No. 08-4160

IN THE

United States Court of Appeals

FOR THE

Third Circuit

LOUIS R. VALLIES, INDIVIDUALLY AND ON BEHALF OF ALL SIMILARLY SITUATED VEHICLE BUYERS,

Plaintiffs-Appellants,

vs.

SKY BANK, AN OHIO BANK, LICENSED TO DO BUSINESS IN THE COMMONWEALTH OF PENNSYLVANIA,

Defendant-Appellee.

Brief of Amici Curiae
American Bankers Association, American Financial Services Association, Association of Consumer Vehicle Lessors, Chamber of Commerce of the United States of America, Consumer Bankers Association, Consumer Mortgage Coalition, Financial Services Roundtable, Mortgage Bankers Association and Pennsylvania Bankers Association

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In Support of Affirmance of an Order of the United States District Court for the Western District of Pennsylvania (No. 2:01-cv-01438)

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INTERESTS OF AMICI CURIAE

This brief is filed with the consent of both parties. Fed. R. App. P. 29(a).

Amici curiae are a coalition of prominent national financial services and business organizations whose members include various companies subject to the Truth In Lending Act ("TILA").

The American Bankers Association ("ABA") is the principal national trade association of the financial services industry in the United States. Its members, located in each of the fifty States and the District of Columbia, include financial institutions of all sizes and types, both federally and state-chartered, holding a majority of the domestic assets of the banking industry in the United States.

The American Financial Services Association ("AFSA") is the national trade association for the consumer credit industry, protecting access to credit and consumer choice. Its 350 members include consumer and commercial finance companies, auto finance/leasing companies, mortgage lenders, credit card issuers, industrial banks and industry suppliers.

The Association of Consumer Vehicle Lessors ("ACVL") is a trade association of the nation's leading vehicle lessors whose members originate about 80 percent of all consumer vehicle leases in the country. The ACVL's primary goals include increasing consumer understanding of lease benefits and responsibilities through improved disclosure.

The Chamber of Commerce of the United States of America is the world's largest business federation, representing an underlying membership of more than three million businesses and organizations of every size, in every industrial sector and from every region of the country. One of its principal functions is to advocate the interests of the business community by filing amicus curiae briefs in cases involving issues of national concern to American businesses.

The Consumer Bankers Association ("CBA") is the national trade association whose members include most of the nation's largest bank holding companies as well as regional and super community banks that collectively hold two-thirds of the industry's total assets. Founded in 1919, the CBA is the recognized voice on retail banking issues in the nation's capital providing leadership, education, research and federal representation.

The Consumer Mortgage Coalition ("CMC") is an industry trade group that represents national residential mortgage lenders, servicers, and service providers.

The Financial Services Roundtable represents 100 of the largest integrated financial services companies that provide banking, insurance, and investment products and services to American consumers. Roundtable member companies provide fuel for America's economic engine, accounting directly for $18.3 trillion in managed assets, $678 billion in revenue, and 2.1 million jobs.

The Mortgage Bankers Association ("MBA") is a nonprofit corporation

headquartered in Washington, D.C. The MBA represents over 3,000 companies in the real estate finance industry, an industry that employs more than 500,000 people in virtually every community in the country.

The Pennsylvania Bankers Association ("PBA") is a trade association that has represented the Pennsylvania banking industry at the state and federal levels since 1985. The PBA supports the diverse needs of its membership through volunteer participation, education, and industry advocacy, including participation in litigation affecting the interests of its members.

The Amici brief addresses the sole question of whether the "actual damage" provision of the Truth in Lending Act's civil liability section, 15 U.S.C. § 1640(a)(1), necessarily includes a *reliance* component. The district court concluded that it does. The Court's resolution of this issue will broadly affect the consumer finance industry as a whole, since an incorrect conclusion that reliance is not required would dramatically widen the industry's exposure in all types of TILA litigation.

Amici wish to aid this Court in deciding this important question by presenting the consumer finance industry's perspective. This brief focuses on the legislative history surrounding the enactment and refinement of TILA's civil enforcement scheme, and the numerous decisions that cite that history in holding reliance essential.

STATEMENT OF THE ISSUE

Did Congress intend to subject lenders to unlimited civil liability for violating TILA disclosure requirements, or does the "actual damage" provision necessarily contain a *reliance* component designed to preserve TILA's carefully crafted balance of remedies, protect the consumer finance industry's solvency, and safeguard the secondary mortgage market?

I

SUMMARY OF AMICI CURIAE'S ARGUMENT

In granting summary judgment in this case, the district court followed six circuit courts in concluding that the "actual damage" provision of the TILA's civil liability section necessarily requires a showing of detrimental reliance.[1] These decisions maintain the balance Congress created in fashioning a remedy that enables consumers to recover for injuries actually sustained as a result of inaccurate disclosures without subjecting their creditors to ruinous liability for innocuous disclosure violations.

Appellants and their Amici focus on only one side of that balance, urging

[1] *See, e.g.*, *Gold Country Lenders v. Smith*, 289 F.3d 1155, 1157 (9th Cir. 2002); *Turner v. Beneficial Corp.,* 242 F.3d 1023, 1028 (11th Cir. 2001) (en banc); *Perrone v. Gen. Motors Acceptance Corp*., 232 F.3d 433, 436-40 (5th Cir. 2000); *Stout v. J.D. Byrider*, 228 F.3d 709, 718 (6th Cir. 2000); *Peters v. Jim Lupient Oldsmobile Co*., 220 F.3d 915, 917 (8th Cir. 2000); *Bizier v. Globe Fin. Servs., Inc.*, 654 F.2d 1, 4 (1st Cir. 1981) (dicta).

the Court to tip it towards a more relaxed damages standard. They all but ignore the specter of virtually unlimited class action damage awards the consumer credit industry would face as a result, if the reliance element were jettisoned. They also brush aside the plain language of the statute, which as Appe llee ably demonstrates, is unambiguous. The statute together with its legislative history, the primary subject of this brief, leaves no doubt that Congress intended reliance to be the key component in determining actual damages.

After TILA was first enacted, class actions seeking statutory penalties became epidemic; that is, until Congress stepped in and, through a series of amendments, limited those penalties. In adjusting the civil remedies, Congress provided for recovery of "actual damage," but only *if* "sustained ... as a result of the failure" to comply with TILA. 15 U.S.C. § 1640(a)(1). Without that limitation, the problem of runaway *statutory* penalties would have been replaced by an equally draconian system of unlimited "*actual* damage."

Congress has said time and again that it does not want to go back to the days of class action exposure threatening the solvency of the consumer finance industry. Every time class actions began to threaten such expansive liability, Congress curtailed TILA's civil remedies. With each amendment to TILA, Congress refined how statutory penalties and actual damages interplay to create a balanced enforcement scheme designed to protect the interests of both creditors

and users of credit.

The reliance element of "actual damage" is critical to that balance. Virtually every court to consider the issue has recognized Congress' intent to retain reliance as a check on runaway damage awards. The district court decision in this case correctly follows that unanimous line of decisions. It should be affirmed.

II

"ACTUAL DAMAGE" WITHOUT A DETRIMENTAL RELIANCE LIMITATION COULD CREATE BOUNDLESS LIABILITY AND THREATEN THE SOLVENCY OF THE COUNTRY'S CONSUMER FINANCE INDUSTRY

The Court should fully consider the impact on the consumer finance industry of imposing "actual damage" liability without requiring proof of reliance. Applied in a class action, a no-reliance "actual damage" formulation could bankrupt a creditor or lessor for an unintentional disclosure violation of TILA.

To appreciate this sober truth, the Court should first consider Appellants' view of how an "actual damage" award might be calculated absent a reliance component. Assume that, as posited by the sole decision that supports Appellants' view, the full amount of any improperly excluded finance charge should be refunded automatically as "actual damage"—regardless of whether the borrower relied on the improper disclosure. *See In re Russell*, 72 B.R. 855, 863 (Bankr.

E.D. Pa. 1987) (Scholl, B.J.).[2]

Now, envision a small creditor. Its net worth is just under $110,000. Suppose that nearly 3,000 of its borrowers received an improper finance charge disclosure, and that the average amount of the finance charge was $400. These were the facts of *Brame v. Ray Bills Fin. Corp.*, 85 F.R.D. 568, 585 (N.D.N.Y. 1979), which, though not involving an actual damage claim, are similar to those present here. Assume also that the actual finance charge was 5%-10% (or $20-$40) higher than the disclosed finance charge. If actual damages were measured by the amount of the understatement of finance charge, a no-reliance "actual damage" award would total between $80,000 (73% of the creditor's net worth) and $160,000 (far more than the creditor's net worth).

In Appellants' view, a simple mistake in a TILA disclosure form should automatically bankrupt the creditor without any proof that a single debtor actually relied on it and, therefore, suffered any harm because of it.

This crippling liability scenario could occur in cases involving small and

[2] *Russell* presumed a false dichotomy, i.e., that "actual damages arise whenever a disclosure statement contains a substantial violation, as opposed to a mere technical violation . . . ." *Id.* at 863. However, TILA provides for actual damages for *all* disclosure violations and makes no such distinction between substantial and non-substantial violations. Appellants commit the same error in their brief, reasoning that "a substantial violation . . . gives rise to actual damages without regard to detrimental reliance." (*Id.* at 25.) It is worth noting that *Russell* was not a class action, which may account for its shortsightedness, and that every other court that has expressly considered the question has reached the opposite conclusion and required reliance. *See infra* n.3.

large creditors alike. Many members of Amici have large portfolios with credit transactions numbering in the hundreds of thousands. Just one misdisclosure could result in staggering "actual damage" awards—in this case, $4 million (Appellants' Br. at 29-30)—unless the courts retain a prudent reliance limitation.

Fortunately, every court since *Russell* has done just that.[3] This Court should follow suit.

III

AWARDING "ACTUAL DAMAGE" WITHOUT PROOF OF DETRIMENTAL RELIANCE WOULD CONTRAVENE LEGISLATIVE INTENT

To understand why the weight of authority is so lopsided in favor of the reliance requirement, it is useful to review the legislative history of TILA. As will be seen, "the primary objective behind the damages provisions of the Act [is to] deter[] Truth-in-Lending violations without bankrupting the creditor." *Adiel*, 630 F. Supp. at 135. The actual damage provision in particular was carefully crafted to

[3] *E.g.*, *supra* n.1 (circuit decisions); *Warburton v. Foxtons, Inc.*, 2005 WL1398512, *9 (D.N.J. 2005); *Smith v. Altegra Credit Co.*, 2004 WL 2399773, *9 (E.D. Pa. 2004); *Cannon v. Cherry Hill Toyota, Inc*., 161 F.Supp.2d 362, 369 (D.N.J. 2001); *Brister v. All Star Chevrolet*, 986 F.Supp. 1003, 1008 (E.D. La. 1997); *Nevarez v. O'Connor Chevrolet, Inc.*, 303 F.Supp.2d 927, 934 (N.D. Ill. 2004); *Anderson v. Rizza Chevrolet, Inc.*, 9 F.Supp.2d 908, 913-914 (N.D. Ill. 1998); *Barlow v. Evans*, 992 F.Supp. 1299, 1301 (M.D. Ala. 1997); *Cirone-Shadow v. Union Nissan*, 955 F.Supp. 938, 943 (N.D. Ill. 1997); *Wiley v. Earl's Pawn & Jewelry, Inc.*, 950 F.Supp. 1108, 1114-15 (S.D. Ala. 1997); *Adiel v. Chase Fed. Sav. & Loan Ass'n*, 630 F.Supp. 131, 133-35 (S.D. Fla. 1986), *aff'd*, 810 F.2d 1051 (11th Cir. 1987); *McCoy v. Salem Mortg. Co.*, 74 F.R.D. 8, 12-13 (E.D. Mich. 1976),

operate in conjunction with TILA's statutory penalties and maintain a balance between the interests of consumers of credit and those who offer it. To eliminate reliance from the "actual damage" remedy would upend this balance and defeat congressional intent.[4]

A. TILA's 1968 Enactment And Its Aftermath

When first enacted, TILA did not permit "actual damage" awards. Instead, to encourage lenders to comply with the new disclosure requirements, Congress created a single private remedy. Consumers could only bring a civil action to recover a statutory penalty of double the finance charge, with a minimum of $100 and a maximum of $1,000. Consumer Credit Protection Act of 1968, Title I, § 206(a), Pub. L. No. 90-321, 82 Stat. 146 (May 29, 1968).

Almost immediately, the $100 minimum statutory penalty created a disaster for the consumer finance industry. For creditors with large portfolios, the minimum penalty multiplied quickly and exponentially. Plaintiffs began filing

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[4] Of course, "[i]t is well-settled that where unambiguous, the plain language of a statute or regulation controls." *Vallies v. Sky Bank*, 432 F.3d 493, 495 (3d. Cir. 2006). As several courts have now held, the phrase "any actual damage sustained … as a result of" is, in fact, clear, and by definition necessarily encompasses a reliance component with respect to faulty disclosures. *See, e.g.*, *Smith*, 289 F.3d at 1157; *Turner*, 242 F.3d at 1028; *Perrone*, 232 F.3d at 435-36; *Cirone-Shadow*, 955 F.Supp. at 947; *McCoy*, 74 F.R.D. at 12. These courts recognize that, in connection with a disclosure violation, there can be no mechanism of causation other than reliance. Indeed, those courts which have thoroughly examined the issue find ample support for that interpretation in the legislative history.

putative class actions seeking statutory penalties amounting to *billions* of dollars—for the most technical of TILA violations.[5] The "most frequently cited case,"[6] *Ratner v. Chem. Bank N.Y. Trust Co.*, 54 F.R.D. 412, 416 (S.D. N.Y. 1972), is actually one of the *least* egregious (only $13 million sought).

Courts were placed "in a dilemma which had them choose between denying class actions altogether or permitting multi-million dollar recoveries against defendants for minor or technical violations." *McCoy*, 74 F.R.D. at 10. To avoid "visiting financial disaster" on defendants, courts began refusing to certify classes in TILA cases. *Barber*, 577 F.2d at 222-23.

Most courts followed *Ratner*, which reasoned that the superiority requirement of Rule 23(b)(3) was not satisfied: "[T]he proposed recovery of [$13 million] would be a horrendous, possibly annihilating punishment, unrelated to any damage to the purported class or to any benefit to defendant, for what is at most a technical and debatable violation of TILA." *Ratner*, 54 F.R.D. at 416 (citing Fed. R. Civ. P. 23(b)(3)).

Since the statutory penalty was TILA's only civil enforcement mechanism,

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[5] *See*, *e.g.*, *Wilcox v. Commerce Bank*, 474 F.2d 336 (10th Cir. 1973) ($60 billion); *Berkman v. Sinclair Oil Corp.*, 59 F.R.D. 602 (N.D. Ill. 1973) ($1.2 billion); *Kroll v. Cities Serv. Oil Co.*, 352 F.Supp. 357 (N.D. Ill. 1972) ($402 million); *Gerlach v. Allstate Ins. Co.*, 338 F.Supp. 642 (S.D. Fla. 1972) ($1 billion); *Shields v. First Nat'l Bank*, 56 F.R.D. 442 (D. Ariz. 1972) ($100 million); *Alsup v. Montgomery Ward & Co.*, 57 F.R.D. 89 (N.D. Cal. 1972) ($20 million in one case, $8 billion in another).

[6] *Barber v. Kimbrell's, Inc.*, 577 F.2d 216, 223 (4th Cir. 1978).

almost every putative class action threatened the solvency of any creditor named as a defendant. Congress had to step in and fix the problem. *See Wilcox v. Commerce Bank*, 474 F.2d 336, 347 (10th Cir. 1973) (hoping for "some more acceptable and general solution by amendments … or clarification by statute").

B. The 1974 Amendment and "Actual Damage"

"To strike an appropriate balance between the advantages of the class action as a vehicle of private enforcement and the need of creditors to avoid financial ruin," Congress amended the statutory penalty provision in 1974. *Barber*, 577 F.2d at 223.

In crafting the amendments, the Senate recognized the grave danger the statutory minimum posed to creditors in class actions such as *Ratner*:

> A problem has arisen in applying these minimum liability provisions in class action suits involving millions of consumers. If each member of the class is entitled to a minimum award of $100, a creditor's liability can be enormous. For example, if a large national department store chain with 10 million customers fails to include a required item of information on its monthly billing statement, it can be subject to a minimum liability of $1 billion in a class action suit.
>
> . . . In the *Ratner* case, Judge Frankel decided that the action by one cardholder would not lie as a class action, stating that, "The allowance of thousands of minimum recoveries like plaintiff's would carry to an absurd and stultifying extreme the specific and essentially inconsistent remedy Congress prescribed as the means of private enforcement."

S. Rep. No. 93-278 at 14 (1973).

As a possible alternative, Congress debated whether to eliminate statutory penalties altogether and replace them with actual damages. Those members of Congress who opposed that idea noted that "most Truth in Lending violations do not involve actual damages and … some meaningful penalty provisions are therefore needed to ensure compliance." *Id.* at 15.[7] As a practical matter, TILA violations do not ordinarily cause consumers any "actual damage" because such damage is "usually negligible or extremely difficult to prove." 119 Cong. Rec. 25419 (July 23, 1973) (remarks of Sen. Hart).[8]

After considered and lengthy debate, Congress enacted special statutory damage provisions for class actions only. It eliminated the $100 minimum penalty, capped the maximum penalty at $100,000 or 1% of the defendant's net worth, whichever was less, and made the award discretionary rather than mandatory. Act of October 28, 1974, § 407, Pub. L. No. 93-495, 88 Stat. 1500

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[7] *Accord* S. Rep. No. 93-278 at 14 (1973) Since it is difficult to prove any actual monetary damage arising out of a disclosure violation, the Act provides that a consumer bringing a successful action is entitled to collect court costs and reasonable attorney's fees plus twice the amount of the finance charge but not less than $100 nor more than $1,000.")

[8] As another senator put it: "While there is no limit on actual damages under the Truth in Lending Act, there are almost never any actual damages." 119 Cong. Rec. 25418 (July 23, 1973) (remarks of Sen. Proxmire). The Chairman of the Federal Reserve Board agreed: "Actual damages for disclosure violations are likely to be nonexistent or extremely difficult to prove, particularly in the class action context." 118 Cong. Rec. 14825 (Apr. 27, 1972) (letter to Sen. Proxmire).

(1974).

For the first time, Congress also permitted private litigants (in both individual and class actions) to recover "any actual damage sustained … as a result of the failure [to comply with TILA]." *Id.*

The 1974 amendments represent "an equitable compromise which permits class actions without bankrupting defendants." *McCoy*, 74 F.R.D. at 10. Statutory penalties were retained to ensure compliance, but capped to protect creditors from the threat of insolvency. Actual damages were added to safeguard the rights of those few consumers who could accomplish the difficult task of proving they suffered real harm. This compromise, Congress believed, would be "sufficient to [both] deter potential violations and achieve widespread compliance." S. Rep. No. 93-278 at 15 (1973); *see Sagal v. First USA Bank, N.A.*, 69 F.Supp.2d 627, 631 (D. Del. 1999).[9]

The circumstances under which Congress reached this compromise and enacted the "actual damage" provision provide insight as to Congress' intent on the reliance question. By repeatedly remarking that "actual damage" is difficult or impossible to prove, Congress acknowledged that such damage necessarily includes a built-in definitional limitation. That limitation must be reliance,

[9] Those objectives "can be achieved without subjecting creditors to enormous penalties for violations which do not involve actual damages and may be of a technical nature … [This] would seem to be in the best interests of both creditors and consumers." S. Rep. No. 93-278 at 14-15 (1973) (alterations in original).

because that is what makes "actual damage" so hard to establish. No other interpretation makes logical sense in the context of the stated purposes of TILA. TILA was enacted "to assure a meaningful disclosure of credit terms so that the consumer will be able to *compare more readily* the various credit terms available to him and *avoid the uninformed use of credit*." 15 U.S.C. § 1601(a) (emphasis added); *see Anderson Brothers Ford v. Valencia*, 452 U.S. 205, 219-20, 101 S.Ct. 2266, 2274 (1981); *Shroder v. Suburban Coastal Corp.*, 729 F.2d 1371, 1381 (11th Cir. 1984).[10]

In later amending TILA, Congress would explicitly declare that "actual damage" presupposes reliance. But first, it would add the Consumer Leasing Act as a new chapter of TILA—clarifying one more time that its intent, all along, has been to strike a workable balance between the rights of consumers and the rights of creditors.

C. The Consumer Leasing Act of 1976

TILA originally did not apply to most leases. By the early 1970s, however,

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[10] As a group of House committee members put it: "[T]he main purpose for which [TILA] is intended is to assure to the consumer sufficient, clearly understandable and readily comparable information to *enable him to measure various types of consumer credit proposals with one another and then decide, with reasonable accuracy, which offer is more suitable to his economic situation, or a better buy, or whether he should dip into his savings or make other arrangements to avoid using credit in a particular situation.*" H.R. Rep. No. 90-1040 at 56 (1995) (emphasis added) (supp. views of Reps. Payman et al.). To award "actual damage" to a consumer who has not read the disclosure—much less detrimentally relied on it—would make no sense in the context of the stated purposes of the Act.

consumers had increasingly begun to lease durable goods, especially cars, instead of buying them. *See Pettola v. Nissan Motor Acceptance Corp.*, 44 F. Supp. 2d 442, 445 (D. Conn. 1999). In response, Congress enacted the Consumer Leasing Act ("CLA") of 1976, Pub. L. No. 94-240, 90 Stat. 257 (Mar. 23, 1976), to "protect consumers against inadequate and misleading leasing information [and] assure meaningful disclosures of lease terms." S. Rep. No. 94-590, at 1 (1976). The CLA was codified as a new chapter of TILA. 15 U.S.C. §§ 1667 et seq.

Congress adopted TILA's civil remedies provision as the measure of liability for CLA violations. Pub. L. No. 94-240, § 3. It did so thoughtfully and advisedly. It also changed the remedy scheme in two important ways.

First, it tailored the remedies for individual CLA actions. For lease advertising disclosure violations, individual litigants can recover actual damage only. Pub. L. No. 94-240 § 3; H.R. Conf. Rep. No. 94-872 at 9 (1976). For other CLA violations, individual litigants can recover a statutory penalty of 25% of the total payments, an amount "intended to represent a civil penalty equivalent in dollar amount to that imposed on other creditors." Pub. L. No. 94 -240 § 3; S. Rep. No. 94-590 at 17.

Second, to maintain the desired deterrent effect, Congress raised the cap on statutory penalties for all TILA class actions. A plaintiff class may now recover $500,000 (up from $100,000) or 1% of the defendant's net worth, whichever is

less. Pub. L. No. 94-240 § 3.

In raising TILA's penalty cap, Congress confirmed, again, that it wants to keep firm hold of the reins on class action liability: "[A]ny ceiling on class action liability is meant to limit the exposure of creditors to vast judgments whose size would depend on the number of members who happened to fall within the class." S. Rep. No. 94-590 at 18. Raising the cap furthered Congress' continuing goal of encouraging private enforcement without jeopardizing creditors' solvency:

> The Committee wishes to avoid any implication that the ceiling on class action recovery is meant to discourage use of the class action device. The recommended $500,000 limit, coupled with the 1% formula, provides, we believe, a workable structure for private enforcement. *Small businesses are protected by the 1% measure, while a potential half million dollar recovery ought to act as a significant deterrent to even the largest creditor*.

S. Rep. No. 94-590 at 18 (citations omitted, emphasis added). In sum, Congress deliberately formulated a remedy—$500,000 in statutory penalties—that it believed was substantial enough alone to deter "even the largest creditor."

D. The Truth in Lending Simplification Act of 1980

By 1980, Congress had decided that "the interests of both consumers and creditors would be furthered by simplification and reform of the Act." H.R. Rep. No. 96-842 (1980).[11] Lenders still faced the specter of multiple class actions, each seeking the maximum statutory penalty for technical violations, creating the threat

of insolvency. Again, Congress was compelled to intervene.

First, Congress clarified that if multiple class actions are brought against the same creditor for the same disclosure violation, only one statutory penalty may be recovered. Truth in Lending Simplification and Reform Act of 1980, Pub. L. No. 96-221 § 615(a)(1), 94 Stat. 132 (March 31, 1980).[12] This amendment furthers congressional intent that creditors be protected from potentially unlimited and annihilating class liability.

Second, for certain types of disclosure violations, Congress also added a new administrative remedy authorizing the agency with jurisdiction over the offending creditor to require the creditor to make a restitution adjustment to the consumer's account "to assure that [the consumer] will not be required to pay a finance charge in excess of the finance charge actually disclosed …." Pub. L. No. 96-221 § 608(a), 94 Stat. 132 (1980).

Congress carefully limited this powerful new remedy in important respects. Most importantly, it gave restitution authority to enforcement agencies, who could be expected to apply appropriate discretion in exercising their power and not to

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[11] *Accord* S. Rep. No. 96-73 at 5 (1980).

[12] As the Senate committee explained, the amendment was designed to "eliminate ambiguity as to a creditor's maximum liability in multiple class actions." S. Rep. No. 96-368 (1980); *see also* S. Rep. No. 96-73 at 11 (1979).

individual consumers, much less class representatives.[13] Additionally, it prohibited any restitution that "would have a significantly adverse impact upon the safety or soundness of the creditor." Pub. L. No. 96-221 § 608(a), 94 Stat. 132; *see also* S. Rep. No. 96-73 at 21 (1979). Finally, it made restitution discretionary with the agency absent a clear and consistent pattern or practice of violations, gross negligence or a willful violation intended to mislead the person to whom the credit was extended.

Third, Congress, for the first time, restricted statutory penalties to six types of disclosure violations to "eliminate litigation based on purely technical violations of the Act." H.R. Rep. No. 96-842 at 71 (1980); *see* S. Rep. No. 96-368 at 71 (1980).[14] By limiting the scope of statutory damages in this way, Congress did not intend to make the recovery of *actual* damages automatic whenever a violation involves any of these six disclosures, as Appellants contend. (*See* Appellants' Br. 25-27.)[15] Though Appellants refer to these six disclosures as

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[13] Contrary to Appellants' position (Appellants' Br. at 33), Congress' decision to give these agencies the discretion to award a form of restitution actually defeats the argument that Congress meant to give borrowers the same power. If Congress so intended, surely it would have said so categorically—or as least as explicitly as it did in the administrative enforcement provision.

[14] The last paragraph of section 1640(a) lists the six disclosures in closed-end transactions eligible for statutory penalties.

[15] This contention echoes Appellants' mistaken argument that "substantial" disclosure violations amount to an "overcharge," an argument which finds no support in the statute or its legislative history.

TILA's "material disclosures," that is a misnomer.

The term "material disclosure" was added with the 1980 amendments for purposes of TILA's rescission remedy.[16] A consumer has an extended rescission right if certain material disclosures, as defined in section 1602(u),[17] are not made. *Smith v. Fidelity Consumer Discount Co.*, 898 F.2d 896, 901 (3d Cir. 1990) (citing 15 U.S.C. § 1635, 12 C.F.R. § 226.23(a)(3)). Inaccurate disclosures not defined as "material" will not extend the right to rescind. *Id.*

But Congress never expressed an intent for the "material disclosures," defined for purposes of the rescission right, to have any bearing on the recovery of actual damages.[18] Section 1640(a)(1) does not differentiate between material and non-material disclosures. *Perrone*, 232 F.3d at 438. Actual damages are available

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[16] To quote from the treatise of Amici for Appellants, "[t]his specific definition was enacted to put creditors 'in a better position to know whether a consumer may properly rescind a transaction.'" Nat'l Consumer Law Ctr, *Truth In Lending*, § 6.4.2.1, p. 414 (6th ed. 2007) (quoting S. Rep. No. 368, 98th Cong., 2d Sess. 29, reprinted in 1980 U.S.C.C.A.N. 236, 264).

[17] Coincidentally, five of the "material disclosures" defined in section 1602(u) also happen to be the disclosures eligible for statutory damages listed in section 1640(a).

[18] This Court did not hold otherwise, as Appellants imply. (Appellants' Br. 27.) The quote Appellants lift out of context from *Vallies I* where the Court observed that Sky Bank's disclosures were inconsistent "in material ways," 432 F.3d at 496-97, does not support their proposition that the materiality of the disclosure affects the extent of actual damages. The statute and its legislative history place no such emphasis on the materiality of the disclosure as it relates to actual damages but, rather, on whether the consumer relied on it to his or her detriment.

for *all* disclosure violations, provided reliance is established.

Returning to the statutory penalty, Congress in 1980 once again decided not to eliminate the statutory minimum in its entirety for compelling reasons:

> First, the scope of civil liability for this penalty would be substantially reduced so that only those terms which are central to a credit transaction are covered. These disclosures are so important in credit shopping that a creditor who gives inaccurate information should face a definite penalty. In addition, *without a fixed penalty, there will be many instances where actual damages alone will provide little or no effective remedy for the consumer* ***who relied on inaccurate disclosures to his detriment***.

S. Rep. No. 96-368 at 32 (emphasis added); *accord* S. Rep. No. 96-73 at 18 ("without a fixed remedy, there will be many instances where actual damages alone will provide little or no effective remedy for the consumer who relied on inaccurate disclosures to his detriment."); S. Rep. No. 95-720 at 16 (1978) (same quotation).

In crafting the 1980 amendments, Congress explicitly acknowledged what it had only implied before: that detrimental reliance is a necessary component of "actual damage" under TILA. In developing its next TILA amendments, it would unequivocally declare reliance an essential prerequisite to recovery.

E. The Truth in Lending Amendments of 1995

In 1995, Congress faced another TILA crisis, this one threatening the mortgage banking industry and the stability of the secondary mortgage market.

More than 50 class actions were filed in the wake of *Rodash v. AIB Mortgage Co.*, 16 F.3d 1142 (11th Cir. 1994), which held that a $20 courier fee must be characterized as part of the "finance charge" in the TILA disclosure statement, and that the lender's violation warranted *rescission* of the entire home loan. Since few mortgage lenders disclosed such fees as part of the finance charge, the whole industry was suddenly vulnerable to massive class action liability—"as high as $217 billion." H.R. Rep. No. 104-193 at 169, 175 (1995).

Congress swiftly intervened and enacted the Truth in Lending Class Action Relief Act of 1995, Pub. L. No. 104-12, 109 Stat. 161 (May 18, 1995). That Act imposed a moratorium on class certification in *Rodash*-type cases until a long-term solution could be devised. *Id.*

That solution was contained in the Truth In Lending Amendments of 1995, Pub. L. No. 104-29, 109 Stat. 271 (Sept. 30, 1995). Congress clarified that certain fees need not be disclosed as part of the finance charge; raised the tolerance level for certain understated disclosures; and retroactively limited liability for misdisclosures of the kind involved in *Rodash*. *Id.* §§ 2, 3(a), 4(a), 109 Stat. at 271-274.

All of these amendments were "intended to curtail the devastating liability that threaten[ed] our housing finance system in the wake of … *Rodash*" and "finally bring to an end the massive potential liability facing the mortgage industry

as a result of extraordinary penalties under the Truth in Lending Act for technical errors." 141 Cong. Rec. S14567 (Sept. 28, 1995) (remarks of Sen. D'Amato); *id.* at S14568 (remarks of Sen. Mack).

In devising the 1995 amendments, Congress also took the opportunity to address, once again, TILA's statutory penalty and "actual damage" provisions. In raising the maximum statutory penalty for certain individual actions from $1,000 to $2,000, the amendment's drafters explained the relationship between the two provisions:

> *Congress provided for statutory damages because actual damages in most cases would be nonexistent or extremely difficult to prove.* ***To recover actual damages, consumers must show that they suffered a loss because they relied on an inaccurate or incomplete disclosure.*** [¶] Recognizing the difficulty of proving actual damages and the increase in costs involved in mortgage lending, this amendment increases the statutory damages available in closed end credit transactions secured by real property or a dwelling to a minimum of $[200] and a maximum of $[2,000].

H.R. Rep. No. 104-193 at 258 (1995) (emphasis added). One of the bill's sponsors also stated:

> …statutory damages are provided in TILA because actual damages, which require proof that the borrower suffered loss in reliance on the inaccurate disclosure, are extremely difficult to establish. ***To recover actual damages, consumers must show that they suffered a loss because they relied on an inaccurate or incomplete disclosure.*** *A number of lawsuits have been filed in which plaintiffs have claimed as actual damages*

> *the amount of the fees or charges that have been misdisclosed. This is not the meaning of actual damages.* ***The proper meaning of damages is discussed in* Adiel** . . .

141 Cong. Rec. H9516 (Sept. 27, 1995) (remarks of Rep. McCollum) (emphasis added). *Accord* 141 Cong. Rec. S14566 (Sept. 28, 1995) ("[T]he bill raises the statutory damages for individual actions from $1,000 to $2,000. *Statutory damages are provided in TILA because actual damages,* ***which require proof that the borrower suffered a loss in reliance upon the inaccurate disclosure****, are extremely difficult to establish*.") (remarks of Sen. Mack) (emphasis added).

Appellants challenge House Report 104-193 above, characterizing it as "post-passage congressional interpretations" not relevant to legislative intent. (Appellants' Br. at 55, 60.) This position is untenable for several reasons. First, such reports "deserve great deference by courts" because "next to the statute itself [they are] the most persuasive evidence of congressional intent." *RJR Nabisco, Inc. v. United States*, 955 F.2d 1457, 1462 (11th Cir. 1992); *see Kuehner v. Heckler*, 778 F.2d 152, 161 (3d. Cir. 1985).

Second, the House Report was not "post-passage" because it related to an important contemporaneous amendment to the TILA civil enforcement scheme. In 1995, Congress was deciding whether it should create different remedies for disclosure violations involving real property loans. In addressing that question,

Congress necessarily considered the meaning of the then-existing remedies, including the "actual damage" provision.

As the House Report indicates, Congress believed that borrowers could not recover "actual damage" unless they proved detrimental reliance, which is hard to do. Therefore, Congress decided to amend the statute and increase the available statutory penalties. Both the House Report and the legislators' statements are compelling evidence of the meaning of the term "actual damage" because they explain why Congress decided to amend the statute.

Finally, even "statements as to legislative intent made by legislators subsequent to the enactment of a statute … are nevertheless 'entitled to consideration as an expert opinion concerning [the statute's] proper interpretation.'" *Barnes v. Cohen*, 749 F.2d 1009, 1015-16 (3d. Cir. 1984) (quoting 2A C. Sands, *Sutherland Statutory Construction*, § 49.11, at 266 (4th ed. 1973) and citing *N. Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 535, 102 S.Ct. 1912, 1925, 72 L.Ed.2d 299 (1982)).

In any event, Congress could not have expressed its intent more clearly through the 1995 amendments. By then, *Adiel*, one of the early leading cases to hold that reliance was necessary to recover actual damages under TILA, was already nine years old.[19] Had Congress wanted to reverse course it certainly could

[19] "When Congress enacts laws, it is presumed to be aware of all pertinent judgments rendered by our branch." *United States v. Barlow*, 41 F.3d 935, 943

have done so. That it chose to retain the detrimental reliance limitation comports with its original intent to prevent unlimited class liability for "actual damage," a notion accepted by the tidal wave of cases that followed.

IV

BASED ON THIS LEGISLATIVE HISTORY, COURTS CORRECTLY REQUIRE RELIANCE

Among the decisions cited in the parties' briefs, the best-reasoned rely on the legislative history surrounding TILA's enactment and amendments. As discussed above, that history contains progressively more forceful statements that reliance must be an essential element of "actual damage."

The very first case construing the term "actual damage" held that the statute's plain language and the 1974 legislative history *both* contemplated that reliance on the misdisclosure must be proven. *McCoy*, 74 F.R.D. at 12-13. On its face, the *McCoy* court reasoned, the statute requires that plaintiffs show "that damages were sustained *as a result of* the failure to properly disclose, i.e., that he or she would have gotten credit on more favorable terms but for the violation." *Id.* at 12 (emphasis added). Moreover, the court observed:

> the Senate Committee report on the 1974 amendments mentions several times the difficulty of proving or computing actual damages in a Truth in Lending case.

(5th Cir. 1994); *see also James v. O'Bannon*, 715 F.2d 794, 804-05 (3d. Cir. 1983).

> This difficulty seems to have been the impetus for establishing a scheme of statutory damages, and it seems likely that if actual damages could be computed by a simple formula, the statutory damage provision would have been unnecessary.

Id.[20] For both of these reasons, the *McCoy* court concluded, a plaintiff may not recover "actual damage" without showing reliance on the misdisclosures. *Id.* at 13.

In *Adiel*, decided after the 1980 amendments, the court also pronounced that a " 'causal nexus' [is] necessary for an award of actual damages." *Adiel*, 630 F. Supp. at 133 (citing *McCoy*). In so holding, it noted:

> The legislative history of the Act indicates that Congress was aware of the difficulty of establishing that causal link between the financial institution's noncompliance with the Act and the Plaintiffs' purported damages. Courts have not only commented on this obstacle, but have also construed it to be the very impetus behind the legislative decision to construct a workable scheme of statutory damages.

Id. at 134 (citing *Riggs v. Gov't Employees Fin. Corp.*, 623 F.2d 68, 71 (9th Cir. 1980)).[21]

Following the 1995 amendments, the court in a CLA case, *Laughman v. Wells Fargo Leasing Corp.* 1997 WL 567800 (N.D. Ill. 1997), noted that "actual damage" awards require "proof of reliance or causation." *Id.* at *2 (citing, *inter*

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[20] *See also Wiley v. Earl's Pawn & Jewelry, Inc.*, 950 F. Supp. 1108, 1114 (S.D. Ala. 1997) (quoting *McCoy*).

[21] *See also Barlow v. Evans*, 992 F. Supp. 1299, 1310 n.10 (M.D. Ala. 1997).

alia, *McCoy*, *Adiel*). "Indeed," the *Laughman* court reasoned, "the legislative history to the 1995 TILA amendments explains that '[s]tatutory damages are provided in TILA because actual damages, which require proof that the [consumer] suffered a loss in reliance upon the inaccurate disclosure, are extremely difficult to establish.' " *Id.* (quoting 141 Cong. Rec. S14566 (Sept. 28, 1995)) (alteration in original).

The issue was well-framed for consideration by the Fifth Circuit in the 2000 *Perrone* case.[22] The court noted that "[w]hile we need not rely on the legislative history, it appears to support the understanding that statutory damages serve as an incentive to ensure compliance, while actual damages are regarded as more difficult to prove." *Perrone*, 232 F.3d at 440. The court then cited to the 1973 Senate Report which described Congress' intent to address the *Ratner* problem and explained that statutory penalties were necessary since "[m]ost Truth in Lending violations do not involve actual damages." *Id.* at 440, n.7 (quoting S. Rep. No. 93-278, at 15).[23]

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[22] Peter N. Cubita, "The Evolution of the TILA Actual Damages Standard," 57 Consumer Fin. L. Q. Rep. 197, 200 (2003) ("The big-picture question presented [in *Perrone*] …was whether the federal appellate courts would allow the *Ratner* problem to be replicated by converting the actual damages remedy into a second, and far more draconian, form of statutory damages.")

[23] Appellants argue that the Senate Report does not state that "actual damages require reliance." (Appellants' Br. at 57.) Yet, as explained above, no other interpretation makes sense in light of the 1974 amendments. Appellants also contend that the Senate Report somehow supports their view that TILA distinguishes between "substantive or material violations" as opposed to "mere"

The following year, the Eleventh Circuit, sitting *en banc*, cited "the 1995 amendments" and House Report 193, in particular, as supporting its conclusion that "[t]he legislative history emphasizes that TILA provides for statutory remedies on proof of a simple TILA violation, and requires the more difficult showing of detrimental reliance to prevail on a claim for actual damages." *Turner*, 242 F.3d at 1028. In this way, "Congress … amended TILA to ensure that it provides for a fair balance of remedies." *Id.* at 1025.

Following *Perrone* and *Turner*, a number of courts, including the district court in this action and two other courts in this circuit, have cited the same legislative history in holding that reliance is an essential element of "actual damage."[24] By joining these courts and the chorus of others,[25] this Court can finally resolve the reliance question as Congress intended.

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disclosure violations. (*Id.*) However, the Report, which speaks for itself, makes no such distinction. Finally, after suggesting that the Senate Report actually supports their position, Appellants say it should be disregarded altogether because "it was not included in the Senate Report accompanying the Act." (*Id.* at 58.) Not so. In fact, the 1973 Report did accompany the text of the 1974 amendments (S.2101), which the conferees accepted, Conference Report H.R. 1221, and which passed the House and Senate.

[24] *Vallies*, 583 F.Supp.2d at 691-92; *Warburton*, 2005 WL 1398512, at *10; *In re Currency Conversion Fee Antitrust Litig.*, 265 F.Supp.2d 385, 428-29 (S.D.N.Y 2003); *Demry v. Citibank (South Dakota), N.A.*, 2003 WL 179772, *4 (S.D.N.Y 2003); *Cannon*, 161 F.Supp.2d at 369; *Gilkey v. Central Clearing Co*., 202 F.R.D. 515, 527 (E.D. Mich. 2001); *Basnight v. Diamond Dev., Inc.*, 146 F.Supp.2d 754, 762 (M.D.N.C. 2001).

[25] *See supra* n.3.

V

CONCLUSION

For the reasons discussed above, Amici urge the Court to affirm the district court's order and retain the detrimental reliance component of "actual damage" for TILA disclosure violations.

DATED: May 5, 2009

Respectfully submitted,

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CERTIFICATE OF BAR MEMBERSHIP

This is to certify that I am a member in good standing of the bar of this Court.

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CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATIONS

This brief complies with the type-volume limitations of Federal Rules of Appellate Procedure 29(d) and 32(a)(7)(B). Excluding the portions exempted by Rule 32(a)(7)(B)(iii), it contains 6,986 words printed in a proportionally spaced 14-point serif font (Times New Roman).

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CERTIFICATION AS TO E-BRIEF AND VIRUS SCAN

Ten copies of the Brief of Amici Curiae are being sent to the Clerk's Office on May 5, 2009. A PDF copy, which is in all respects identical to the ten hard copies, is being electronically submitted on this same date. The electronic submission was subjected to Symantec, a virus scan program.

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CERTIFICATE OF SERVICE

I, Marilyn Li, hereby certify that two true and correct copies of the Brief of Amici Curiae were served on counsel listed below by U.S. Mail, postage prepaid, on May 5, 2009. A copy of the electronic submission of the Brief also was served electronically on the below listed counsel:

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Third Circuit Court of Appeals

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