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Seventh Circuit Holds Rescission Cannot Be Pursued on a Class-wide Basis Under TILA

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On September 24, 2008, the Seventh Circuit joined the growing chorus of Circuit Courts that have held that a class action cannot be certified for rescission claims under the Truth in Lending Act ("TILA"), 15 U.S.C. § 1635. *Andrews v. Chevy Chase Bank*, No. 07-1326. The *Andrews* court held that such claims are incompatible with class action treatment.

Mr. and Ms. Andrews filed their putative class action in the federal court in Wisconsin, alleging that Chevy Chase violated TILA by failing to adequately disclose certain aspects of its "cashflow payment option" adjustable rate mortgage product. In its January 16, 2007 decision, the district court granted summary judgment for plaintiffs, and then certified a class under Rule 23(b)(2), providing that class members would receive notice of their right to rescind their mortgages. *Andrews v. Chevy Chase Bank, FSB*, 240 F.R.D. 612 (E.D. Wis. 2007). The case was then appealed to the Seventh Circuit, where it has been watched closely by the industry ever since it was argued nearly a year ago. The case was of concern, as it was one of the few instances in which a court had allowed such a rescission claim to proceed on a class basis. In reaching its conclusion, the district court relied heavily on a Massachusetts district court decision that was subsequently reversed by the First Circuit. *McKenna v. First Horizon Home Loan Corp.*, 475 F.3d 418 (1st Cir. 2007). In *McKenna*, the First Circuit agreed with the Fifth Circuit's decision in *James v. Home Constr. Co. of Mobile, Inc.*, 621 F.2d 727 (5th Cir. 1980), that TILA rescission class actions may not be maintained as a matter of law. The *Andrews* district court's decision was also problematic in that it spawned a host of TILA class action lawsuits, particularly ones involving "payment option" adjustable rate mortgage products. Many of these cases are still pending with unresolved challenges to the ability of plaintiffs to maintain a TILA class action. An unfavorable ruling by the Seventh Circuit on the class certification issue would have spurred on the filing of additional cases, and would also have created a circuit split, perhaps paving the way for Supreme Court review.

The Seventh Circuit, however, determined that, as a matter of law, TILA does not allow claims for rescission to be maintained in a class action. First, the court decided that Congress did not intend to allow class actions for rescission claims under TILA. As the court reasoned, the rescission remedy in § 1635 "appears to contemplate only individual proceedings," and the statute makes it clear that the court may tailor the remedy to what are likely to be highly individualized circumstances. While TILA does not explicitly prohibit the use of class actions for rescission, the court did not find this fact dispositive because the remedy is "written with the goal of making the rescission process a private one." The court also pointed out that Congress explicitly established a cap for class action claims seeking damages, but did not include a similar cap for claims seeking rescission. Second, the court noted that the "fundamental incompatibility" between the rescission remedy under TILA and the class action device "raises serious questions as to whether a TILA rescission class could ever be properly certified under Fed. R. Civ. P. 23(b)." Because a declaration of a "rescission class" would only initiate a process of individual rescission actions, such a declaration would not be a form of "final" declaratory relief under Rule 23(b)(2).