



## SEVENTH CIRCUIT BARS CLASS ACTIONS FOR CLAIMS SEEKING RESCISSION OF MORTGAGES UNDER THE TRUTH IN LENDING ACT

The Seventh Circuit has joined the First and Fifth Circuits to hold as a matter of law that a class action for claims that seek the remedy of rescission under the Truth in Lending Act (TILA), 15 U.S.C. § 1635, may not be certified. *Andrews v. Chevy Chase Bank*, 2008 WL 4330761 (7th Cir., decided Sept. 24, 2008).<sup>1</sup>

Plaintiffs had mortgage loans with a “cashflow payment option,” which allowed them to vary their payments depending on their monthly cash flow. Under the loan structure, plaintiffs were entitled to a low interest rate for an initial term, after which the interest rate would adjust monthly, while minimum payments would remain fixed according to the initial rate.

As the plaintiffs’ interest rate climbed, so did the portion of the minimum monthly payment required to cover the interest. Eventually, the plaintiffs’ minimum monthly payment proved insufficient to cover the accrued interest, and a “negative amortization” feature (adding the unpaid interest to the principal) started.

Plaintiffs’ putative class-action lawsuit claimed violations of TILA and sought statutory damages, rescission and attorney’s fees. Plaintiffs alleged that defendant’s mortgage disclosures were misleading and specifically challenged whether the initial interest rate was fixed and whether the payment periods were properly stated.

The court found that the rescission remedy under TILA is both procedurally and substantively incompatible with class-action treatment. Substantively, the language of TILA’s statutory-damages remedy, § 1640(a)(2), specifically references class actions, but TILA’s rescission remedy, § 1635, omits any reference to class actions.

The court also noted that § 1635(b) provides that “[t]he procedures prescribed by this subsection shall apply except when otherwise ordered

*Shook, Hardy and Bacon Class Action and Complex Litigation Alerts keep defense and corporate counsel informed about important and emerging issues in multi-district and aggregated claims litigation.*

*SHB offers expert, efficient and innovative representation to clients targeted by class action and complex litigation. We know that the successful resolution of class action claims requires a comprehensive strategy developed in partnership with our clients.*

*For more information about SHB’s class action capabilities, please contact:*

**Jim Muehlberger**  
SHB Kansas City  
(816) 474-6550  
[jmuehlberger@shb.com](mailto:jmuehlberger@shb.com)

**John Sherk**  
SHB Kansas City  
(816) 474-6550  
[jsherk@shb.com](mailto:jsherk@shb.com)

**Tammy Webb**  
SHB San Francisco  
(415) 544-1900  
[tbwebb@shb.com](mailto:tbwebb@shb.com)

<sup>1</sup> *McKenna v. First Horizon Home Loan Corp.*, 475 F.3d 418 (1st Cir. 2007); *James v. Home Constr. Co. of Mobile, Inc.*, 621 F.2d 727 (5th Cir. 1980).

by the court,” suggesting that the remedy must proceed on a case-by-case basis. The court rejected the dissent’s argument that in the absence of an explicit TILA prohibition on the use of a class action for rescission, the court should allow for class relief.

The majority countered that the lack of an explicit prohibition against class actions in § 1635 was not dispositive. Rather, TILA’s rescission remedy “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.” Finally, the presence of a damages cap of \$500,000 or 1 percent of the creditor’s net worth in § 1640, and the absence of a damages cap in § 1635 when class treatment could permit vast recoveries, suggests that class actions are not available for rescission.

Turning to the requirements of Federal Rule of Civil Procedure 23, the court noted that the rescission remedy in general is a highly individualized remedy. Specifically, under TILA, rescinding a loan transaction requires “unwinding the transaction in its entirety and thus requires returning the borrowers to the position they occupied prior to the loan agreement.” Because of the nature of the remedy, “TILA rescission is [] considered a purely personal remedy” that is an “extremely poor fit for the class-action mechanism.”

Under Rule 23(b)(2), a class may be maintained when *final* injunctive relief for the class is sought. But certification of a rescission class would be a court declaration that only a certain group of plaintiffs could initiate a process of individual rescission actions that would then vary by consumer loan transaction. “Rather than settling the legal relations at issue, a judicial declaration in this situation would be essentially advisory.” The court found that this is not a form of final declaratory relief that is proper under Rule 23(b)(2).

The court also found certification to be inappropriate under Rule 23(b)(3). It recognized that certification of a rescission class would inevitably give rise to individual proceedings, tailored to the particular circumstances of each transaction, and that consequently, plaintiffs could not satisfy the rule’s predominance or superiority requirements. Such a scheme, it noted, simply “would not promote the primary purposes of the class-action mechanism: judicial economy and efficiency.”

## **FEDERAL COURT CONFIRMS CLASS CERTIFICATION INAPPROPRIATE IN CONSUMER ACT CASES INVOLVING MULTIPLE STATES’ LAWS**

The U.S. District Court for the Northern District of Illinois this week denied certification of a putative nationwide class in claims filed against numerous integrated oil companies relating to retail fuel pricing. *Siegel v. Shell Oil Co.*, No. 06-C-0035 (N.D. Ill.)

The court’s order reinforces a growing body of law establishing that cases involving multiple states’ laws—particularly those based on state consumer



protection acts and common law unjust enrichment claims—are not amenable to class-action treatment.

Plaintiffs' proposed class of retail fuel purchasers involved the laws of all states and the District of Columbia. The court's analysis focused on choice-of-law principles. It noted that unless "all litigants are governed by the same legal rules," a class representative cannot meet her burden of satisfying Rule 23's requirements.

Plaintiffs argued that a choice-of-law analysis was unnecessary because no "outcome determinative conflicts" existed among the laws of Illinois and the other states at issue. To support this contention, plaintiffs submitted a chart purporting to summarize the unanimity of the various states' common laws of unjust enrichment and consumer fraud. The court, however, found that differences in the causes of action were evident from plaintiffs' own chart and noted that even "nuance in the law is important and must be respected."

Citing its own precedent, the court acknowledged that unjust enrichment claims may be subject to "varying interpretations even by courts within the same state, let alone among the fifty states." The court also found that inconsistencies in language and interpretation plague state consumer fraud statutes, which may differ with regard to key issues that include the type of prohibited conduct, proof of injury-in-fact, available remedies, scienter, statute of limitations, and reliance.

Although varying laws would be immaterial for certification purposes if applicable choice-of-law analysis pointed to only one state's laws, in a diversity case, the court was obligated to apply the forum state's choice-of-law rules. Under the *Restatement (Second) of Conflict of Laws* employed by Illinois, "where a plaintiff relies on a representation in the same state where that representation was made and received, the law of that state applies."

Because the alleged representations occurred at the point of sale for each retail transaction, Illinois' choice-of-law rules required the application of each state's unjust enrichment and consumer protection laws, and class certification was deemed inappropriate under Rule 23.

Case analyses prepared by SHB Partner **Rebecca Schwartz** and SHB Associate **Brigette Willauer**.

## SHB ACCOLADES

In January 2008, *The American Lawyer* magazine named SHB the Litigation Department of the Year in the Product Liability category. The United States' 200 largest law firms (by gross revenue) were invited to participate in the biennial competition, which recognizes the leading firms in four litigation categories. The magazine described SHB's success in defeating class certification involving an array of products from diverse industrial sectors and noted that SHB has "built the deepest bench of product liability talent anywhere."

In 2008, the firm was named Global Product Liability Firm of the Year for the fourth consecutive year by *Who's Who Legal* and listed in *Chambers USA* as one of just six elite "Band One" firms for national product liability defense.



## OFFICE LOCATIONS

**Geneva, Switzerland**  
011-41-22-787-2000

**Houston, Texas**  
713-227-8008

**Irvine, California**  
949-475-1500

**Kansas City, Missouri**  
816-474-6550

**London, United Kingdom**  
011-44-207-332-4500

**Miami, Florida**  
305-358-5171

**San Francisco, California**  
415-544-1900

**Tampa, Florida**  
813-202-7100

**Washington, D.C.**  
202-783-8400

