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TILA Rescission: A Class Act?

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Literally thousands of lawsuits have been filed all across the country alleging violations of the Truth In Lending Act (TILA) in the 40 years since TILA was enacted. Some plaintiffs seek damages, others seek injunctive relief. TILA cases are often brought as class actions, which are specifically addressed in the language of the statute itself as it relates to money damages. A split among the Circuit Courts of Appeals as to whether a TILA rescission claim can be certified for class treatment was recently resolved, and a pending appeal offers opportunity for the 11th Circuit Court of Appeals to follow suit.

The Court of Appeals for the 1st Circuit held in 2007 that a TILA rescission case could not be certified and proceed as a class. *McKenna v. First Horizon Home Loan Corp.*, 475 F.3d 418 (1st Cir. 2007). The *McKenna* court's analysis focused on two factors: (1) TILA rescission is an individual, personal right that is not appropriate for class treatment, and (2) TILA does not expressly provide for class treatment of rescission claims as it does for money damage claims. This ruling was consistent with one of the only previous Circuit Court decisions addressing whether a TILA rescission claim could be brought as a class, *James v. Home Construction Co.*, 621 F.2d 727 (5th Cir. 1980), as well as several District Court opinions that refused to certify TILA rescission classes.

Certain other District Courts had held that a TILA rescission could proceed as a class. Perhaps the most notable such decision was an order issued by a trial court in the Eastern District of Wisconsin, also in 2007. In *Andrews v. Chevy Chase Bank*, 240 F.R.D. 612, 621 (E.D. Wis. 2007), the District Court held that TILA rescission claims may be certified for class-wide treatment. In its order, the trial court employed the same two factors as the *McKenna* court, but reached the opposite conclusion. Rather than focusing on the absence of class action references as evidence of congressional opposition to class treatment of rescission claims, the trial court in *Andrews* reasoned that nothing in TILA expressly prohibits the class action. Recognizing that rescission is a personal right, the trial court determined that rescission itself, while personal in detail for each borrower, is not per se individual; rescission as a concept and process was uniform in nature and therefore capable of class administration even if the facts of each loan rescinded are individual in nature.

The trial court's order was appealed to the U.S. Court of Appeals for the 7th Circuit, which reversed. In *Andrews v. Chevy Chase Bank*, 545 F.3d 570 (7th Cir. 2008), the Appeals Court resolved any split in the Circuits by holding that TILA rescission claims are not amendable to class-wide adjudication. Although the borrowers in *Andrews* sought review by the U.S. Supreme Court, the Court denied certiorari. See *Andrews v. Chevy Chase Bank*, 129 S. Ct. 2864 (2009). Until this issue is squarely addressed by the U.S. Supreme Court, or perhaps by Congress by way of amendments to TILA, there is little doubt that borrowers turned parties litigant will seek to challenge the *McKenna* and *Andrews* rulings in their home Circuits.

Such an attempt is underway in the 11th Circuit, where residential mortgage borrowers recently filed suit on behalf of a putative class in the Northern District of Alabama seeking money damages and rescission of mortgage loans pursuant to alleged violations of TILA. Represented by Sirote's Mortgage Litigation Group, the defendant mortgage companies filed a Motion under Fed. R. Civ. P. 23 to strike the rescission claims on the basis that rescission under TILA is not amenable to class-wide adjudication. On July 27, 2009, the U.S. Magistrate judge issued a Report recommending that the Motion be granted. On September 16, 2009, the District Court adopted the report and recommendations of the magistrate and entered an order striking the rescission claims from the putative class action. In its Order, the District Court acknowledged that permissive appeal to the 11th Circuit Court of Appeals could help resolve "one or more controlling questions of law as to which there is a substantial difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation." The named class representative filed a Petition for permissive appeal to the 11th Circuit on September 29, and simultaneously moved to stay the trial court proceedings pending the outcome of the appeal. The trial proceedings have been stayed, but the Petition for permissive appeal remains pending without ruling.

If granted, this pending appeal presents an opportunity for the 11th Circuit to be the next Circuit Court to rule that TILA rescission claims may not proceed as a class. History teaches us, however, that even if the 11th Circuit is the next court to rule on this issue, it will not be the last.