interest rate or repayment terms.  The federal Truth in Lending Act attempts to correct inequality between the consumer of credit and the provider of credit (the lender).  It does this by obligating lenders to disclose material information about the cost of a loan to the consumer.  If the lender fails to comply with its TILA obligations, then TILA gives the consumer the right to damages or the right to rescission.  

There is no disagreement over whether individuals have TILA remedies – they clearly do.  Nor is there disagreement over whether classes of consumers can sue for damages under TILA – they can.  Rather the current debate is about whether a class of consumers can bring a rescission claim under TILA.  

This debate now splits the federal circuits.  
The federal First Circuit Court of Appeals has barred class action rescission claims.  The Seventh Circuit Court of Appeals is deciding the issue now.  Soon the Second and the Ninth Circuit Courts of Appeals will be asked to do the same.  

This paper is a straightforward look at how the federal courts have thus far interpreted the statutory silence of section 1635 of the Truth in Lending Act. 

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I
Introduction:

This paper discusses whether consumers of mortgage products who later discover that their lenders failed to meet federal disclosure standards can sue as a class for rescission under the Truth in Lending Act.\(^1\) Embedded in this statutory question is a deeper economic issue concerning the cost and availability of credit in the United States. The Truth in Lending Act section 1635 governs the issue, but section 1635 is silent on the matter of whether a lender is liable to those consumers whom it sells high cost credit to in the guise of affordably priced credit.\(^2\)

The Truth in Lending Act gives consumers of credit a rescission right.\(^3\) Consumers have three days after closing (what the TILA calls consummation) to cancel an otherwise valid contract for any reason whatsoever.\(^4\) A consumer also has a right to cancel a credit contract for up to three years after closing

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\(^1\) 15 U.S.C. § 1635 (2005) is silent on this point.
\(^2\) 15 U.S.C. § 1635(b) (2005) (providing for the order that rescission is to take in terms of tender of loan principal and cancellation of security interests).

if he or she can demonstrate that the lender failed to meet its disclosure obligations under federal law.\(^5\)

Additionally, in section 1635(b) the Truth in Lending Act explicitly addresses the process by which rescission is to take place. It provides that when the consumer files a notice to rescind, the lender has 20 days to evaluate (and possibly cure) the disclosure problem; if the lender agrees to rescission the lender’s security interest then gets canceled.\(^6\) Therein lies the key legal and, as it turns out, social, economic, and political issue of the current debate over class action rescission claims in the civil context: If the consumer invokes his or TILA right to rescind, how should the rescission process move forward? Should it proceed to protect the consumer? Or should it proceed to protect the lender? Is this a question of consumers’ rights? Or is it one of creditors’ rights?\(^7\)

\(^5\) 15 U.S.C. § 1635(b) (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.”).


The worry is over what happens to the lender’s security interest in the rescinding consumer’s house. This worry exists in individual rescission cases; it gets amplified in class action cases. Clearly rescission must void the lender’s security interest in the consumer’s house; but the question is when should this magic moment occur?

If the security interest is voided before the consumer repays the borrowed funds, then the mortgage lender seemingly becomes an unsecured creditor in accordance with TILA 1635(b), which states that in a TILA rescission process the lender releases its security interest before the consumer pays back the loan principal. But case law has conditioned TILA rescission on tender (repayment of the loan principal by the consumer to the lender), thus giving lenders a protection that the literal language of 1635(b) does not extend.

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Palmer v. Wilson, 502 F. 2d 860, ??? (9th Cir. 1974) (conditioning cancellation of security interest on tender); Williams v. Homestake Mortgage Co., 968 F.2d 1137, 1142 (11th Cir. 1992) (noting that a court can impose conditions on the voiding of a creditor’s security interest); Yamamoto v. Bank of N.Y., 329 F.3d 1167, 1172-73 (9th Cir. 2003) (explain); Am. Mortgage Network, Inc. v. Shelton, 486 F.3d 815, 821 (4th Cir. 2007) (holding that unconditional rescission is inappropriate where borrowers cannot first repay loan principal); Ruiz v. R&G Fin. Corp., 383 F. Supp. 2d 318, 322 (D.P.R. 2005) (holding rescission is conditional upon tender of loan principal).
Lenders have argued against a hard-line rule that obligates them to go first in the rescission process. \(^{11}\) Ironically, they have also argued against rescission in cases where they would get an equitable modification that evidently would allow them to go second in that same process. \(^{12}\) The span of these legal arguments is wide – it covers virtually all possible bases under 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, the (mis)use of rescission to

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\(^{11}\) 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).

\(^{12}\) See e.g., McKenna v. First Horizon Home Loan Corporation, 475 F.3d 418, 424 (1st Cir. 2006) (acknowledging the economic problem for lenders if wholesale rescission were to occur).
palliate the economic woes caused by overspending, the judicial disregard for the realities of mortgage lending,\textsuperscript{13} and, ultimately, the current volatility of the nation’s economy.\textsuperscript{14} These factors are indeed plausible in any given case, but seen from a macro level these arguments seemingly invoke the time-worn Puritan ethic of economic virtue, as well as the time-tested argument of the Morgans and the Rockefellers. The message of course being that the status quo of “the edifice created by the American industrial revolution” should be protected against consumer (i.e. individual) overspending.\textsuperscript{15}

\textsuperscript{13} See e.g., Ruth Simon, \textit{Ruling Faults Lender in Option ARM Suit,} \textit{Wall. St. J., Personal Finance,} Jan. 18, 2007 ___ (quoting Thomas McCormick, Chevy Chase General Counsel, 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.”).

\textsuperscript{14} Robert D. Manning, \textit{Credit Card Nation: The Consequences of America’s Addiction to Credit} 16 (2000) (making the point generally and citing Lendol Calder, \textit{Financing the American Dream: A Cultural History of Consumer Credit} ___ (1999) for the same point from the historical record).

\textsuperscript{15} See e.g., Robert D. Manning, \textit{Credit Card Nation: The Consequences of America’s Addiction to Credit} 16-20, 33-38, 292-293 (2000) (criticizing what he calls the “normative individualistic perspective” at 292-293 and citing George Ritzer, \textit{Expressing America: A Critique of the Global Credit Card Society} 71-72 (1995) for promoting the normative individualistic argument that, “‘People are not helpless victims . . . Before they can take steps to deal with credit card abuse, people must accept the fact that their credit card is a personal trouble.’”); Daniel Horowitz, \textit{The Morality of Spending: Attitudes Toward the Consumer Society in America,} 1875-1940 78 (1985), and Lendol Calder, \textit{Financing the American Dream: A Cultural History of Consumer Credit} ?? (1999) (each discussing historical appearances of this normative view of consumer spending).
Although the mechanics of rescission are straightforward, how rescission proceeds could become a hub issue in the emerging disputes over mortgage loans. But before that question can be answered, the federal circuits (and courts in states that have been hard hit by the mortgage crisis) must first decide whether consumers have the right under the Truth in Lending Act Section 1635 to bring their claims as a class.

Section 1635 is entirely silent on the matter. This paper is about how that silence is interpreted by courts.

II
Shopping

You may not now be in the process of buying a house, but if you are, you will likely sign whatever papers your lender or broker sets before you.\textsuperscript{16} Despite the occasional boast or urban legend, material terms of the mortgage contract are not typically negotiable.\textsuperscript{17} What you should know at the outset -

\textsuperscript{16} Angie Littwin, Reading Redux (June 9, 2008) available at http://www.creditslips.org/creditslips/LittwinAuthor.html (relaying her experience as a law faculty member who was in the process of buying a house . . . “partway through the closing itself, faced with two inches of papers to sign, my resolve wavered. I was tired and hungry, and my mind kept circling around to all the moving-related errands I needed to do in Austin before the end of business hours and my flight out of town the next day. (A word to the wise: Never go to a closing on an empty stomach.) So I took a few shortcuts.”)

\textsuperscript{17} Id.
although it has not been widely studied as such in the legal literature – is that mortgages are fast being re-conceptualized as a consumer product.\textsuperscript{18}

The fiction is that the mortgage transaction is between two equal actors – the consumer and the lender. But the reality is that the sale of credit is governed by contractual documents that are generated by the lender for the consumer to sign. To be sure, caveat emptor – the buyer beware common law doctrine that has been softened when it comes to goods and real estate – reigns supreme in the sale of credit. This is so notwithstanding TILA's disclosure mandates, which are meant to put the buyer and seller of credit on equal terms at least when it comes to information, and it is so notwithstanding lenders' voluntary steps to make disclosures more clear than they have been.\textsuperscript{19}

So imagine yourself the consumer. Regardless of what type of mortgage product you have purchased, once you have signed the loan contract, federal law gives you a three-day cooling-off

\textsuperscript{18} [Insert foonote]: Insert note on lender liability: credit from borrowed funds to goods/service that meets the definition of a product under laws like the California and Illinois Consumer Protection statutes.

\textsuperscript{19} See e.g., Ruth Simon, Ruling Faults Lender in Option ARM Suit, WALL. ST. J., Personal Finance, Jan. 18, 2007 __ (noting that in response to the subprime mortgage crisis, the Mortgage Bankers Association set up a task force to create a voluntary disclosure form that would make it easier for consumers to understand the pros and cons of various products).
period in which to rescind (cancel) the mortgage contract.\textsuperscript{20} In that three-day window, you can change your mind for any reason whatsoever.\textsuperscript{21} But on midnight of the third business day, for purposes of repose your statutory right to rescind can only be invoked if the lender fails to give you accurate and understandable disclosures.\textsuperscript{22} Disclosures summarize the material terms of a contract; therefore, a lender’s failure to disclose these terms can extend a consumer’s TILA rescission right for up to three years.\textsuperscript{23} Lenders do not ordinarily admit to lapses in disclosure; the burden of proof will be on you, the consumer.\textsuperscript{24}

Your TILA granted rescission right is evidently an extension of the common law right of rescission.\textsuperscript{25} The common law doctrine is an equitable possibility; TILA rescission, by contrast, is a right granted by Congress\textsuperscript{26} to consumers\textsuperscript{27} and,

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\item [\textsuperscript{20}] 15 U.S.C. § 1635(a) (2005) ("the obligor shall have the right to rescind the transaction until midnight of the third business day following the consummation of the transaction or the delivery of the information and rescission forms required under this section together with a statement containing the material disclosures required under this title.").
\item [\textsuperscript{22}] 15 U.S.C. § 1635(f) (2005) ("An obligor’s right of rescission shall expire three years after the date of consummation of the transaction or upon the sale of the property, which occurs first . . . ").
\item [\textsuperscript{23}] 15 U.S.C. § 1635(b) (2005) (the rescission right terminates when the property is sold *** foreclosure sales? *** refinances ***)
\item [\textsuperscript{24}] See e.g., Jones v. E*Trade Mortgage Corp., 397 F.3d 810 (9th Cir. 2005).
\item [\textsuperscript{26}] 15 U.S.C. § 1635(a); see Reg. Z, 12 C.F.R. § 226.9.
\end{itemize}
surprisingly enough, to creditors as well.\textsuperscript{28} The TILA rescission right exists even if the underlying contract is valid.\textsuperscript{29} This means that a consumer can cancel an otherwise good contract, which raises the issue of whether, when, and how TILA acts as a penalty imposing statute, if indeed it does.\textsuperscript{30} A consumer can seek rescission under TILA if the necessary disclosures that “reflect the terms of the legal obligation between the parties”\textsuperscript{31} have not been made “clearly and conspicuously in writing, in a form that the consumer can keep.”\textsuperscript{32} Leading to the next point:

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\item \textsuperscript{27} See e.g. Andrews v. Chevy Chase Bank, FSB, 2007 U.S. Dist. LEXIS 3162, * 4-*8 (E.D. Wis. 2007).
\item \textsuperscript{29} Under the common law, a contract must be voidable before rescission is available, and once available rescission can go forward without the necessity of a court decree. See, e.g., Truth-in-Lending: Judicial Modification of the Right of Rescission 1974 DUKE L.J. 1227, 1231 (1974) (explaining by example how common law rescission is available in cases where the contract is voidable, how common law rescission is a private process, and, thus, why it is that “judicial action is necessary only to assist the rescinding party in recovering his property.”).
\item \textsuperscript{30} Jefferson v. Security Pacific Financial Services, 161 F.R.D. 63, 69 (1995) (“A declaratory judgment permitting classwide rescission [sic], under the circumstances presented in this case, would turn Section 1635(b) into a penal provision, a result certainly never explicitly authorized by Congress.”).
\item \textsuperscript{31} Regulation Z, 12 C.F.R. § 226.5(c) (2008).
\item \textsuperscript{32} Regulation Z, 12 C.F.R. § 226.5(a), § 226.17(b) (2008).
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See, Elwin Griffith, Lenders and Consumers Continue the Search for the Truth in Lending Under the Truth in Lending Act and Regulation Z, 44 SAN DIEGO L. REV. 611, 626-627 (2007) (discussing general rules requiring that the creditor provide the consumer with the necessary disclosures before consummation of a credit transaction).
the TILA rescission right appears to be Congress’s way of recognizing just how standardized the credit lending process has become.\textsuperscript{33}

Of course the type of loan you, the consumer, obtain is not just a question of how well your gray matter wraps itself around contract documents. Underwriting practices will also play a role in your “decision” about what type of mortgage to obligate yourself (and your home) to. Analysts have identified reasons other than the intellectual or market prowess of the credit consumer to help explain why some individuals end up with manageable (reasonably priced) mortgage loans and others do not.\textsuperscript{34} Reasons like adverse life events,\textsuperscript{35} limited financial

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See generally, Jo Carrillo, In Translation for the Latino Market Today: Acknowledging the Rights of Consumers in a Multilingual Housing Market, 11 HARV. LATINO L. REV. 1 (2008) (discussing how these standards apply to consumers whose proficiency is in a language other than English).\textsuperscript{33} [check legislative history]
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See e.g., Courchane, Marsha J., Brian J. Surette, and Peter M. Zorn, Subprime Borrowers: Mortgage Transitions and Outcomes, 29 J. REAL EST. FIN. & ECON., 365, 372 (2004) (analyzing Freddie Mac survey data to find it “indicate[s] that, of those surveyed, subprime borrowers generally come from an underserved population with 16 percent of subprime (vs. 4 percent of prime) loans taken out by African-Americans and 8.3 percent of subprime (vs. 4.5 percent of prime) loans taken out by Hispanic borrowers); Jill L. Wetmore and Chiaku Ndu, Mortgage Refinancing Activity: An Explanation [1990-2001], 33 J. REAL EST. FIN. & ECON. 75 (2006).
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\textsuperscript{34} See, e.g., Teresa A. Sullivan, Elizabeth Warren & Jay Lawrence Westbrook, The Fragile Middle Class: Americans in Debt 254-56 (2000). See, e.g., Lendol Calder, Financing the American Dream: A Cultural History of Consumer Credit 303 (1999) (arguing that lending and debt are regulators of income for middle-class Americans that lead not to excess, but to the “transform[ation of] consumer culture
knowledge, poor mortgage search behaviors, or failure to read the contract documents can tip the scales against a consumer. So too can race, ethnicity, or language proficiency – what analysts call borrower demographics. Other conditions can

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36 Jill L. Wetmore and Chiaku Ndu, Mortgage Refinancing Activity: An Explanation [1990-2001], 33 J. REAL EST. FIN. & ECON. 75 (2006). Cf., Karl Llewellyn, THE COMMON LAW TRADITION 370 (1960) (“Instead of thinking about ‘asset’ to boilerplate clauses, we can recognize that so far as concern the specific, there is no asset at all. What has in fact been assented to specifically are the few dickered terms, and the broad type of transaction and . . . a blanket assent (not a specific assent) to any not unreasonable or indecent terms the seller may have on his form, which do not alter or eviscerate the reasonable meaning of the dickered terms.”).


39 Courchane, Marsha J., Brian J. Surette, and Peter M. Zorn, Subprime Borrowers: Mortgage Transitions and Outcomes, 29 J. REAL EST. FIN. & ECON., 365, 372 (2004) (analyzing Freddie Mac survey data to find it “indicate[s] that, of those surveyed, subprime borrowers generally come from an underserved population with 16 percent of subprime (vs. 4 percent of prime) loans taken out by African-Americans and 8.3 percent of subprime (vs. 4.5 percent of prime) loans taken out by Hispanic borrowers).
determine a consumer’s choice; for example, analyses of mortgage refinancing activity – an important topic in the real estate finance literature – demonstrate that refinancing behavior is strongly influenced by the interplay of personal, industry, and market factors.

Then there are market incentives that lenders might use to "steer" a consumer to "choose" one product over another. The

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40 See, e.g., Lendol Calder, FINANCING THE AMERICAN DREAM: A CULTURAL HISTORY OF CONSUMER CREDIT 303 (1999) (arguing that lending and debt are regulators of income for middle-class Americans that lead not to excess, but to the “transform[ation of] consumer culture into a suitable province for more work”); Lloyd Klein, IT’S IN THE CARDS: CONSUMER CREDIT AND THE AMERICAN EXPERIENCE 1-14 (1999) (making the same point based on the sociological literature).

41 See e.g., Office of the Attorney General, Department of Legal Affairs State of Florida v. Countrywide, Case No. 08 30105, June 30, 2008 (complaint filed in the Circuit Court of the 17th Judicial Circuit of Florida, Broward County under the Florida Deceptive and Unfair Trade Practices Act, alleging in Count 37 that “. . . Defendant failed to afford borrowers the opportunity to avail themselves of alternate loan options, certain of which carried lower rates of interest. Thus Defendants made Subprime Loans to borrowers when they knew or should have known that the borrowers were qualified for alternate loans at lower interest rates.”).

42 See for example, Jill L. Wetmore and Chiaku Ndu, Mortgage Refinancing Activity: An Explanation [1990-2001], 33 J. REAL EST. FIN. & ECON. 75, 76-78 (2006) (reviewing the literature on mortgage refinancing activity to identify personal (e.g. debt consolidation, desire to “cash out” one’s home equity, perceiving savings that can be gained when interest rates drop) and structural reasons (e.g. interest rates, housing prices, underwriting standards) for mortgage refinancing behavior).

yield-spread premium (YSP) is such a device.\textsuperscript{44} A YSP is something one cannot easily identify from the loan documents, but once identified it serves as a reminder that the lender paid a perhaps-trusted-broker to sell a more expensive product than the consumer otherwise might have qualified for.\textsuperscript{45} The use of a broker can work against the consumer; one empirical study found that more subprime than prime borrowers relied on mortgage brokers to help maneuver their way around the credit market.\textsuperscript{46} The maze of charges, fees and interest rates is another sink point – some charges will get folded into the cost of the loan

\textsuperscript{44} Courchane, Marsha J., Brian J. Surette, and Peter M. Zorn, \textit{Subprime Borrowers: Mortgage Transitions and Outcomes}, 29 \textit{J. Real Est. Fin. \& Econ.}, 365, *** (2004).

\textsuperscript{45} See e.g, Wolski v. Fremont Investment & Loan, 127 Cal. App. 4\textsuperscript{th} 347, 354 (2005) (discussing a YSP and holding that a YSP is not included in the definition of a point or fee for purposes of the California predatory lending law); \textit{Office of the Attorney General, Department of Legal Affairs State of Florida v. Countrywide}, Case No. 08 30105, June 30, 2008 (complaint filed in the Circuit Court of the 17th Judicial Circuit of Florida, Broward County under the Florida Deceptive and Unfair Trade Practices Act, ***, alleging in Count 36 that “Defendants employed deceptive marketing practices in an attempt to influence and steer unwary consumers toward the purchase of risky and costly mortgages and home loans.”).

(to be paid off with interest), others will not.\textsuperscript{47} And, of course, there are the personal and social costs of credit.\textsuperscript{48}

Additionally, conventional mortgage underwriting views the consumer’s reason for assuming a loan itself a predictor of risk.\textsuperscript{49} Extracting home equity to pay credit card bills is understandably a riskier proposition – from the underwriting perspective – than a no-equity out refinance whose purpose is to save the consumer money when prevailing interest rates are lower than contract rates.\textsuperscript{50} The former is the strategy of a cash-strapped consumer; the latter of a cash-flush consumer.\textsuperscript{51}

\textsuperscript{47} See e.g. Elwin Griffith, Lenders and Consumers Continue the Search for Truth in Lending Under the Truth in Lending Act and Regulation Z, 44 SAN DIEGO L. REV. 611, 616-626 (2007) (discussing the vast array of charges, fees from a legal perspective).

\textsuperscript{48} See e.g., Robert D. Manning, CREDIT CARD NATION: THE CONSEQUENCES OF AMERICA’S ADDICTION TO CREDIT 16-26 (2000) (discussing social costs of credit and trends in postindustrial inequality); Lloyd Klein, IT’S IN THE CARDS: CONSUMER CREDIT AND THE AMERICAN EXPERIENCE 1-14 (1999) (discussing social costs of credit and credit as a social control mechanism); Mark Schreiner and Michael Sherraden, CAN THE POOR SAVE? SAVING & ASSET BUILDING IN INDIVIDUAL DEVELOPMENT ACCOUNTS 4 (2007) (discussing why it is important to include the poor in existing asset-based social policies).


\textsuperscript{51} See e.g., Robert D. Manning, CREDIT CARD NATION: THE CONSEQUENCES OF AMERICA’S ADDICTION TO CREDIT 16-20 (2000) (discussing a divide between “poor” (cash-strapped) and “rich” (cash-flush) users of
Finally, there is the backdrop of historical patterns.\textsuperscript{52} The Financial Institutions Reform, Recovery and Enforcement Act of 1989 (FIRREA) required banks to report data on applicants and the underwriting decisions that went into the home mortgage origination decision.\textsuperscript{53} Data on race was part of what FIRREA collected; these data paved the way for the study of patterns (and disparities) in mortgage lending.\textsuperscript{54} While these data are interpreted in contentious and competing ways\textsuperscript{55} they tend to

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\textsuperscript{52} See e.g., John Goering and Ron Wienk (eds.), \textit{Mortgage Lending, Racial Discrimination and Federal Policy} 3 (1996) (collecting papers from the conference); Jason Dietrich, \textit{Under-specified Models and Detection of Discrimination: A Case Study of Mortgage Lending}, \textit{31 J. Real Est. Fin. & Econ.} 83, 84-86 (2005) (re-analyzing an early study that found that Black and Hispanic applicants were 60\% more likely to be denied credit than similarly situated white applicants and arguing that omitted variable bias must be empirically analyzed since it is difficult to predict, without empirical analysis of data, how omitted variables effect previous analyses of discrimination).
\textsuperscript{53} FIRREA
\textsuperscript{54} Jason Dietrich, \textit{Under-specified Models and Detection of Discrimination: A Case Study of Mortgage Lending}, \textit{31 J. Real Est. Fin. & Econ.} 83, 84-86 (2005) (re-analyzing an early study that found that Black and Hispanic applicants were 60\% more likely to be denied credit than similarly situated white applicants and arguing that omitted variable bias must be empirically analyzed since it is difficult to predict, without empirical analysis of data, how omitted variables effect previous analyses of discrimination).
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coalesce\textsuperscript{56} around core issues of discrimination by mortgage lenders.\textsuperscript{57}

It is against this sort of explanatory backdrop that the legal case of Latham versus lender came into being. Latham signed a $55,250 adjustable rate mortgage to pay off other personal loans.\textsuperscript{58} Whatever the multiplicity of factors that motivated Latham to replace unsecured debt with secured debt, Latham-the-man was eventually reduced to Latham-the-subprime-debtor.\textsuperscript{59} Latham’s purpose for refinancing and his loan type, an adjustable rate mortgage with an initial interest rate of 9.375\% and maximum interest rate of 16.375\%, probably led to his being classified as a subprime borrower.\textsuperscript{60}

At closing, Latham’s loan came with several documents that were meant – by Congress – to place Latham on a level information field with his lender. One was the mandatory TILA disclosure form (known as a TILD) that stated the loan’s annual percentage rate at a rather optimistic 10.537\% considering the

\textsuperscript{57} John Goering and Ron Wienk (eds.), \textit{MORTGAGE LENDING, RACIAL DISCRIMINATION AND FEDERAL POLICY} 3 (1996) (collecting papers from the conference).
loan’s maximum interest rate of 16%.61 Another was a postdated “Election to Not Cancel.”62 With this last document Latham muddied if not waived his legal right to rescind without cause because he signed it at the beginning of the three-day cancellation period rather than at the end.63

Consumers typically claim not to have sufficient time to read the loan documents at closing. And fine print cannot be wished away notwithstanding Karl Llewellyn’s observation – to touch a modernist base – that “the fine print which has not been read . . . has no business to cut under the reasonable meaning of those dickered terms which constitute the dominant and only real expression of the agreement.”64 So, if Latham were to be on an equal footing with his lender he would at the very least need

64 15 U.S.C. § 1635(a) (2005). Karl Llewellyn, THE COMMON LAW TRADITION 370 (1960) (“Instead of thinking about ‘assent’ to boilerplate clauses, we can recognize that so far as concerns the specific, there is no asset at all. . . . The fine print which has not been read has no business to cut under the reasonable meaning of those dickered terms which constitute the dominant and only real expression of the agreement.”).
to be fully informed of the dickered terms, the ones that, according to Llewellyn, would constitute the only real expression of Latham’s agreement with the lender.

Dickered terms are probably the TILA equivalent of material terms. Thus, Latham would need the TILA mandated three-day cooling-off period if for no other reason than to get familiar with the material terms of his deal. Based on his reading of the TILDs, Latham might want to consult with an attorney or even rescind the loan. Latham could do this as a matter of right under TILA, unless of course he waived that right at closing when he signed the postdated Election to Not Cancel document.

The facts underlying Latham’s “choice” could be said to reflect Latham’s financial sophistication. Some would argue that it reflects badly on Latham’s knowledge because he used funds from an adjustable rate mortgage product secured by his

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68 Varga, Craig, Finance Charges for Consumer Credit Under the Truth in Lending Act – A Report to the United States Congress, 990 PLI/Corp 455 (1997) (explaining that the 3-day cooling off period granted by TILA allows borrowers to review the loan documentation they have just signed, a comment consistent with the legislative history as discussed in Note: Truth in Lending – Right of Rescission, supra note __).
home to pay off unsecured debt. Others might say that Latham’s pre-consummation signing of the postdated Election Not to Cancel form has no legal downside and a considerable economic upside if it allows the lender to disburse funds to Latham sooner rather than later. Others might argue that Latham’s decision to refinance – as it occurred in a twisting market – represents a trend toward increased consumer sophistication, the idea being that consumers like Latham refinance out of a reasoned strategy to save money on interest rates.

The Tax Reform Act of 1986 prohibited interest expense tax deductions on all loans but mortgage loans on primary residences. Intended to encourage homeownership, the change created a disincentive to pay off mortgage loans while simultaneously creating a strong incentive to use mortgage funds secured by one’s primary residence to pay off nondeductible unsecured loans like credit-card balances.

The current view is that changes in the tax law have played an important role in mortgage refinancing behavior.

In the housing finance and economics literature, see e.g. Jill L. Wetmore and Chiaku Ndu, Mortgage Refinancing Activity: An Explanation [1990-2001], 33 J. REAL EST. FIN. & ECON. 75, 77 (2006) (footnoting, at footnote 8, sources in the housing finance and economics literature that also reach this conclusion).

In the law review literature, see e.g. [insert footnote]

70 The Tax Reform Act of 1986 prohibited interest expense tax deductions on all loans but mortgage loans on primary residences. Intended to encourage homeownership, the change created a disincentive to pay off mortgage loans while simultaneously creating a strong incentive to use mortgage funds secured by one’s primary residence to pay off nondeductible unsecured loans like credit-card balances.

71 See e.g, Smith v. Highland Bank, 107 F.3d 1325 (11th Cir. 1997) (**).

72 Elwin Griffith, Lenders and Consumers Continue the Search for the Truth in Lending Under the Truth in Lending Act and Regulation Z, 44 San Diego L. Rev. 611, 637-42 (2007) (discussing this point of view, though not necessarily agreeing with it, in terms of the Election Not to Cancel form as it fell into question in Rodash v. AIB Mortgage, 16 F.3d 1142, 1145-47 (D.D.C. 1999) and in Smith v. Highland Bank, 108 F.3d 1325 (11th Cir. 1997).

73 Jill L. Wetmore and Chiaku Ndu, Mortgage Refinancing Activity: An Explanation [1990-2001], 33 J. REAL EST. FIN. & ECON. 75, 76
Whatever the perspective, Latham’s was a move that did not keep pace with the credit industry, an industry that responds like the hive-minded Borg\(^74\) to organizational, technological, and legal challenges. The credit industry is simply better equipped than the consumer to respond to market conditions.\(^75\) Ralph Nader summarized the situation well when he testified that for buyer and seller in the American marketplace that “the fact is, it is not an equal contest.”\(^76\)

\(^{74}\) Borg (Start Trek) available at http://en.wikipedia.org/wiki/Borg_(Star_Trek) (“The Borg have become a symbol in popular culture for any juggernaut against whom ‘resistence is futile.’”).

\(^{75}\) See for example, Jill L. Wetmore and Chiaku Ndu, Mortgage Refinancing Activity: An Explanation [1990–2001], 33 J. REAL EST. FIN. & ECON. 75, 85 (2006) (concluding that “refinancing activity is showing a faster response to changes in mortgage rates,” because “consumers are more sophisticated and mortgage markets more efficient due to technological and organizational changes.”); Paul Bennett, Richard Peach and Stavros Peristiani, Structural Change in the Mortgage Market and the Propensity to Refinance, 33 J. MONEY, CREDIT & BANKING 955 (2001).

See also, Robert D. Manning, CREDIT CARD NATION: THE CONSEQUENCES OF AMERICA’S ADDICTION TO CREDIT 293 (2000) (discussing the institutionalist perspective of debt that “emphasizes the role of the banking industry and its sophisticated mass-marketing machinery (along with its strategic alliances with consumer-oriented companies such as Citibank–Sony Visa) in transforming traditional attitudes toward debt in order to promote greater levels of consumption – the fundamental dynamic of postindustrial capitalism.”).

\(^{76}\) Cited in James Bishop, Jr. and Henry W. Hubbard, LET THE SELLER BEWARE 17 (1969).
Whether Latham chose his loan because of the strength or weakness of his financial knowledge, the loan was secured by real estate - his home.\textsuperscript{77} One might suggest that a consumer like Latham seek out the expertise of a mortgage broker, but this would not necessarily help him, either at the origination stage or at the litigation stage.\textsuperscript{78} Indeed, the uncertainties of the origination stage are far exceeded by the uncertainties of a litigation stage, should there be litigation.

The TILA extends the three-day right of rescission by three years if the mortgage lender does not properly disclose,\textsuperscript{79} but even so the question of how that right has been altered by the courts, if indeed it has, is currently up for grabs.\textsuperscript{80}

\textsuperscript{78} Courchane, Marsha J., Brian J. Surette, and Peter M. Zorn, Subprime Borrowers: Mortgage Transitions and Outcomes, 29 J. REAL EST. FIN. & ECON., 365, *** (2004).
\textsuperscript{80} See e.g., Palmer v. Wilson, 502 F.2d 860 (9th Cir. 1974) (judicially modifying 15 U.S.C. § 1635(a) by requiring that rescission be conditioned on repayment of loan principal to lender by consumers); Griffith L. Garwood, Truth-in-Lending After Two Years, 89 BANKING L.J. 3, 8 (1972) (Garwood was an advisor to the Legal Division of the Board of Governors of the Federal Reserve System); Truth in Lending, 1974 DUKE L.J. 1227, 1234-1242 (1974 ) (criticizing the Ninth Circuit for judicially altering TILA section 1635 language); Notes: Truth in Lending - Right of Rescission, 1975 WIS. L. REV. 192, 197-202 (1975) (discussing and comparing the options for managing the debtor’s obligation under 15 U.S.C. § 1635(a) as read in relation to Palmer v. Wilson, 502 F.2d 860 (9th Cir. 1974)); Richard P. Goddard, Judicial Erosion of the Rescission Right under Truth In Lending, 35 WASH. & LEE L. REV. 979 (1978) (discussing judicial interpretation of section 1635); Consumer Protection: Judicial
Therefore, even if a consumer serves a lender a notice of rescission, the question of when the lender’s security interest will be cancelled can be called into question as an equitable matter. This makes rescission – despite the existence of TILA – a process muddied by forty years of litigation over the ostensibly uncomplicated mechanics of section 1635(b).\(^{81}\)

To be sure, the absence of material disclosure is a basis for the consumer’s statutory rescission right.\(^ {82}\) So too are inaccurate disclosures, unless the inaccuracy was the result of an unanticipated change.\(^ {83}\) This exception might apply in the case of Susan and Bryan Andrews who, along with thousands of other borrowers, took out an adjustable rate mortgage (ARM) product in an inflated housing market.\(^ {84}\)

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\(^{81}\) \textit{McKenna v. First Horizon Home Loan}, 475 F.2d 418, 422 (1st Cir. 2007) (opining that “the mechanics of rescission are uncomplicated.”).

\(^{82}\) \textit{15 U.S.C. § 1635(a) and Reg. Z, 12 C.F.R. § 226 (2008)} (providing that “disclosures shall reflect the terms of the legal obligation between the parties.”).

\(^{83}\) \textit{Reg. Z, 12 C.F.R. § 226.5 \_\_ (2008)}.

\(^{84}\) See e.g., \textit{Office of the Attorney General, Department of Legal Affairs State of Florida v. Countrywide}, Case No. 08 30105, June 30, 2008 (complaint filed in the Circuit Court of the 17th Judicial Circuit of Florida, Broward County under the Florida Deceptive and Unfair Trade Practices Act, ***, alleging in Count 35 that “Defendants made material misrepresentations to consumers relating to its ARMs: a) misrepresenting the amount of time the initial “fixed” interest rates would be in effect; b) misrepresenting that the interest rates on the loans were “fixed” when that was not the case; c) misrepresenting the manner and degree in which payments would increase subsequent to
The Andrews received disclosures for a Chevy Chase product called the “WS Cashflow 5-Year Fixed Note Interest Rate” mortgage loan, a product that one industry observer called “the most complicated mortgage product ever marketed to consumers.”

There are at least three legal reasons why this observer’s assessment is fair. One, the word “fixed” typically refers to a prime product, not to an adjustable subprime product. Two, this loan “adjusted” (changed) on a regular basis making accurate costs disclosures difficult to understand (and, to be fair, to make). And three, because of the loan’s adjustability, the question of what constitutes proper the termination of the initial fixed rate period; and/or d) employing and advertising extremely low “teaser rates” while not properly disclosing that these rates would dramatically increase, resulting in monthly payments which were beyond the capacity for consumers to meet, given the financial/income information provided by these consumers to the Defendants.”).

85 Report or Affidavit of Mark Vandeventer, February 27, 2006, available on ***
88 Jo Carrillo, Dangerous Loans: Consumer Responses to Adjustable Rate Mortgages, 5 BERKELEY BUS. L.J. 1, ?? (2008).
89 Jo Carrillo, Dangerous Loans: Consumer Responses to Adjustable Rate Mortgages, 5 BERKELEY BUS. L.J. 1, ?? (2008).
disclosure is put to a legal test under Reg. Z, 12 C.F.R. section 226.5(e), which says that “if a disclosure becomes inaccurate because of an event that occurs after the creditor mails or delivers the disclosures, the resulting inaccuracy is not a violation of this regulation although a new disclosure may be required under 226.9.” In the Andrews case, the lender might arguably blame its trouble in disclosing the cost of the ARM product linked to a LIBOR sensitive formula as a problem caused by changing market events or a series of market events that occurred after the disclosures were delivered. If so, the lender would only need to update the TILDs to reflect new information.  

Chevy Chase Bank’s option ARM product prominently featured a 1.95% teaser rate in its Truth in Lending Disclosure Statements - a blatant appeal to the consumer’s search for low interest rates. The 1.95% rate was a discount rate set by the lender; it was a cost leader that, as it turned out, only applied in the first month of the loan’s repayment. From the second month onward, the interest rate on Chevy Chase’s WS

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89 Andrews v. Chevy Chase Bank, FSB, 474 F. Supp. 2d 1006 (E.D. Wis. 2007). I think this is an incorrect cite??
Cashflow 5-Year Fixed Note product more than doubled, because each month, depending on LIBOR rates, the interest rate on the Andrews’ loan moved — upward. If the Andrews had sought to calculate their interest rate adjustments — an implausible desire — they would have had to become proficient at a type of complex math called Complexity Theory.

These are but two examples of loan origination processes (Latham) and products (Andrews) that consumers increasingly allege are dangerous to their financial, physical and emotional wellbeing. They are also examples of common loan origination problems in the legal context.

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93 Jo Carrillo, Dangerous Loans: Consumer Responses to Adjustable Rate Mortgages, 5 BERKELEY BUS. L.J. 1 (2008) (presenting the legal significance of the market indices in a TILA case).


95 Jo Carrillo, Dangerous Loans: Consumer Responses to Adjustable Rate Mortgages, 5 BERKELEY BUS. L.J. 1, PG# (2008) (for a discussion of LIBOR in relation to loan costs in the legal context).

See generally, Dimitris N. Chorafas, CHAOS THEORY IN THE FINANCIAL MARKETS: APPLYING FRACTALS, FUZZY LOGIC, GENETIC ALGORITHMS, SWARM SIMULATION & THE MONTE CARLO METHOD TO MANAGE MARKET CHAOS & VOLATILITY 9 (1994) (discussing time, chaotic market behavior, and the importance of time series properties to predictions of what is possible (not probable)).

96 [Insert footnote: cite NY lender liability cases.]
Loan origination problems fall into two broad categories. The first category includes problems that stem from the lender’s standardized documents or operations. The second category includes problems that stem from facts unique to a single transaction. Loan origination problems tend to involve the use of standardized forms. So, for example, a standardized disclosure form that fails to accurately assess the cost of a loan – like the *Latham* and the *Andrews* TILDs – raises legal questions common to the named plaintiff as well as to any other borrower who obligates him or herself to that same product via identical documents.

Similarly, standard lender practices such as having the consumer sign a non-election of rescission document at the start of the three-day cooling-off period rather than at the end, as alleged in the *Latham*, strips the consumer of, or at the very least predictably interferes with, his or her TILA granted right to read the TILDs outside of the pressure of the deal.\(^\text{97}\) It does this by denying the consumer the opportunity to read the forms in the period immediately after consummation.\(^\text{98}\) This is especially true where the consumer does not get a copy of the TILDs or of the contract until the closing. The premature

\(^{98}\) 15 U.S.C. § 1635(a) (2005) (making clear that the consumer as a “right of rescission as to certain transactions,” not a mere option, and not an equitable position).
waiver of the TILA granted three-day rescission period raises legal questions common to the named plaintiff and to any other consumer who met with that same policy.

There are of course instances where the facts at origination are not the result of standard lender forms or policies. Yet because residential mortgage lending is standardized in form and practice, documents and policies used at origination necessarily become a key part of any consumer claim against a lender. Increasingly, there is a finer line in the legal literature between liability due to standard lender practice and liability due to a unique (customized) set of facts. In Andrews, for example, plaintiffs alleged that the lender printed a payment schedule in the TILDS that misrepresented information unique to each consumer. The information was indeed unique, by which we mean consumer-specific, but the misrepresentation that gave rise to the inaccuracy was the outcome of a standardized process.

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99 Rodash v. AIB Mortgage Co., 16 F.3d 1142, *** (11th Cir. 1994). and post-Rodash
100 Murry
101 Andrews v. Chevy Chase, FSB, complaint p. 4 alleging a violation of Reg. Z., § 226.18(g), which requires that “creditors .. . must disclose the payment intervals or frequency, such as monthly,” and that the TILDS must also display the entire fully amortized principal and interest being imposed upon the consumer each month, according to the definition in the TILDS form and the related regulations. Reg. Z, 12 C.F.R. § ___ (2008).
In those circuits where the courts interpret TILA to allow a declaratory rescission class action claim under section 1635, thousands of residential mortgagors (borrowers) have won judicial approval to seek certification as a class for TILA rescission cases.\textsuperscript{102} As one judge explained, when a class is certified, "the decision as to whether to actually seek rescission [is then left] to each individual class member."\textsuperscript{103} Thus, the plaintiff-borrowers use the class action lawsuit as a way to begin the process of rescission. When the plaintiffs win a declaratory judgment, what each consumer confirms is the right to the continued existence of his or her TILA section 1635(a) right to rescind his or her individual loans on a case-by-case basis within the three year period.\textsuperscript{104}

By contrast, in those federal circuits where the courts interpret TILA section 1635 as a bar to class action rescission claims, consumers rights are considerably more constrained than they are in those jurisdictions were consumers can certify a class for purposes of rescission. When class action is barred under section 1635, an aggrieved consumer arguably still has a statutory rescission right, but rather than having the right to

\textsuperscript{102} List cases – see Paul’s list
\textsuperscript{103} Andrews v. Chevy Chase Bank, FSB, 474 F. Supp. 2d. 1006, 1007 (E.D. Wis. 2007).
\textsuperscript{104} See e.g., Andrews v. Chevy Chase, FSB, 243 F.R.D. 313, 316 (E.D. Wis. 2007) (discussing tolling in relation to statues of repose).
sue as part of a consumer class action, the plaintiff now must seek his or her right on a solitary basis. This predictably can lead to repeat player inequalities.\textsuperscript{105} It also can constitute a legal factor that causes credit markets to be even more skewed toward \textit{caveat emptor} than they already are. That is, those consumers who sue in a jurisdiction that permits class action rescission claims have a significant advantage over similarly situated consumers who sue in a jurisdiction that bars class action rescission claims.

To date, the term classwide rescission has been used by the courts and in the legal literature as a general term.\textsuperscript{106} The term includes the possibility of both direct and declaratory rescission, but in the current round of litigation, the term has been clarified – on plaintiff’s motion – to mean declaratory rescission.\textsuperscript{107} Neither McKenna nor Andrews – both civil cases – have used the term classwide rescission to mean direct rescission – both are cases where the plaintiffs seek declaratory rescission. The term does not mean, as some lender advocates suggest, that class members are required or otherwise


\textsuperscript{106} See e.g., McKenna PG#, banking article, Andrews, Carrillo

\textsuperscript{107} McKenna and Andrews
obligated (forced) to undergo the rescission process. Nor does the term mean in the civil context that certification of the class will give all members in the class a wholesale right of rescission that gets exercisable en masse, Sun Yung Moon wedding-style. Class action rescission does not necessarily mean that lenders will lose their portfolio of security interests in one fell swoop. (However, this is not to say that state Attorneys General might not seek these options.) And yet, there is considerable lender anxiety over what lenders call excessive liability, which has its source in uncertainty over the effects of aggregate liability in relation to the rescission process.

This next part of this Article analyzes the class action rescission question in its case law context. It is important to stress that the primary focus of this paper is the opinion and competition of opinion in the courts over the meaning of section 1635’s silence. We survey legal holdings in civil cases on the issue of what TILA does not say – the section 1635 silence.

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108 McKenna v. First Horizon Home Loan, 475 F.3d 418, 424 (1st Cir. 2007) (quoting Sen. D’Amato as saying the “threat of wholesale rescissions present[s] a real danger to our modern system of home financing.”).

109 Id.

110 Id.

We do not concern ourselves here with the ambiguity in section 1635(b) concerning the mechanics of rescission.

Whether section 1635 permits class action claims is a question that currently divides the federal courts. Our goal in the next part is to offer a straightforward analysis of the key cases and policy concerns that federal circuits have looked to. To do this we introduce in Part Three the two competing legal paradigms used by the federal circuits to interpret section 1635’s silence. Part Four focuses on the paradigm that bars class action claims for rescission – what we call the McKenna rationale. Part Five discusses the rival paradigm that allows class action claims for rescission – the Andrews rationale.

III
The Sounds of Silence:
What Rescission Is and Isn’t

To determine whether TILA permits a class action rescission remedy against residential mortgage lenders, federal courts are called on to interpret 15 U.S.C. section 1635 (2000), TILA’s


rescission provision.\textsuperscript{115} 15 U.S.C. section 1635 is silent on any and every question surrounding class actions claims.\textsuperscript{116}

By contrast, 15 U.S.C. section 1640, the TILA provision governing money damages, explicitly allows class actions cases, but caps statutory damages for a single violation at the lesser of $500,000 or one percent of the creditor’s net worth.\textsuperscript{117} Section 1635, the rescission provision, has no analogous cap on liability.\textsuperscript{118} This makes a section 1635 class action claim a potentially broader and more powerful remedy than either a common law remedy\textsuperscript{119} or a section 1640 claim for money damages.\textsuperscript{120}

\begin{flushleft}
\textit{under the Truth in Lending Act, *** Cal. Real Prop. J. 3 (2008); Jo Carrillo, Dangerous Loans: Consumer Responses to Adjustable Rate Mortgages, 5 Berkeley Bus. L.J. 1 (2008).}
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\textsuperscript{115} Section 1635 gives consumers an affirmative right of rescission that expires over time if not invoked. See e.g., __

\textsuperscript{116} See e.g., McKenna v. First Horizon Home Loan Corporation, 429 F. Supp. 2d 291, 294 (D. Mass. 2006) (where U.S. District Judge Reginald C. Lindsay referred the Plaintiffs’ motion for declaratory judgment on the class certification issue to Magistrate Judith Gail Dein, who recommended that “the declaratory judgment sought shall be a ‘declaration that any class member who so desires may seek to rescind their transaction.’”).

\textsuperscript{117} 15 U.S.C. § 1640 (____).

\textsuperscript{118} 15 U.S.C. § 1640(a)(2)(B) (____).  

\textsuperscript{119} Rescission under 15 U.S.C. § 1635(b) is potentially more powerful than its common law equivalent because it is a matter of consumer right, not of judicial equity. See e.g., Truth-in-Lending: Judicial Modification of the Right of Rescission, 1974 Duke L.J. 1227, 1229-1234 (1974) (discussing the differences between rescission under the common law and under 15 U.S.C. § 1635(b) as originally enacted.).

\textsuperscript{120} See 15 U.S.C. § 1635. Section 1640 yields money damages of around $2,000. Rescission typically eliminates the entire finance charge from a loan and can be far more valuable to consumers.
One Congressional report estimated as far back as 1995 that the cost of rescinding all refinanced mortgages over a three-year period could be as high as $217 billion. Today, those estimates are equally daunting. Looking at individual cases, lenders tend to estimate liability as part of their advocacy efforts; they do this both in court and in the law review literature as a way to warn off chaos. In Andrews, the lender’s off-record estimate of liability was $200,000,000. In McKenna, the lender’s record estimate was also in the $200,000,000 to $4,450,000 range. In the California Court of Appeal case of LaLiberte, the lender’s estimate of its potential liability was $37,000,000. These numbers are indeed steep, and they do portend of chaos in the current down market. But they nevertheless beg two questions. One, are they accurate predictors of rescission liability? And, two, what are the

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121 H.R. Rep. No. 104-193, at 52 (1995) (comments of Rep. Roukema of N.J.). Class action lawsuits for rescission under TILA serves to give borrowers who are members of the class the right to go forward with their individual rescission claims at a later date. Lender liability will therefore ultimately be the sum total of cases where a borrower who wins the right to bring an individual rescission action later chooses to bring that action in the time allowed.

122 [insert footnote]

123 [insert footnote]

124 McKenna v. First Horizon Home Loan Corp., 475 F.3d 418, 424 (1st Cir. 2007).

benefits of allowing declaratory rescission consumer class action claims to proceed?

The main statutory issue with TILA’s rescission provision – section 1635 – is that it is silent on the issue of class certification. Section 1635 clearly grants consumers a right of rescission under subsection (a), and it literally speaks to the order in which rescission is to proceed in subsection (b), but it is completely silent on whether class action rescission claims are allowed. In essence, what this means is that section 1635 permits two diametrically opposed readings – either Congress “intended rescission to be totally unavailable as a class remedy in the TILA milieu,” or Congress “intended rescission class actions to be available unrestrainedly in TILA cases, not subject to the limiting conditions” of the money damages class actions.\textsuperscript{126}

The legal issue reduces down to what section 1635 means – and particularly to what its silence signifies or should signify as legal policy. Rule 23 of the Federal Rules of Civil Procedure is of course implicated as well. The upshot is that lenders are asking courts to interpret TILA in a way that gives the mortgage industry the profit of its innovation – namely the speculative use of mortgage products like option ARMs – while simultaneously holding the consumer to the risk of default.

\textsuperscript{126} McKenna, 475 F.3d 418, 424 (1st Cir. 2007) (emphasis added).
These cases arise from a deep albeit useful diversification of product in the mortgage industry, diversification whose enhancement over the last decade led to brisk business for lenders in a low interest rate /boom housing market environment.\textsuperscript{127} Yet now as the lenders newly preferred array of products is called into legal challenge, and as the market twists precipitously downward on all fronts, lenders now implore the federal courts to err on the side of \textit{caveat emptor} when it comes to addressing consumer claims. This relationship between change and stasis in credit markets - and in financial markets generally - appears to be what defendant-lenders are in actuality asking the courts to calibrate as they make their pleas in the guise of a TILA section 1635 defense.

The courts that decline to certify section 1635 rescission class actions acknowledge that TILA is meant to protect consumers, but they evidently give more weight to TILA’s language of economic stabilization.\textsuperscript{128} On the factual level, they are persuaded by lenders’ claims that class action rescission does not now but could someday mean that loans of all members of the class would \textit{automatically} be rescindable if a class were certified pursuant to section 1635; this is an

\textsuperscript{127} Jo Carrillo, \textit{Dangerous Loans: Consumer Responses to Adjustable Rate Mortgages}, 5 BERKELEY BUS. L.J. 1 (2008) (noting changes in mortgage lending according to Lehman Brothers over the last decade).

excessive liability argument variant. On the policy level, they imply that protecting consumers and protecting the economy are mutually exclusive endeavors; this is yet another excessive liability argument. These two positions merge into judicial assertions that ironically protect an invented past, one in which honest lenders helped honest consumers achieve the American Dream. It is that invented past that lenders are now imploring courts to protect by shielding creditors from what they fear will be “crushing liability.”

In this rubric, the only consumer who is deemed worthy to receive the protection of rescission is the individual consumer who is current on his or her mortgage payment. Thus, this rationale turns on a faint but detectable normative claim that gets incorporated into the legal literature. According to the claim’s logic, the so-called bad faith borrowers – those who are in default – are separated out from the so-called good faith borrowers – those who meet their mortgage obligations. In this sense whether any particular consumer can or cannot keep current on a mortgage loan becomes characterizable as matter of personal integrity rather than as a matter of statutory interpretation, twisting markets, how to address lender

129 McKenna, 475 F.3d at 424-25 (1st Cir. 2007).
130 McKenna, 475 F.3d at 424-25 (1st Cir. 2007).
131 See McKenna, 475 F.3d at 424-25 (1st Cir. 2007).
132 See supra note __. (cite Manning)
133
misfeasance in the transitional space between the up- and the
down-market, or any one of a host of other factors. The normative perspective that differentiates between the poor debtor and everyone else has been identified by the policy literature as a problem in need of attention. One legal scholar observed, for example, that middle class debtors take on the characteristics of poor debtors when they find themselves struggling to keep up with debt repayment. And a study of asset development products offered to the poor (specifically individual development accounts), to give a different example, concluded that social policy for the poor is held to a higher standard than social policy for everyone else. The authors of that studied asserted:

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134 See supra note __ (citing Manning)  
135 See, e.g., Dimitris Chorafas, Chaos Theory in Financial Markets 7 (1994) ("One of the major shortcomings of the process of making financial decisions is the lag between the reception of market information, the cognition of the new trends under development, and subsequent response to them. Taken together, these references make up the ability of repositioning to face market forces, but in the typical case [p]eople do not recognize trends until they are well established – which means until it is too late.").  
“At best, policy makers have simply overlooked the fact that the poor – like everyone else – require assets for long term development. At worst, there is suspicion that the poor are unworthy or incapable of acquiring assets and using them for development. . . . [T]he point is not that the poor require special social policies but rather that social policy for the poor is held to a different political standard.”138

Courts are increasingly faced with disputes about whether consumers can seek redress as a class based on documents that all members of the class received. When a court characterizes these disputes as personal to the consumer rather than a result of broader factors, it shifts the focus from the legal question of what section 1635 means to the political one of whether Congress should side with consumers or with the moneyed interests that lenders represent. The popular literature is fairly certain which way Congress leans, thus further complicating the issue with cultural elements.139

Are players in the mortgage industry liable as a matter of law for the widespread harms that have resulted from the


aggressive marketing and extension of credit? TILA would say yes, under certain conditions. Can the loans that those lenders made be canceled? Again, TILA would say yes, on an individual basis. Can groups of consumers win the right as a group to cancel their individual loans within the three-year repose period on an individual basis? This is the unanswered question that must examine who is in the best position to address the harms that have resulted from any TILA-violating systems that lenders might have advertently or inadvertently set up in their rush to make money in the housing boom.

McKenna and Andrews 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 bars rescission class action cases by its silence, but allows individual rescission claims by its explicit approval. Andrews, a case arising in the Eastern District of Wisconsin and now on appeal to the Seventh Circuit Court of

140 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.’”).
Appeals, holds that consumers have the right to sue as a class for declaratory rescission under section 1635.\textsuperscript{141}

The First Circuit Court of Appeals decision in McKenna was decided before the U.S. District Court handed down its decision in Andrews, a case that criticizes and rejects the First Circuit Court of Appeals rationale in McKenna.\textsuperscript{142} A comparison of McKenna and Andrews demonstrates that they are at odds in their approach to the silence of section 1635, and to the TILA's ultimate purpose; they are in agreement in their application of the post-Rodash amendments to TILA that distinguishes between material and non-material failures in disclosure.\textsuperscript{143}

\section*{IV}
\textbf{McKenna: The Rationale Against Class Action Declaratory Rescission Claims}

In McKenna, the plaintiffs alleged that the lender did not accurately disclose rescission information during the

\begin{footnotesize}
\textsuperscript{142} McKenna v. First Horizon Home Loan Corp., 429 F. Supp. 2d 291 (D. Mass. 2006).
\textsuperscript{143} Rodash v. AIB Mortgage Co., 16 F.3d 1142, *** (11th Cir. 1994).
\end{footnotesize}
Plaintiffs filed a federal court claim to rescind their mortgage loans; soon thereafter they filed a motion for declaratory judgment seeking class certification. U.S. District Court Judge Reginald C. Lindsay referred the class certification issue to Magistrate Judge Judith Gail Dein. Magistrate Judge Dein recommended certifying the class by a "declaration that any class member who so desires may seek to rescind their transaction." Defendants challenged Judge Dein’s recommendation. The defendants 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 in 1974 but then – in the same amendment process – kept silent about that issue in relation to section 1635. Defendants’ position was that the 1640 limitation on class action claims carried over to any 1635 class related issues. Defendants ignored the function of time in its analysis; instead, they asked the court to interpret TILA based on a 1974

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mortgage market point that came before Rodash and before Congress’s correction of Rodash in 1995.  

U.S. District Court Judge Lindsay ruled against the Defendants’ motion. He adopted Judge Dein’s recommendations to certify the class. He also conceptualized the relief as a “declaratory judgment” so that “any class member who so desires may seek their transaction.” Defendants appealed.

The McKenna defendant challenged the idea that Rule 23, TILA section 1635, and Massachusetts consumer protection law intersect. Defendants rejected the Plaintiff-consumers efforts to link the three laws. According to Plaintiff-consumers: the defendant-lender had inaccurately disclosed rescission related information on the TILDs, and in so doing had

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148 Rodash v. AIB Mortgage Co., 16 F.3d 1142, *** (11th Cir. 1994).
152 McKenna v. First Horizon Home Loan Corp., 475 F.3d 418 (1st Cir. 2007).
153 McKenna v. First Horizon Home Loan Corp., 475 F.3d 418, 420 (1st Cir. 2007) (“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).”).
154 McKenna v. First Horizon Home Loan Corp., 475 F.3d 418, 420-421 (1st Cir. 2007) (“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.”).
thereby violated TILA and Massachusetts Consumer Protection Law as to approximately 8,900 consumers, thus invoking Rule 23. The loans involved in McKenna were option ARM loans, but it is important to note that the dispute was over whether the lender was clear enough in its disclosures about statutory (section 1635) rescission rights.

McKenna and cases like it can be sorted by both fact and rationale; they ought also be sorted out by historical time. Factually a key issue is whether the lack of disclosure is serious enough – *material* in the words of TILA and its regulations – to invoke the section 1635 rescission right for cause. In McKenna the plaintiff’s complaints about the

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155 MASS. ANN. LAWS ch. 140D, § 1 (LEXIS through 2007 legislation).
156 McKenna v. First Horizon Home Loan Corp., 475 F.3d 418, 420 (1st Cir. 2007) (“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.”). This 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. See also Morgan, supra note 96, at 195 (1995) (arguing strongly—prior to the rise of subprime and complicated lending products—that judges should “just say no to section 1635 class action certification” in cases like Rodash that involve minor errors in disclosure).
157 McKenna v. First Horizon Home Loan Corp., 475 F.3d 418, 420 (1st Cir. 2007) (“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.).
origination documents did not go so far as to mislead the consumer about the true cost of the mortgage, though it obscured for the consumer accurate information about the TILA rescission right. In Andrews, by sharp contrast, the plaintiffs alleged harms caused by Chevy Chase’s failure to accurately disclose the type and cost of its option ARM product.

In terms of rationale, and specifically in terms of McKenna, the McKenna rationale looks to Congressional intent to interpret the silence in section 1635; it decides that Congress intended its silence to serve as a clear signal that class action rescission cases are barred.\textsuperscript{158} The Andrews rationale, by contrast, looks to the language of section 1635 silence as a mere omission, one that must permit such claims unless or until Congress specifically bars them.\textsuperscript{159}

In addition to its statutory interpretation analysis, the defendants have urged the court to define TILA’s main purpose as informational. The basic idea behind TILA as an informational law is accurate. TILA serves the nearly impossible purpose of giving the Davids of the residential mortgage world the information they need to prudently negotiate with the Goliaths

\textsuperscript{158} McKenna v. First Horizon Home Loan Corp., 475 F.3d 418, 423-424 (1st Cir. 2007).

\textsuperscript{159} Andrews v. Chevy Chase, FSB, 2007 LEXIS 3162, *26 (E.D. Wis. 2007); Andrews v. Chevy Chase, FSB, 2007 LEXIS 10751, *8 (E.D. Wis. 2007)(“the language of TILA is plain. It does not bar courts from certifying classes whose members have a right to rescind.”).
of that world. When a Goliath gives a David inaccurate or incomplete information, however, a violation of TILA occurs. The McKenna rationale would restrict civil rescission on a class basis for such a violation in the interests of keeping credit markets stable; while the Andrews rationale would allow civil rescission on these circumstances until and unless Congress said otherwise.\footnote{McKenna v. First Horizon Home Loan Corp., 475 F.3d 418, 425 (1st Cir. 2007); Andrews v. Chevy Chase, FSB, 2007 LEXIS 10751, *9 (E.D. Wis. 2007) (the fact that a statute subjects a party to severe liability does not give courts a license not to enforce it).}

This begs the question: does TILA give consumers protection or does it offer creditors protection? The Andrews rationale suggests the former; the McKenna rationale the latter.

Some judicial language even goes so far as to suggest that rescission class action lawsuits are filed by greedy consumers — or alternatively by wishful thinkers who did not read their contract documents — and, of course, those lawyers ever in search of a deep pocket. McKenna has skeptically pointed out that 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.”\footnote{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,}
Judge Adelman has criticized McKenna for “engaging in ‘clairvoyance . . . not construction or interpretation.’”\(^{162}\)

The McKenna rationale distinguishes damages from rescission, arguing that rescission is a personal remedy that should be available only on an individual, case-by-case basis.\(^{163}\)

It regards consumer protection and economic stabilization (particularly the stabilization of an industry) as competing policies rather than as cooperative policies. And, to effectuate its view of TILA’s policies, it bars consumers of mortgage products from suing as a class for clearly granted rescission right.

In terms of media-capturable images, the McKenna rationale implies that mortgage default is a problem caused by consumers. Specifically, it is the problem of those 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 casts the dispute in this way, it necessarily simplifies the problem by creating a disabling certitude – a place where analysis

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\(^{163}\) McKenna, 475 F.3d at 425.
cannot occur. From this troubling point it is but a short step to the (incorrect, in our view) idea that any benefits or equities that the legal system can offer ought to fall on the side of business rather than on the side of the consumer whenever Congress has been less than clear on an issue.  

In sum, McKenna is framed in a set of skeptical questions. Is the TILA right powerful enough to “open the door for vast recoveries?” If it is, could that result in “financial disaster in the mortgage industry”? Can consumers who are facing financial ruin of their own making nevertheless cancel the loans of lenders who made “honest mistakes?” Are consumers trying to beat the legal system by by “wrest[ing] the . . . [law] from its contextual moorings” so that they can escape their debts with a remedy that Congress did not grant them?

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164 McKenna v. First Horizon Home Loan Corp., 475 F.3d 418, 424 (1st Cir. 2007) (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.”).

165 McKenna, 475 F.3d 418, 425 (1st Cir. 2007).

166 McKenna, 475 F.3d 418, 424 (1st Cir. 2007) (noting that TILA amendments are meant to signal “higher tolerance levels” for “honest mistakes” on the part of mortgage lenders).

167 McKenna, 475 F.3d 418, 425 (1st Cir. 2007) (Opining that plaintiffs reliance on Califano v. Yamasaki creates a “problem” which is “that the plaintiffs wrest the quoted statement from its contextual moorings.”).

168 McKenna, 475 F.3d at 425 (“Moreover, debtors enjoy an array of private remedies.”).
Although a number of other courts have denied class certification for TILA rescission, McKenna is the most important because it is the only federal circuit court to do so in 27 years.\textsuperscript{169}

\textbf{V}

\textit{Andrews:}
The Rationale In Favor Of Class Action Declaratory 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 \textit{Andrews v. Chevy Chase Bank, FSB}, Case No. 05-C-0454 (E.D. Wis., January 16, 2007). The outcome of that case, which exacerbates the split already evident in the federal circuits, could carry the issue of what section 1635’s silence means to the United States Supreme Court.

\textit{Andrews v. Chevy Chase Bank} allowed declaratory class action rescission in an opinion that explicitly rejected the First Circuit Court of Appeal’s rationale in \textit{McKenna}.\textsuperscript{170} In \textit{Andrews}, the alleged TILA violation tested the sufficiency of the lender’s disclosures about the costs of its option ARM product, making it direct test of TILA’s rescission provision.

\textsuperscript{169} \textit{McKenna}, 475 F.3d at 425. The only other federal circuit court to deny TILA rescission class certification was \textit{James v. Home Constr. Co. of Mobile, Inc.}, 621 F.2d 727 (5th Cir. 1980).

In other words, the loans that Chevy Chase disclosed as so-called low cost to plaintiffs turned out to be high cost loans.

Andrews involves a product that the lender’s disclosure statement called a “WS Cashflow 5-year fixed.”\textsuperscript{171} The “note interest rate” was listed as 1.950%.”\textsuperscript{172} 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.\textsuperscript{173} The Annual Percentage Rate (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.\textsuperscript{174}

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.”\textsuperscript{175} 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% APR applied, but it too was subject to change. Indeed, there was nothing fixed about the WS Cashflow 5-year fixed product despite all of the lender’s disclosures to the contrary. For that reason the TILD raised the legal issue: did the TILD clearly convey to the ordinary

\textsuperscript{171} Exhibit A, Truth in Lending Disclosure Statement.
\textsuperscript{172} Exhibit A, Truth in Lending Disclosure Statement.
\textsuperscript{173} Exhibit A, Truth in Lending Disclosure Statement.
\textsuperscript{174} Exhibit A, Truth in Lending Disclosure Statement.
\textsuperscript{175} Statement of Andrews expert. at 615.
consumer that the WS Cashflow 5-year fixed product was an adjustable rate mortgage with a one-month discount rate?  

As it happened, the Andrew’s minimum fixed payment of $701.21 became insufficient to cover the interest accruing on the loan, which went into negative amortization. The Andrews’ 5-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. The Andrews’ mortgage was secured by the family’s home.

In a class action claim for rescission the Andrews alleged that Chevy Chase failed to disclose the true cost and variable

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176 Add visual of the mandated disclosure
177 Id.; see also 12 C.F.R. § 226.22(a)(2) (LEXIS through 2007 legislation).
178 Cf. Gene D. Sullivan and R. Mark Rogers, The Adjustable Mortgage Loan: Benefits to the Consumer and to the Housing Industry in Housing and the New Financial Markets (Richard L. Florida ed.) 380-81 (1986) (noting that negative amortization represents risk to the lender in the form of making an unanticipated loan, raising the question in my (Carrillo’s) mind of whether this is so even when loans are securitized and sold days after consummation).
180 Andrews v. Chevy Chase Bank, FSB, 474 F. Supp. 2d 1006 (E.D. Wis. 2007) at Appendix 1 and R.29, Ex. 16 & 3(F).
nature of its option ARM product.\textsuperscript{181} At the start of the lawsuit, the class included two thousand borrowers with WS Cashflow 5-year fixed mortgages, all originated by Chevy Chase Bank and all explained to the consumer with the same TILD.\textsuperscript{182}

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.\textsuperscript{183} 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.\textsuperscript{184} Therefore, one question that will be addressed when the case gets heard on the merits is whether the mandated disclosures convey accurate information about the loan under the ordinary consumer standard, a standard that scrutinizes TILDs from “the standpoint of an ordinary consumer, not the perspective of a Federal Reserve Board member, federal judge or English professor.”\textsuperscript{185}

\textsuperscript{181} \textit{Andrews}, 240 F.R.D. at 615-16 (failure to disclose variable nature of loan’s payment schedule); \textit{Id.} at 617 (failure to disclose payment period); \textit{Id.} at 617-20 (conflicting information on discount interest rate versus annual percentage rate); \textit{Id.} at 619-21 (failure to disclose variable interest rate feature of the loan); \textit{Id.} at 620 (insufficient disclosure on negative amortization).

\textsuperscript{182} \textit{Andrews}, 240 F.R.D. at 616.

\textsuperscript{183} \textit{Andrews}, 240 F.R.D. at 616.

\textsuperscript{184} \textit{Smith v. Check-N-Go, Inc.}, 200 F.3d 511, 515 (7th Cir. 1999).

\textsuperscript{185} \textit{Andrews}, 240 F.R.D. at 616 (citing \textit{Smith v. Cash Store Mgmt.}, 195 F.3d 325, 328 (7th Cir. 1999)).
Under TILA, a disclosure is clear if it is subject to no more than one interpretation. A disclosure is unclear — and thus a violation of both TILA’s mandatory disclosure provision and its consumer protection policy — if it is subject to more than one interpretation from the standpoint of an ordinary consumer.\textsuperscript{186} Additionally, litigation that results in improved disclosures down the line is an important part of how TILA is designed.\textsuperscript{187} The idea is that lenders will amend their forms to conform to the ordinary consumer standard over time and in response to factual and legal challenge.

On January 16, 2007, Judge Lynn Adelman of the U.S. District Court for the Eastern District of Wisconsin certified the class.\textsuperscript{188} Defendant Chevy Chase Bank immediately challenged the judge’s certification, citing McKenna for the proposition that TILA section 1635 precludes class action rescission cases.\textsuperscript{189} In a separate opinion handed down on February 14, 2007, Judge Adelman ruled against the lender.\textsuperscript{190} The judge explicitly rejected the holding and the reasoning of the First Circuit in McKenna, noting that while Congress amended 15 U.S.C.

\begin{footnotes}
\item Id.
\item McKenna, supra note __ at 426.
\item McKenna, 475 F.3d at 425.
\item McKenna, 475 F.3d at ???.
\end{footnotes}
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, “[i]t is just as likely that Congress did not intend to limit rescission claims in any way.”191

Citing TILA’s consumer protection policy, the judge held that the class certification was valid because this was a case involving “public wrongs and widespread injuries.”192 Judge Adelman cited reasons of systemic efficiency in support of his decision to certify the class, confirming that because the “infirmity” plaintiffs sought to litigate appeared “in the [loan] documents,” which were “common to all members of the class,”193 the disregard of TILA’s mandates would “reward defendants who may have committed wrongs and leave victims who may have been wronged uncompensated.”194

Andrews was stayed on the merits pending appeal of the class-wide rescission issue. Andrews is a significant test of whether a class of plaintiffs who allege substantial violations of TILA’s disclosure provisions can lower their individual legal costs and enhance their legal strength by use of the class

193 Id.
194 Andrews, 2007 U.S. Dist. LEXIS 3162 *27 (1st Cir. 2007) (“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).)
Andrews also raises the issue of whether courts have the power in the words of Judge Adelman “to shield lenders from liability in ways that Congress has not.”

Additionally, the federal district court decision in Andrews took a different tack than the First Circuit Court of Appeal had taken in McKenna. Recall that in McKenna, the court asserted focused on the harms that could befall the economy if consumers’ class action rescission claims were certified. In Andrews, by sharp contrast, Judge Adelman implied – correctly in our view – that the mortgage crisis was a function of systemic factors when he wrote that refusal to certify a class action would punish the victims of TILA violations while rewarding unscrupulous lenders for their unlawful practices.

Andrews reasoned 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 statutorily rights, namely rescission or damages. The Andrews rationale downplays concerns about the impact of classwide rescission claims on the

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197 McKenna, supra note __ at 424.
198 [insert footnote]
199 Andrews, 240 F.R.D. at 615-16 (E.D. Wis. 2007).
lending industry. Instead, it focuses on the benefits to consumers and to the legal system of permitting declaratory class action suits in the statutory rescission context.\footnote{Andrews v. Chevy Chase Bank, FSB, 474 F. Supp. 2d 1006, 1009 n.1 (E.D. Wis. 2007).}

The McKenna rationale and the Andrews rationale are rival responses to the current mortgage crisis. Both cases address the availability of a classwide rescission remedy. Both cases opine on TILA’s purpose. And both cases are cognizant of the fact that important policy issues are at stake. Yet, McKenna collapses into a normative individualistic analysis that blames the consumer while Andrews holds firm to idea that a systemic event occurred that led to disruptions in the mortgage market that affected both consumers and lenders.

Oral arguments were heard by the Seventh Circuit Court of Appeals in the Andrews case on September 26, 2007.\footnote{Seventh Circuit Court of Appeals, Oral Arguments, Case No. 07-1326, Andrews v. Chevy Chase Bank, FSB (September 26, 2007), available at http://www.ca7.uscourts.gov/fdocs/docs.fwxarguments.} At the hearing in Chicago, Jeffrey Sarles argued on behalf of defendant Chevy Chase Bank. Sarles characterized TILA rescission as a highly individualized process – perhaps something akin to common law equitable rescission.\footnote{[insert footnote]} He called consumer character into question when he said that permitting classwide rescission under TILA would amount to a “court-sponsored invitation” for

\footnote{Andrews v. Chevy Chase Bank, FSB, 474 F. Supp. 2d 1006, 1009 n.1 (E.D. Wis. 2007).}
\footnote{Seventh Circuit Court of Appeals, Oral Arguments, Case No. 07-1326, Andrews v. Chevy Chase Bank, FSB (September 26, 2007), available at http://www.ca7.uscourts.gov/fdocs/docs.fwxarguments.}
thousands of borrowers “to receive a retroactive interest-free loan” and a “big lump sum refund.” He characterized the lower court’s decision as an “irresistible invitation” to give a “windfall” to undeserving consumers at the expense of the mortgage industry. And he warned of upsets to the status quo when he speculated that class action rescission cases would result in an “enormous hit to lenders requiring them to pay out hundreds of millions of dollars per case” – not, he stressed, a result that Congress intended.

Classwide rescission had other drawbacks from Sarles’ point of view. Not all class members were dissatisfied with their loans – suggesting that they were not all similarly situated. For Sarles this suggested that it would be unfair to creditors to offer satisfied borrowers a “golden opportunity to rescind” just because their documents were identical to the dissatisfied borrowers who could not shoulder their debt obligations. Finally, Sarles threatened, the indiscriminate burden this rush-to-refund would put on the mortgage industry would raise the cost of credit and hurt worthy borrowers.

\footnote{203}{\textit{Id.}} \footnote{204} \footnote{205}
The judges were a relatively cold panel, but one judge asked “why isn’t the right way to view this as a windfall to the bank?” Sarles replied [insert answer].

As the defense advances, many of the proposed class members are in fact satisfied with their loans. However, the logical consequence of this circumstance is not, as the defense argues, that all of these satisfied borrowers will accept the “irresistible invitation” to rescind their loans. In fact, the costs to the consumer of rescission could likely outweigh the benefits. To rescind, borrowers must repay their loans, meaning that they must first refinance their loans before moving ahead with the rescission process.

In doing so they might pay additional costs in the form of points, fees, and potentially higher interest rates. Moreover, refinance standards are now tighter in the wake of the faltering housing market, as is access to credit. Reports are that the vast majority of refinances today result in new loans that cost more than the loans that they replaced. There is thus no

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207 Journal of Real Estate Finance and Freddie Mac study

208 [insert footnote]

209 Cash-Out Refi’s Declining in Both Numbers and Amounts, MORTGAGE NEWS DAILY, February 8, 2008, available at http://www.mortgagenewsdaily.com/282008_Refi_Cash.asp (Eighty-one percent of Freddie Mac-owned loans that were refinanced in
indication that actual liability in Andrews would be $200 million. Nor is there an indication that every class rescission case must necessarily result in hundreds of millions of dollars of liability for lenders. Nothing close to that magnitude has ever resulted from a class rescission suit.\footnote{210}

As to the idea that class certification would hurt borrowers by raising the cost of credit: lenders that actually comply with TILA would not be subject to additional liability. Instead, at least in theory, they would be more competitive in the field generally.\footnote{211} The argument that liability could cause companies to raise the cost of credit seems an argument for the tolerance of a pecuniary externality to be borne by consumers – and though such may be an “acceptable” way to shift costs in the credit industry, it is not a legitimate reason to refuse to assign liability or to refuse to certify classes for legal harms committed. If a car manufacturer produced defective cars that injure people, courts would not decline to extend liability simply because it might raise the price of automobiles in the future.

Kevin Demet, representing plaintiffs Bryan and Susan Andrews, faced slightly more questioning from the bench during the fourth quarter of 2007 resulted in new mortgages that were at least five percent higher than the mortgages they replaced).\footnote{210} [insert footnote] \footnote{211} N.Y. TIMES, Business Section, July 8, 2008.
his oral arguments at the Seventh Circuit. Mr. Demet coupled the holding in *Califano v. Yamasaki*,\(^{212}\) which gives the right to class action absent clear congressional indication to the contrary, with TILA, which states that a court may “award rescission in any action.”\(^{213}\) If the court decides not to certify the rescission class, it will arguably cut against the Supreme Court precedent of *Califano v. Yamasaki*.\(^{214}\) Mr. Demet pointed out that TILA states a private right of action for rescission in three different places, and thus that section 1635 should tolerate the class action. According to *Carnegie v. Household International, Inc.*, all class actions at the remedial stage have some individual issues, but these can be resolved after the class action.\(^{215}\)

Mr. Demet rejected the idea that class rescission would provide a windfall to consumers. He noted that if every person chose rescission when the case was filed 2.5 years earlier, the most the liability could have been was $70 million. The fact that defendant now projected liability to reach $200 million reflected, for Mr. Demet, not a threat to the status quo, but a strategy on Chevy Chase’s part to litigate relentlessly while at

\(^{212}\) 442 U.S. 682 (1979).
\(^{213}\) [insert footnote]
\(^{214}\) [insert footnote]
\(^{215}\) 376 F.3d 656, 660-61 (7th Cir. 2004) (The court also noted that defendants’ argument against class certification that “there are millions of class members” is “no argument at all.”).
the same time continuing to collect interest on the loans that were the subject of the declaratory rescission action. “The windfall,” Mr. Demet stressed, “is really going to Chevy Chase and not to these borrowers.”

VI
Other Courts Certifying Declaratory Class Action Rescission Claims

A number of other courts have certified rescission classes. 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. 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, and held that a class can be certified for declaratory judgment purposes. The reason was that class certification might be inappropriate in a direct rescission case because rescission is a personal remedy, but it is appropriate in a declaratory rescission case since declaratory rescission affirms the class members’ right to pursue rescission claims on an individual basis within the three year repose period. The Seventh Circuit judges expressed concern during oral arguments in the Andrews case about the

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217 [insert footnote]
extent to which individual proceedings would involve matters of equitable defenses, tender, and lien issues, making the distinction between direct and declaratory rescission important in the future.

Among federal district courts of the Seventh Circuit, the trend is towards certifying rescission classes. In addition to the 2007 Ameriquest case, in *Latham v. Residential Loan Centers Of America, Inc.*, a 2004 case, the District Court for the Northern District of Illinois agreed with the line of cases holding that a class action claim for rescission can be maintained under TILA section 1635.

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. The court did this because the class met the Rule 23 requirements of numosity, commonality, typicality, adequacy, predominance, and superiority. The court acknowledged the split in the federal circuits, but agreed

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that class resolution is appropriate for declaratory class action rescission claims under TILA.\textsuperscript{220}

The Rodrigues court responded to defendants’ arguments about exploding liability with skepticism when it wrote:

Defendants’ \textit{sturm und drang} about the catastrophic effects of a declaration of a right to rescind is particularly unpersuasive in light of the relatively small class involved and 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.\textsuperscript{221}

The holding certifying a rescission class under TILA was later overturned by the First Circuit; however, the U.S. District Court of Massachusetts in \textit{McKenna v. First Horizon Home Loan Corp.}, before it was reversed, must also be counted in the recent cases that have read section 1635 to permit declaratory rescission claims. In that case, U.S. District Court Judge Reginald C. Lindsay opined in the lower level \textit{McKenna action}.


\textsuperscript{221} Rodrigues, 226 F.R.D. at 153.
that class rescission did not pose the same economic threat to the credit industry that class action damages did.\textsuperscript{222}

\section*{VII
Other Courts Denying Declaratory Rescission Class Action Claims}

Courts of Appeals have denied motions for class certification of TILA rescission claims, but other than the First Circuit Court of Appeals decision in \textit{McKenna}, they have not done so recently.\textsuperscript{223}

\begin{quote}
\textit{James v. Home Construction Co. of Mobile, Inc.}, a 1980 Fifth Circuit Court of Appeals case, disallowed class action claims for rescission.\textsuperscript{224} However, read in its entirety \textit{James} is simply not on point. \textit{James} involved a home improvement loan, not a mortgage or equity refinance loan; and the issue was whether TILA rescission rights are inheritable.\textsuperscript{225} In holding that a TILA cause of action survives the death of the consumer as an inheritable interest, \textit{James} applied a three part test. According to that test, \textit{James} found that the purpose of TILA is:
\end{quote}

\begin{footnotesize}
\textsuperscript{224} Cf. note \textsuperscript{__} infra discussing \textit{Tower v. Moss}.
\textsuperscript{225}
\end{footnotesize}
(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).

Only from there did the James court’s reasoning wade into the waters of class action rescission claims to bar the class action rescission claims of obligors’ heirs. For this reason James is of questionable applicability in a case like Andrews, which involves the rescission claims of the obligors themselves. The part of James that is relied on in this round of mortgage disputes is therefore dicta.

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226 James, 621 F.2d 727, 729-30 (1980) (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. . . . the 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, *** (6th Cir. 1977), which relied heavily on Huntington v. Attrill, 146 U.S. 657 (1892).).

227 James, 621 F.2d 727, 7__ (1980) (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 recission [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.”). And James, 621 F.2d 727, 731 (1980) (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
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 U.S. District Court in McKenna as indicative of the defendant’s main argument. Jefferson involved the classification of whether an undisclosed $90 loan disbursement “fee” under TILA. Jefferson’s rationale, which was cited by the First Circuit Court of Appeals in McKenna on an unrelated matter, reasoned that “Section 1635(b), and the case law interpreting it, cut strongly in favor of treating rescission as a purely personal remedy which a borrower must request from the lender before he or she has standing to sue.” In reading TILA as asserting creditors’ rights, U.S. District Judge Ruben Castillo denied a motion for class certification because he found that “rescission is a purely personal remedy for technical violations of TILA.”

 Particularly relevant to Judge Castillo’s conclusion was the language in Section 1635(b) that gives a creditor twenty

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.”).

229 McKenna v. First Horizon Home Loan Corp., 475 F. 2d 418, 423 (1st Cir. 2007)(citing Jefferson as an example of how the availability of monetary recoveries and attorneys’ fees under TILA militate against “deployment of the class-action vehicle in this context.”).
days to act on a borrower’s request for rescission before the claim can be filed in court. Judge Castillo read 1635(b) as 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 time frames, before filing suit.”

In concluding as he did, Judge Castillo relied heavily on an inaccurately broad gestalt of James, one that does not reflect the actual holding in James.

Judge Castillo’s opinion was most deeply marred, however, by his view of the twenty-day cure period and its function. He thought 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.” But if this is correct (and we argue that it is not), then such an equity-based process would return TILA to the common law status quo – a world of caveat emptor in credit markets, a world 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.

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Mortgage lending, as discussed previously, is a standardized process. To the degree that TILA includes mortgage lending – and it most clearly does – it is a statute whose purpose is to address standardized practices in a rights-based manner. TILA streamlines the common law; it waives the preconditions for rescission that the common law required. Therefore, it seems a mistake to presume, as Judge Castillo did, 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.” Judge Castillo correctly described common law rescission, but TILA rescission, to be sure, is not the same as common law rescission.

Murry, a U.S. District Court case that arose in 2005 in the Northern District of Illinois, is yet another case involving how to classify an overcharge fee under TILA. Murry relied on Jefferson to conclude that section 1635(b) does not permit class action rescission claims. The Murry court placed great weight on section 1640, the provision governing damages class actions, to make sense of section 1635. The Murry rationale was that when section 1640 was amended in 1974 to expressly include class actions and to impose a cap on damages, the fact that Congress

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did not amend section 1635(b) at that time (1974) evidenced Congressional intent to treat rescission as a purely personal remedy.\textsuperscript{237}

Virtually every court to deny rescission class certification in the last three decades has relied on \textit{James} — Mayo in 1993, \textit{Jefferson} in 1995, \textit{Gibbons} in 2002, \textit{Morris} in 2004, \textit{Murry} in 2005, and \textit{McKenna} in 2007. This reliance is questionable at best. \textit{James} is a pre-\textit{Rodash} case. It is a case that addresses the lending fringe—predatory home-improvement loans—not a case that addresses the middle-class heart of standardized mortgage lending practices. \textit{Jefferson} wrongly resurrected \textit{James} in 1995, at a time when Congress was reacting to \textit{Rodash} — the famous case where liability was imposed on a lender for a minor error in disclosures. Congress overruled \textit{Rodash} when it passed the 1995 amendments to TILA, and then went on to place a temporary moratorium on some class action cases.\textsuperscript{238}

In light of subsequent post-\textit{Rodash} amendments to TILA, \textit{James} lost its value to the current debate as far back as 1995. And, in light of \textit{Jefferson’s} and subsequent case’s reliance on the


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dicta rather than the holding of James, James’ application to cases involving such different facts has still to be.\textsuperscript{239}

Even if James were still relevant on the facts at hand – facts like those in McKenna or Andrews – James fails to address the mechanics of declaratory rescission: when classes are certified to seek declaratory rescission it is the individuals – not the group as a whole – that still must ultimately choose whether to rescind their loans – and they do this on a case by case basis.\textsuperscript{240}

\textbf{VIII}  
\textbf{Conclusion}

Assumptions, not facts, animate the deep currents of how best to address the mortgage disputes of today. So far, these assumptions rest on an antinomy: either consumers are in need of TILA’s protection against unscrupulous lenders, or they are not; either consumers are individually to blame for their bad decisions about types of loans they have obligated themselves to

\textsuperscript{239} James, 621 F.2d at 731.  
\textsuperscript{240} See, e.g., Tower v. Moss, 625 F.2d 1161, **** (5th Cir. 1980) (Decided a few months after James and allowing class certification under TILA; a settlement agreement was reached 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 member class, 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.).
or they are not; either the increase in mortgage default is due
to consumer overreaching or it is due to systemic fissures;
either we are discussing consumer rights or creditor rights.

By contrast, none of the statements that appear in the case
law discussed herein incorporate or refer to descriptive
statistics. Neither do they incorporate or refer to extra-legal
(e.g. empirical) data on mortgage lending. Instead, the cases
hew very closely to traditional legal analysis: they parse
statutory phrases and compare past precedents against implicit
normative rubrics that gauge to what degree TILA, an
informational statute whose purpose is to help the consumer make
informed decisions about credit, can address the mortgage claims
of today.

Indeed, the stated purpose of TILA is "to assure a
meaningful disclosure of credit terms" so that the consumer will
be able to compare terms and thus avoid the uninformed use of
credit.\(^{241}\) TILA and Regulation Z mandate that required
disclosures be made "clearly and conspicuously."\(^{242}\) These
mandates coupled with remedies of damages and rescission
strongly suggest that TILA is a remedial consumer protection
statute, especially if one considers that it is widely

acknowledged that TILA “should be construed liberally in favor of the consumer.”\textsuperscript{243}

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.”\textsuperscript{244} Information is supposed to give consumers greater bargaining power, but while information can help arm consumers against unscrupulous lenders, it cannot correct unscrupulous lending practices after they have already occurred.

The certification of declaratory rescission classes, in our view, would enable TILA to more effectively assist the consumer than would its rival theory, which bars declaratory class action claims. Indeed, to have any effect on the field of consumer

\textsuperscript{243} 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 enforced strictly against creditors and construed liberally in favor of consumers. . . .”); Thomka v. A.Z. Chevrolet, Inc., 619 F.2d 246, 248 (3d Cir. 1980) (TILA achieves its consumer protection purposes “in part by a system of strict liability in favor of consumers.”); Rossman v. Fleet Bank, 280 F.3d 384, 390 (3d Cir. 2002) (plain language of TILA dictates that it should be construed liberally in favor of consumers); Robert Murken, Can’t Get No Satisfaction? Revising How Courts Rescind Home Equity Loans Under the Truth in Lending Act, 77 TEMP. L. REV. 457, 490 (2004).

\textsuperscript{244} See Bizier v. Globe Fin. Servs., Inc., 654 F.2d 1, 3 (1st Cir. 1981).
home financing, TILA’s rescission provision must have a
deterrent effect on those creditors who would otherwise take a
lax approach to their obligations under the statute, or worse,
those who would purposefully exploit unsuspecting consumers.\textsuperscript{245} Damages are not enough 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. Rescission is the only remedy that effectively
restores parties to the status quo ante, as far as economics on
the loan itself are concerned,\textsuperscript{246} making the threat of class
action rescission a useful deterrent for those lenders that have
systematically misled borrowers into purchasing inappropriate or
deceptively expensive products.\textsuperscript{247}

Class action rescission – in its declaratory form – is also
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{248} Class
certification thus serves an important function in TILA cases,
where, according to the Seventh Circuit, “the difficult
financial situation of many litigants may inhibit individual

\textsuperscript{245} See Thomka, 619 F.2d at 248.
\textsuperscript{246} Social costs, Credit Card Nation
\textsuperscript{247} Swanson v. Am. Consumers Indus., Inc., 415 F.2d 1326, 1333 n. 9 (7th Cir. 1969) (reversed on other grounds).
litigation.”

Class actions provide a critical mechanism that protects a litigant’s right to reasonable court access. In *Linder v. Thrifty Oil Co.*, the California Supreme Court in 2000 noted that “[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 effective way to halt and redress such exploitation.”

Today’s credit markets make the need for clear and accurate disclosure about fees and charges more pressing as 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 what is becoming a matter of common knowledge: loan products are now so complex that “most lawyers can’t get through [the disclosures]. For the average consumer, it is mission impossible.”

The Truth in Lending Act envisions a model reader, a reader who is proficient in the English language, a reader who can read, understand, digest, and map the probable (and perhaps even the possible) consequences of the mortgage documents he or she

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249 *Williams v. Chartwell Fin. Servs.*, 204 F.3d 748, 760 (7th Cir. 2000).
The very premise of Truth in Lending is that accurate information will assist consumers in making informed decisions about the use of credit, a trend that will in turn stabilize the economy. But the mortgage industry’s clients are not model readers. They are empirical readers. What the law often calls subjective readers. Indeed, if a scholar on consumer credit who has graduated from the country’s premier legal institution and now teaches at a top ranked legal institution has difficulty going through the motions of “reading” and “understanding” her mortgage contract, what hope is there for anyone else? We are fortunate that this scholar has shared her experience with us. That experience is a small rend in the illusion of fair credit markets, a small glimmer of recognition that the ordinary consumer is not alone in his or her intuitive sense that buying a home – and signing mortgage documents – is a treacherous acquisition at best.

We are the empirical readers. We are the consumers – rich or poor, owning or non-owning, current, in arrears or in default. We are the ones who (correctly it turns out) make the assessment that the documents filled with small print that we have been asked to sign in order to fund our housing purchase

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255 See Litwin, supra note __.
are incomprehensible. And we know that, even if we could understand each and every contract provision, our default could lead to some labyrinthine, 21st century, American version of BLEAKHOUSE256 – even if by luck and persistence we were to somehow miraculously prevail against the mortgage industry in a legal claim.

There are personal, structural, economic, and legal reasons that determine why consumers default on their loans.257 Record-breaking numbers of class actions that allege inadequate disclosure and violations of TILA are being filed in federal courts nationwide, and all indicators suggest that the litigation fallout from the mortgage/housing crisis is only in its infancy.258 In the first quarter of 2008 alone, for instance, 170 subprime-related lawsuits were initiated, a record 79 of those were class actions brought by home-loan borrowers against lenders and mortgage brokers, and the principal claims of 42% of those alleged inadequate disclosure.259 This represents the largest category of subprime crisis-related suits filed, and an 85% increase over the previous busiest quarter.260

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259 Id.
260 Id.
Given the recent proliferation of TILA class action suits, whether courts can certify classes of borrowers who are seeking declaratory rescission is an increasingly important matter. 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 – the kind that will bankrupt the mortgage industry and hurt consumers – and standardize what has been mischaracterized as a unique process (rescission).

At oral argument in Andrews, the Seventh Circuit was noncommittal about allowing rescission class action. Regardless of how that case is decided, the matter will soon reach other federal circuit courts. In the post-Rodash era, the issue is one of first impression for all of the federal circuit courts except the First (McKenna). Currently, more borrower class action cases are being filed, with a large number appearing in the Ninth and the Second federal court circuits. Once those cases percolate through the U.S. district courts, it is likely that those circuits – and in time state courts as well – will be compelled to address the legal issue of whether section 1635 permits direct and declaratory rescission class action cases.

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This paper concludes that section 1635 includes within its silence the authority for a court to certify a class action rescission claim, unless and until Congress says otherwise. Declaratory rescission will not destroy the economy. Rather it will simply clarify the repose issue for classes of consumers who seek the right to rescind as a class, but exercise that right as individuals within the three year TILA repose period provided by section 1635. [THE END]