No. 07-1326

IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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

BRIEF OF FINANCIAL SERVICES AMICI CURIAE IN SUPPORT OF DEFENDANT-APPELLANT CHEVY CHASE BANK, F.S.B. AND REVERSAL

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Appellate Court No: 07-1326

Short Caption: Andrews v. Chevy Chase Bank, F.S.B.

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American Bankers Association, American Financial Services Association, America's Community Bankers, Consumer Bankers Association, Consumer Mortgage Coalition and ~~Mortgage Bankers Association~~

(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:

Ballard Spahr Andrews & Ingersoll, LLP, 1735 Market Street, 51st Floor, Philadelphia, PA 19103, 215-665-8500

(3) If the party or amicus is a corporation:

i) Identify all its parent corporations, if any; and

None

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Attorney's Signature: Jeremy Rosenblum   Date: April 4, 2007

Attorney's Printed Name: Jeremy T Rosenblum

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** X **No** ____

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INTEREST OF AMICI CURIAE

This brief is filed, with the consent of both parties, by the American Bankers Association, American Financial Services Association, America's Community Bankers, Consumer Bankers Association, Consumer Mortgage Coalition, and Mortgage Bankers Association (collectively, the "Financial Services Amici").

The ABA is the largest national trade association of banks in the country. The ABA represents banks of all sizes in all fifty states and the District of Columbia, including community, regional, and money center banks and holding companies as well as savings associations, trust companies and savings banks. ABA members hold approximately 95% of the U.S. banking industry's domestic assets. The ABA frequently appears as an amicus curiae or party in litigation where the issues in dispute are of widespread importance or concern to the banking industry.

Founded in 1916, the AFSA is the trade association for a wide variety of market-funded providers of financial services to consumers and small businesses. AFSA members are important sources of credit to the American consumer, providing over 20 percent of all consumer credit.

ACB is the national trade association committed to shaping the future of banking by being the innovative industry leader strengthening the competitive position of community banks. ACB members, whose aggregate assets are more than $1.5 trillion, pursue progressive, entrepreneurial and service-oriented strategies in providing financial services to benefit their customers and communities.

Member institutions of the CBA are the leaders in consumer financial services, including mortgage and home equity lending, nationwide. They 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. CBA frequently appears as an amicus curiae or a party in litigation where issues in dispute are of widespread importance or concern to the banking industry.

The CMC is a trade association of national mortgage lenders, mortgage servicers and mortgage origination-service providers committed to the nationwide rationalization of consumer mortgage laws and regulations. The CMC regularly appears as amicus curiae in litigation with implications for the national mortgage lending marketplace.

The MBA is a non-profit corporation headquartered in Washington, D.C. Its members include mortgage companies, mortgage brokers, commercial banks, thrifts, credit unions, savings and loan associations and savings banks. The MBA is devoted exclusively to the field of mortgage and real estate finance. The MBA has more than 3,000 member companies representing all facets of the real estate finance industry.

The Financial Services Amici frequently appear in litigation where the issues raised are of widespread importance and concern to their members. That is the case here because the district court's decision to certify a rescission class under the federal Truth-in-Lending Act ("TILA"), 15 U.S.C. §§ 1601, et seq., means that many of the organizations' members (and/or their affiliates) face potentially devastating liability from disclosure infractions that cause no consumer injury.

SUMMARY OF ARGUMENT

Chevy Chase Bank ("Chevy Chase") has demonstrated in its brief that a rescission class action is incompatible with TILA's statutory language and legislative history. Accordingly, the other Circuits that have considered the issue have held that rescission class actions, whether for affirmative or declaratory relief, are improper, and that a contrary result here would create confusion and market disruption. See McKenna v. First Horizon Loan Corp., 975 F.3d 418 (1st Cir. 2007); James v. Home Constr. Co. of Mobile, Inc., 621 F.2d 727, 730 (5th Cir. 1980). Financial Services Amici fully endorse Chevy Chase's arguments.

In recognition of the fact that this is an amicus curiae brief, Financial Services Amici will not duplicate Chevy Chase's arguments. Rather, Financial Services Amici write to make the following points:

Class certification of rescission claims would saddle the mortgage lending industry and secondary market with billions of dollars of class action exposure for supposed violations of TILA that do not give rise to any actual damages. The adverse consequences of such a result would be felt not only by the industry but also by homeowners seeking mortgage financing. Certification of a rescission class would contravene the manifest intent of Congress, as well as Due Process constraints on penalties courts may award.

By purporting to seek a declaratory judgment rather than actual rescission on behalf of the class, Plaintiffs seek inappropriate relief. Rescission is intended to be a self-executing remedy invoked in the first instance by the borrower's delivery to the creditor of a notice that the borrower intends to rescind the loan. Plaintiffs delivered the requisite rescission notice to Chevy Chase but have not alleged that a single class member has done so. Thus, Plaintiffs seek a declaratory judgment remedy for the class (but not themselves) that was never contemplated by TILA. Not only is this remedy unwarranted under TILA, it does not further the purposes of the Declaratory Judgment Act.

The notice to the class the District Court contemplates at this time would compound the problems associated with class rescission and would prematurely raise a number of difficult issues, with the attendant waste of judicial and party time and resources.

ARGUMENT

A. Congress Has Repeatedly Expressed Its Concern About Undue TILA Liability For Violations That Give Rise To No Actual Damages

In word and deed, Congress has repeatedly expressed its intent that harmless TILA violations not give rise to massive, unlimited liability. Section 1640 of TILA was first amended in 1974 to cap statutory damages recoverable in a class action at the lesser of $100,000 or 1% of the creditor's net worth. The purpose of this limitation was " 'to protect small business firms from catastrophic judgments.' " H.R. Conf. Rep. No. 93-1429 (1974) (quoted in Johnson v. West Suburban Bank, 225 F.3d 366, 372 (3d Cir. 2000)). Congress increased the $100,000 threshold to $500,000 two years later in 1976, reasoning that the "$500,000 limit, coupled with the 1% formula, provides . . . 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 8 (1976) (quoted in Johnson, 225 F.3d at 373). During this time period, class actions seeking rescission were nonexistent. See Nelson v. United Credit Plan, Inc., 77 F.R.D. 54, 58 (E.D. La. 1978) ("[W]e note that there is not a single precedent in which class certification was broached, must less granted or denied, in a case where rescission pursuant to 15 U.S.C. § 1635 was the relief prayed for.") (footnotes omitted).

Congress subsequently confronted the threat that trivial disclosure errors could result in devastating TILA rescission liability, see Rodash v. AIB Mortg. Co., 16 F.3d 1142 (11th Cir. 1994), by enacting a moratorium on class actions, see Truth in Lending Class Action Relief Act of 1995, Pub.L. No. 104-12, § 2, 109 Stat. 161, 161-62, and higher tolerance levels for variances between actual and disclosed finance charges. See Truth in Lending Act Amendments of 1995, Pub.L. No. 104-29, § 3, 109 Stat. 271, 272-73. In taking these steps, a key proponent of the legislation expressed an awareness, acknowledged by others during the floor debate, that the "threat of wholesale rescissions presents a real danger to our modern system of home financing: potential liability could reach into the billions." 141 Cong. Rec. S14566, 14567 (1995) (Statement of Sen. D'Amato). The amendments, Senator D'Amato stated, were specifically "intended to curtail the devastating liability that threatens our housing finance system." Id.

Another Senator explained that "[t]he granting of wholesale rescissions . . . could be devastating to both mortgage lenders, and the secondary markets that provide the mortgage market with liquidity." Id. at S5614-S5616 (Statement of Sen. Kyl). See also 141 Cong. Rec. H4120, 4121 (1995) (Statement of Rep. Roukema) ("If the courts were to permit borrowers to rescind loans as part of a class action lawsuit, based on technical disclosure and notice violations, the potential disruption to the secondary mortgage market and the liability that lenders face . . . may be enormous."); 141 Cong. Rec. S14568 (1995) (Statement of Sen. Sarbanes) (class rescissions "seriously threatened the viability of residential mortgage lending in this country including the mortgage-backed securities markets"). Congress acted "to avert what could [have] be[en] a financial disaster in the mortgage industry." Id. (Statement of Sen. Mack).[1]

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1 A construction of TILA allowing for the certification of rescission classes would clearly fly in the face of Congress' concern for the safety and soundness of the mortgage lending industry and the secondary mortgage market. It would also ignore that section 1635 "is not penal in the tendency of courts that have interpreted [TILA] to emphasize the remedial character of the Act." James, 621 F.2d at 730. The remedial purpose of TILA "would be undone by allowing a class of plaintiffs to rescind their agreements against an individual defendant when the cost of recovery would exceed the harm done by the technical violation. A declaratory judgment permitting classwide rescission . . . would turn Section 1635(b) into a penal provision, a result certainly never explicitly authorized by

(continued...)

In 1995, the House of Representatives observed that the "potential cost of rescinding all refinanced mortgages made in the last three years (the time allowed under TILA to exercise the rescission right) has been estimated to be as high as $217 billion." See H.R. Report 104-193, at 52 (1995) (emphasis added). And the financial stakes to the industry of potential wholesale rescissions have grown dramatically in the intervening years. According to publicly available statistics compiled by the MBA in the ordinary course of its business, the volume of mortgage loan refinancings nearly quintupled from $669 billion in the three-year period ending December 31, 1994 to $3,135 billion in the most recent three-year period for which data is available, ended September 30, 2006.[2] See Appendix attached hereto (also available at

(...continued)

Congress." Jefferson v. Security Pacific Fin. Servs., 161 F.R.D. 63, 69 (N.D. Ill. 1995); accord Gibbons v. Interbank Funding Group, 208 F.R.D. 278, 286 (N.D. Cal. 2002). As recently concluded by the First Circuit: "It is nose-on-the-face plain that unrestricted class action availability for rescission claims would open the door to vast recoveries . . . The notion that Congress would limit liability to $500,000 with respect to one remedy while allowing the sky to be the limit with respect to another remedy for the same violation strains credulity." McKenna, 475 F.3d at 424.

2 In estimating rescission exposure, the focus is necessarily on refinancing volume since purchase money loans are not subject to rescission. See 15 U.S.C. § 1635(e) (exempting "residential mortgage transactions" from section 1635) and 15 U.S.C. § 1602(w) (defining "residential mortgage transaction" as a dwelling secured

(continued...)

http://www.mortgagebankers.org/ResearchandForecasts/MarketEnvironment/1-4FamilyMortgageOriginations1990-2005.htm).

A mortgage lending industry and secondary mortgage market hobbled by catastrophic rescission remedies would be able to supply less credit to homeowners. Due to the increased risk profile of refinance and other transactions subject to rescission, the risk-reward trade-off for this type of lending would result in further contraction. See, e.g., Appendix, "Remarks by John D. Hawke, Jr., Comptroller of the Currency, Before the Exchequer Club, Washington, D.C. (Apr. 16, 2003), OCC NR 2003-30 (discussing generally the contraction of credit resulting from state and local predatory lending laws). Thus, the approval of rescission class actions would likely cause serious harm to consumers, not just mortgage lenders and the purchasers of mortgage loans and mortgage backed securities.

B. The Prospect Of Excessive Rescission Liability For Technical TILA Violations Is Of Constitutional Dimension.

The problem Congress sought to avoid is one of constitutional dimension; an evaluation of Congress' intent regarding rescission class

(...continued)
transaction used to finance the purchase or initial construction of the dwelling).

actions should be informed by the serious Due Process problems that would result from authorization of rescission class actions which expose lenders to tens of millions of dollars of liability for violations that, as here, frequently involve no demonstrated actual damages.

1. The Due Process Clause Imposes Limits on Statutory Remedies.

In recent years, the Supreme Court has repeatedly held that punitive damages awards must conform with Due Process limitations. Thus, in BMW of North America, Inc. v. Gore, 517 U.S. 559, 580 (1996), the Supreme Court applied the Due Process Clause to strike down a punitive damages award, noting that the "most commonly cited indicium of an unreasonable or excessive punitive damages award is its ratio to the actual harm inflicted on the plaintiff." Subsequently, in State Farm Mutual Auto. Ins. Co. v. Campbell, 538 U.S. 408 (2003), the Supreme Court instructed that the "Due Process Clause of the Fourteenth Amendment prohibits the imposition of grossly excessive or arbitrary punishments on a tortfeasor." Id. at 416. It went on to instruct that "few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process." Id., 538 U.S. at 425. See also Cooper Industries, Inc. v. Leatherman Tool Group, Inc., 532 U.S. 424, 436 (2001) (holding that "courts of appeals should apply a de novo standard of review when passing on district courts' determinations of the constitutionality of punitive damages awards"); United States v. Bajakajian, 524 U.S. 321, 324 (1998) (punitive forfeiture of $ 357,144 for violating reporting requirement was "grossly disproportional" to the gravity of the offense). Most recently, the Supreme Court reiterated that "the Constitution imposes certain limits, in respect both to procedures for awarding punitive damages and to amounts forbidden as 'grossly excessive.'" Philip Morris USA v. Williams, 127 S. Ct. 1057, 1062 (2007).

The same constitutional principles that limit punitive damages awards likewise restrict excessive statutory remedies. Indeed, in BMW, the Supreme Court explicitly relied on an earlier Supreme Court decision applying a Due Process analysis to a statutory penalty. See BMW, 517 U.S. at 575 (citing Saint Louis, Iron Mountain & Southern Ry. Co. v. Williams, 251 U.S. 63, 66-67 (1919) for the proposition that a "punitive award may not be 'wholly disproportioned to the offense.'").[3] Likewise, the Second Circuit raised Due Process concerns about the application in a class action of a statutory penalty under the federal Cable Communications Policy Act (the "Cable Act"), codified at 47 U.S.C.

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3 Williams declined to invalidate on Due Process grounds a $75 statutory penalty assessed in an individual action on account of a $0.60 overcharge.

§ 551. See Parker v. Time Warner Entertainment Co., 331 F.3d 13 (2d Cir. 2003).

In Parker, the plaintiff brought a class action on behalf of cable television subscribers, alleging that the cable provider violated the subscriber privacy provisions of the Cable Act. Section 551(f) of the Cable Act authorized the award of damages, but not less than $100 per day for each day of violation or $1,000, whichever is higher.

The District Court dismissed the class claims in Parker based on its conclusion that the statutory damages award would be disproportionately large compared to the actual harm suffered by class members and, therefore, failed to satisfy the "superiority" requirements of Rule 23(b)(3). The Second Circuit remanded the case after concluding that the District Court's decision to deny Rule 23(b)(3) class certification was premature and lacked factual support. 331 F.3d at 22. In doing so, however, the Second Circuit acknowledged that the District Court had a "legitimate concern" about the magnitude of the statutory remedy when applied in a class action. It observed that the remedies provided by the Cable Act, when applied in a class action, might "come to resemble punitive damages – yet ones that are awarded as a matter of strict liability, rather than for the egregious conduct typically necessary to support a punitive damages award." According to the Second Circuit, "in a sufficiently serious case the due process clause might be invoked . . . ." Id.

Respectfully, Financial Services Amici submit that this lawsuit, involving the mistaken certification below of a rescission class, presents precisely the kind of "serious case" where the Due Process Clause must be invoked. This is a lawsuit without any allegations of actual damages but with exposure running into tens of millions of dollars. Chevy Chase Brief, p. 29. In State Farm, the Supreme Court established a rule of thumb that punitive damages should not exceed actual damages by more than a factor of ten. In the context of rescission class actions, the cost of the remedial relief available to the class is wholly unmoored from any actual damages the class may have suffered, and the resulting Due Process problem is manifest.

2. The Due Process Problems Resulting From Certification Of A Rescission Class Cannot Readily Be Fixed.

The Second Circuit in Parker suggested that the appropriate response to the constitutional problem it identified would be to reduce the aggregate damage award rather than to deny class certification. 331 F.3d at 22. This option was feasible because all it required was a reduction in the minimum award. Class members could simply opt out of the class if they were dissatisfied with the relief allocated to them.

In the instant case, the course of action contemplated by the Parker Court is not available because, inter alia: (1) there is no clear statutory basis for a court to reduce the recovery available to any borrower rescinding his or her loan and no guidance how any such reduction should be effected; (2) the District Court certified a non-opt out class under Rule 23(b)(2); and (3) it is not possible for the Court to determine how much each class member's rescission windfall would need to be cut back in order to produce a constitutionally acceptable result.

The District Court contemplates that, after the instant appeal is resolved, a notice to class members will promptly go out describing class members' right to rescind their loans. But what will such notice say? If the recoveries for individual borrowers must be scaled back to prevent constitutional problems, the cut-back must be described to borrowers so they can decide whether or not to exercise their individual rescission rights. In order to figure the cut-back, the District Court must first ascertain the constitutionally permissible rescission cost and Chevy Chase's aggregate rescission exposure. It must then estimate the percentage of the class that will exercise the (modified) rescission rights. However, this will be only the roughest kind of guess, and if more borrowers rescind than expected the result would still present a constitutional problem, requiring a new round of notices. This kind of iterative process is wholly unworkable. The practical difficulties of the scale-back of relief contemplated by Parker are insurmountable in the present case.

3. TILA Should Be Construed To Avoid Due Process Problems.

Fortunately, there is a solution to this constitutional conundrum. This Court merely needs to recognize, as argued by Chevy Chase in its brief, that rescission is inherently an individual, consensual right unsuited for resolution in a class action. Congress did not contemplate or desire rescission class actions and should not be deemed to have created a statutory framework raising Due Process concerns of this type.[4]

Instead of attempting somehow to cut back on the relief available to any consumer entitled to rescind his or her loan, this Court can – and should – simply hold that the District Court erred in certifying a class in this case. "It is . . . settled policy to avoid an interpretation of a

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4 Given that the statutory provisions in question are not even designed to punish, stretching Rule 23 and TILA to permit class rescission would produce an unintended and perverse result. See Apaydin v. Citibank Fed. Sav. Bank (In re Apaydin), 201 B.R. 716, 724 (Bankr. E.D. Pa. 1996) (observing that "rescission, as an equitable remedy, is not meant to be punitive"); see also Belini v. Wash. Mut. Bank F.A., 412 F.3d 17, 28 (1st Cir. 2005) (referencing the "remedial provisions accompanying suits for rescission under TILA"); Croysdale v. Franklin Sav. Ass'n, 601 F.2d 1340, 1347 (7th Cir. 1979) (referencing the "remedial purpose of the TILA").

federal statute that engenders constitutional issues if a reasonable alternative interpretation poses no constitutional question." Gomez v. United States, 490 U.S. 858, 864 (1989). The doctrine that statutes should be construed so as to avoid constitutional questions rests on "respect for Congress, which we assume legislates in the light of constitutional limitations." Jones v. United States, 526 U.S. 227, 239 (1999). What is needed here, then, is "a sensible interpretation of a statute, construed against a background of possible constitutional concerns . . . ." Parker, 331 F.3d at 27 (Newman, J., concurring). "'Where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress.'" Id., 331 F.3d at 28 (quoting Edward J. DeBartolo Corp. v. Florida Gulf Coast Building and Construction Trades Council, 485 U.S. 568, 575 (1988)). This course should be followed here.

C. Plaintiffs Cannot Evade The Insuperable Problems That Would Result From Rescission Class Actions Through The Expedient Of Requesting Declaratory Relief.

1. Rescission Is An Individual Remedy.

Section 1635 of TILA requires a borrower seeking to rescind a mortgage loan to notify the creditor of his or her exercise of the rescission right. See 15 U.S.C. § 1635(b). Section 1635(b) then gives the creditor twenty days to respond. A creditor may agree to rescind, refuse to rescind entirely or agree to rescission while seeking equitable modifications. If the creditor agrees, it must return money or property and terminate any security interest. Where the creditor agrees to rescind, an injured borrower is required to repay his or her mortgage loan and generally must obtain new financing to do so, in some cases on less attractive terms than the financing already in place. Thus, depending upon the consumer's individual economic circumstances and prevailing economic conditions, rescission may or may not be advantageous or even feasible.

In short, "TILA contemplates that 'individuals must choose to assert the right to rescind, on an individual basis and within individual time frames, before filing suit.'" Gibbons, 208 F.R.D. at 285 (citation omitted) (emphasis added). "[T]he purpose of the rescission remedy is to restore the parties, as much as possible, to the status quo ante." James, 621 F.2d at 730 (affirming refusal to certify a class). See Belini, 412 F.3d at 25 (section 1635 "is written with the goal of making the rescission process a private one, worked out between creditor and debtor without the intervention of the courts"). Thus, "the rescission remedy [is] a 'purely personal remedy'." James, 621 F.2d at 731.[5] For this reason, among others, it is clear that rescission classes may not be certified under TILA. See McKenna; James, 621 F.2d 727 at 730.

In recognition of the fact that rescission is a personal remedy that depends upon the particular financial circumstances and predilictions of each consumer, Plaintiffs attempt to execute an end-run around Rule 23 by seeking a class-wide declaration that rescission is available. In rejecting "[t]his bit of legal legerdemain" regarding an identical request for a declaratory judgment class, the First Circuit observed: "Both of the primary reasons for denying class treatment to actual rescission claims – Congress's manifest intent to shield residential lenders from crushing liability and the highly personal nature of the rescission remedy – apply with equal force to the proposed formation of declaratory rescission classes." McKenna, 475 F.3d at 426; accord Gibbons, 208 F.R.D. at 285 ("The distinction drawn in the relief sought by plaintiff – a declaration authorizing rescission rather than an order enforcing rescission rights – seems to be one of form more than substance.").

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5 A number of courts have reached this same conclusion and have consequently refused to certify rescission classes under TILA. See, e.g., Gibbons, 208 F.R.D. at 285; Jefferson v. Security Pacific Fin. Servs., 161 F.R.D. at 68-69.

2. **Rescission Is Effected By Filing A Notice, <u>Not</u> By Bringing An Action For Declaratory Relief. Accordingly, Pre-Rescission Declaratory Relief Is Not Available Under TILA.**

Significantly, there is not a shred of textual support in TILA suggesting that a plaintiff-borrower may obtain declaratory relief before seeking rescission and having the request rejected by the lender. To the contrary: While administrative agencies have a host of powers at their disposal in the event of a TILA violation, <u>see</u>, <u>e.g.</u>, 15 U.S.C. § 1607(a) (regarding creditors generally); 12 U.S.C. § 1818 (regarding banks and savings institutions), rescission and damages are the sole remedies available to private parties under TILA. <u>See</u> 15 U.S.C. §§ 1635, 1640. This limitation of powers in private actions is not inadvertent.

Courts, including this Court, construing both the Fair Debt Collections Practices Act and the Fair Credit Reporting Act (which, like TILA, are parts of the Consumer Credit Protection Act) have concluded that neither statute permits a private litigant to seek declaratory or injunctive relief as those statutes only expressly allow governmental agencies to seek such relief. <u>See</u>, <u>e.g.</u>, <u>Crawford v. Equifax Payment Servs.</u>, 201 F.3d 877, 882 (7th Cir. 2000) (observing that "all private actions under the Fair Debt Collection Practices Act are for damages. <u>See</u> 15 U.S.C. sec. 1692k and <u>Sibley v. Fulton DeKalb Collection Service</u>, 677 F.2d 830, 834 (11th Cir. 1982)."); <u>Krey v. Castle Motor Sales, Inc.</u>, No. 06 C 4173, 2007 U.S. Dist. LEXIS 20880, *6-7 (N.D. Ill. Mar. 21, 2007) ("[T]his Court finds that the express delineation between legal remedies available to an individual through a private action, § 1681n-o, and injunctive remedies enforceable through administrative enforcement, § 1681s, conveys a legislative intent to limits courts' equitable powers when considering FCRA claims. See In re Trans Union Corp. Privacy Litig., 211 F.R.D. 328, 340 (N.D. Ill. 2002); see also Washington v. CSC Credit Servs. Inc., 199 F.3d 263 (5th Cir. 2000)."). The same logic applies to TILA.

Under section 1635(a), rescission is accomplished through the simple expedient of the borrower "notifying the creditor . . . of his intention" to rescind. No judicial intervention is necessary to rescind a loan nor is contemplated prior to the borrower's delivery of the requisite notice. Thus, the sole legitimate purpose of declaratory or injunctive relief in the context of a borrower's effort to rescind a loan is to enforce a valid claim for rescission or deny an invalid claim. No case or controversy exists as to rescission unless and until a borrower attempts to rescind a loan and the lender rejects the request or fails to honor the request within the time periods prescribed by TILA. Cf. Highsmith v. Chrysler Credit Corp., 18 F.3d 434, 437 (7th Cir. 1994) (in class action regarding lawfulness of lease early termination charges, no standing for plaintiff who had neither terminated lease nor alleged an intent to terminate lease). Plaintiffs have not alleged that there are any members of the class certified by the District Court who have actually sought to rescind their loans.[6]

3. There Is No Proper Purpose For Declaratory Relief Here.

Not only does a declaratory judgment class composed of borrowers who, unlike Plaintiffs, have not attempted to rescind their loans conflict with TILA (and Rule 23), it directly contravenes the purpose of the Declaratory Judgment Act ("DJA"), 28 U.S.C. § 2201. Congress enacted the DJA "to avoid accrual of avoidable damages to one not certain of his rights. . . .'" Nucor v. Aceros, 28 F.3d 572, 577 (7th Cir. 1994). A declaration of contract rights is appropriate only when it will "serve a very real practical need of the parties for guidance in their future conduct" and prevent the accrual of avoidable damages. See, e.g., American Machine & Metals, Inc. v. De Bothezat Impeller Co., 166 F.2d 535, 536-537 (2nd Cir. 1948) (involving "irrevocable choice as the termination of the contract" and distinguishing cases in which parties did not face such irrevocable choice). Because any absent class members who want to rescind their loans suffer no detriment by

6 In the absence of any class members who are similarly situated with Plaintiffs, the class does not meet Rule 23(a)'s numerosity and typicality prerequisites.

delivering a simple cancellation notice to Chevy Chase, there is absolutely no need for declaratory relief for the class.

And as Chevy Chase has noted in its brief (pp. 40-41), due to TILA's fee-shifting provision, which makes the creditor liable for court costs and reasonable attorneys' fees if a borrower asserts a successful TILA claim, 15 U.S.C. § 1640(a)(3), class actions are not required for borrowers to vindicate their rescission rights. According to computer searches of the LexisNexis CourtLink® database, 688 TILA cases, of which only 17 were class actions, were filed in the federal courts in 2006; 492 TILA cases, of which only 19 were class actions, were filed in the federal courts in 2005; 574 TILA cases, including only 20 class actions, were filed in 2004; 513 TILA cases, of which only 39 were class actions, were filed in 2003; and 576 TILA cases, of which only 37 were class actions, were filed in 2002. The foregoing figures do not include state-court actions, bankruptcy proceedings, counterclaims and rescissions effected without judicial intervention. Thus, it is apparent that consumers are willing and able to bring individual actions to vindicate their rights under TILA.[7]

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[7] CourtLink does not distinguish between rescission and damages cases.

D. An Order Directing Notice To The Class At This Time Would Create Severe Practical Problems.

If its class certification order is affirmed, the District Court will schedule briefing and a hearing on the question of the appropriate notice to the class. See District Court Decision and Order, p. 22. In reality, any notice to the class at this time would compound the problems associated with certification of a rescission class and create additional practical difficulties.[8]

1. Notice To The Class Threatens To Short-Circuit The Appellate Process And Unduly Increase The Stakes Of The Litigation.

It is well-recognized that certification of a class can place "insurmountable pressure" on a defendant to settle a case, Castano v. Am. Tobacco, 84 F.3d 734, 746 (5th Cir. 1996), even where it has a good chance of succeeding on the merits.

> Many corporate executives are unwilling to bet their company that they are in the right in big-stakes litigation, and a grant of class status can propel the stakes of a case into the stratosphere. In re Rhone-Poulenc Rorer Inc., 51 F.3d 1293 (7th Cir. 1995), observes not only that class actions can have this effect on risk-averse corporate executives (and corporate counsel) but also that some plaintiffs or even some district judges may

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8 For classes certified under Rule 23(b)(2), the court "may direct appropriate notice to the class." Rule 23(c)(2). TILA does not require any notice to affected consumers. Indeed, TILA is quite clear that disclosure of past TILA violations is entirely elective with the creditor. See 15 U.S.C. § 1640(b).

> be tempted to use the class device to wring settlements from defendants whose legal positions are justified but unpopular. Empirical studies of securities class actions imply that this is common. Class certifications also have induced judges to remake some substantive doctrine in order to render the litigation manageable.

Blair v. Equifax Check Services, Inc., 181 F.3d 832, 834 (7th Cir. 1999) (citations omitted).

Mandating delivery of notices before a final judgment and the resolution of appeals risks advising class members of rights they do not have and placing mortgage lenders in the untenable position of dealing with a flood of rescinding borrowers whose "right" to rescission remains uncertain. The pressure to settle, and concomitant damage to the mortgage lending industry, would be particularly pronounced here, because, if a lender refuses to grant immediate rescission to borrowers responding to pre-appeal notice of their right to rescind, the lender's exposure automatically increases by $2,000 per borrower. See 15 U.S.C. § 1640(a)(2). Further, hasty notice would inevitably generate customer confusion and ill will, as well as reputational harm to a lender caught up in this nightmare.

2. Class Notice At This Time Would Require The Courts And The Parties To Prematurely Address Difficult And Potentially Academic Issues.

Finally, notice at this time would force the District Court to grapple prematurely with a number of important procedural and substantive issues. These issues would include the following, without limitation:

- What must the notice say?
  - As a result of the Due Process concerns described above, will the notice provide for an adjustment in the relief available to class members and, if so, how will the adjustment be determined and described? As noted above, there are no ready answers to these questions.
  - Will the notice to the class be accompanied by TILA disclosures that do not contain the deficiencies (wrongly) perceived by the District Court? Creditors that violate TILA clearly have the substantive right under TILA to provide corrective disclosures to borrowers to eliminate their exposure in regulatory and private actions, see 15 U.S.C. § 1640(b), and to start running the normal three-business day period that

borrowers have to rescind their loans. 15 U.S.C. § 1635(a).

- Will class members be required under 15 U.S.C. § 1635(d) to tender the principal balance of their loans at the same time the lender tenders the interest, fees and charges it has collected? If so, how long a period will class members be afforded to make this tender?
- While lenders are not entitled to retain any interest or charges on rescinded loans, the purpose of rescission is to restore the parties to the status quo. James, 621 F.2d at 730 Borrowers who have used some or all of the proceeds of their loans to refinance existing mortgages not only get an interest-free loan, they also save the interest they would have had to pay on the refinanced loan. A court considering the terms of a notice to class members in a rescission case would also need to resolve the question of first impression whether the lender is entitled to some form of quantum meruit compensation for these interest savings. Additionally, the court would need to decide whether, and to what extent, a lender advancing new funds is entitled to such compensation.

CONCLUSION

For the reasons discussed above and in Chevy Chase's brief, Financial Services Amici respectfully request that this Court reverse the decision of the District Court and hold that a rescission class may not be certified under the TILA.

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Dated: April 4, 2007

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P.l 32(a)(7)(C)l the undersigned hereby certifies that the foregoing opening brief of Financial Services Amici Curiae:

(i) complies with the type-volume limitation in Fed. R. App. P. 32(a)(7)(B)(i) because it contains 5493 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii); and

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

Martin C. Bryce, Jr.

Dated: April 4, 2007

APPENDIX

1-4 Family Mortgage Originations 1990-2005

(Bil. $)

	Total Originations	Purchase Originations	Refinance Originations	Refinance Share (%)
1990-Q1	116	94	22	19
1990-Q2	123	107	15.943	13
1990-Q3	120	104	15.607	13
1990-Q4	100	84	15.988	16
1991-Q1	106	74	31.752	30
1991-Q2	136	100	35.244	26
1991-Q3	152	120	31.897	21
1991-Q4	169	91	77.643	46
1992-Q1	255	92	133.039	59
1992-Q2	215	144	70.967	33
1992-Q3	220	117	103.317	47
1992-Q4	233	119	114.325	49
1993-Q1	190	110	79.595	42
1993-Q2	248	117	131.699	53
1993-Q3	290	142	147.771	51
1993-Q4	292	117	175.268	60
1994-Q1	262	136	125.53	48
1994-Q2	214	165	49.292	23
1994-Q3	157	137	20.454	13
1994-Q4	136	119	16.269	12
1995-Q1	119	106	13.125	11
1995-Q2	141	122	18.268	13
1995-Q3	190	139	51.237	27
1995-Q4	190	127	62.645	33
1996-Q1	194	101	93.214	48
1996-Q2	209	155	54.376	26
1996-Q3	191	158	32.407	17
1996-Q4	191	145	45.904	24
1997-Q1	174	123	50.386	29
1997-Q2	196	155	41.223	21
1997-Q3	222	162	59.985	27
1997-Q4	241	150	91.744	38

1998-Q1	330	149	182	55
1998-Q2	401	225	176	44
1998-Q3	429	227	201	47
1998-Q4	496	194	303	61
1999-Q1	373	168	205	55
1999-Q2	405	251	154	38
1999-Q3	334	254	80	24
1999-Q4	267	205	61	23
2000-Q1	238	183	55	23
2000-Q2	302	254	48	16
2000-Q3	312	255	56	18
2000-Q4	287	213	75	26
2001-Q1	418	192	226	54
2001-Q2	579	272	307	53
2001-Q3	507	274	233	46
2001-Q4	739	222	517	70
2002-Q1	518	217	300	58
2002-Q2	552	315	237	43
2002-Q3	774	302	472	61
2002-Q4	1010	263	748	74
2003-Q1	794	230	564	71
2003-Q2	1187	344	843	71
2003-Q3	1199	384	815	68
2003-Q4	632	322	310	49
2004-Q1	627	251	376	60
2004-Q2	825	379	445	54
2004-Q3	646	362	284	44
2004-Q4	675	317	358	53
2005-Q1	640	294	346	54
2005-Q2	800	432	368	46
2005-Q3	869	434	434	50
2005-Q4	718	352	366	51
2006-Q1	590	301	289	49
2006-Q2	719	410	309	43
2006-Q3	624	375	250	40
2006-Q4	N/A	N/A	N/A	N/A

Note: Refinance Share is percent of total dollar volume of mortgage loans.

Source: Mortgage Bankers Association

NEWS RELEASE

Comptroller of the Currency
Administrator of National Banks

NR 2003-30

FOR IMMEDIATE RELEASE
April 16, 2003

Contact: Kevin Mukri
(202) 874-5770

Remarks by
John D. Hawke, Jr.
Comptroller of the Currency
Before the
Exchequer Club
Washington, D.C.
April 16, 2003

Forty-three years ago, I arrived in Washington from New York City, fresh out of law school, to serve a clerkship on the U.S. Court of Appeals. Washington has been my home ever since.

Washington has obviously changed over those four decades, but one thing hasn't changed: every time someone new encounters our Byzantine structure of financial regulation, they immediately want to overhaul it. As a result, we have seen almost a score of studies, commissions, proposals, and reorganization plans put forward over the past three or four decades.

Yet, as sensible and thoughtful as these initiatives may have been, they have uniformly failed to get any traction. Just why this is so is the main topic I want to discuss with you today. And if that doesn't get your pulse racing, I want to finish up with a few comments on another current topic – predatory lending and preemption.
So let me start by posing this question: why has there been so much chatter about our bank regulatory structure?

The answer to this is obvious: the current bank regulatory structure offends all of our aesthetic and logical instincts. It's complicated; it's irrational; it probably has inefficiencies; and it takes a great deal of explaining. It's a product of historical accident, improvisation, and expediency, rather than a methodically crafted plan. It reflects the accretion of legislative enactments, each passed at a very different time – and under very different circumstances – in our history.

Given all of these criticisms over the years, it's fair to ask why we have not seen any change in the structure. It's certainly not for trying. Major efforts were put forth in the Reagan and Clinton administrations to rationalize the structure, but they never got very far off the ground. Yet in a number of foreign countries – the United Kingdom and Japan, for example – we have seen in recent years the creation of strong, independent financial supervisory agencies, with consolidated jurisdiction over financial firms. Why haven't we been as enlightened?

There are a variety of very compelling reasons, I believe.

First, the system works. While it is far from perfect, at its best it works extremely well. A variety of formal mechanisms and external pressures have caused the agencies to work quite well together. To be sure, there are examples of interagency rivalry, turf protection, and even inconsistency that arise from time to time, but on the whole the agencies have recognized the need to work together, to avoid inconsistencies, and to respect one another's jurisdictions and responsibilities. We clearly have an example of a system that doesn't work at all in theory, but works well in practice.

Moreover, studies conducted over the years by the General Accounting Office and others have repeatedly deflated the proposition that huge savings would accrue from regulatory restructuring. Instead, researchers have concluded that while there are some redundancies and extra costs associated with multiple agencies, those costs are located primarily in such back-office functions as human resources and information technology, rather than in front-line supervision, where the lion's share of agency resources are spent. Accordingly, the savings that might be realized from restructuring would likely be quite modest.

Second, there has never been a public constituency for change. Neither the banking industry itself – which has learned to cope with and take advantage of the current structure – nor advocacy or interest groups that are stakeholders in the system, have mounted any case for change. And experience tells us that logic alone will generally not be enough of a catalyst for major reform legislation; a public and political constituency is almost always necessary.

But apart from these considerations, there have been, and continue to be, two major reasons why regulatory restructuring has not gained more momentum. The role of the Federal Reserve and the FDIC is one; the impact on state banking systems is the other. Time after time, well-meaning proposals for change have run into the intractable reality of having to deal with those concerns.

Right at the outset of any consideration of restructuring one must confront the question of what role the Federal Reserve should play in bank supervision. While the Fed's role as a supervisor was quite modest until the expansion of its bank holding company jurisdiction in 1970, the Fed has long and successfully argued that it must have a major presence in bank supervision in order to obtain a "window" into the banking system as an adjunct to its monetary policy and payments system responsibilities. Yet countries around the world – Great Britain, Japan, and now China, chief among them – have chosen to move precisely in the opposite direction, concluding that the central bank cannot provide objective, independent bank supervision while discharging its monetary responsibilities at the same time. Who's right? More importantly, what's right for the United States? My personal view is that we have it about right as it is – although I believe very strongly that bank supervision must focus on safety and soundness concerns, and bank supervisors should not be looked to for the conduct of macroeconomic policy.

The role of the FDIC in the supervisory framework is another perennial issue. The FDIC's role in insuring deposits and resolving failed banks has provided it with a strong argument for involving itself in the supervision of banks. But does the FDIC's legitimate interest in minimizing losses to the deposit insurance fund constitute justification for pervasive and continuous involvement in day-to-day supervision of banks that are not in the problem categories? Even more fundamentally, is the FDIC's paramount interest in minimizing losses – with the aversion to risk that interest encourages – consistent with the responsibilities of balanced supervision?

To be sure, some would resolve these conflicts by transferring all bank supervisory jurisdiction to the Fed or the FDIC. In fairness, I don't think either of those agencies has seriously suggested this. Without putting too fine a point on it, I'll just say that I do not share this view. It would probably be immodest of me to expand on that at this time.

It is obvious, I think, that the present distribution of bank supervisory authority creates some burdens for banks, not the least of which is having to contend with visitations by examiners from different agencies, frequently duplicating – or ignoring – one another's work. I believe this is a concern that needs continual attention, for if there was anything that might galvanize the industry to support restructuring, it is likely to be the annoyance and burden of such supervisory duplication.

Finally, there is the question of how any plan to rationalize bank supervision would comport with a strong dual banking system. If the federal bank supervisory agencies were consolidated into a single independent agency, as many scenarios envision, with the federal supervision of state banks being performed by the same agency that supervises national banks, charter choice might be rendered all but meaningless. Banks' ability to select the system of supervision they deemed best suited to their needs would be curtailed. Disparities in powers between state and national banks would become untenable with a single federal agency presiding over both types of institutions, and the pressure for uniformity would be very strong.

Perhaps the most significant question would be how such an agency would be funded. Today, national banks bear virtually all of the costs of their supervision, while state banks bear only about 20 percent of their supervision costs – the portion attributable to that supervision carried out by the states themselves. As we are all aware, this disparity arises because the Fed and the FDIC, with virtually bottomless pockets, subsidize the state banks they supervise by absorbing all of the costs of their federal supervision. This inequity could not possibly be perpetuated if all federal bank supervision were vested in a single independent agency that didn't have the resources of the Fed or the FDIC. Such an agency would either have to be supported by appropriations – which would be a bad idea, in my view – or it would have to assess all of the banks it supervised. Even if the agency for unified supervision were the Fed or the FDIC, it is inconceivable that the present subsidy for supervision costs could be limited to state banks. Since many supervisors of state banks – at both the state and federal levels -- have a pathological fear that equalizing supervisory fees would cause massive conversions from state to national charter, it is not surprising that they have opposed regulatory consolidation.

I recognize that some may view these remarks as a ringing endorsement of maintaining the status quo. That is not my intention. I share the intellectual interest in structural rationalization that the advocates exhibit. But I think that any proposal, no matter how logical it might appear, must address the fundamental political obstacles I've been discussing before we spend a lot more time spinning our wheels over still another iteration of an idea that is showing distinct signs of age.

* * *

Now let me turn briefly to two related subjects that are stirring up a lot of comment these days: predatory lending and preemption. First, I want to state emphatically that there is no question that predatory lending is a real concern. We have ample evidence that people in many areas are being stripped of the equity in their homes by a certain subspecies -- and I use that term in its most pejorative sense -- of subprime lenders, overwhelmingly unregulated nonbanks. Some 20 states have undertaken initiatives to address predatory lending, either through statute or regulation. In a case that's drawn considerable attention, a Georgia statute imposes severe restrictions on so-called "high-cost" mortgage loans, requiring lenders who offer them to comply with a range of substantive and procedural requirements.

Unfortunately, the passage of these laws has led to considerable uncertainty about their applicability to national banks, which, as you know, operate under a longstanding constitutional immunity from state laws that purport to regulate the manner in which they conduct their banking business – an immunity repeatedly reaffirmed by the Supreme Court of the United States, tracing back to the mid-19th century. The Office of Thrift Supervision has already determined that the Georgia law is inapplicable to federally chartered savings institutions and their operating subsidiaries, and the OCC is now reviewing comments submitted in response to a request for a determination of that law's applicability to national banks.

Unfortunately, the legal disputation over preemption tends to distract us from the real question: how best to deal with the problem of predatory lending in our communities, while ensuring that adequate credit remains available on reasonable terms to mortgage customers at all income levels. The nuances of preemption theory are unlikely to mean much to borrowers who either have been burned by predatory lenders or denied credit in the first place.

I have several concerns about the across-the-board approach that has been adopted, with the best of intentions, by some states. First, it would inevitably add significant costs to banks that operate in many jurisdictions, since they would have to bear the costs and risks of complying with innumerable local laws – costs that would ultimately be reflected in the cost of credit. But even more of a concern is that such laws may actually have the effect of making credit harder to come by for those who may most need it and deserve it.

Evidence increasingly suggests this might already be happening. Fannie Mae recently announced that it would not purchase mortgage loans subject to the New York State and Georgia anti-predatory laws – a decision that will undoubtedly cause some contraction in credit availability to subprime borrowers.

Recent analysis by economists, one of whom has been on the OCC staff, of anti-predatory lending laws in Chicago and Philadelphia and in North Carolina bears out this fear. In Chicago, a municipal law that applied primarily to banks had the effect of driving more subprime mortgage lending into the nonbank sector, which is precisely where predatory practices are most prevalent. And a Philadelphia law that applied to <u>all</u> financial services providers had the effect of reducing the availability of subprime mortgage money generally. Similarly, it appears that the North Carolina law decreased the availability of subprime credit in the state.

Subprime credit is not the equivalent of predatory credit. Indeed, the growth of our subprime credit market has made legitimate credit available to families that may previously not have had access to credit. Thus, any law that causes responsible lenders to exit the subprime market must be viewed as problematic.

I think that the OCC has a better approach. Rather than focusing on the features of particular loan products, we focus on abusive practices – on preventing them in the first place, attacking them out where they're found to exist, and providing restitution to those who have been victimized by them.

Our emphasis on prevention has taken the form of comprehensive guidance – the only such guidance that's been produced by any of the federal banking agencies -- instructing national banks on how to avoid engaging in abusive or predatory practices. Rigorous, ongoing supervision and oversight by OCC examiners is designed to make certain that this guidance is followed. But when it's not, we have not hesitated to use our enforcement authority to combat unsafe, unsound, unfair, or deceptive practices. Indeed, OCC enforcement actions have resulted in refunds totaling hundreds of millions of dollars to consumers.

I believe that the OCC's approach to predatory lending not only provides an effective remedy where abusive conduct has been found, but avoids the overbroad and unintended adverse effects of one-size-fits-all laws.

Quite apart from the question whether state and local laws threaten the unintended consequences of encouraging bank lenders to exit the subprime lending market, there is the question whether such laws can constitutionally apply to national banks. Since we presently have under consideration a request for a preemption determination with respect to the Georgia law, I will not discuss that issue directly. Suffice it to say that preemption is a doctrine with almost 200 years of history and constitutional precedent behind it. It is not an issue as to which we have a broad range of discretion.

# # #

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that on April 4, 2007 he caused two copies of the foregoing Brief of Financial Services Amici Curiae in Support of Defendant-Appellant Chevy Chase Bank, F.S.B. to be served by federal express on the following:

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