

Commercial and Consumer Credit Law—Class Action Remedy Unavailable in First Circuit for Plaintiffs Seeking Rescission Under Truth in Lending Act—*McKenna v. First Horizon Home Loan Corp.*, 475 F.3d 418 (1st Cir. 2007)

The Truth in Lending Act (TILA) provides consumers with the right to rescind their loan agreements within three days of the closing of the transactions.¹ Beyond this statutory provision permitting consumer recovery, the federal courts remain split as to the availability of class certification for actions brought under TILA.² In *McKenna v. First Horizon Home Loan Corp.*,³ the United States Court of Appeals for the First Circuit considered, in a case of first impression, the legitimacy of class actions brought under the rescission provisions of TILA.⁴ Relying on its interpretation of congressional intent and the personalized remedy provided by the rescission section, the court held that class certification is unavailable in rescission actions under TILA.⁵

Ralph McKenna and Christopher and Laurie Lillie received mortgage loans from First Horizon Home Loan Corporation (First Horizon) in June and August of 2003, respectively.⁶ In March 2004, both parties filed a complaint in the United States District Court for the District of Massachusetts claiming the forms they received from First Horizon, which explained their rights of rescission, were defective.⁷ Specifically, the plaintiffs argued that the forms violated TILA's disclosure requirements by failing to distinguish between the rescissory rights of those refinancing loans procured from a different lender and those initially received from First Horizon.⁸ The plaintiffs also moved to certify a class of plaintiffs who acquired loans with similarly defective

1. See 15 U.S.C. § 1635(a)-(b) (2006) (codifying rescissory rights).

2. See generally 7B CHARLES ALAN WRIGHT, ARTHUR R. MILLER & MARY KAY KANE, FEDERAL PRACTICE AND PROCEDURE § 1804 (3d ed. 2007) (noting contrary decisions in TILA suits seeking class certification).

3. 475 F.3d 418 (1st Cir. 2007).

4. *Id.* at 420 (reciting issue before court).

5. See *id.* at 423 (holding class certification unavailable for direct or declaratory rescission claims).

6. *McKenna v. First Horizon Home Loan Corp.*, 429 F. Supp. 2d 291, 297-98 (D. Mass. 2006), *rev'd*, 475 F.3d 418 (1st Cir. 2007). Each party secured the loan with its primary home and used the proceeds for personal, family, or other household matters and to pay off a significant part of an existing mortgage with another lender. *Id.*

7. 475 F.3d at 420 (reciting facts and procedural history). Both parties received a similar Notice of Right to Cancel informing them of their rights of rescission under TILA. *McKenna v. First Horizon Home Loan Corp.*, 429 F. Supp. 2d 291, 297-98 (D. Mass. 2006), *rev'd*, 475 F.3d 418 (1st Cir. 2007).

8. *McKenna v. First Horizon Home Loan Corp.*, 429 F. Supp. 2d 291, 300 (D. Mass. 2006), *rev'd*, 475 F.3d 418 (1st Cir. 2007) (explaining alleged defects in disclosure). Lenders must use either model forms furnished by the Federal Reserve Board, or "comparable written notice." 15 U.S.C. § 1635(h) (2006). First Horizon furnished its own allegedly defective forms. See *McKenna v. First Horizon Home Loan Corp.*, 429 F. Supp. 2d 291, 298 (D. Mass. 2006), *rev'd*, 475 F.3d 418 (1st Cir. 2007).

disclosures.⁹

The magistrate judge, finding that TILA does not preclude the use of the class action mechanism and that the proposed class met the requirements of Rule 23(b) of the Federal Rules of Civil Procedure, narrowed the class and recommended certification.¹⁰ The district court adopted the magistrate's class certification recommendation and First Horizon sought interlocutory review.¹¹ The First Circuit reversed and held that class certification is unavailable for rescission claims under TILA.¹² In denying class certification, the court reasoned that Congress did not intend to permit class actions as a judicial vehicle for rescissory relief because such relief would expose lenders to "overwhelming liability."¹³

In 1968, Congress enacted TILA to protect consumers from potentially unfair credit practices by requiring lending institutions to disclose credit terms to consumers and encourage "informed use of credit."¹⁴ Congress modified TILA in 1974 by placing a damages cap on actions brought under § 1640, the section of TILA authorizing civil liability.¹⁵ Notably, Congress did not impose a cap on the amended version of § 1635, the section of TILA providing the

9. 475 F.3d at 420 (describing plaintiffs' attempt for class certification). The plaintiffs sought declaratory relief allowing any class member to rescind the loan at any time during the statutory three-year default period. *Id.*

10. *McKenna v. First Horizon Home Loan Corp.*, 429 F. Supp. 2d 291, 308 (D. Mass. 2006), *rev'd*, 475 F.3d 418 (1st Cir. 2007) (recommending certification of a narrower class); *see also* FED. R. CIV. P. 23(b) (establishing class certification requirements). The district court limited the certified class to those who received a Notice of Right to Cancel like those received by the plaintiffs, namely the class representatives, and when "(1) the loans were secured by the borrower's Massachusetts residence; (2) the loan was for purposes other than the initial construction or acquisition of the residence; and (3) all or part of the loan proceeds were used to refinance a loan made by someone other than First Horizon . . ." *McKenna v. First Horizon Home Loan Corp.*, 429 F. Supp. 2d 291, 308-09 (D. Mass. 2006), *rev'd*, 475 F.3d 418 (1st Cir. 2007). The court ruled that the relief sought "shall be 'a declaration that any class member who so desires may seek to rescind their transaction.'" *Id.* at 309 (citation omitted).

11. 475 F.3d at 421 (indicating defendant's appeal for interlocutory review of the class certification order pursuant to FED. R. CIV. P. 23(f)).

12. *See id.* at 423 (holding rescissory claims pursuant to TILA preclude class certification).

13. *See id.* at 423-24 (reviewing congressional concerns of heightened liability in mortgage industry).

14. 15 U.S.C. § 1601(a) (2006) (explaining purpose of TILA); *see also* Matthew A. Edwards, *Empirical and Behavioral Critiques of Mandatory Disclosure: Socio-Economics and the Quest for Truth in Lending*, 14 CORNELL J.L. & PUB. POL'Y 199, 210 (2005) (positing consumer ignorance and value of credit information as underlying presumptions of TILA). The strict disclosure requirements mandated by TILA reflect a preference to protect consumers. *See Gibbons v. Interbank Funding Group*, 208 F.R.D. 278, 282 (N.D. Cal. 2002) (strictly construing TILA as imposing liability on creditor for minor violations). TILA provides borrowers the opportunity to rescind the finance agreement within three days of the closing or the receipt of the notice of the right to rescind, whichever comes later. 15 U.S.C. § 1635(a) (2006). Furthermore, a creditor's failure to disclose material terms extends the borrower's rescissory period to three years. § 1635(f).

15. *See* 15 U.S.C. § 1640(a)(2)(B) (2006) (requiring damages limit); Act of October 28, 1974, Pub. L. 93-495, 88 Stat. 1500 (codified as amended at 15 U.S.C. § 1640) (amending section 1640(a)(2)(B) of TILA). The statute now provides that in class actions "the total recovery . . . arising out of the same failure to comply by the same creditor shall not be more than the lesser of \$500,000 or 1 per centum of the net worth of the creditor." § 1640(a)(2)(B).

rescission remedy.¹⁶ Twenty-one years later, to alleviate concerns and ambiguity surrounding the legitimacy of class certification for rescission suits under TILA, Congress modified the statute again with the Truth in Lending Act Amendments of 1995 (Amendments).¹⁷ Consistent with the Amendments' emphasis on creditor protection, Congress also imposed a six-month moratorium on class action suits prior to passing the TILA Amendments.¹⁸ As enacted, the Amendments remained silent regarding the class action mechanism in suits brought pursuant to § 1635.¹⁹

Prior to the First Circuit's ruling in *McKenna*, the Fifth Circuit was the only circuit court to address whether rescission class actions are permissible under TILA.²⁰ In *James v. Home Construction Co. of Mobile, Inc.*,²¹ the Fifth Circuit

16. See 15 U.S.C. § 1635(b) (2006) (outlining procedural devices of modified version of TILA). Under TILA, an obligor seeking rescission must notify the creditor of his intention to do so; the creditor then has twenty days to respond. § 1635(a). Further suggestive of its personalized nature, the statute provides that the rescissory procedure "shall apply except when otherwise ordered by a court." § 1635(b); see also Jefferson v. Sec. Pac. Fin. Servs., 161 F.R.D. 63, 68 (N.D. Ill. 1995) (holding exclusion of class action provision dispositive of legislative presumption of rescission as personal remedy). But see *Andrews v. Chevy Chase Bank*, 240 F.R.D. 612, 621 (E.D. Wis. 2007) (finding 1974 modification of § 1640 without comparable provision in § 1635 insignificant). In subsequent years, some courts rejected the contention that TILA uniformly disallowed class actions. See *Haynes v. Logan Furniture Mart*, 503 F.2d 1161, 1163-65 (7th Cir. 1974) (rejecting district court's holding of incompatibility between class action suits and substantive goals of TILA); *Wilcox v. Commerce Bank of Kansas City*, 474 F.2d 336, 347-49 (10th Cir. 1973) (rejecting incompatibility of class action with TILA).

17. See Truth in Lending Act Amendments of 1995, Pub. L. No. 104-29, § 3, 109 Stat. 271, 272-76 (1995) (codified as amended in scattered sections of 15 U.S.C.) (amending TILA). New York Senator Al D'Amato stressed that the purpose of the Amendments, curtailing creditor liability, was in response to the Eleventh Circuit's decision in *Rodash v. AIB Mortgage Co.*, 16 F.3d 1142 (11th Cir. 1994). See 141 CONG. REC. S14566-03, 14567 (daily ed. Sept. 28, 1995) (statement of Sen. D'Amato). *Rodash* resulted in potentially devastating creditor liability for technical violations of TILA by triggering dozens of class action suits. *Id.* (citing *Rodash v. AIB Mortgage Co.*, 16 F.3d 1142 (11th Cir. 1994)). The nature of the violation should not dissuade courts from certifying a class because "the statute allows scant room for deviation, and even seemingly immaterial or hyper-technical violations of TILA's disclosure requirements give rise to monetary liability." Robert Murken, *Can't Get No Satisfaction? Revising How Courts Rescind Home Equity Loans Under the Truth in Lending Act*, 77 TEMPLE L. REV. 457, 460 (2004) (stressing enforcement of technical violations as essential to TILA's goal of protecting consumers).

18. See Truth in Lending Class Action Relief Act of 1995, Pub. L. No. 104-12, § 2, 109 Stat. 161, 161-62 (1995) (codified as amended at 15 U.S.C. § 1640(i)) (imposing temporary ban on class certification under TILA).

19. See 15 U.S.C. § 1635 (2006) (lacking class action provision). See generally Daniel J. Morgan, *The Right to Rescission, Still Controversial After All These Years*, 49 CONSUMER FIN. L.Q. REP. 177 (1995) (noting amendment's failure to address class actions, purpose of its enactment). Senate debates preceding the Amendments' enactment indicated congressional resistance to eliminating the right of rescission thereby reflecting a general concern to preserve consumer protection under TILA. See 141 CONG. REC. S14566-03, 14567-68 (daily ed. Sept. 28, 1995) (statement of Sen. Sarbanes) (noting TILA's objectives by stressing limitations on increased tolerance for lenders).

20. See *James v. Home Constr. Co. of Mobile*, 621 F.2d 727, 731 (5th Cir. 1980) (prohibiting class-wide treatment of rescission actions). At the time, several district courts had also ruled on the issue. See, e.g., *McIntosh v. Irwin Union Bank & Trust, Co.*, 215 F.R.D. 26, 33 (D. Mass. 2003) (holding certification available for rescissory relief); *Gibbons v. Interbank Funding Group*, 208 F.R.D. 278, 286 (N.D. Cal. 2002) (concluding rescission inappropriate for class certification); *Jefferson v. Sec. Pac. Fin. Servs.*, 161 F.R.D. 63, 70 (N.D. Ill. 1995) (holding certification dissonant with rescission).

held that the personalized provisions under § 1635(b) illustrated congressional opposition to class action rescission.²² Subsequent district court decisions also focused on the individuated remedy of § 1635 when ruling against the availability of class treatment for rescission suits.²³ Additionally, district courts refusing class certification stressed that the inclusion of the cap in class actions brought under § 1640, coupled with the absence of similar language under § 1635, was demonstrative of congressional intent to withhold class treatment under § 1635.²⁴

Conversely, district courts that have certified classes seeking rescission under § 1635(b) have relied on the absence of language precluding class treatment under TILA.²⁵ These courts have reasoned that the personalized

21. 621 F.2d 727 (5th Cir. 1980).

22. *James v. Home Constr. Co. of Mobile*, 621 F.2d 727, 730-31 (5th Cir. 1980) (stressing redress of individual wrongs as primary underpinning of statute). The *James* court noted that § 1635(b) “gives the creditor ten days in each case in which to go through the steps of rescission before the matter can be brought to court,” a procedural device it reasoned contradicted class actions. *Id.* at 731.

23. See *Gibbons v. Interbank Funding Group*, 208 F.R.D. 278, 285 (N.D. Cal. 2002) (highlighting personal language of § 1635(b) in positing inapplicability of class actions). *But see* Murken, *supra* note 17, at 460-61 (noting congressional intent of empowering violated borrowers); Note, *Class Actions Under the Truth in Lending Act*, 83 YALE L.J. 1410, 1416-17 (1974) (warning against decisions precluding Rule 23 from fulfilling its purpose of remedying widespread harm). The court in *Gibbons* also noted that the relief sought by the plaintiffs—a right of rescission—pointed to a larger issue of whether, in the absence of a claim and subsequent denial, a justiciable issue existed between the parties. *Gibbons v. Interbank Funding Group*, 208 F.R.D. 278, 285 (N.D. Cal. 2002) (citing *Jefferson v. Sec. Pac. Fin. Servs.*, 161 F.R.D. 63, 69 (N.D. Ill. 1994)) (stressing absence of claims for rescission instructive of lacking standing for class members)). Additionally, the *Jefferson* court reasoned that because rescission restores the parties to *status quo ante*, certifying classes seeking rescission would turn TILA into a penal statute, with potentially devastating consequences on the credit industry. *Jefferson v. Sec. Pac. Fin. Servs., Inc.*, 161 F.R.D. 63, 69-70 (N.D. Ill. 1994) (concluding consequences of rescission disproportionate to conduct of offending parties). *But see* *McIntosh v. Irwin Union Bank and Trust, Co.*, 215 F.R.D. 26, 33 (D. Mass. 2003) (maintaining TILA’s penal structure). The *McIntosh* court underscored TILA’s remedial structure by stressing the statute’s embedded protection of class members. *McIntosh v. Irwin Union Bank and Trust, Co.*, 215 F.R.D. 26, 33 (D. Mass. 2003).

24. See *Jefferson v. Sec. Pac. Fin. Serv’s., Inc.*, 161 F.R.D. 63, 68 (N.D. Ill. 1995) (noting congressional inaction regarding class actions under § 1635(b)). *But see* *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 241 (1989) (resolving question of statutory meaning with examination of statute’s language exclusively); *Caminetti v. United States*, 242 U.S. 470, 490 (1917) (holding language as conclusive evidence of congressional intent).

25. See *Andrews v. Chevy Chase Bank*, 240 F.R.D. 612, 621 (E.D. Wis. 2007) (quoting *Rodrigues v. Members Mortgage Co.*, 226 F.R.D. 147, 153 (D. Mass. 2005) (noting absence of language in TILA precluding class treatment of rescission). See generally *Murray v. GMAC Mortgage Corp.*, 434 F.3d 948 (7th Cir. 2006) (affirming adherence to plain language of statute in absence of congressional action limiting liability). A presupposition to certification is that the relief sought is a declaratory right to rescission, and not actual rescission. See *Williams v. Empire Funding Corp.*, 183 F.R.D. 428, 435-36 (E.D. Pa. 1998) (distinguishing cases seeking declaratory relief from cases seeking actual rescission). In the event the certified class prevailed, those class members seeking rescission would do so on an individual basis pursuant to § 1635(b), which also provides the defendant the opportunity to cure the violation. *Id.* at 435; see also *McIntosh v. Irwin Union Bank and Trust, Co.*, 215 F.R.D. 26, 33 (D. Mass. 2003) (noting declaratory relief as stronger indicia of congressional intent for class treatment). *But see* *Gibbons v. Interbank Funding Group*, 208 F.R.D. 278, 285 (N.D. Cal. 2002) (dismissing distinction between declaratory and rescissory relief as “one of form more than substance”).

remedy of the rescission statute further encourages certification.²⁶ Moreover, courts certifying classes under § 1635(b) have noted that the objectives of class actions—to redress and deter injurious conduct—are entirely consistent with claims seeking the right to rescission.²⁷

In *McKenna v. First Horizon Home Loan Corp.*, the First Circuit overturned the district court's class certification under § 1635(b), holding that class certification is unavailable, as a matter of law, for rescission claims under TILA.²⁸ Following the decision of the Fifth Circuit in *James*, the court concluded that congressional intent did not support class treatment of rescission suits, and instead intended for rescission to serve as a "purely personal remedy."²⁹ The court evaluated the legislative history of TILA and juxtaposed the presence of a class-action provision in § 1640 with its conspicuous absence in § 1635.³⁰ The court dichotomized the exclusion of the preclusive language under § 1640 as a decision by Congress to either categorically prohibit class actions in rescission claims or permit them unabashedly.³¹ Maintaining that the former option was more plausible, the court concluded that the imposition of a modest cap on damages illustrated congressional intent to protect lenders from potentially devastating consequences, namely insolvency, which could result

26. See, e.g., *In re Ameritrust Mortgage Co.*, No. 05-CV-7097, 2007 WL 1202544, at *3 (N.D. Ill. April 23, 2007) (noting appropriateness of declaration permitting already available individual remedy); *Andrews v. Chevy Chase Bank*, 240 F.R.D. 612, 622 (E.D. Wis. 2007) (establishing commonality of potential class members where declaratory relief sought); *Rodrigues v. Members Mortgage Co., Inc.*, 226 F.R.D. 147, 153 (D. Mass. 2005) (excluding individuals lacking initial right of rescission from class). The issue of whether the defendant furnished similarly illegal forms to several potential plaintiffs is well suited for certification because the defendant "acted or refused to act on grounds generally applicable to the class." *Williams v. Empire Funding Corp.*, 183 F.R.D. 428, 436 (E.D. Pa. 1998) (quoting FED. R. CIV. P. 23(b)(2)). But see *James v. Home Constr. Co. of Mobile*, 621 F.2d 727, 730 (5th Cir. 1980) (holding individual recovery feature of rescission statute instructive of statute's purpose "to redress individual wrongs").

27. See *Haynes v. Logan Furniture Mart, Inc.*, 503 F.2d 1161, 1163 (7th Cir. 1974) (rejecting district court's theory of incompatibility between class action mechanism and goals of TILA). Class actions "offer increased public accountability for a proven wrongdoer's conduct and greater deterrence of future wrongdoing by the litigants and others." Henry Rose, *Class Actions and the Poor*, 6 PIERCE L. REV. 55, 70 (2007); see also 6 ALBA CONTE & HERBERT B. NEWBERG, *NEWBERG ON CLASS ACTIONS* § 21:1 (4th ed. 2007) (noting increased efficacy of class action over individual suit when seeking to modify defendant's conduct). Moreover, courts have maintained that a decision of whether to certify a class must consider the underlying policy goals of class actions. *Smilow v. Southwestern Bell Mobile Sys., Inc.*, 323 F.3d 32, 41 (1st Cir. 2003) (stressing class certification determination be made in context of class action objectives); *Andrews v. Chevy Chase Bank*, 240 F.R.D. 612, 621 (E.D. Wis. 2007) (construing public policy support for class certification under TILA); see also Scott S. Partridge & Kerry J. Miller, *Some Practical Considerations for Defending and Settling Products Liability and Consumer Class Actions*, 74 TUL. L. REV. 2125, 2129 (2000) (noting importance of class action goals in resolving question of certification).

28. 475 F.3d at 427 (denying class certification as a matter of law).

29. *Id.* at 423 (quoting *James v. Home Constr. Co. of Mobile*, 621 F.2d 627, 731 (5th Cir. 1980)) (noting *James* court's reasoning of congressional intention for rescission as "purely personal remedy").

30. *Id.* (indicating presumption of deliberateness regarding varied treatment of class actions under § 1635 and § 1640). Noting the deliberateness of the omission, the court ultimately held that the varied treatment of the class remedy within TILA indicated congressional intent to preclude its deployment under § 1635. *Id.* at 423-24.

31. *Id.* at 424 (contrasting binary interpretations of congressional intent).

from class actions seeking rescission.³²

In addition to the congressional intent manifested in the statute and TILA Amendments, the court held that the personalized language of the rescission subsection obviates the need for class treatment.³³ Specifically, the court reasoned that the individualized procedure for rescission, coupled with the various private remedies available to borrowers, illustrates the statute's tension with the class action vehicle.³⁴ Furthermore, the court refused to acknowledge a substantive difference between claims seeking rescission and those seeking the right to rescind.³⁵

The First Circuit erred by following the Fifth Circuit's decision in *James* by denying the availability of class certification for rescission suits under TILA on the basis that Congress intended to withhold class certification from rescission actions.³⁶ In establishing its two-fold justification for withholding class certification, the court's determination of congressional intent ignored the underlying objectives of both TILA and class certification, while violating traditional canons of statutory construction.³⁷ First, the court disregarded previous applications of TILA by concluding that rescission conflicts with the class action vehicle.³⁸ Second, the court reached the conclusion that Congress intended to protect creditors by interpreting congressional intent in a manner that is not supported by the statute or traditional interpretations of legislative history.³⁹

32. 475 F.3d at 424 (estimating losses in excess of \$200,000,000 if class certification permissible). In ruling against certification, the court however noted that the class action provision in 15 U.S.C. § 1640(a)(2)(B) (2006) appears in the form of a cap. *Id.* The court explained that concerns over "the ominous prospect of large-scale liability that would be inherent in rescission class actions" supported Congress's decision not to permit class actions under § 1635. *Id.* at 425.

33. *Id.* at 426 (noting presence of statutory authority penalizing non-compliance).

34. *Id.* (noting nature of rescission remedy as between borrower and creditor outside judicial arena). The court distinguished *Califano v. Yamaski*, 442 U.S. 682, 700 (1979), which held that in the absence of congressional expression to the contrary, class relief is an appropriate mechanism in civil actions. *Id.* at 424 (quoting *Califano v. Yamaski*, 442 U.S. 682, 700 (1979)).

35. 475 F.3d at 426 (rejecting distinction between declaratory judgment and actual rescission). The court held that the two justifications for not certifying the class—congressional intent to protect creditors from devastating consequences and the private nature of rescission actions—also apply to actions seeking declaratory relief for rescission. *Id.*

36. *Id.* at 423; *see also James v. Home Constr. Co. of Mobile*, 621 F.2d 727, 730-31 (5th Cir. 1980) (reasoning congressional intent supported purely personal reading of statute).

37. 475 F.3d at 424 (holding protection of lenders and personalized quality of rescission remedy as reasons for denying certification); *see* 141 CONG. REC. S14566-03, 14567-68 (daily ed. Sept. 28, 1995) (statement of Sen. Sarbanes) (warning against dilution of TILA consumer protections); Partridge & Miller, *supra* note 27, at 2129 (requiring consideration of class action goals in certification ruling); *see also Caminetti v. United States*, 242 U.S. 470, 485 (1917) (noting role of courts to enforce statutory language, not legislative intent).

38. *Compare* 475 F.3d at 424 (holding rescission procedure too personalized for class actions), *with McIntosh v. Irwin Union Bank & Trust, Co.*, 215 F.R.D. 26, 33 (D. Mass. 2003) (stressing declaratory relief as encouraging class treatment), *and Williams v. Empire Funding Corp.*, 183 F.R.D. 428, 435 (E.D. Pa. 1998) (noting opportunity for defendant to cure violation).

39. *Compare* 475 F.3d at 423-24 (holding variable treatment in § 1635 and § 1640 indicative of

The decision to exclude the class remedy from rescission suits creates less informed consumers with one less regulatory tool at their disposal—an incongruous consequence with the objectives of TILA.⁴⁰ Moreover, the goal of TILA—to inform and protect consumers—is consistent with public policy rationales for class actions.⁴¹ Contrary to the court’s assertions, the individualized remedy supplied by the statute demonstrates its fitness for class treatment because the putative remedy of TILA is a declaratory right for each class member to rescind.⁴² Additionally, the failure to certify this class will further benefit guilty parties at the expense of uncompensated victims, ignoring not only the primary goal of class actions—to remedy widespread injurious conduct—but also of TILA itself.⁴³

The First Circuit reached the conclusion that Congress intended to protect lenders at the expense of restricting potential plaintiffs by interpreting TILA’s legislative history incongruously from the statute.⁴⁴ The court noted correctly

congressional intentions to bar class remedy), with 15 U.S.C. § 1635 (2006) (lacking provisions precluding class certification). Moreover, “as long as the statutory scheme is coherent and consistent, there generally is no need for a court to inquire beyond the plain language of the statute.” *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 240-41 (1989); see *Murray v. GMAC Mortgage Corp.*, 434 F.3d 948, 953-54 (7th Cir. 2006) (granting certification by maintaining strict adherence to statutory language absent direct congressional expression to contrary).

40. See *Edwards*, *supra* note 14, at 201-02 (highlighting TILA’s function of regulating asymmetrical information advantage enjoyed by creditors); see also *Murken*, *supra* note 17, at 461-62 (remarking on TILA’s role in addressing predatory lending practices).

41. See *Haynes v. Logan Furniture Mart, Inc.*, 503 F.2d 1161, 1164-65 (7th Cir. 1974) (stressing TILA’s preference for protecting consumers from wide-spread harm caused by TILA violators); *Andrews v. Chevy Chase Bank*, 240 F.R.D. 612, 621-22 (E.D. Wis. 2007) (discussing policy rationale for class certification); see also *Murken*, *supra* note 17, at 458 (noting TILA’s deterrent effect on non-complying creditors). Though it ultimately held against certification, the harmony between rescission and class action objectives was evident to the *James* court: “It is true that in some senses the purpose of the [Truth in Lending] Act and of this action is to redress both individual wrongs and wrongs to the public, in the sense of redressing a broad social problem.” *James v. Home Constr. Co. of Mobile*, 621 F.2d 727, 730 (5th Cir. 1980).

42. See *Williams v. Empire Funding Corp.*, 183 F.R.D. 428, 435 (E.D. Pa. 1998) (noting distinction between declaratory and actual relief in rescission context). Further, “a declaration of the existence of a right to rescind would benefit the class as a whole.” *Id.* at 436; see also *NEWBERG*, *supra* note 27, at § 21:1 (noting preference for class treatment when relief sought is declarative). Additionally, the *McKenna* court’s unwillingness to distinguish the relief sought as between the declaratory right of rescission from actual rescission is the consequence of the court’s misguided interpretation of § 1635 and its fitness for class treatment. See *McIntosh v. Irwin Union Bank & Trust, Co.*, 215 F.R.D. 26, 33 (D. Mass. 2003) (positing TILA’s individual mechanisms as evidence of statute’s fitness for declaratory relief).

43. See *Haynes v. Logan Furniture Mart, Inc.*, 503 F.2d 1161, 1163-64 (7th Cir. 1974) (stressing consumer protective tone of TILA); *Andrews v. Chevy Chase Bank*, 240 F.R.D. 612, 621-22 (E.D. Wis. 2007) (reasoning public policy support for class certification under TILA). A desire to protect the credit industry should not outweigh TILA’s purpose of incentivizing creditor compliance. *Haynes v. Logan Furniture Mart, Inc.*, 503 F.2d 1161, 1164 (7th Cir. 1974) (opposing protection of TILA violators).

44. See 15 U.S.C. § 1635 (2006) (lacking statutory language precluding class action claims); *Andrews v. Chevy Chase Bank*, 240 F.R.D. 612, 621 (E.D. Wis. 2007) (indicating lack of preclusive language in TILA). Additionally, the court’s imposition of congressional intent to bar class action suits violates traditional methods of statutory interpretation. See *Murray v. GMAC Mortgage Corp.*, 434 F.3d 948, 954 (7th Cir. 2006) (cautioning against judicial appropriation of “procedural devices to undermine laws of which a judge disapproves”).

that, while absent from § 1635, the class action provision in § 1640 appears in the form of a cap, thus functioning as a limitation on previously conferred power (i.e., class treatment) rather than as an affirmative grant of that right.⁴⁵ Despite this acknowledgment, however, the court presumed that the absence of class action language in § 1635 indicated congressional intent to withhold the class remedy.⁴⁶ In arriving at this attenuated conclusion, the court ignored its own warning that “it is risky business to attribute much significance to congressional inaction.”⁴⁷ By basing its decision on an interpretation of congressional intent, the First Circuit highlights that Congress, and not the courts, should directly address this issue.⁴⁸ Until this statutory ambiguity is settled, however, the court should have resolved this issue consistent with the stated objectives of both TILA and class certification by permitting the class certification.⁴⁹

In *McKenna v. First Horizon Home Loan Corp.*, the First Circuit addressed, in a case of first impression, the availability of class certification for plaintiffs seeking rescission under TILA. Due to Congress’s failure to resolve this issue, the First Circuit’s decision employs similar reasoning utilized by the Fifth Circuit and reaches the same conclusion. By introducing legislative intent, the court employs reasoning contrary to traditional methods of statutory interpretation and its own cautionary language regarding such practices. Consequently, despite employing a modified lens for evaluating rescission claims under TILA, the same resulting equivocation will persist until a direct expression of congressional intent helps courts better navigate this intersection of procedural and substantive law.

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45. See 475 F.3d at 423-24 (rejecting presumption of inherent statutory power for class remedy under § 1635); see also 15 U.S.C. §§ 1635, 1640 (2006).

46. Compare 475 F.3d at 423 (noting deliberateness of omission), with *Andrews v. Chevy Chase Bank*, 240 F.R.D. 612, 621 (E.D. Wis. 2007) (rejecting significance of variable treatment under statute). Furthermore, the fact that Congress did not amend § 1635(b), even after imposing a temporary moratorium on class actions under TILA, suggests that Congress did *not* intend to withhold class certification. See *Murray v. GMAC Mortgage Corp.*, 434 F.3d 948, 953-54 (7th Cir. 2006) (finding congressional inaction instructive of plain reading of statutory language). Congress was aware of the potentially hazardous consequences of certifying rescission suits, but it still did not alter the statute. See 141 CONG. REC. S14566-03, 14567 (daily ed. Sept. 28, 1995) (statement of Sen. Sarbanes) (demonstrating Congress’s awareness of potential threat posed by class action rescission suits); see also Morgan, *supra* note 19, at 177 (discussing peculiarity of amendment’s failure to resolve class action question).

47. 475 F.3d at 425 (evaluating legislative history and congressional intent).

48. *Id.* at 423 (concluding congressional intention to withhold class treatment from rescission suits).

49. See *supra* text accompanying notes 40-44 (articulating suitability of class certification for rescission claims under TILA).