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The Availability of Statutory Damages under TILA to Remedy the Sharp Practice of Payday Lenders

One day in 2001, Lisa Timbers found herself in a common predicament when she was in need of immediate funds.¹ She decided to obtain a “payday” loan for the \$300 she needed.² Under the terms of the agreement, Lisa, a twenty-three year-old gas station cashier, wrote a post-dated check that would not be cashed by the lender until she got her paycheck.³ Like many consumers in need of quick cash and without any meaningful alternatives, “she was unfazed by the harsh terms: The principal, plus \$51, had to be repaid in two weeks, for a[n] . . . annualized interest rate of 443%.”⁴ Unfortunately, the terms Ms. Timbers encountered are far from extraordinary in the payday lending industry.⁵ In fact, the annualized interest rate she was charged in the form of a fee was actually slightly below the average rate charged by payday lenders.⁶ To find relief from these sharp practices, consumers like Ms. Timbers have turned to the courts by filing suits against payday lenders for violations of certain disclosure requirements of the Truth in Lending Act (TILA).⁷ Additional regulations have been promulgated under TILA to address payday lending practices,⁸ but consumers have had mixed results in obtaining statutory damages.⁹ Courts have not reached a

1. Paul Beckett, *Risky Business: Exploiting a Loophole, Banks Skirt Stock Laws on High Interest Rates*, WALL ST. J., May 25, 2001, at A1.

2. *Id.*

3. *Id.*

4. *Id.*

5. John Hackett, *Ethically Tainted*, U.S. BANKER, Nov. 2001, at 48.

6. *Id.* Consumer advocacy groups estimate the average annualized interest rate for a payday loan at 474%. *Id.*

7. Truth in Lending Act, 15 U.S.C. §§ 1601-1667 (2001).

8. 12 C.F.R. § 226.2(a)(14) cmt. 2 (2000). A recent comment added by the Federal Reserve Board indicates that payday loans are to be considered credit under the Truth in Lending Act. *Id.*; Elizabeth C. Yen, Wingrove S. Lynton & Timothy P. Meredith, *Truth in Lending in the Year 2000*, BUS. LAW., May 2001, at 1089, 1090.

9. *See Brown v. Payday Check Advance, Inc.*, 202 F.3d 987 (7th Cir. 2000) (holding that statutory damages are only available for violations of certain enumerated provisions of the Truth in Lending Act). *But see Lozada v. Dale Baker*

consensus on the availability of statutory damages for violations of TILA disclosure requirements for payday lenders, thus leaving consumers in a difficult position when attempting to find relief from the extreme terms of the average payday loan.¹⁰

This Note focuses on the split between the courts on the availability of statutory damages to plaintiffs claiming that a payday lender has violated TILA's disclosure requirements. Part I of this Note provides an overview of payday lending and discusses the quick growth of the industry.¹¹ It also discusses the effect of payday lending practices on consumers and counterarguments made by the lenders.¹² Part II explains the effect of TILA on payday lenders and how the difference between statutory and actual damages can frustrate a plaintiff's attempt to secure a remedy.¹³ Part III examines the split among the courts on the issue of which disclosure violations result in automatic statutory damages.¹⁴ Part III also gives an overview of pertinent statutes as well as cases that describe the competing viewpoints on statutory damages under TILA.¹⁵ Part IV concludes that Congress should provide more protection to consumers obtaining payday loans.¹⁶

I. AN INTRODUCTION TO PAYDAY LENDING

A. *An Overview of the Concept of Payday Lending and the Growth of the Industry*

Payday lending is becoming an increasingly important and controversial part of the financial landscape of the United States.¹⁷ It has grown into an industry that exceeds \$2 billion in annual

Oldsmobile, Inc., 145 F. Supp. 2d 878 (W.D. Mich. 2001) (holding that statutory damages are widely available under TILA).

10. See *infra* notes 54-63 and accompanying text for a discussion of the different types of damages available under TILA.

11. See *infra* notes 17-36 and accompanying text.

12. *Id.*

13. See *infra* notes 37-63 and accompanying text.

14. See *infra* notes 64-98 and accompanying text.

15. *Id.*

16. See *infra* notes 99-106 and accompanying text.

17. Ann Hayes Peterson, *Payday Loans*, CREDIT UNION MAG., Dec. 2000, at 56.

revenues¹⁸ with over \$14 billion in loans made to over eight million people.¹⁹ Despite its quick growth,²⁰ many people are not aware of the term “payday” loan.²¹ Ann Hayes Peterson offers a succinct description of the typical transaction:

Payday loans are short-term transactions in which customers borrow against their paychecks by postdating personal checks in exchange for cash — and service charges. Say, for example, you need \$100. You write a check to a payday lender for \$115 and you get \$100 in cash right away. Two weeks later, the payday lender cashes your \$115 check. Most payday lenders make the bulk of their money through rolling over loans, though. And consumers tend to roll over loans about seven times, consumer groups say.²²

Despite a fee ranging from \$15 to \$50 for the initial loan that usually has a term of two weeks, a consumer can be hurt by extending the loan when it expires, thus paying that same fee each time an extension is made.²³

B. *The Effects of Payday Loans on Consumers*

The rollover of payday loans is the part of the payday lending industry that most outrages consumer advocates and other critics of payday lending.²⁴ By treating the fee charged to a borrower as interest on the loan, the annual percentage rate on payday loans averages 474%.²⁵ Jean Ann Fox, director of

18. *Id.*

19. Beckett, *supra* note 1, at A1.

20. *Id.* Payday lending was virtually non-existent as recently as the early 1990s. *Id.*

21. Peterson, *supra* note 17, at 56. Even professionals in the financial industries often require an explanation of how payday lending works. *Id.*

22. *Id.*

23. *Id.* Some loans do have longer terms. *Id.* There is much variation in the industry with regards to the length, amount and interest rate of the loans. *Id.*

24. Hackett, *supra* note 5, at 48.

25. *Id.*

consumer protection at the Consumer Federation of America, has been particularly vocal in opposing this practice: “Payday loans are a transfer of wealth from the poor . . . to the predatory and the powerful.”²⁶

The payday lending industry defends itself from its critics in several ways. First, industry supporters argue that payday loans carry a high risk of default that must be compensated by the high fees.²⁷ However, consumer advocacy groups estimate that losses for payday lenders are in line with what a typical bank encounters on unsecured loans.²⁸ The lenders also claim that they are serving consumers with urgent needs for cash and no other options.²⁹ While payday lenders vehemently argue that they do not target the poor,³⁰ it seems that low-income consumers would be more likely to require the services of payday lenders.³¹ Therefore, it can be argued that payday lenders intend to trap these consumers into continuously rolling over their payday loans.³²

In response, payday lenders argue that alternatives such as bounced check fees are usually more expensive than a payday loan.³³ Billy Webster, president of the Community Financial Services Association of America (CFSA), payday lending’s industry trade group, asserts that “the average bounced check costs \$60 in fees.”³⁴ Webster goes on to point out that banks charge “\$7 billion a year for bounced checks” while “payday lenders are assailed for collecting \$1.6 billion in fees a year.”³⁵ The

26. Michael W. Lynch, *Legal Loan Sharking or Essential Service? The Great “Payday” Loan Controversy*, REASON, Apr. 2002, at 38.

27. *Helping Consumers Skirt Scams*, TRIAL, Apr. 2002, at 58, 60.

28. Hackett, *supra* note 5, at 48.

29. Peterson, *supra* note 17, at 56.

30. *Id.*

31. *Helping Consumers Skirt Scams*, *supra* note 27, at 60.

32. Charles A. Bruch, *Taking the Pay out of Payday Loans: Putting an End to the Usurious and Unconscionable Interest Rates Charged by Payday Lenders*, 69 U. CIN. L. REV. 1257, 1257 (2001) (describing the story of Patricia Turner who was forced into bankruptcy due to rolling over a payday loan); Peterson, *supra* note 17, at 56. Rolling over payday loans is one way payday lenders make money. *Id.* Each time a loan is rolled over, an additional fee is charged to the consumer. *Id.* A low-income consumer can get to the point where bankruptcy must be declared to escape the cycle. *Id.*

33. Lynch, *supra* note 26, at 38.

34. *Id.*

35. *Id.*

banking industry has responded “that bounced check fees differ from payday loan activity in that the bounced check cost is a one-time occurrence, not a first step in an expensive financial entanglement.”³⁶

II. PAYDAY LENDING AND THE REQUIREMENTS OF THE TRUTH IN LENDING ACT

A. *Payday Lenders are Subject to the Requirements of the Truth in Lending Act*

The Truth in Lending Act came into existence in 1968 to provide a remedy for consumers injured by lenders.³⁷ More specifically, TILA was passed to “standardize the mechanism for communicating the terms of consumer credit agreements, which in turn serves to advise borrowers of the cost of credit.”³⁸ If a lender violates the disclosure requirements established by TILA, the Act provides remedies to consumers in the form of statutory and actual damages.³⁹

Payday lenders commonly claim that they are not subject to the disclosure requirements of TILA because they are not involved in providing credit.⁴⁰ The lenders argue that they are merely providing a service for a set fee and should not have to comply with TILA, which governs extensions of credit.⁴¹ However, the Federal Reserve Board recently added a comment to TILA’s regulations that unequivocally states that payday lending is to be considered an extension of credit subject to the requirements of TILA.⁴² Courts have also universally rejected the idea that payday loans should not be considered credit just because the interest charged is couched in terms of a fee.⁴³ Therefore, courts consider

36. Hackett, *supra* note 5, at 48.

37. Kilbourn v. Candy Ford-Mercury, Inc., 209 F.R.D. 121 (W.D. Mich. 2002).

38. Bruch, *supra* note 32, at 1262.

39. 15 U.S.C. § 1640(a)(1)-(2) (2001).

40. Peterson, *supra* note 17, at 56.

41. *Id.*

42. Official Staff Commentary, 12 C.F.R. pt. 226, Supp. I, § 226.2(a)(14) cmt. 2 (2000); Yen, Lynton & Meredith, *supra* note 8, at 1090.

43. See, e.g., Brown v. Payday Check Advance, Inc., 202 F.3d 987, 998 (7th Cir. 2000).

payday lenders to be subject to the disclosure requirements of TILA.⁴⁴

B. Disclosure Requirements of TILA and Payday Lending

Payday loans are classified as “closed-end” credit,⁴⁵ a type of loan that requires a single payment or succession of payments (also known as a “installment” loan).⁴⁶ Like other closed-end loans, payday loans are subject to the disclosure requirements of section 1638 of TILA.⁴⁷ Consumers who have been injured by payday lenders have sued, often in class actions, alleging violations of these disclosure requirements.⁴⁸ Since the requirements can be violated by very small deviations, payday lenders often violate them or do not attempt to follow them at all.⁴⁹

The disclosure requirements of TILA are indeed exceedingly specific. In an attempt to give complete protection to consumers, a violation can be found for missteps such as using the wrong typeface for a financing term,⁵⁰ or for failing to provide a document at the proper time during a transaction.⁵¹ Consumers have utilized the ease with which TILA can be violated to bring suits against payday lenders who run afoul of the disclosure requirements.⁵² Therefore, consumers can attempt to recover damages for the high rates of interest charged by payday lenders

44. *Id.*

45. See Eugene J. Kelley & John L. Ropiequet, *Actual Damages under the TILA: Collapsing Class Actions*, CONSUMER FIN. L.Q. REP. 200, 201 (2001).

46. See generally Hackett, *supra* note 5, at 48. Although payday loans are treated as a single-payment loan for statutory purposes, the effect of repeatedly rolling over the loan into a new loan can turn the payday loan into a long-term arrangement that becomes more like a revolving line of credit. See *id.* at 50. If treated as such, different provisions of TILA would apply to a payday loan. Truth in Lending Act, 15 U.S.C. § 1638 (2001).

47. 15 U.S.C. § 1638(b); Kelley & Ropiequet, *supra* note 45, at 201.

48. See, e.g., *Payday Check Advance, Inc.*, 202 F.3d at 989.

49. Peterson, *supra* note 17, at 56 (describing how payday lenders do not follow TILA because they believe it does not apply to their business practices).

50. *Payday Check Advance, Inc.*, 202 F.3d at 990.

51. *Kilbourn v. Candy Ford-Mercury, Inc.*, 209 F.R.D. 121 (W.D. Mich. 2002).

52. See, e.g., *Payday Check Advance, Inc.*, 202 F.3d at 989-90.

through the indirect means of statutory damages for violations of disclosure requirements.⁵³

C. *Statutory versus Actual Damages under TILA*

When attempting to recover for a violation of TILA, a borrower has the option of claiming actual or statutory damages.⁵⁴ Statutory damages are automatically available under TILA once a violation has been established without regard to whether an actual injury has been suffered.⁵⁵ Statutory damages amount to twice the finance charge imposed by the lender in the particular transaction.⁵⁶ Since a violation will be plain on the face of the document, statutory damages will be quite easy to prove if they exist.⁵⁷ Actual damages are compensatory damages that are available whenever an actual injury can be proven.⁵⁸ It is more difficult to prove actual injury and receive actual damages than to prove a violation of one of TILA's many disclosure requirements.⁵⁹

For several reasons, Truth in Lending Act (TILA) class action suits generally focus on statutory damages. First, statutory damages are automatic. They do not require the often difficult-to-obtain evidence of actual reliance, proximate causation, actual injury or measurable quantification of loss. Secondly, actual damage claims often involve individualized proof, which highlights the unique aspects of a host of transactions for which class action plaintiffs want to establish an element of commonality. Finally, a focus on actual damages may place the plaintiff—the purported

53. *Id.*

54. 15 U.S.C. § 1640(a)(1)-(2) (2001).

55. 15 U.S.C. § 1640(a)(2); *Payday Check Advance, Inc.*, 202 F.3d at 990-91.

56. 15 U.S.C. § 1640(a)(2)(i).

57. Lynch, *supra* note 26, at 38.

58. 15 U.S.C. § 1640(a)(1); *Payday Check Advance, Inc.*, 202 F.3d at 990.

59. *See Kelley & Ropiequet, supra* note 45, at 200.

representative of a potentially huge class—under a microscope which reveals inadequacy to represent a large group of others.⁶⁰

Many cases brought against payday lenders are class actions, a common trait of suits brought against lenders who affect a large group of consumers.⁶¹ If a consumer decides not to attempt the difficult task of proving actual damages, her only alternative under TILA is statutory damages.⁶² However, some jurisdictions limit statutory damages to only certain violations of TILA.⁶³ This can effectively leave the plaintiff without a remedy if she is unable to prove actual damages.

III. THE COURTS' INTERPRETATIONS OF THE AVAILABILITY OF STATUTORY DAMAGES UNDER THE TRUTH IN LENDING ACT

A. *The Pertinent Provisions of TILA*

Section 1640(a) of TILA controls the availability of statutory damages by providing a list of disclosure violations that trigger statutory damages.⁶⁴ Section 1640(a) indicates that these are the “only” violations that can be compensated by statutory damages.⁶⁵ However, there is a split among the courts whether this restrictive language of section 1640(a) controls all of TILA or only section 1638 of TILA, which provides a list of disclosure

60. *Id.*

61. *See, e.g.,* Kilbourn v. Candy Ford-Mercury, Inc., 209 F.R.D. 121 (W.D. Mich. 2002) (regarding a class action against a financier of automobiles).

62. 15 U.S.C. § 1640(a)(1)-(2).

63. *See* Kelley & Ropiequet, *supra* note 45, at 200-01; *see infra* notes 69-83 and accompanying text (exploring the split among the courts on the issue of statutory damages).

64. 15 U.S.C. § 1640(a). The pertinent section of 1640(a) reads as follows:

“In connection with the disclosures referred to in section 1638 of this title, a creditor shall have a liability determined under paragraph (2) *only* for failing to comply with the requirements of section 1635 of this title or of paragraph (2) (insofar as it requires a disclosure of the ‘amount financed’), (3), (4), (5), (6), or (9) of section 1638(a) of this title”

Id. (emphasis added).

65. *Id.*

violations.⁶⁶ If section 1640(a) applies to all of TILA, then it provides an exhaustive list of violations compensable by statutory damages.⁶⁷ If section 1640(a) only applies to section 1638, then the remainder of TILA is unaffected and courts may interpret whether these remaining statutes allow for statutory damages.⁶⁸

B. The Split Among the Courts over the Interpretation of TILA

Brown v. Payday Check Advance was the first case to address the issue of statutory damages in the context of payday loans.⁶⁹ The *Payday Check Advance* court found that statutory damages existed only for violations of the paragraphs enumerated by section 1640(a).⁷⁰ To arrive at this conclusion, the court in *Payday Check Advance* interpreted section 1640(a) as applying to and limiting all of Part B of TILA instead of only applying to section 1638(a).⁷¹ The court based its reasoning on a portion of Section 1640(a) providing that it encompasses statutes “under this part.”⁷²

The court next pointed to the language in section 1640(a) that indicated that the enumerated paragraphs are intended to be an exclusive list of violations providing for statutory damages.⁷³

66. Compare *Kilbourn*, 209 F.R.D. at 126-28 (restricting statutory damages under TILA to those listed by section 1640(a)) with *Lozada v. Dale Baker Oldsmobile, Inc.*, 145 F. Supp. 2d 878 (W.D. Mich. 2001) (allowing statutory damages for most sections of TILA).

67. *Kilbourn*, 209 F.R.D. at 127-28 (restricting statutory damages under TILA to those listed by section 1640(a))

68. *Lozada*, 145 F. Supp. 2d at 886 (allowing statutory damages for most sections of TILA).

69. *Brown v. Payday Check Advance, Inc.*, 202 F.3d 987 (7th Cir. 2000). *Payday Check Advance* became such an important case on the availability of statutory damages simply because it was the first case to rule on the issue. See Kelley & Ropiequet, *supra* note 45, at 201. “This limitation on statutory damages was little explored until the Seventh Circuit took a close look at it in *Brown v. Payday Check Advance, Inc.*” *Id.*

70. *Payday Check Advance, Inc.*, 202 F.3d at 991 (finding for statutory damages only when one of the disclosure requirements enumerated by section 1640 of TILA was violated).

71. *Id.* at 990-91.

72. *Id.* (quoting 15 U.S.C. § 1640(a) (2001)).

73. *Id.* “[A] creditor shall have a liability determined under paragraph (2) only for failing to comply with section 1635 of this title or with paragraph (2) . . . , (3), (4), (5), (6), or (9) of section 1638(a) of this title” 15 U.S.C. § 1640(a) (2001)

Since the court held that section 1640(a) applied to all of Part B of TILA, it reasoned that the disclosure violations listed by section 1640(a) are the only violations of Part B that can be compensated by statutory damages.⁷⁴ The remainder of the court's reasoning is based on the legislative intent behind TILA.⁷⁵

Lozada v. Dale Baker Oldsmobile is the case that most extensively and directly disagrees with the holding in *Payday Check Advance*.⁷⁶ The *Lozada* court read section 1640 as establishing a presumption in favor of statutory damages "unless otherwise excepted."⁷⁷ However, it disagreed with *Payday Check Advance* by holding that section 1640 "provides a limitation on statutory damages only . . . within the listed subsections."⁷⁸ In other words, the *Lozada* court viewed section 1640(a) as only limiting sections 1635 and 1638 and not applying to the remainder of Part B of TILA.⁷⁹ The court used examples to illustrate its view:

Violations of sections [of Part B] not mentioned [by section 1640] remain subject to statutory damages under the general provision. For example, violations of §§ 1631 (Disclosure requirements), 1632 (Form of disclosure), and 1639 (Requirements for certain mortgages) all place requirements on creditors but are not specifically mentioned in § 1640(a). No basis exists for concluding that these unmentioned sections are excluded from the presumptive language of § 1640(a) authorizing statutory damages.⁸⁰

(emphasis added).

74. *Payday Check Advance, Inc.*, 202 F.3d at 990-91.

75. See *infra* notes 84-98 and accompanying text (exploring the courts' use of legislative intent).

76. *Lozada v. Dale Baker Oldsmobile, Inc.*, 145 F. Supp. 2d 878, 885-86 (W.D. Mich. 2001) (citing 15 U.S.C. § 1640(a) (2001)). The *Lozada* opinion contains several paragraphs that argue against the holding in *Payday Check Advance*. *Id.* at 886-89. The *Lozada* court was very direct in expressing its disagreement with the Seventh Circuit decision. *Id.* at 888, 889.

77. *Id.* at 886. In holding for a presumption in favor of statutory damages, the court did not agree with the findings of *Payday Check Advance*. *Id.* at 886-87.

78. *Id.* at 887.

79. *Id.* at 887-88.

80. *Id.*

The *Lozada* court also used the consequences of the opposing view of the Seventh Circuit to illustrate why it is inaccurate:

Moreover, reading the exception [in section 1640] as an enumerated and exclusive list of provisions . . . would read an odd conflict into Congress' treatment of § 1639. Section 1640(a)(4) considers violations of § 1639 so severe as to warrant recovery of damages in the amount of all finance charges and fees paid by the customer — damages available for violations of no other section Yet adopting the reasoning of the Seventh Circuit would require this court to consider that Congress had concluded that a violation of § 1639 was merely a “picky and inconsequential formal error” intended by Congress to be excluded from statutory damages.⁸¹

Finally, the court argued that the limiting language in section 1640 should not apply to all of Part B of TILA because section 1640 only addresses disclosure violations.⁸² The court noted that “TILA does not encompass only disclosure requirements. Instead, it requires certain disclosures, prohibits certain kinds of charges, and addresses the form and timing in which disclosures are made. As a result, the word ‘disclosures’ is not a comprehensive description of all types of potential violations of TILA generally.”⁸³

C. *Arguments in Support of the Competing Views Among the Courts*

The courts find the legislative purpose of TILA to be very important in deciding how to apply it to specific circumstances.⁸⁴

81. *Id.* (quoting *Brown v. Payday Check Advance, Inc.*, 202 F.3d 987, 991 (7th Cir. 2000)).

82. *Lozada*, 145 F.Supp.2d at 887, 888.

83. *Id.* at 888.

84. *See, e.g.*, *Kilbourn v. Candy Ford-Mercury, Inc.*, 209 F.R.D. 121, 127-28 (W.D.

In this context, TILA has been described as a “remedial statute [so that] . . . the court is to give liberal construction to the Act in favor of the consumer.”⁸⁵ Furthermore, “TILA receives a hypertechnical reading” that allows courts to find violations by lenders if they do not comport with the exact letter of the statute.⁸⁶

The two leading payday loan cases on the availability of statutory damages under TILA, *Payday Check Advance* and *Lozada*, strongly rely on legislative intent to establish their positions.⁸⁷ In general, the courts’ penchant for interpreting TILA in favor of consumers supports the view of *Lozada*, allowing consumers more opportunities to receive statutory damages.⁸⁸ Since statutory damages are easier to prove than actual damages, construing TILA for the availability of statutory damages will benefit consumers.⁸⁹ The *Lozada* court also argued that “[t]he excepting language [of section 1640(a)] does not stand alone and may not be given preeminence over the general provision.”⁹⁰ “Exceptions to broad statutory language must be narrowly, not broadly, construed to avoid undermining the operation of the general principle.”⁹¹

The *Payday Check Advance* case,⁹² holding for limited availability of statutory damages, finds legislative intent to support it as well.⁹³ The court argued that statutory damages should not arise from “picky and inconsequential formal errors,” because Congress did not intend for such small errors to trigger statutory damages.⁹⁴ This argument has support from other jurisdictions

Mich. 2002) (referring repeatedly to the legislative intent behind TILA when explaining the court’s holdings).

85. *Kilbourn*, 209 F.R.D. at 124.

86. *Brown v. Payday Check Advance, Inc.*, 202 F.3d 987, 989 (7th Cir. 2000) (citing *Smith v. No. 2 Galesburg Crown Fin. Corp.*, 615 F.2d 407, 417 (7th Cir. 1980)).

87. *Id.* at 991; *Lozada*, 145 F. Supp. 2d at 888-89 (W.D. Mich. 2001).

88. *Lozada*, 145 F. Supp. 2d at 888-89 (W.D. Mich. 2001).

89. See *Kelley & Ropiequet*, *supra* note 45, at 200.

90. *Lozada*, 145 F. Supp. 2d at 886 (citing *Mills Music, Inc. v. Snyder*, 469 U.S. 153 (1985); *United States v. First City Nat. Bank of Houston*, 386 U.S. 361 (1967)).

91. *Id.*

92. *Payday Check Advance, Inc.*, 202 F.3d at 992.

93. *Id.* at 991.

94. *Id.* at 991. The *Payday Check Advance* case makes a strong point about legislative intent behind TILA. *Id.* Many plaintiffs suing payday lenders are using “picky and inconsequential formal errors” to get their cases in court since actual

because amendments made to TILA in 1980 “were intended to reduce the scope of creditor liability to violations which are central to understanding a credit transaction’s costs and terms.”⁹⁵ The court in *Kilbourn* continued with a more direct attack on *Lozada*: “Reading the limiting provisions of § 1640 as the court did in *Lozada* would permit the recovery of statutory damages for violations of ‘technical’ requirements, which is what Congress intended to eliminate.”⁹⁶

The Seventh Circuit in *Payday Check Advance* also argued that it was limited by legislative intent because it could only go by the statutes that Congress had enacted: “Whether Congress *should* have included it, or would have done so had it thought more fully, does not affect interpretation of the law it actually enacted. . . . [e]ven if its omission is a legislative oversight.”⁹⁷ Finally, the court made the direct argument that Congress had written down what it intended in clear language and that the court should not try to subvert what Congress had written through a strained construction of the statutes.⁹⁸

IV. CONCLUSION

Payday lending is a practice that is quickly moving from the “fringe” credit market into a more broadly accepted practice by banks and credit unions.⁹⁹ As the number of people patronizing

damages can be difficult to prove. *Id.*

95. S. REP. NO. 96-73, at 7, 17 (1979); *Kilbourn v. Candy Ford-Mercury, Inc.*, 209 F.R.D. 121, 127 (W.D. Mich. 2002).

96. *Kilbourn*, 209 F.R.D. at 128 (citing *Payday Check Advance*, 202 F.3d at 991-92).

97. *Payday Check Advance, Inc.*, 202 F.3d at 992 (citing *West Virginia University Hospitals, Inc. v. Casey*, 499 U.S. 83, 100-01 (1991); *In re Sinclair*, 870 F.2d 1340 (7th Cir. 1989).

98. *Id.* at 991.

99. See Hackett, *supra* note 5, at 48.

Today . . . ‘subprime lending’ has become the rage among many of the nation’s banks. Now, a growing number of banks are pushing the ethical envelope even further, moving down the chain, even below the level of the pawnshop. They are adopting variations of so-called payday lending, characterized by loans of short duration and extraordinarily high annual rates - at times more than 400%.

Id.

payday lenders continues to increase,¹⁰⁰ it will be increasingly important that the courts provide relief to borrowers who have been injured by short-term lenders. The most effective remedy available to borrowers is to request statutory damages under section 1640 of TILA.¹⁰¹

Of the competing theories on how to approach the availability of statutory damages for disclosure violations, the Seventh Circuit in *Payday Check Advance*¹⁰² offered the view that seems to comport with Congress's intent when it passed the 1980 Amendments to TILA.¹⁰³ While the issue is still relatively novel,¹⁰⁴ the available case law seems to support the approach that the Seventh Circuit has proffered.¹⁰⁵ Of course, the downside of this construction is that statutory damages for borrowers from payday lenders will be limited to the seven subsections listed by section 1640. In light of this situation, the best approach may be to lobby Congress to amend TILA to offer more opportunities for borrowers to have access to statutory damages.¹⁰⁶

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100. Lynch, *supra* note 26, at 38. "The best estimates peg the short-term loan industry as growing from a few hundred stores at the start of the last decade to roughly 10,000 today, lending nearly \$14 billion a year." *Id.*

101. 15 U.S.C. § 1640(a)(2) (2001).

102. *Payday Check Advance, Inc.*, 202 F.3d at 992.

103. S. REP. NO. 96-73, at 7, 17 (1979).

104. Kelley & Ropiequet, *supra* note 45, at 201. "This limitation on statutory damages was little explored until the Seventh Circuit took a close look at it in *Brown v. Payday Check Advance, Inc.*" *Id.*

105. *See, e.g., Kilbourn v. Candy Ford-Mercury, Inc.*, 209 F.R.D. 121 (W.D. Mich. 2002).

106. The court in *Payday Check Advance* seemed to hint at this approach when it mentioned that a court is unable to go against legislative intent. *Payday Check Advance, Inc.*, 202 F.3d at 992 (citing *West Virginia University Hospitals, Inc. v. Casey*, 499 U.S. 83, 100-01 (1991); *In re Sinclair*, 870 F.2d 1340 (7th Cir. 1989)). "Whether Congress *should* have included it, or would have done so had it thought more fully, does not affect interpretation of the law it actually enacted. . . . [e]ven if its omission is a legislative oversight." *Id.*