Biting the (Loan) Sharks: Why the Truth in Lending Act Currently Fails in Its Goal to Promote Well-Informed Consumer Credit Decisions, and How Greater Allowance of Statutory Damages May Improve Its Effectiveness

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ABSTRACT: Current state and local payday loan regulations purport to protect payday loan borrowers through decreasing payday loan presence in credit markets. These regulations appear to be based on a simple premise: "How can payday lenders harm consumers if consumers are less able to find a payday loan?" This Note argues payday loan borrowers are often choosing to take on such loans because it is the best source of available credit. State and local regulations, then, too often take away this option and force would-be payday loan borrowers to even more expensive alternatives, such as bouncing checks and making late bill payments. The federal Truth in Lending Act ("TILA") properly focuses federal regulation not on decreasing the supply of payday loans in credit markets, but in ensuring lenders provide borrowers with adequate disclosures related to payday loans. However, TILA currently provides plaintiff-borrowers with inadequate opportunity to recover statutory damages for lender violations. Instead, plaintiff-borrowers are often required to show actual damages. This Note argues that TILA should be amended to provide plaintiff-borrowers with greater ability to recover statutory damages through TILA, and provides a legislative suggestion modeled after the Telephone Consumer Protection Act.

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I. INTRODUCTION

The payday loan industry conjures up a very negative picture in many consumers' minds. As a general matter, consumers likely picture payday loan shops as only doing business in the poorest neighborhoods. Aside from the payday loan shops' location, the businesspeople who run these shops have similarly poor reputations. To many, the payday loan shopkeeper may be only one or two steps above organized crime's loan shark.

The industry is also rife with stories of trapping consumers into "debt spirals" from which they may only escape at great cost, if at all. In 2016, *The New York Times* reported on Candice Byrd's debt spiral story, providing an illustrative example of the payday loan industry's public image.[1] Ms. Byrd initially borrowed a $500 payday loan in 2011 for a car payment, but needed to continually roll the original loan to finance the debt's carrying costs.[2] After two years of continually rolling over her payday loan, she lost her car and her apartment.[3] When *The New York Times* reported Ms. Byrd's story in 2016, she had virtually no credit and was forced to complete all transactions in cash.[4]

Studies suggest the public's mistrust of the payday loan industry is not misguided. For example, the Federal Reserve Bank of Kansas City[5] has noted that data "suggest that the bulk of lenders' profits come from repeat

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1. Stacy Cowley, *Payday Loans' Debt Spiral to be Curtailed*, N.Y. TIMES (June 2, 2016), https://www.nytimes.com/2016/06/02/business/dealbook/payday-borrowings-debt-spiral-to-be-curtailed.html [https://perma.cc/U86N-ZN9R].

2. *Id.*

3. *Id.*

4. *Id.*

5. *See About the Fed*, BD. GOVERNORS FED. RES. SYS., https://www.federalreserve.gov/aboutthefed.htm [https://perma.cc/4C7J-F498] (providing an overview of the Federal Reserve System). The Federal Reserve serves as the United States' central bank and is responsible for conducting the United States' monetary policy as well as conducting research on various issues important to the American economy. *Id.* The Federal Reserve has banks in Boston, New York City, Philadelphia, Cleveland, Richmond, Atlanta, Chicago, Saint Louis, Minneapolis, Kansas City, Dallas, and San Francisco. *Id.* Each bank employs economists who conduct research such as that cited above, Kansas City coincidentally employed economists who researched the payday loan market. *Id.*

borrowers."[6] These repeat borrowers could be people like Ms. Byrd, who need to continually borrow from payday lenders to finance their debt's carrying costs, or they could be borrowers who need credit for other purchasers. Regardless of the reason for taking out repeat loans, the average payday loan recipient applies for an additional 8.8 payday loans, highlighting how difficult it is to break free of the payday loan debt cycle.[7] These data prompted the Federal Reserve Bank of Kansas City to conclude that "[t]he payday business model may therefore rest on activities that may not be in the best interest of most consumers."[8]

Aside from the debt spiral discussed above, data also suggest the payday loan industry may target poor and minority communities. Researchers at the Center for Responsible Lending found that in California "payday lenders tend to locate in closer proximity to neighborhoods with a higher proportion of people of color, renters, adults, lower educational attainment, and non-English speakers."[9] However, it is difficult to prove that payday lenders are insidiously targeting minority populations, because payday lenders "may simply be locating their stores where markets exist."[10]

Given payday lenders' negative public perception and the data supporting this view, it is understandable that governing bodies want to regulate this market. Part II of this Note provides a brief overview of the regulations governing the payday loan industry and why those regulations are not rooted in sound economic theory. Part III discusses how courts have interpreted the availability of statutory damages in the Truth in Lending Act of 1968 ("TILA") and why those interpretations show TILA does not

6. Kelly D. Edmiston, *Could Restrictions on Payday Lending Hurt Consumers?*, FED. RES. BANK KAN. CITY ECON. REV. 31, 35 (2011) (citing Pearl Chin, Note, *Payday Loans: The Case for Federal Legislation*, 2004 U. ILL. L. REV. 723, 729–30) (Chin notes that "[w]ith multiple rollovers generating the bulk of revenue for payday lenders, the industry has every incentive to keep its customers in a perpetual cycle of debt."); *see* Leslie Parrish & Uriah King, *Phantom Demand: Short-Term Due Date Generates Need for Repeat Payday Loans, Accounting for 76% of Total Volume*, CTR. FOR RESPONSIBLE LENDING (July 9, 2009), https://www.responsiblelending.org/payday-lending/research-analysis/phantom-demand-final.pdf [https://perma.cc/6DQF-88K3]. King and Parrish found that 98 percent of all payday loan borrowers are repeat borrowers, and only five percent of these repeat loans were originated a month or more after a previous loan was closed. Parrish & King, *supra*.

7. Edmiston, *supra* note 6, at 35 (citing Paige Marta Skiba & Jeremy Tobacman, *Measuring the Individual-Level Effects of Access to Credit: Evidence from Payday Loans* 3 (Fed. Reserve Bank of Chi., Working Paper No. 1069, 2007), *available at* https://pdfs.semanticscholar.org/2dfd/a2b26db9315215a31144ca6a88edf44a8fb5.pdf [https://perma.cc/64AN-XQX6]). Skiba and Tobacman sought to research what effects access to payday loans has on a borrower's borrowing activity, bankruptcy, and likelihood to commit crime. Skiba & Tobacman, *supra*, at 3.

8. Edmiston, *supra* note 6, at 35.

9. Wei Li et al., *Predatory Profiling: The Role of Race and Ethnicity in the Location of Payday Lenders in California*, CTR. FOR RESPONSIBLE LENDING (Mar. 26, 2009), http://www.responsiblelending.org/payday-lending/research-analysis/predatory-profiling.pdf [https://perma.cc/8BV5-EFSJ].

10. Edmiston, *supra* note 6, at 36.

adequately protect consumers. Finally, Part IV suggests a legislative change modeled after the Telephone Consumer Protection Act's damages provision that will bolster TILA's focus on requiring payday lenders to provide adequate disclosure to borrowers prior to the consummation of the transaction.

II. BACKGROUND OVERVIEW OF PAYDAY LOANS AND THE CURRENT STATE AND FEDERAL REGULATORY FRAMEWORK

Consumer credit plays an incredibly important role in the modern American economy.[11] Credit allows consumers to spend beyond what they have in cash on hand today by borrowing money and agreeing to repay a lender in accordance with a payment plan.[12] The Federal Reserve Bank of Saint Louis maintains a database called the Federal Reserve Economic Database (known as FRED) that tracks the household debt to gross domestic product ("GDP") ratio for the United States.[13] The latest available data, from the fourth quarter of 2016, show American household debt totals approximately 80 percent of American GDP.[14] Given the critical role consumer credit plays in the American economy,[15] it is valuable to understand the regulatory landscape in which the $40 billion payday loan market operates.[16] Part II first explains characteristics common to payday loans, then provides an overview of state and local payday loan regulations, and concludes with an overview of federal payday loan regulations.

A. *WHAT IS A PAYDAY LOAN?*

The first characteristic of a payday loan is that the loan is for a small amount of money, typically between $100 and $500.[17] The payday loans'

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11. CONSUMER FIN. PROT. BUREAU, THE CONSUMER CREDIT CARD MARKET 28–29 (2015), https://files.consumerfinance.gov/f/201512_cfpb_report-the-consumer-credit-card-market.pdf [https://perma.cc/PJ2Y-5FV9] [hereinafter CREDIT CARD MARKET REPORT] (noting that consumer credit in the United States peaked prior to the Great Recession "at just over one trillion dollars").

12. *See* Julia Kagan, *Consumer Credit*, INVESTOPEDIA, https://www.investopedia.com/terms/c/consumercredit.asp [https://perma.cc/33BU-64E9] (last updated May 7, 2019) (providing an overview of consumer credit's role in a consumer's life).

13. *Household Debt to GDP for United States*, FED. RES. BANK SAINT LOUIS, https://fred.stlouisfed.org/series/HDTGPDUSQ163N [https://perma.cc/Q95J-RRPP] (last updated Apr. 27, 2017).

14. *Id.* (defining "household debt" as "debt incurred by resident households of the economy only. This [Financial Soundness Indicator] measures the overall level of household indebtedness (commonly related to consumer loans and mortgages) as a share of GDP").

15. *See* CREDIT CARD MARKET REPORT, *supra* note 11, at 28–30 (providing a broad overview of the consumer credit market).

16. Jonathan Zinman, *Restricting Consumer Credit Access: Household Survey Evidence on Effects Around the Oregon Rate Cap* 1 (Research Dep't, Fed. Reserve Bank of Phila., Working Paper No. 08-32, 2008).

17. Christopher L. Peterson, *Usury Law, Payday Loans, and Statutory Sleight of Hand: Salience Distortion in American Credit Pricing Limits*, 92 MINN. L. REV. 1110, 1123 (2008) (noting that "[a]

design almost necessitates they be in small amounts. Payday loans are short-duration loans and are meant to be paid with funds from the borrower's next paycheck.

The second characteristic of a payday loan is that the borrower provides the lender with a post-dated check, generally dated to the loan payment's due date.[18] This gives the payday lender the right to deposit the borrower's payment on the loan's due date. This post-dated check will need to be written for an amount larger than the loan's principal in order to pay the interest rate and finance charge.[19] A loan's principal is the amount of money the borrower receives from the lender.[20] In addition to the principal amount, this post-dated check will need to factor in fees and interest the borrower owes to the lender for the service the lender is providing, and for bearing the risk that the borrower may not repay the lender.[21] If the borrower does not have sufficient funds to repay the loan obligation, the lender will charge an additional fee for the service of holding the check another two weeks, at which time the lender will try once again to deposit the check.[22]

The third common characteristic is that payday loans are generally made to high-risk borrowers.[23] A 2005 Federal Deposit Insurance Corporation study found "that the mean ratio of loan losses to total revenue for the two large payday lenders studied was 15.1%."[24] This means payday lenders face a reduction of over 15 percent of payday loan revenues due to borrowers defaulting on loan obligations. This reflects the fact that making payday loans is a riskier business endeavor than making more traditional long-term loans.[25] Since payday loans are generally made to high-risk borrowers, states have implemented several types of regulatory regimes aimed at protecting these borrowers.

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contemporary payday loan usually involves an initial balance of between $100 and $500, with $325 being typical").

18. *Id.*

19. *Id.* at 1130 ("A finance charge includes all charges incident to the extension of credit expressed as a dollar amount. Roughly speaking, the finance charge is the *price* of a loan. Importantly, as defined under federal law, the finance charge includes not only interest paid on the loan, but also most fees and closing costs." (footnotes omitted)).

20. *Id.* at 1124.

21. *Id.*

22. *Id.*

23. Edmiston, *supra* note 6, at 34 (noting that "the incidence of default on payday loans is high").

24. *Id.*

25. *Id.* The Federal Reserve Bank of Kansas City further noted that this also "suggest[s] that large fees on payday loans may be warranted." *Id.* This 15.1 percent haircut payday lenders take can be compared to commercial banks' delinquency rates of less than three percent on consumer loans in 2018, indicating the payday loan business is about five times as risky as making traditional commercial bank loans. *Charge-Off and Delinquency Rates on Loans and Leases at Commercial Banks*, BD. GOVERNORS FED. RES. SYS., https://www.federalreserve.gov/releases/Chargeoff/delallsa.htm [https://perma.cc/WCM3-KE34].

B. *Overview of Payday Loan Regulatory Regimes*

There are many kinds of state and local regulations governing payday lending, such as setting a maximum number of rollovers, rights of rescission granted to consumers, and limits on collateral requirements.[26] The three most common regulatory regimes, however, are usury ceilings, outright prohibition, and zoning restrictions on payday lenders.

The first common regulation, a usury, or interest rate, ceiling, is likely the oldest loan regulation method in the United States, dating back to 1641 when the colony of Massachusetts passed an eight percent annual interest rate ceiling on loans.[27] An interest rate is most easily understood as the price of money. Several variables determine this price, but one of the most important is the borrower's risk profile as perceived by the lender. If the lender perceives the borrower to be risky, and thus less likely to pay the loan in the future, the lender will demand the borrower pay a higher interest rate to compensate the lender for the additional risk.[28] Understanding the interest rate as a price allows for a more intuitive analysis of a price ceiling's effects on a good's market.[29]

Several states still enforce interest rate ceilings, including New Hampshire, Montana, South Dakota, Maine, and Oregon.[30] This regulatory method lost some force after the Supreme Court's decision in *Marquette National Bank v. First Omaha Service Corp.*[31] In *Marquette National Bank*, the

26. Edmiston, *supra* note 6, at 37. The Federal Reserve Bank of Kansas City noted that in recent years regulations limiting rollovers to one are the most common new regulation. *Id.* Limiting rollovers to one serves to prevent consumers from getting caught in a debt spiral, as happened to Ms. Byrd. *See* Cowley, *supra* note 1.

27. Nathalie Martin, *Public Opinion and the Limits of State Law: The Case for a Federal Usury Cap*, 34 N. ILL. U. L. REV. 259, 263 (2014). The opposition to high interest rates has deep historical roots. Martin notes that "[t]he first U.S. laws were borrowed from England's 5% Statute of Anne. The English usury laws that this country inherited grew out of the moral view that charging more than 5% was wrong. Similarly, in the 1400s and 1500s, Catholic and Protestant churches espoused rates of no higher than 8%." *Id.* (footnotes omitted).

28. *See* Liran Einav et al., *Contract Pricing in Consumer Credit Markets*, 80 ECONOMETRICA 1387, 1392–93 (2012) (discussing that in sub-prime consumer loan markets, specifically for used automobile loans, borrowers often face higher interest rates due to the riskiness of lending to borrowers with a higher probability of default).

29. *See* KARL E. CASE ET AL., PRINCIPLES OF MICROECONOMICS 75 (12th ed. 2017) (noting that a price ceiling, when imposed below the equilibrium price of any good will result in a shortage because, with an upward-sloping supply curve and downward sloping demand curve, a price ceiling below equilibrium will incentivize producers to produce fewer goods than the market demands).

30. *Legal Status of Payday Loans by State*, CONSUMER FED'N AM., https://paydayloaninfo.org/state-information [https://perma.cc/M8NW-74YE]. Several states maintain an interest rate ceiling today. *Id.* For example, New Hampshire, South Dakota, and Montana all have an annual percentage interest rate cap of 36 percent. *Id.*

31. Marquette Nat'l Bank v. First Omaha Serv. Corp., 439 U.S. 299, 314–15 (1978) (finding that a national bank in one state may charge interest rates to a customer above the usury cap in the customer's home state).

Court found that when a national bank lends money to an out-of-state consumer, the applicable interest rate ceiling is that of the state where the bank is incorporated.[32] This allows national banks to charge interest rates above the usury cap in a customer's home state, as long as the charged interest rate does not violate the usury cap in the state where the national bank is incorporated.[33] *Marquette National Bank* provided an incentive for states to remove their interest rate ceilings as an effort to attract banks to the state.[34] If a bank is located in a state without an interest rate ceiling, that bank can loan to a borrower in a state with a low interest rate ceiling without that ceiling applying to the out-of-state bank. Although federal law does not currently place an interest cap on the payday loan market in general, the federal government has passed a 36 percent annual interest rate ceiling for "creditor[s] who extend[] consumer credit to a covered member of the armed forces or a dependent of such a member."[35]

It is important to note that the *Marquette National Bank* decision only applied to banks, so payday lenders were not granted the same flexibility afforded to national banks.[36] In some ways, *Marquette National Bank* did not affect the largest banks; such banks generally do not engage in short-term, risky, high interest rate loans.[37] Thus, it fell on the consumer loan industry's lobbyists to convince state governments to roll back interest rate ceiling statutes.[38] Efforts to convince state legislatures to abolish interest rate ceilings succeeded in Alabama, Minnesota, Texas, Ohio, and several other states.[39]

32. *Id.*

33. *Id.*

34. Martin, *supra* note 27, at 264 (citing *Marquette Nat'l Bank*, 439 U.S. at 299).

35. 10 U.S.C. § 987 (2012).

36. Peterson, *supra* note 17, at 1123. This created a sense of unfairness in the financial services industry. Since both banks and payday lenders were both in the business of lending money, critics believed that regulators should treat both groups of lenders the same. *Id.* Peterson notes that this frustration gained steam in the 1980's, noting that "in the 1980s the moral authority of those rules became somewhat suspect." *Id.*

37. *See* Evan Ramstad, *U.S. Bank Rolls Out Simple Loan, Offering Small-Dollar Loans to Compete with Payday Lenders*, STAR TRIB. (Sept. 10, 2018, 11:46 AM), http://m.startribune.com/u-s-bank-rolls-out-simple-loan-offering-small-dollar-loans-to-compete-with-payday-lenders/492741741 [https://perma.cc/J82G-B3H8] (reporting that U.S. Bank recently became the first national bank to offer a loan product that directly competes with payday loans). The bank is calling this product "Simple Loan." *Id.* A borrower who takes out a "Simple Loan" can borrower between $100 and $1,000, which must be paid back in three payments over the course of three months. *Id.* The bank will charge borrowers $12 per $100 borrowed if the borrower repays with an autopay feature connected to an existing U.S. Bank account. *Id.* A borrower who does not pay with this autopay feature will face a $15 per $100 charge. *Id.* These charges are directly in line with many payday lenders. *Id.*

38. Peterson, *supra* note 17, at 1123.

39. *Legal Status of Payday Loans by State*, *supra* note 30 ("Thirty-two states either enacted legislation authorizing payday loans, failed to close loopholes exploited by the industry to make high-cost loans, or deregulated small loan interest rate caps. Payday loan states include: Alabama, Alaska, California, Delaware, Florida, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky,

The second general category of payday loan regulation is outright prohibition.[40] The effect of such a ban, in theory, is to eliminate the supply of payday loans in credit markets.[41] Some states, such as Georgia and Arkansas, follow this regulatory regime.[42] These bans are often ineffective, though, because the internet serves as a marketplace in which payday lenders can circumvent state law.[43] Despite state efforts to curb payday lending, "[o]nline payday loans proliferate in all states, regardless of the laws of these states."[44] Thus, technology appears to have made the outright prohibition of payday loans an unworkable policy solution.

The third general category of payday loan regulation is anti-concentration zoning regulations.[45] As with other zoning laws, the broad aim of these zoning laws is to allow local governments control over the ways in which the locality develops.[46] City governments may pass restrictive zoning laws prohibiting payday lenders from opening in specifically delineated neighborhoods.[47] Cities that have passed such anti-concentration zoning laws include San Jose, California, Gladstone, Missouri (suburb of Kansas City, Missouri), and South Tucson, Arizona.[48]

Within the broader category of zoning laws that regulate payday lenders are three types of zoning laws: (1) zoning laws limiting the number of payday loan businesses that may operate within a municipality; (2) zoning laws requiring payday lenders to maintain a required minimum distance between each other; and (3) zoning laws that limit where a payday lender may set up

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Louisiana, Michigan, Minnesota, Mississippi, Missouri, Nebraska, Nevada, New Mexico, North Dakota, Ohio, Oklahoma, Rhode Island, South Carolina, Tennessee, Texas, Utah, Virginia, Washington, Wisconsin, and Wyoming."). Regulatory regimes vary greatly state-to-state. *Id.*

40. *See* Nathalie Martin, *1,000% Interest—Good While Supplies Last: A Study of Payday Loan Practices and Solutions*, 52 ARIZ. L. REV. 563, 594–95 (2010) (noting that prohibiting payday lending is one way states regulate the payday loan market).

41. *See* CASE ET AL., *supra* note 29, at 57–59.

42. *Illegal Payday Lending*, ARK. ATTORNEY GEN.'S OFFICE, https://arkansasag.gov/consumer-protection/money/one/illegal-payday-lending [https://perma.cc/XJ2W-EWST] ("Since 2008, the Attorney General's office has worked to eliminate all forms of payday lending in Arkansas."); *Payday Lending*, ST. GA. DEP'T BANKING & FIN., https://dbf.georgia.gov/payday-lending [https://perma.cc/W9YX-6XAZ] ("Payday lending in its most common form is illegal in Georgia." (emphasis omitted)).

43. Martin, *supra* note 27, at 260.

44. *Id.*

45. Sheila R. Foster, *Breaking Up Payday: Anti-Agglomeration Zoning and Consumer Welfare*, 75 OHIO ST. L.J. 57, 79–80 (2014) (describing how anti-concentration zoning measures are designed to allow city governments to control the concentration of payday loan shops within city limits).

46. *Id.*

47. *See id.* at 79–80 nn.78–82 (providing examples of cities that have passed various zoning regulations). Vice Dean Foster, at the Fordham University School of Law, notes that many local governments pass zoning restrictions affecting payday lenders even though "the empirical evidence on the consumer-welfare impacts of payday lending is mixed." *Id.* at 59.

48. *Id.* at 79–80 nn.78–82.

a storefront within a municipality.[49] These zoning restrictions are passed in accordance with the Supreme Court's decision in *Village of Euclid, Ohio v. Ambler Realty Co.*, which found zoning restrictions designed to protect the public safety, health, and welfare of residents may be considered legitimate restrictions.[50] Many of these zoning ordinances are passed with the goal of protecting vulnerable consumers from what are viewed as predatory lenders, satisfying *Euclid*'s broad requirements for a measure to satisfy the public welfare.[51]

These three regulatory areas provide an overview of the most popular state and local regulatory regimes. While these are important, this Note focuses on federal regulation because of its ability to affect the nationwide marketplace. Specifically, this Note focuses on federal disclosure requirements because without adequate disclosures, borrowers are unable to make informed borrowing decisions.

C. Current Federal Regulatory Regime

The current federal regulatory regime governing payday loans is rooted in the Truth in Lending Act of 1968 ("TILA"), which established the current federal regulatory regime governing payday loans. The following three Subsections provide an overview of TILA,[52] the Federal Reserve's Regulation Z,[53] and the Consumer Financial Protection Bureau's final rule and official interpretation of TILA.[54]

1. Truth in Lending Act

Federal authority over the payday loans is rooted in TILA. The Act contains two types of provisions—disclosure-related provisions and damages-related provisions. Congress did not write TILA to regulate the flow of credit;

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49. *Id.* at 79.

50. *Id.* at 59 (citing Vill. of Euclid v. Ambler Realty Co., 272 U.S. 365, 395 (1926)).

51. *Id.* at 60. Zoning ordinances limiting the presence of payday lenders are also justified on the basis of reducing potential negative spillovers such as lowering property values. *Id.* at 60 n.11. Part III will discuss in more detail the potential negative effects payday regulatory regimes based on zoning restrictions may have on the vulnerable consumers policymakers seek to protect. Still, it is important to mention how these zoning regulations run into serious problems when analyzing the policy through an economic framework. Zoning restrictions that prevent payday loan firms from locating in the most fertile markets may actually increase search costs to consumers and prevent competition between lenders that can drive down the price of services. *Id.* at 87–92. Vice Dean Foster notes "the number of firms is not as important a variable in price competition as the space available for firms to locate in a particular area. The larger the zoned area, and the more distance between firms, the higher prices tend to be, even between rivals." *Id.* at 91. This is an important consideration to keep in mind, especially as the second category of zoning restrictions discussed above requires that payday lenders maintain a minimum distance between one another. *Id.* at 91–92.

52. Truth in Lending Act (TILA), 15 U.S.C. §§ 1601–1667f (2012).

53. 12 C.F.R. § 226 (2012).

54. 12 C.F.R. § 1041 (2017).

Congress wrote the Act to focus on governing the required disclosures lenders must provide to borrowers:[55]

> It is the purpose of this subchapter *to assure a meaningful disclosure* of credit terms so that the consumer will be able to compare more readily the various credit terms available to him and *avoid the uninformed use of credit*, and to protect the consumer against *inaccurate and unfair* credit billing and credit card practices.[56]

TILA's stated purpose shows that Congress' intent in enacting the Act was not necessarily to protect consumers from being tempted into taking out high-cost payday loans, as many state and local regulations aim to do. Rather, TILA's purpose is to allow consumers to make informed decisions. This puts power in consumers' hands to decide whether to take out a payday loan.

Two of TILA's most important disclosure provisions concern the disclosure of the annual percentage rate and the finance charge.[57] TILA defines a finance charge "as the sum of all charges, payable directly or indirectly by the person to whom the credit is extended, and imposed directly or indirectly by the creditor as an incident to the extension of credit."[58] TILA provides a definition for the annual percentage rate:

> (A) that nominal annual percentage rate which will yield a sum equal to the amount of the finance charge when it is applied to the unpaid balances of the amount financed . . . or (B) the rate determined by any method prescribed by the Bureau as a method which materially simplifies computation while retaining the reasonable accuracy as compared with the rate determined under subparagraph (A).[59]

TILA regards these two provisions as important enough to require them "to be more conspicuously displayed than the other mandatory disclosures."[60] Within § 1632, titled "Form of disclosure; additional information," TILA specifically identifies the terms "annual percentage rate" and "finance charge" that "shall be disclosed more conspicuously than other terms, data, or information provided in connection with a transaction . . . ."[61] This requirement is also codified in Regulation Z, which requires "the terms

55. Elizabeth Renuart & Diane E. Thompson, *The Truth, The Whole Truth, and Nothing but the Truth: Fulfilling the Promise of Truth in Lending*, 25 YALE J. ON REG. 181, 186 (2008).

56. 15 U.S.C. § 1601(a) (emphasis added).

57. *See* Renuart & Thompson, *supra* note 55, at 187 ("That the the [sic] finance charge and the APR are critical is highlighted by the fact that the Act requires these two disclosures to be more conspicuously displayed than the other mandatory disclosures.").

58. 15 U.S.C. § 1605; *see also* Peterson, *supra* note 17, at 1130 (explaining the definition of the term "finance charge" as used in TILA).

59. 15 U.S.C. § 1606(a)(1).

60. *Id.* § 1632(a); Renuart & Thompson, *supra* note 55, at 187.

61. 15 U.S.C. § 1632(a).

'finance charge' and 'annual percentage rate,' when required . . . shall be more conspicuous than any other disclosure . . . ."[62]

Courts interpret this provision to mean that the terms "finance charge" and "annual percentage rate" must be differentiated from other disclosure terms.[63] However, mere differentiation may not be sufficient to satisfy the "more conspicuously" requirement. In *Pinkett v. Moolah Loan Co.*, the court found that, although "the annual percentage rate and finance charge were in all capital letters and the other disclosures were in upper and lower case" these terms were not "more conspicuously" disclosed than other terms.[64] In *Pinkett*, the court at least partly relied on its own inability to notice the difference in typeface without assistance when it decided the "finance charge" and "annual percentage rate" terms were not "more conspicuously" disclosed than others.[65] TILA requires other disclosures specific to payday loans and other closed end credit plans in § 1638. Section 1638(a)(5) is especially relevant for TILA litigation. It requires the lender to disclose "[t]he sum of the amount financed and the finance charge, which shall be termed the 'total of payments.'"[66]

The second type of provision details the availability of damages if a lender fails to comply with TILA's disclosure requirements. TILA's damages provisions make both statutory and actual damages available to the plaintiff,[67] and create a presumption that a plaintiff may recover statutory damages unless the statute notes an exception.[68] Section 1640(a) demonstrates this presumption, stating that "*[e]xcept as otherwise provided in this section*, any creditor who fails to comply with any requirement imposed under this part . . . is liable to such person . . . ."[69] Sections 1640(a)(2)–(4) detail how statutory damages are calculated in various circumstances.[70] Recovering statutory damages does not preclude a plaintiff from also recovering actual damages if the plaintiff can show such damages.[71]

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62. 12 C.F.R. § 226.17 (2012).

63. Brown v. Payday Check Advance, Inc., 202 F.3d 987, 990 (7th Cir. 2000) (finding TILA violation where the terms "finance charge" and "annual percentage rate" were "in the same typeface as 'amount financed' and 'total of payments'").

64. Pinkett v. Moolah Loan Co., No. 99C2700, 1999 WL 1080596, at *7–8 (N.D. Ill. Nov. 2, 1999).

65. *Id.* at *8 ("[T]his Court has examined the promissory note in question, and had the defendants not pointed out that the annual percentage rate and finance charge were in all capital letters and the other disclosures were in upper and lower case, this Court never would have noticed the difference.").

66. 15 U.S.C. § 1638(a)(5).

67. *Id.* § 1640(a).

68. Elwin Griffith, *Lenders and Consumers Continue the Search for the Truth in Lending Under the Truth in Lending Act and Regulation Z*, 44 SAN DIEGO L. REV. 611, 664 (2007).

69. 15 U.S.C. § 1640(a).

70. *Id.* § 1640(a)(1)–(4).

71. Griffith, *supra* note 68, at 664.

The availability of statutory damages is meant to provide lenders with an incentive to comply with TILA. When a plaintiff is awarded statutory damages, he or she does not have to show actual damages to recover damages. When courts interpret TILA's provisions to allow statutory damages, the plaintiff's burden is rather low if he or she can prove the defendant violated TILA. The lender knows this and thus should take care not to violate any of TILA's provisions.[72] Since TILA's key purpose is to make sure consumers are informed, the Act's effectiveness hinges on thorough enforcement.[73] Enforcement responsibilities are distributed to the Board of Governors of the Federal Reserve and the Consumer Financial Protection Bureau, in addition to judicial enforcement.[74]

2. Regulation Z

Regulation Z is a regulation "issued by the Board of Governors of the Federal Reserve System to implement the federal Truth in Lending Act."[75] As previously discussed, TILA requires lenders to comply with several disclosure requirements.[76] Regulation Z governs the timing, content, and form of these disclosures.[77] One key timing provision is the requirement that lenders "make disclosures before consummation of the transaction."[78] Additionally, Regulation Z defines "consummation" to occur at "the time that a consumer becomes contractually obligated on a credit transaction."[79] State law determines the time at which consummation occurs, because the timing of consummation is a contract law matter.[80]

Section 226.18 of Regulation Z details the required disclosures' contents. Required contents include the identity of the creditor, the amount financed, the finance charge, annual percentage rate, and the total of payments.[81] The requirements are very detailed. For example, in describing the requirement

72. *Id.* Although it is uncontroversial to state that TILA provides plaintiffs an opportunity for statutory and actual damages, controversy and litigation arises when litigation raises the question of whether particular statutory provisions give rise to claims that qualify for statutory as well as actual damages.

73. *Id.*; *see also* Renuart & Thompson, *supra* note 55, at 190 (arguing that if lenders fail to properly disclose all required terms, then "the usefulness of the APR as a shopping tool" is diminished "and the core purpose of TILA unravels").

74. *See supra* notes 53–55 and accompanying text.

75. 12 C.F.R. § 226 (2012).

76. *See supra* Section II.C.1 (discussing how TILA focuses enforcement of disclosures, as opposed to loan terms or lending practices).

77. *See generally* 12 C.F.R. § 226 (establishing regulations for lender disclosures).

78. *Id.* § 226.17(b).

79. *Id.* § 226.2(13).

80. Griffith, *supra* note 68, at 626; *see also* Davis v. Werne, 673 F.2d 866, 870–71 (5th Cir. 1982) (finding that the consummation is considered to occur when the contractual relationship is created between two parties, regardless of time of performance).

81. *See* 12 C.F.R. § 226.18.

for "total of payments," Regulation Z states the lender must disclose "[t]he *total of payments*, using that term, and a descriptive explanation such as 'the amount you will have paid when you have made all scheduled payments.'"[82] Some of these disclosure requirements mirror those outlined in TILA.[83] Regulation Z is made more complex by the fact that its provisions are not always interpreted literally. For example, in *Brown v. Payday Check Advance, Inc.*, the court found the lender did not violate TILA or Regulation Z even though the lender failed to disclose the total of payments, because the borrower was only going to make one payment to the lender.[84] In such a situation where the borrower is only going to make one payment, the court found the "total of payments" requirement inapplicable.[85]

3. Consumer Financial Protection Bureau's Final Rule, 12 C.F.R. § 1041

The third and newest addition to federal authority governing payday loans is the Consumer Financial Protection Bureau's ("CFPB") final rule on "Payday, Vehicle Title, and Certain High-Cost Installment Loans," codified as 12 C.F.R. § 1041.[86] This rule was issued on October 5, 2017 with an effective date of January 16, 2018.[87] Section 1041 sets forth two important provisions regarding "unfair and abusive practice[s]."[88] The first makes the practice of lending a short-term loan "without reasonably determining that the consumers will have the ability to repay the loans according to their terms" an "unfair and abusive practice."[89] The second important provision deems as an "unfair and abusive practice" the practice of "attempt[ing] to withdraw payment from consumers' accounts . . . after the lender's second consecutive attempts to withdraw payments from the accounts from which the prior attempts were made have failed due to a lack of sufficient funds."[90] Concern over the payday loan debt spiral was likely a motivator for the CFPB to pass this regulation. Richard Cordray, the director of the CFPB at the time the regulation was issued, stated that "[t]he very economics of the payday lending business model depend on a substantial percentage of borrowers being

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82. *Id.* § 226.18(h).

83. *See supra* Section II.C.1 (discussing TILA's requirements that lenders disclose the annual percent rate and the finance charge to borrowers, and that these two provisions "be more conspicuously displayed than the other mandatory disclosures").

84. Brown v. Payday Check Advance, Inc., 202 F.3d 987, 989 (7th Cir. 2000).

85. *Id.*

86. *See generally* 12 C.F.R. § 1041 (2019).

87. *Id.*

88. *Id.* § 1041.4.

89. *Id.*

90. *Id.* §1041.7. The CFPB rule allows a lender to make more withdrawals from the borrower's account if the lender has "obtain[ed] the consumers' new and specific authorization to make further withdrawals from the accounts." *Id.*

unable to repay the loan and borrowing again and again at high interest rates."[91]

Section 1041 is narrowly applicable in that it only applies to two types of loans. The first type is "short-term loans that have terms of 45 days or less, including typical 14-day and 30-day payday loans."[92] The second type, which is not relevant for the purposes of this Note, is "certain longer-term loans with terms of more than 45 days that have (1) a cost of credit that exceeds 36 percent per annum; and (2) a form of 'leveraged payment mechanism' that gives the lender a right to withdraw payments from the consumer's account."[93]

This patchwork of federal regulation creates a complicated regulatory framework. Given the complexities involved in regulating the payday loan market and the sheer size of the market, judicial consistency in interpreting the regulations' damages provisions is important to provide certainty in the marketplace. Unfortunately, courts have not interpreted TILA's damages provisions in a consistent manner, creating a challenge for both plaintiffs and defendants in estimating potential damages.[94]

D. Weaknesses in Current Regulatory Regimes Reliant Upon Decreasing the Supply of Payday Loans in the Credit Market

To understand the detrimental effect current regulatory regimes can have on consumers, it is important to understand two concepts: (1) the basic economic theory underpinning price caps,[95] and (2) that state and local regulatory regimes broadly focus on decreasing the supply of credit in the market.[96] Together, these show that regulatory regimes focused on limiting the supply of payday lenders in a market may harm consumers because they may be forced into more expensive alternatives, or credit markets even more hostile than the payday loan market such as those run by illegal loan sharks.[97]

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91. Cowley, *supra* note 1.

92. CFPB, DOCKET NO. CFPB-2016-0025, PAYDAY, VEHICLE TITLE, AND CERTAIN HIGH-COST INSTALLMENT LOANS 4 (2017), *available at* https://files.consumerfinance.gov/f/documents/201710_cfpb_final-rule_payday-loans-rule.pdf [https://perma.cc/ZUH4-NFM3].

93. *Id.*

94. *See infra* Section III.A (providing an overview of the caselaw surrounding TILA litigation and highlighting the difficulties these cases present for parties to estimate damages).

95. *See supra* note 29 and accompanying text. It is important to keep in mind how a price ceiling potentially creates a shortage. A price ceiling above equilibrium price will not cause a shortage. *See supra* note 29 and accompanying text. A price ceiling at exactly equilibrium price will also not cause a shortage. *See supra* note 29 and accompanying text. However, a price ceiling placed below equilibrium price will cause a shortage because the quantity demanded will exceed the quantity supplied at the imposed price ceiling. *See supra* note 29 and accompanying text.

96. *See supra* Section II.B. The three general categories of payday loan regulation discussed in Section II.B are the imposition of an interest rate ceiling, outright prohibition of payday loans, and anti-concentration zoning ordinances. All three of these regulatory regimes are rooted in decreasing the supply of payday loans in the market.

97. *See* CARL P. SIMON & ANN D. WITTE, BEATING THE SYSTEM: THE UNDERGROUND ECONOMY 227–40 (1982) (discussing several aspects of the loan shark industry, including its presence in

With loan sharks' social costs so high, policymakers should pursue policies that make loan sharks a less viable option for vulnerable consumers, not policies that may push consumers into such markets.[98] Improving payday loan regulation may reduce consumers' reliance on even more expensive and hostile credit markets.[99]

1. Economic Theory Underpinning Price Caps

Economic theory tells us a price cap in any good will result in a shortage if the price cap is set below the equilibrium.[100] Markets generally have a downward sloping demand curve because, *ceteris paribus*,[101] consumers will demand a higher quantity of a good as the price lowers, and will demand a lower quantity of a good as the price increases.[102] Markets also generally have an upward sloping supply curve because, *ceteris paribus*,[103] firms will produce a greater amount of a good as the price increases.[104] The quantity at which the supply and demand curves intersect then determines the equilibrium price.[105] At the equilibrium price, all consumers willing to pay the equilibrium price are able to consume as much of the good as they desire. This does not mean that all consumers will be satisfied. Certainly, some consumers who would like

every major American city, estimates that put the industry's market value up to $2 billion, and the industry's connection to organized crime and corruption).

98. *Id.* at 237. The authors note that financial innovation and government intervention provided individuals and small business easier access to legitimate credit in the 1970's. *Id.* With legitimate credit more readily attainable, "[t]hese new legitimate credit options weakened some of the advantages of loan shark loans over bank loans." *Id.*

99. *Id.* at 233. The authors note that "[t]he basic cause for the existence and growth of the loan shark market is the nonavailability in the legitimate business world of the funds and services that loan sharks provide." *Id.*

100. *See supra* note 29 and accompanying text.

101. *Ceteris Paribus*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/ceteris%20paribus [https://perma.cc/5QFS-46XP] (defining "*ceteris paribus*" as "if all other relevant things, factors, or elements remain unaltered"). *Ceteris paribus* is often used in economics literature to explain that the reader should hold all other factors constant.

102. *See* CASE ET AL., *supra* note 29, at 46–48. A downward sloping demand curve is illustrated by a graph with quantity along the X-axis and price along the Y-axis. *Id.* Price and quantity demanded are negatively correlated, so as the price falls (moving down the Y-axis), the quantity demanded increases (moving outward on the X-axis). *Id.*

103. *See* MERRIAM-WEBSTER, *supra* note 101.

104. *See* CASE ET AL., *supra* note 29, at 46–48. An upward sloping supply curve is illustrated by a graph with quantity along the X-axis and price along the Y-axis. *Id.* Price and quantity supplied are positively correlated, so as the price increase (moving up the Y-axis), the quantity supplied also increases (moving outward on the X-axis). *Id.*

105. *Id.*

to consume the good are unable to afford the good.[106] However, this equilibrium price is the most efficient price for the market.[107]

Now assume that a market for "Good X" is in equilibrium when the price of "Good X" equals $100. At $100, consumers are happy to consume the full quantity of goods, but no more, that firms are producing. Now assume further that a regulatory agency has placed a price cap on Good X at $80. Suddenly more consumers now want to purchase "Good X" at $80 than the number of consumers who could purchase "Good X" at $100. Furthermore, firms are unwilling to produce the same amount of "Good X" at $80 that they were willing to produce at $100. Thus, a shortage has been created in "Good X."[108] The most common state and local regulatory regimes should be analyzed with this theoretical economic framework in mind.

2. State and Local Payday Lending Regulatory Regimes Broadly Focus on Decreasing the Supply of Payday Loans in Credit Markets

The first and second general categories of payday loan regulatory regimes discussed in Section II.B are an interest rate ceiling and outright prohibition.[109] An interest rate cap operates as a price ceiling, placing an explicit cap on interest rates, which represent the price of money.[110] An outright prohibition on payday loans is a less obvious form of price manipulation, but is theoretically an incredibly high price floor preventing any consumer from participating in the market. Prohibition can alternatively be thought of as an incredibly low-price ceiling that fails to provide lenders with any incentive to participate in the market. Regardless of how one conceptualizes prohibition, the important point is that prohibition prevents a market from forming where one would otherwise form. This economic theory shows that placing an interest rate ceiling on payday loans will result in a credit shortage if the interest rate cap is below the equilibrium interest rate.[111] Prohibiting the market from forming also causes a shortage because consumer demand for payday loans exceeds supply.[112]

The third regulatory regime discussed in Section II.B, zoning restrictions that limit payday lenders' ability to establish business, also decreases the

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106. *See* CASE ET AL., *supra* note 29, at 60–64. To illustrate this point, consider a sports car priced at $150,000, and assume that $150,000 represents the equilibrium price for the sports car. There will certainly be consumers who would love to have a sports car, but simply cannot afford the price. That, however, does not mean the price is not at equilibrium.

107. *Id.*

108. *See* CASE ET AL., s*upra* note 29, at 60–62 (providing a graphical illustration of a shortage due to price for goods being below equilibrium price).

109. *See supra* Section II.B.

110. *See Legal Status of Payday Loans by State*, *supra* note 30 (providing an overview of regulatory regimes on a state-by-state basis).

111. *See supra* Section II.D.1.

112. *See* CASE ET AL., *supra* note 29, at 46–48 (discussing the effects of price manipulation in a market).

supply of payday loans in credit markets.[113] Such zoning restrictions thus may also cause an increase in payday loan prices, to consumers' detriment.[114]

Economic theory suggests that these price manipulations, especially outright prohibition, will cause a shortage of credit in credit markets.[115] To have a shortage, demand for a good must exceed supply for that same good.[116] It can be difficult to understand why demand for payday loans exists, given the industry's poor reputation and high prices.[117] The first step to understanding why demand exists for high-cost payday loans is to develop an appreciation for the position the average payday borrower finds him or herself in; many payday loan borrowers do not have access to other forms of credit.[118] In a survey of payday loan consumers, Gregory Elliehausen, the Principal Economist for the Board of Governors of the Federal Reserve System,[119] found that "[m]any payday advance customers perceived that they had few options to their most recent new advance."[120] Alternatives that were sparsely available to payday loan consumers included cash, credit cards, and money from a friend or relative.[121] Of the survey participants, "50.6 percent of customers reported *believing* that a payday loan was their only choice at the time they obtained their most recent new payday loan."[122] Additionally, borrowers did not take the decision to take out a payday loan lightly. Elliehausen found that 46.4 percent of respondents claimed to have

113. *See supra* Section II.B.

114. *See* Foster, *supra* note 45, at 91 ("The larger the zoned area, and the more distance between firms, the higher prices tend to be, even between rivals.").

115. *See* CASE ET AL., *supra* note 29, at 46–48 (discussing how a shortage requires demand to exceed supply).

116. *Id.*

117. *See supra* Part I (providing an example of a payday loan borrower who was caught in a "debt spiral").

118. *See* Edmiston, *supra* note 6, at 37–42 (discussing the difficult choices consumers must make when taking out a payday loan and noting that many consumers do not have another viable option to obtain funds). It is important to understand these consumers' positions because an understanding that consumers are seeking payday loans out of necessity suggests that policies limiting access to this credit may operate counter to the consumers' interests. Thus, it is important to explain that payday loans are often not consumers' first choice, and instead consumers approach this market out of necessity.

119. Gregory Elliehausen, *An Analysis of Consumers' Use of Payday Loans*, GEORGE WASH. U. SCH. BUS. 39 (Fin. Servs. Research Program, Monograph No. 41, Jan 2009). Gregory Elliehausen is the Principal Economist in the Federal Reserve's Consumer Finance Section. *Meet the Economists*, BD. GOVERNORS FED. RESERVE SYS., https://www.federalreserve.gov/econres/gregory-elliehausen.htm [https://perma.cc/S5YF-2NTF] (providing an overview of Mr. Elliehausen's education and career, which includes time with the Board of Governors of the Federal Reserve System as an Economist, and time with George Washington University as an Associate Research Professor).

120. Elliehausen, *supra* note 119, at 39.

121. *Id.*

122. *Id.* (emphasis added).

considered another avenue for credit prior to taking out a payday loan.[123] It is worth noting that even if the survey participants were incorrect in their belief that they had limited options outside of a taking out a payday loan, a belief in one's inability to access credit has the same effect as truly being unable to access credit.[124]

The second part of understanding payday loan borrowers' situations is to understand that the alternatives available to borrowers may be more expensive than payday loans.[125] The most extreme alternative to payday loans is a loan shark,[126] but far less extreme alternatives such as taking a credit card over its limit or bouncing a check also may be more expensive than a payday loan.[127] Elliehausen found that pawn shops and automobile title loans were generally not considered viable substitutes for a payday loan,[128] and are sometimes subject to higher interest rate caps than payday lenders.[129] Credit cards are also often unavailable.[130] Even if a payday loan borrower has a credit card, there is a high likelihood that he or she will exceed the credit limit if the card is used to satisfy financial obligations that could otherwise be satisfied

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123. *Id.* While Elliehausen's findings suggest that customers are taking their decision to take out a payday loan seriously, convenience was a frequently stated reason for taking on a payday loan over other possible credit sources. *Id.*

124. Edmiston, *supra* note 6, at 37. Believing in a lack of credit access has the same effect as an actual lack of credit access because the consumer ends up making the decision. That decision is to take out a payday loan. Although one could argue that an inaccurate belief in a lack of credit access may be remedied with information, while an actual lack of credit access could not, it is important to understand how consumers in the market are behaving and making decisions.

125. *See* SIMON & WITTE, *supra* note 97, at 227–40 (discussing one of the available alternatives to payday loans, seeking a loan from a loan shark, and how loan sharks' loans are expensive both financially and in terms of violence inflicted on borrowers who fail to repay).

126. *Id.*

127. Edmiston, *supra* note 6, at 39–40.

128. Elliehausen, *supra* note 119, at 39 ("Many customers considered an institutional source (bank, credit union, finance company, or credit card company). Few customers considered pawnshops or automobile title loan companies. These high-price credit products apparently are not considered very close substitutes for payday loans." (footnote omitted)).

129. *See* Edmiston, *supra* note 6, at 40 (noting that, for pawnbrokers, "[t]he median cap on interest rates was 15 percent monthly, which is similar to the typical payday loan charge. Many of the caps were much higher, however"); Joshua D. Shackman & Glen Tenney, *The Effects of Government Regulations on the Supply of Pawn Loans: Evidence from 51 Jurisdictions in the U.S.*, 30 J. FIN. SERVS. RES. 69, 81 tbl.3 (2006) (providing a table with the monthly interest rate cap for pawnbrokers on a state-by-state basis throughout the United States). Some of the states in Shackman and Tenney's research stand out as having a much higher interest rate cap for pawnbrokers and automobile title lenders than the 15 percent monthly interest rate cap which would make these loans comparable in price to payday loans, according to Edmiston. Shackman & Tenney, *supra*, at 81 tbl.3; *see also* Edmiston, *supra* note 6, at 40. Georgia in particular stands out for two reasons: The monthly interest rate cap on pawnshops and automobile title lenders is 10 percentage points higher than the median monthly interest rate of 15 percent, and Georgia has outlawed payday lending. *See supra* note 29 and accompanying text.

130. *See* Elliehausen, s*upra* note 119, at 39 (finding "that 45.6 percent of [payday lending] customers did not have a bank card").

with a payday loan.[131] The Federal Reserve found the overage fees associated with credit cards can be significantly higher than taking out a payday loan. It found that "[a]s of March 2010, the average over-the-limit fee was between $36 and $39."[132] This means that "[o]n a two-week, $100 loan, typical of most payday loans, the effective rate of interest could exceed 1,000 percent."[133]

Another potential alternative, bouncing a check, may also be more expensive than taking out a payday loan. Bouncing a check will either result in the bank returning the check to the writer or processing the check and creating a negative account balance.[134] Allowing the account holder to have a negative balance means "the bank is, in essence, making a loan to the account holder."[135] This "loan" from the bank to the account holder generally comes with a significant fee.[136] At least one study, conducted by Dr. Marc Anthony Fusaro of Emporia State University in Kansas,[137] found "the median interest rate on bounce protection loans to be in excess of 20 times that of payday loans."[138]

Borrowers often choose to use payday loans because alternative credit sources may be more expensive than payday loans or simply unavailable.[139] This suggests that payday lending regulation should seek to properly regulate this market and facilitate efficient, well-informed transactions between lenders and borrowers, rather than manipulate prices or eliminate the payday loan market.[140] It also suggests that payday loans play an important role in borrowers' financial lives, and regulatory regimes should be analyzed and critiqued with this understanding in mind.

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131. *See id.* (noting that "40.2 percent of the customers who had a bank card[] said that they would have exceeded their credit limit if a credit card had been used").

132. Edmiston, *supra* note 6, at 39.

133. *Id.*

134. *Id.* The latter approach, known as "bounce protection," comes at a high price for the account holder. *See* Marc Anthony Fusaro, *Hidden Consumer Loans: An Analysis of Implicit Interest Rates on Bounced Checks*, 29 J. FAM. & ECON. ISSUES 251, 251 (2008) (lamenting that this form of fee-generation has escaped much regulation, because "[l]egally, these are not loans, so they do not have to comply with truth in lending regulations which require the disclosure of an APR").

135. Edmiston, *supra* note 6, at 39.

136. *Id.* at 39–40.

137. *See* Marc Anthony Fusaro, *Emporia State Economic Index*, EMPORIA ST. U., https://www.emporia.edu/esei [https://perma.cc/5U8Z-T5GH] (providing an overview of Dr. Fusaro's background and research interests). Dr. Fusaro earned a Ph.D. in Economics at Northwestern University. *Id.* His professional "research interests include banking industry market structure and household financial management with particular interest in overdraft checks, debit card usage, and payday loans." *Id.*

138. Fusaro, *supra* note 134, at 251 (footnote omitted).

139. *See supra* Section II.D.2 (discussing how alternatives to payday loans may be more expensive or unavailable to those borrowers who ultimately choose to take out a payday loan).

140. *See supra* Section II.D.2 (discussing state and local regulatory measures that manipulate the price of payday loans or eliminate the payday loan market in certain jurisdictions).

Not only does economic theory support the idea that regulations focused on decreasing the supply of payday loans in credit markets harm borrowers by cutting off access to credit;[141] the data also support this theory. The Federal Reserve Bank of Kansas City studied the effect regulatory regimes, that place an interest rate cap on payday loans, have on borrowers.[142] The study found that such regulations resulted in decreased consumer access to credit.[143] While the regulations were intended to impose financial discipline, the regulations did not spur more rational consumer borrowing behavior or make consumers more financially secure because they avoided payday lenders.[144] Jonathon Zinman,[145] of the Dartmouth College Department of Economics, studied the effect Oregon's 2007 credit restrictions have had on area households to determine how consumers respond to a decrease in payday loan credit.[146] To capture the regulation's effect, his study only included consumers who were payday loan borrowers prior to Oregon's cap.[147] Oregon's credit regulation applies to consumer loans of less than $50,000 and took effect July 1, 2007.[148] The regulation set "the maximum combination of finance charges and fees that can be charged to Oregon borrowers [to] approximately $10 per $100, with a minimum loan term of 31 days (for a maximum APR of 150%)."[149]

While the statute does not on its face restrict access to payday loans, payday lenders faced reduced economic incentives to remain in the Oregon market. Thus, many left the state, meaning the regulation effectively decreased consumers' access to payday loans.[150] Zinman found the most common forms of substitute credit were late bill payments and checking

141. *See supra* Section II.B.

142. *See* Edmiston, *supra* note 6, at 44–46.

143. *See id.* The Federal Reserve undertook a study to examine the effect of payday loan bans, and found "that, after accounting for differences in income and unemployment, the share of consumers with the weakest credit scores was 0.36 percentage point[s] lower in low-income payday loan counties than in low-income counties without legal access to payday lending." *Id.* at 45. This suggests that consumers are unable to find substitute credit sources, thus the poor credit scores.

144. *See id.*

145. *Professor Jonathon Zinman's Homepage*, DARTMOUTH COLL.: DEP'T ECON., https://sites.dartmouth.edu/jzinman [https://perma.cc/HB8S-CQAV].

146. Zinman, *supra* note 16, at 6–10.

147. *Id.* at 7.

148. *Id.* at 6.

149. *Id.*

150. *Id.* Although a 150 percent APR sounds high when viewed in comparison to low cost consumer loans from institutions such as commercial banks, this is a dramatic decrease from the payday loan market APR, which can typically be 390 percent. *Id.* The much lower APR decreased the economic incentives for payday lenders to remain in the Oregon market, and indeed many exited. *Id.* Zinman notes that six months prior to the regulation's effective date, there were 346 licensed payday lenders in Oregon. *Id.* By February 2008, seven months after the regulation went into effect, that number had decreased to 105. *Id.*

account overdrafts.[151] As previously discussed, these forms of substitute credit can be more expensive than payday loans.[152] Professor Zinman's results suggest that the 150 percent APR cap the Oregon statute imposed may be below the equilibrium market APR, resulting in a shortage pushing consumers to more expensive options.[153] This bolsters the argument that current regulatory regimes over-emphasize regulating the supply of payday loans in credit markets.

Economists Donald Morgan[154] and Michael Strain,[155] at the Federal Reserve Bank of New York, found further evidence that consumers respond to a decrease in the availability of payday loans by overdrawing on their checking accounts.[156] Morgan and Strain examined the effect Georgia and North Carolina's 2004 ban on payday loans had on consumers.[157] Their findings suggest that consumers used bank overdraft as a substitute for payday loans.[158] One key finding was that "[o]n average, the Federal Reserve check processing center in Atlanta returned 1.2 million more checks per year after the ban. At $30 per item, depositors paid an extra $36 million per year in bounced check fees after the ban."[159] Morgan and Strain also found higher rates of Chapter 7 bankruptcy filings after Georgia and North Carolina's bans.[160] Overall, Morgan and Strain "take [the] results as evidence of a slipping down in the lives of would-be payday borrowers: fewer bother to reschedule debts under Chapter 13, more file for Chapter 7, and more simply default without filing for bankruptcy."[161] These results further suggest that regulations focused on decreasing the supply of payday loans fail to consider that such loans may be the best available option for borrowers.

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151. *Id.* at 3; *see also supra* notes 138–43 and accompanying text (discussing "bounce protection" and how it functions as a high-cost loan from a customer's bank).

152. *See supra* notes 139–43 and accompanying text (discussing how alternative forms of credit may be more expensive than taking out a payday loan).

153. *See supra* Section II.D.1 (discussing the economic theory of price equilibriums, price caps, and the resulting shortage when price cap is set below equilibrium price).

154. *Donald P. Morgan*, FED. RES. BANK N.Y., https://www.newyorkfed.org/research/economists/morgan [https://perma.cc/VM6Y-MPF5].

155. *Michael R. Strain*, AM. ENTERPRISE INST., https://www.aei.org/scholar/michael-r-strain. Michael Strain worked at the Federal Reserve Bank of New York until 2007 and is currently with the American Enterprise Institute. *Id.*

156. DONALD P. MORGAN & MICHAEL R. STRAIN, FED. RES. BANK N.Y., PAYDAY HOLIDAY: HOW HOUSEHOLDS FARE AFTER PAYDAY CREDIT BANS 21 (2007).

157. *Id.* at 1.

158. *Id.* at 3.

159. *Id.*

160. *Id.* at 5 (noting that while they found lower Chapter 13 filings after the payday loan bans, they hypothesize that bankruptcy filings under Chapter 7 is the more appropriate metric to observe, because Chapter 7 is for debtors with no assets, presumably the category of borrowers who would also be using payday loans).

161. *Id.* at 5–6.

III. THE TRUTH IN LENDING ACT'S OVERLY NARROW ALLOWANCE OF STATUTORY DAMAGES FAILS TO PROTECT CONSUMERS FROM PREDATORY LENDERS

Courts have not interpreted TILA consistently, and judicial interpretations often fail to protect consumers from predatory lenders. Section III.A highlights this inconsistency by discussing four decisions from around the country interpreting the Act. Section III.B then briefly discusses regulatory implications of the *Brown v. Payday Check Advance, Inc.*,[162] *Davis v. Werne*,[163] *Baker v. Sunny Chevrolet, Inc.*,[164] and *Lozada v. Dale Baker Oldsmobile, Inc.*[165] decisions and how those decisions inform a legislative solution to clarify TILA's damages provisions. Combined with the weaknesses underpinning many of the current state and local regulatory regimes discussed in Section II.D, the current federal focus on a narrow allowance of statutory damages under TILA provided a full picture of how the current regulatory regimes and legislation fail to adequately protect vulnerable consumers.

A. *JUDICIAL CONSTRUCTION OF TILA'S ENFORCEMENT PROVISIONS*

This Section discusses four cases that interpreted TILA and addressed the question of the availability of statutory damages under various provisions. Which TILA violations qualify for statutory damages is an important question because allowing statutory damages for a violation significantly lowers a plaintiff's burden. When statutory damages are available, a plaintiff must only show that the defendant committed a TILA violation, as opposed to showing that the defendant's violation actually harmed the plaintiff.[166]

1. The Seventh Circuit Differentiated Between a Failure to Disclose and Improper Disclosure in *Brown v. Payday Check Advance, Inc.*, Effectively Reducing Plaintiffs' Paths to Statutory Damages Under TILA

Brown v. Payday Check Advance, Inc. involved five plaintiffs who had filed suit under TILA, alleging that the payday lender, Payday Check Advance, Inc., had violated three form-related provisions in TILA: § 1638(b)(1), § 1638(a)(8), and § 1632(a).[167] The Seventh Circuit Court of Appeals found that the payday lender had indeed violated these three TILA provisions.[168]

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162. Brown v. Payday Check Advance, Inc., 202 F.3d 987 (7th Cir. 2000).

163. Davis v. Werne, 673 F.2d 866 (5th Cir. 1982).

164. Baker v. Sunny Chevrolet, Inc., 349 F.3d 862 (6th Cir. 2003).

165. Lozada v. Dale Baker Oldsmobile, Inc., 145 F. Supp. 2d 878 (W.D. Mich. 2001).

166. *Brown*, 202 F.3d at 989 (describing statutory damages as those "available . . . without regard to injury" (citation omitted)).

167. *Id.* at 991. The plaintiffs specifically argued that the payday lender had violated §§ 1632(a), 1638(a)(8), and 1638(b)(1). *Id.*

168. *Id.* at 989–90. The court found that the lenders violated § 1638(b)(1) because "the lenders' use of 'total payment' rather than 'total of payments' in the federal box yields a violation of the segregation rule." *Id.* at 989. The court also found the forms violated § 1638(a)(8) because

After making that determination, the only remaining question was whether statutory damages were available for violations of the aforementioned provisions.[169] The critical interpretative question was how to interpret § 1640(a):[170]

> In connection with the disclosures referred to in [15 U.S.C. § 1638], a creditor shall have a liability determined under paragraph (2) only for failing to comply with the requirements of [15 U.S.C. § 1635], of paragraph (2) (insofar as it requires a disclosure of the "amount financed"), (3), (4), (5), (6), or (9) of [15 U.S.C. § 1638(a)].[171]

The plaintiffs argued that in failing to satisfy the requirements of § 1638(a)(8), the defendant also failed to satisfy the requirements of § 1638(a)(3).[172] Section 1638(a)(8) required the lender to disclose "[d]escriptive explanations of the terms 'amount financed,' 'finance charge,' 'annual percentage rate,' 'total of payments,' and 'total sale price.'"[173] Section 1638(a)(3) required the lender to disclose "the 'finance charge,' not itemized, using that term."[174] Plaintiffs were essentially arguing that § 1638(a)(8) should be read as a building block requirement which must be satisfied for § 1638(a)(3) to be satisfied.[175] The "[p]laintiffs insist[ed] that information has been 'disclosed' in compliance with sec. 1638 only if *all* of the TILA . . . [has] been followed."[176]

The court found the plaintiffs were not entitled to statutory damages because the listing of provisions in § 1640(a)(4) is a comprehensive and

"[s]ome of [the forms] fail to provide adequate descriptive explanations of terms such as 'finance charge' and 'annual percentage rate'; this shortcoming violates 15 U.S.C. [§] 1638(a)(8)." *Id.* at 990. Lastly, the court also found the lenders violated § 1632(a) "because the phrases 'finance charge' and 'annual percentage rate' are in the same typeface as 'amount financed' and 'total of payments.' Because the former terms must be 'disclosed more conspicuously than' the latter, Payday Loan Corp. has violated 15 U.S.C. [§] 1632(a)." *Id.*

169. *Id.* at 990. Plaintiffs did not claim to have suffered any actual damages, thus the only avenue to recovery for plaintiffs was through statutory damages. *Id.*; *see supra* Section II.C.1 (discussing TILA's damages-related provisions and the availability of actual and statutory damages).

170. 15 U.S.C. § 1640(a) (2012).

171. *Id.*

172. *Brown*, 202 F.3d at 991; *see also* 15 U.S.C. § 1638(a)(8) (requiring that a lender disclose "[d]escriptive explanations of the terms 'amount financed', 'finance charge', 'annual percentage rate', 'total of payments', and 'total sale price' as specified by the Bureau"); *id.* § 1638(a)(3) (requiring that a lender disclose "[t]he 'finance charge', not itemized, using that term"). Plaintiffs were essentially arguing that § 1638(a)(8) should be read as a building block requirement which must be satisfied for § 1638(a)(3) to be satisfied. *Brown*, 202 F.3d at 991. If the plaintiffs could succeed in arguing this as the correct interpretation of § 1638(a)(3), (a)(8), they would be entitled to statutory damages under even a very narrow reading. *Id.*

173. 15 U.S.C. § 1638(a)(8).

174. *Id.* § 1638(a)(3).

175. *Brown*, 202 F.3d at 991–92.

176. *Id.* at 991 (emphasis added).

exclusive list of all TILA provisions that allow for statutory damages.[177] The court did not accept the plaintiffs' argument that the lender's satisfaction of § 1638(a)(8) should be read as a prerequisite for satisfaction of § 1638(a)(3).[178] According to the Court, allowing statutory damages for violations outside that list would be contrary to Congressional intent.[179] The result of *Brown* is to make plaintiffs in the Seventh Circuit subject to a very strict reading of TILA, significantly limiting future plaintiffs' opportunities to recover damages.

2. The Fifth Circuit Found in Favor of Lenders in *Davis v. Werne* Because the Court Found No TILA Violations, but Provided Dicta Supporting More Robust Availability of Statutory Damages Under TILA than the Seventh Circuit

Davis v. Werne involved a plaintiff, Lorene Davis, who brought suit against a commercial provider of storm doors and window guards, Metalcraft Industries.[180] Ms. Davis alleged that Metalcraft had failed to provide adequate disclosures in connection with a financing agreement for payment of the storm door and window guards Metalcraft installed on Ms. Davis' home.[181] The Fifth Circuit found the defendant had provided adequate disclosures and did not violate TILA.[182] Despite this finding, the court provided dicta that lends support to a more robust availability of statutory damages than the Seventh Circuit's decision in *Brown*.[183] The court described TILA in a way that promotes private citizen action for damages:

> TILA is a prophylactic measure that creates a system of "private attorneys general" to aid its enforcement. In order to penalize noncomplying creditors and to deter future violations, these private attorneys general may recover the statutory penalties even if they have not sustained any actual damages, or even if the creditors are

177. *Id.* at 991–92 (finding "that the TILA does not support plaintiffs' theory of derivative violations under which errors in the *form* of disclosure must be treated as non-disclosure of the key statutory terms" (emphasis added)).

178. *Id.*

179. *Id.* at 991 (referring to TILA violations, the court noted that "Congress included some and excluded others; plaintiffs want us to turn this into universal inclusion, which would rewrite rather than interpret sec. 1640(a)").

180. Davis v. Werne, 673 F.2d 866, 868 (5th Cir. 1982).

181. *Id.* at 868–69.

182. *Id.* at 872 (finding that "[a]lthough the October contract was 'consummated' and was therefore fully subject to TILA and Regulation Z, we cannot agree with the plaintiff Davis that Metalcraft failed to comply with the statute or its implementing regulations").

183. *See Brown*, 202 F.3d at 987 (finding that the list of provisions in § 1638(a)(4) that TILA lists as allowing statutory damages under § 1638(a)(2) is an exhaustive list that does not allow for a finding of a violation in another provision to show a defendant violated a provision listed in § 1638(a)(4)).

> guilty of only minute deviations from the requirements of TILA and implementing Regulation Z.[184]

This does not provide precedent to show that the Fifth Circuit would contradict the Seventh Circuit's TILA interpretation in *Brown*;[185] however, it is a more plaintiff-friendly reading of TILA. This plaintiff-friendly reading more effectively promotes TILA's stated purpose "to assure a meaningful disclosure of credit terms."[186]

3. The Sixth Circuit, in *Baker v. Sunny Chevrolet, Inc.*, Joined the Seventh Circuit's Narrow TILA Interpretation Regarding Statutory Damages, Contradicting the Western District of Michigan's Decision in *Lozada*[187]

Baker v. Sunny Chevrolet, Inc. involved a class action suit brought against a car dealership for failure to satisfy TILA's § 1638(b)(1) disclosure timing requirements;[188] the same TILA provision at issue in *Lozada*.[189] Ms. Baker had entered into a retail installment sales contract which allowed her to purchase a vehicle from the defendant.[190] The defendant allowed Ms. Baker to review the agreement prior to signing it, and she did not allege any shortcomings in the disclosure's contents.[191] The defendant did not provide the plaintiff with a copy of the contract until approximately three weeks after the two parties had signed the agreement.[192] Ms. Baker, along with a class of plaintiffs, filed suit alleging the defendant did not satisfy TILA's form and timing of disclosure requirements in § 1638(b)(1).[193] No actual damages were alleged.[194]

The court was faced with the same question presented in *Lozada*: whether a plaintiff is allowed to recover statutory damages for a violation of § 1638(b)(1).[195] The court held that "§ 1638(b) is a separate requirement

184. *Davis*, 673 F.2d at 869 (citations omitted) (quoting McGowan v. King, 569 F.2d 845, 848–49 (5th Cir. 1978)).

185. *See supra* Section III.A.1.

186. 15 U.S.C. § 1601(a) (2012).

187. Baker v. Sunny Chevrolet, Inc., 349 F.3d 862, 869 (6th Cir. 2003) (finding that TILA "creates two types of violations: (a) complete non-disclosure of enumerated items in § 1638(a), which is punishable by statutory damages; and (b) disclosure of the enumerated items in § 1638(a) but NOT in the manner required . . . which is not subject to the statutory damages").

188. *Baker*, 349 F.3d at 863–64.

189. *See infra* Section III.A.4 (discussing the *Lozada* court's interpretation of TILA which allowed statutory damages for violations of § 1638(b)(1)).

190. *Baker*, 349 F.3d at 863.

191. *Id.* at 864.

192. *Id.*

193. *Id.* at 864–65.

194. *Id.* at 864.

195. *Id.* at 868–69. The court described two competing arguments; the court's decision on which to choose would decide the case's outcome. *Id.* The court described the first argument as "§ 1638(b) form and timing disclosures should be read to apply to each subsection of § 1638(a)

that relates only tangentially to the underlying substantive disclosure requirements of § 1638(a)" and thus, the plaintiff was precluded from recovering statutory damages even if the defendant violated § 1638(b)(1).[196] Although the alleged TILA violations in *Baker* differed from those in *Brown*, the *Baker* court adopted a similar argument to the *Brown* court in finding that only provisions specifically listed in § 1640(a)(4) allowed for statutory damages.[197] Both the *Baker* and *Brown* decisions stand in opposition to the *Lozada* decision, which would have allowed the *Baker* plaintiffs to seek statutory damages for violations of § 1638(b)(1).

Part II of this Note illustrated the most common characteristics of payday loans,[198] frequently employed state and local regulatory regimes,[199] and federal payday loan regulations.[200] Part III then discussed the caselaw interpreting these federal regulations.[201] As courts' contrasting interpretations of TILA's damages provisions shows, these provisions are ambiguous and require a legislative solution. The following section argues that a legislative solution is needed to clarify TILA's damages provisions.

4. The Western District of Michigan, in *Lozada v. Dale Baker Oldsmobile,* Found Statutory Damages Available for Violations of § 1638(b)(1)

In *Lozada v. Dale Baker Oldsmobile, Inc.*, the District Court for the Western District of Michigan was presented with alleged TILA violations under § 1638(b)(1) and was asked to decide whether § 1640(a)(4) permits statutory damages for § 1638(b)(1) violations.[202] Section 1638(b)(1) requires lenders to make disclosures "before the credit is extended."[203] The plaintiffs were all individuals who alleged that Dale Baker Oldsmobile, Inc. failed to provide the

individually." *Id.* This would suggest a plaintiff could recover statutory damages for the alleged violation of § 1638(b)(1) in *Baker*. *Id.* The court described the second argument as "§ 1638(b) is a separate requirement that relates only tangentially to the underlying substantive disclosure requirements of § 1638(a). Under this theory, a § 1638(b) violation is not one of the enumerated violations that warrant a statutory damages award." *Id.* at 869. *But see* Lozada v. Dale Baker Oldsmobile, Inc., 145 F. Supp. 2d 878, 888 (W.D. Mich. 2001) (finding statutory damages are available for violations of § 1638(b)(1) and "conclud[ing] that the understanding of § 1640(a) as accepted by the Seventh Circuit in *Brown*—allowing such damages only for enumerated provisions—is at odds with the fundamental structure of the statute, which provides presumptive availability of statutory damages followed by exceptions").

196. *Baker*, 349 F.3d at 869.

197. *See supra* notes 169–79 and accompanying text.

198. *See supra* Section II.A (providing an overview of payday loans).

199. *See supra* Section II.B (discussing frequently used state and local regulatory measures to regulate the payday loan market).

200. *See supra* Section II.C (discussing federal regulations of the payday loan market).

201. *See supra* Section III.A (discussing important cases in interpreting TILA's disclosure requirements and highlighting courts' contradictory interpretations).

202. Lozada v. Dale Baker Oldsmobile, Inc., 145 F. Supp. 2d 878, 887 (W.D. Mich. 2001).

203. 15 U.S.C. § 1638(b)(1) (2012).

customers with a copy of the retail installment sales contract the customers entered into with the dealership.[204]

The *Lozada* court took a very different approach from the *Brown* court when determining whether the plaintiffs were entitled to statutory damages, and found that TILA "presumptively makes available statutory damages unless otherwise excepted."[205] The *Lozada* court also took a position opposite the *Brown* court in finding that the list of specific subsections in § 1640(a)(4) is not an exhaustive list of TILA subsections eligible for statutory damages.[206] The court emphasized that the language in § 1640(a)(4) acts as a narrow exception that only limited the availability of statutory damages within those explicitly listed TILA provisions in § 1640(a).[207] This holding is in direct opposition to the *Brown* court's interpretation of § 1640(a)(4).[208]

The *Lozada* court found the plaintiffs could recover statutory damages for a violation of § 1338(b)(1)'s timing provisions because § 1640(a)(4) only required plaintiffs to show actual damages if plaintiffs were alleging damages "[i]n connection with the disclosures referred to in [15 U.S.C. § 1638]."[209] The court found that the general presumption that statutory damages are available to plaintiffs requires 1640(a)(4)'s limitations on statutory damages to "be construed narrowly."[210] Applying this narrow reading, provisions that govern the timing of disclosures are distinct from provisions that require disclosure particular information.[211] The court's interpretation means that although "§ 1638(b)(1) provides requirements for both the timing and the form of disclosures under § 1638(a), [it] provides no disclosure requirements itself."[212] A timing provision is distinct from a disclosure requirement; whereas § 1640(a)(4) would require a plaintiff alleging violation of a disclosure requirement to show actual damages, a violation of a timing provision is eligible for statutory damages because the timing provision is distinct from a disclosure requirement.[213]

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204. *Lozada*, 145 F. Supp. 2d at 882.

205. *Id.* at 886. The court emphasized that § 1640(a) opens with the language "except as otherwise provided in this section" in finding that the TILA created a presumption that statutory damages are available unless they are unavailable due to an exception. *Id.*

206. *Id.* (noting that "[t]he oddness of the [statute's] structure appears to have led some courts to misconstrue the excepting language as an exclusive list of TILA provisions that are subject to statutory damages" (citing Brown v. Payday Check Advance, Inc., 202 F.3d 987, 991 (7th Cir. 2000))).

207. *Id.* at 887 ("I conclude that the enumerated provisions, as exceptions, must be construed narrowly. Thus construed, they clearly were intended to limit the availability of statutory damages only within the particular section or subsection mentioned in § 1640(a).").

208. *See supra* notes 166–79 and accompanying text.

209. 15 U.S.C. § 1640(a)(4) (2012).

210. *Lozada*, 145 F. Supp. 2d at 887.

211. *Id.*

212. *Id.*

213. *Id.* at 885–88.

The *Lozada* court's vastly different interpretation of § 1640(a) in comparison to the *Brown* court demonstrates TILA's ambiguity.[214] The judicial inconsistency between *Lozada* and *Brown* suggests TILA, as currently interpreted, may not be enforced in accordance with Congressional intent "to assure a meaningful disclosure of credit terms" so the consumer may engage in "informed use of credit."[215]

B. BROWN*,* DAVIS*,* LOZADA*, AND* BAKER *ILLUSTRATE TILA, AS CURRENTLY WRITTEN, FAILS TO PROTECT CONSUMERS*

The court decisions discussed in Section III.A set forth two broad policy problems.[216] First, it is reasonable to think that decisions such as *Brown*[217] and *Baker*,[218] which both limit statutory provisions under which plaintiffs may recover damages, may be inconsistent with Congress' purpose in passing TILA.[219] TILA describes Congressional purpose as focused on "assur[ing] a meaningful disclosure of credit terms."[220] The *Brown* and *Baker* courts' narrow allowance of statutory damages cuts against Congressional intent to assure borrowers are made aware of all credit terms because such an interpretation inadequately incentivizes lenders to ensure they comply with TILA's disclosure requirements. Second, the *Baker* and *Brown* decisions set the stage for lenders to circumvent important disclosure provisions by only violating provisions "that relate[] only tangentially to the underlying substantive disclosure requirements of §1638(a)."[221] Doing so allows lenders to inadequately disclose required terms, while still avoiding incurring statutory damages. Lenders could still be liable for actual damages, but this places a greater burden on plaintiff-borrowers.[222]

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214. *See supra* notes 204–13 and accompanying text (describing the *Lozada* court's decision).

215. 15 U.S.C. § 1601(a) (2012).

216. *See supra* Section III.A (discussing courts' contrasting interpretations of TILA's damages provisions).

217. Brown v. Payday Check Advance, Inc., 202 F.3d 987, 992 (7th Cir. 2000). The court found "that the TILA does not support plaintiffs' theory of derivative violations under which errors in the *form* of disclosure must be treated as non-disclosure of the key statutory terms." *Id.* (emphasis added). Thus, plaintiffs were unable to recover statutory damages for defendant's violation of § 1638(b)(1). *Id.* at 991.

218. Baker v. Sunny Chevrolet, Inc., 349 F.3d 862, 869 (6th Cir. 2003) (finding that TILA "creates two types of violations: (a) complete non-disclosure of enumerated items in § 1368(a), which is punishable by statutory damages; and (b) disclosure of the enumerated items in § 1368(a) but NOT in the manner required . . . which is not subject to the statutory damages").

219. 15 U.S.C. § 1601(a) (Congress described TILA's purpose by stating that "[i]t is the purpose of this subchapter *to assure a meaningful disclosure* of credit terms so that the consumer will be able to compare more readily the various credit terms available to him and *avoid the uninformed use of credit*, and to protect the consumer against *inaccurate and unfair* credit billing and credit card practices" (emphasis added)).

220. *Id.*

221. *Baker*, 349 F.3d at 869.

222. *See supra* Section II.C.1 (discussing the allowance of statutory and actual damages in TILA).

To illustrate the second problem, consider a scenario in which a defendant lender violates § 1638(b)(1), as the court found the defendants did in *Brown*.[223] Section 1638(b)(1) states that "[e]xcept as otherwise provided in this part, the disclosures required under subsection (a) shall be made before the credit is extended."[224] The *Brown* decision means that a lender could fail to provide a borrower with proper disclosures until after the credit was extended, and yet escape statutory damages.[225] Disclosures received after credit has been extended do nothing to help the borrower decide whether or not to take out a loan; that decision has already been made. In such a scenario, TILA has failed to "assure a *meaningful* disclosure of credit terms."[226]

The *Lozada* court's plaintiff-friendly interpretation of § 1640(a)(4) does little to settle how payday loan plaintiffs' damages should be calculated because the statutory interpretation is so unnatural.[227] The court appeared to admit this when it stated that "[t]he structure of the statute therefore is somewhat odd: The exceptions to the general provision allowing statutory damages are stated by way of a positive list of included items under particular subsections, rather than by a list of excluded provisions."[228] Arguing the statute is oddly structured is simply a way for the court to explain why it needed to apply such an unnatural reading.

The lack of clarity between the judicial decisions suggests a legislative change is the most appropriate way to uphold TILA's purpose of "assur[ing] a meaningful disclosure of credit terms."[229] In contrast to the state and local regulations discussed above that overemphasize decreasing the supply of payday loans in the credit market,[230] TILA appropriately focuses on ensuring consumers receive adequate disclosures. However, these disclosures are meaningless if not provided to a borrower prior to the lender extending

223. Brown v. Payday Check Advance, Inc., 202 F.3d 987, 989 (7th Cir. 2000).

224. 15 U.S.C. § 1638(b)(1).

225. *See supra* Section III.A.1 (discussing the *Brown* decision that a § 1638(b)(1) violation is not grounds for statutory damages).

226. 15 U.S.C. § 1601(a) (emphasis added).

227. *See supra* Section III.A.4 (discussing the *Lozada* court's decision).

228. *See* Lozada v. Dale Baker Oldsmobile, Inc., 145 F. Supp. 2d 878, 886 (W.D. Mich. 2001) (highlighting that judges can disagree on how to interpret § 1638(a)(4)). *But see* Baker v. Sunny Chevrolet, Inc., 349 F.3d 862, 873 (6th Cir. 2003) (finding that "[w]hile the structure of § 1640(a) makes the *Lozada* interpretation plausible, the language and design of these provisions convince me that the Seventh Circuit and a majority of district courts addressing the issue are correct in concluding that statutory damages are not available for violation of § 1638(b)(1)"). While *Baker* overrules the district court's opinion in *Lozada*, *Lozada* still has value when compared to *Baker* to show the difficulty in interpreting § 1638(a)(4) and the section's ambiguity.

229. 10 U.S.C. § 1601(a).

230. *See supra* Section II.D.2. State and local payday loan regulations tend to overemphasize decreasing the supply of payday loans in consumer credit markets. *See supra* Section II.D.2. TILA, on the other hand, more appropriately emphasizes ensuring consumers receive adequate disclosures prior to borrowing from a payday lender. *See supra* Section II.C.1.

credit.[231] Preventing plaintiffs from recovering statutory damages for such violations, as occurred in *Baker* and *Brown*, does not adequately serve TILA's purpose.

IV. PROPOSED LEGISLATIVE SOLUTION

As described in Part III,[232] courts have inconsistently applied TILA's damages provision, § 1640(a)(4).[233] Part IV argues that a legislative solution broadening access to statutory damages is necessary for Congress to best advance TILA's purpose and equip borrowers with the information necessary to make informed decisions about whether to take on the burden of a payday loan.

Section II.D argued that a proper payday lending regulatory regime would focus on ensuring that consumers are provided with adequate disclosure and information to make an informed decision about whether to incur payday loan debt, and that the current regimes most prevalent in state and local regulations over-emphasize decreasing the supply of payday loans in the credit market.[234] Part IV will argue that the federal Truth in Lending Act, as currently interpreted, does not ensure adequate disclosure for payday loan consumers because statutory damages are not allowable for all TILA violations.[235] This outcome persists despite the fact that TILA emphasizes disclosure—as opposed to many state and local regulations, which focus on decreasing the supply of payday loans in the credit market.[236] Thus, TILA is correctly focused on ensuring consumers are best equipped to make well-informed decisions regarding credit, but making explicit that a plaintiff will

231. *See* 15 U.S.C. § 1638(b)(1) (requiring that "the disclosures required under subsection (a) shall be made before the credit is extended").

232. *See supra* Part III (discussing decisions in *Brown, Davis, Lozada,* and *Baker*, and the decisions' implications for protecting payday loan borrowers, respectively).

233. *See supra* Section III.A (providing an overview of judicial decisions in the Seventh, Fifth, and Sixth Circuits that inconsistently apply TILA's damage-providing language in § 1640(a)(4)).

234. *See supra* Section II.D.

235. *See* Baker v. Sunny Chevrolet, Inc., 349 F.3d 862, 869 (6th Cir. 2003) (finding that "disclosure of the enumerated items in § 1638(a) but NOT in the manner required by the Regulation and § 1638(b)(1) . . . is not subject to . . . statutory damages"); Brown v. Payday Check Advance, Inc., 202 F.3d 987, 992 (7th Cir. 2000) (finding that the plaintiff was not entitled to statutory damages under 15 U.S.C. § 1638(a)(5), for lender's alleged failure to disclose the "total of payments" as required under TILA).

236. 15 U.S.C. § 1601(a). Congress described TILA's overall goal in stating that "[t]he Congress finds that economic stabilization would be enhanced and the competition among the various financial institutions and other firms engaged in the extension of consumer credit would be strengthened by the informed use of credit." *Id.* Congress showed its intent to enhance the informed use of credit when it stated that "it is the purpose of this subchapter to assure a meaningful disclosure of credit terms so that the consumer will be able to compare more readily the various credit terms available to him and avoid the uninformed use of credit, and to protect the consumer against inaccurate and unfair credit billing and credit card practices." *Id.*

be eligible for statutory damages for any TILA violation will place even greater focus on helping consumers "avoid the uninformed use of credit."[237]

A. *Legislative Proposal: Amend the Truth in Lending Act to Add a Provision Similar to the Telephone Consumer Protection Act's Statutory Damage Provision*

The Telephone Consumer Protection Act ("TCPA") explicitly allows a private action for plaintiffs who prove a defendant violated the TCPA and provides a model that should be adopted to amend TILA.[238] The TCPA prevents businesses from making unwanted phone calls to consumers in the hopes of soliciting those consumers' business.[239] The TCPA allows a plaintiff to recover statutory damages, actual damages, or both:

> A person or entity may, if otherwise permitted by the laws or rules of court of a State, bring in an appropriate court of that State—(A) an action based on a violation of this subsection or the regulations prescribed under this subsection to enjoin such violation, (B) an action to recover for actual monetary loss from such a violation, *or to receive $500 in damages for each such violation, whichever is greater, or (C) both such actions.*[240]

Under the TCPA, the plaintiff must only show that the defendant violated the TCPA, not that the plaintiff suffered any actual damages.[241] A similar provision should be adopted for TILA. The complex language used for TILA's damage provision in 15 U.S.C. § 1640(a)(4) should be replaced with language similar to what Congress used for the TCPA in 47 U.S.C. § 227(b)(3). This amendment would both prevent lenders from circumventing TILA's disclosure requirements by hiding behind a violation "that relates only tangentially to the underlying substantive disclosure requirements of § 1638(a)"[242] and advance Congress' legislative goals in passing TILA "to assure a meaningful disclosure of credit terms."[243]

237. *Id.*

238. 47 U.S.C. § 227(b)(3).

239. *Id.* § 227.

240. *Id.* § 227(b)(3) (emphasis added).

241. *See* Beal v. Wyndham Vacation Resorts, Inc., 956 F. Supp. 2d 962, 981 (W.D. Wis. 2013) (finding "that defendant violated the Telephone Consumer Protection Act by making 27 calls and leaving two prerecorded messages on her cellular phone . . . . Plaintiff is AWARDED $14,500 in statutory damages under 47 U.S.C. § 227(b)(3)(B)"). The 27 calls and two prerecorded messages make a total of 29 violations. Each violation being assessed at $500 makes the total statutory damages $14,500. *Id.*

242. Baker v. Sunny Chevrolet, Inc., 349 F.3d 862, 869 (6th Cir. 2003).

243. 15 U.S.C. § 1601(a).

B. *Policy Critiques and Counterarguments: In Defense of a TILA Enforcement Regime that Encourages Clarity and Accountability in the Payday Loan Market*

This legislative proposal rests on TILA's foundational assumption that consumers are better served when they receive ample disclosure information about their loan,[244] and the general assumption that information transparency aids in decision-making.[245] This Note's proposal applies that assumption to advocate for better consumer compensation when lenders do not comply with required disclosures. One of the common criticisms against the assumption that disclosures help consumers is that TILA is overly complicated and provides the consumer with excessive information.[246] Indeed, survey data supports the idea that consumers find TILA disclosures difficult to understand.[247] However, limiting the information TILA requires lenders to disclose to borrowers would not solve this problem; limiting the required disclosures would only limit TILA's effectiveness at carrying out Congressional intent. While consumers may struggle to manage and understand the large amount of disclosure information TILA requires, that does not mean the appropriate policy response is to reduce the information available to consumers.

Reducing the information available to consumers would be appropriate only if the available information served a disutility on consumers, but confusion about information does not mean the information itself has negative value. The proper policy response to this problem is to incentivize borrowers to seek lawyers who are well-trained in understanding TILA disclosures and incentivize lawyers to take these cases. This Note's legislative proposal accomplishes both goals because it clarifies damages consumers may seek when they suspect lenders have violated TILA, thus incentivizing borrowers to seek legal assistance in bringing a claim and incentivizing lawyers to take TILA claims.

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244. *See supra* Section II.C.1 (discussing the key provisions of TILA).

245. *See* Frederick Schauer, *Transparency in Three Dimensions*, 2011 U. ILL. L. REV. 1339, 1350 (discussing the historical reliance on the theory that transparency facilities better exchange of ideas and decision-making).

246. *See* Renuart & Thompson, *supra* note 55, at 208 (noting that "[c]redit card agreements on average require reading at a fifteenth grade level—or three years of college"); *see also* Patricia A. McCoy, *Predatory Lending Practices: Definition and Behavioral Implications*, *in* WHY THE POOR PAY MORE: HOW TO STOP PREDATORY LENDING 81, 95 (Gregory D. Squires ed., 2004) ("[I]t is hard to imagine Congress mandating a disclosure scheme so starkly plain that victims [of predatory lending] would turn down abusive, irrational loans."); 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, 220–21 (2005).

247. Edwards, *supra* note 246, at 229 n.168 (citing Thomas A. Durkin, *Consumers and Credit Disclosures: Credit Cards and Credit Insurance*, FED. RES. BULL., Apr. 2002, at 208 tbl.9).

The policy critique that mandatory disclosures often fail to result in improved consumer decisions is misguided if used to attack this proposal[248] because consumer choice is beyond the scope of this legislative proposal. This proposal focuses on ensuring lender accountability for TILA violations,[249] while leaving consumers free to make their own choices about whether to take out a payday loan. Indeed, this Note criticized state regulatory regimes that take the power of choice out of consumers' hands.[250] This legislative proposal is meant to maintain borrowers' freedom in making their financial decisions, while providing them a recourse when lenders violate TILA. The challenge facing consumers is more accurately understood as facing a difficult route to damage recovery when lenders commit TILA violations, rather than a challenge in understanding TILA-mandated disclosures.[251] As stated above, this Note proposes a legislative solution that would encourage consumers to seek legal advice when they believe lenders have committed a TILA violation. This neutralizes the concern that consumers would be unable to comprehend the vast amount of disclosure information. Seeking legal advice takes the burden of interpreting TILA off the borrower and places it on the borrower's lawyer. The straightforward damages provision proposed here incentivizes lawyers to take bona fide claims, especially if the lawyer charges fees on a contingency basis. The threat of liability for TILA violations in turn incentivizes lenders to comply with TILA.

Another common critique of subprime lending disclosure requirements is that such measures overburden lenders and ultimately hurt borrowers because the regulatory costs are passed on to the consumer.[252] Lender advocates frequently raise this concern in the context of subprime home loan regulation but would likely also raise these arguments in opposition to the proposed damages provision.[253]

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248. *See* Lauren E. Willis, *Decisionmaking and the Limits of Disclosure: The Problem of Predatory Lending: Price*, 65 MD. L. REV. 707, 712 (2006). In discussing the market for subprime home loans, Professor Willis argues "that for significant borrower segments shopping in today's market of risk-based pricing and multifarious loan products, the disclosures currently mandated by federal law for home loans neither effectively facilitate price shopping, nor do they result in good deliberate decisionmaking about risk." *Id.*

249. *See supra* Section IV.B (providing a legislative proposal with a simple damages-calculation provision).

250. *See supra* Section II.D.2 (criticizing state and local regulatory regimes that place price caps or ban payday loans).

251. *See supra* Section III.A (discussing judicial inconsistency when determining damages owed to consumers for lenders' TILA violations).

252. *See* Michael J. Pyle, *A "Flip" Look at Predatory Lending: Will the Fed's Revised Regulation Z End Abusive Refinancing Practices?*, 112 YALE L.J. 1919, 1924–25 (discussing lenders' lobbying efforts against subprime home loans, noting that "[bank lobbyists] argued that uncertainty over [the meaning of federal regulation] and the consequent likelihood of producing overzealous enforcement would lead to a chilling of the market for legitimate subprime loans").

253. *See, e.g.*, Christopher L. Peterson, *Federalism and Predatory Lending: Unmasking the Deregulatory Agenda*, 78 TEMP. L. REV. 1, 63 (arguing that "[i]n general, the lending industry has

Lenders' concerns over increased regulatory costs should not result in market damage because improving TILA's mandatory disclosure requirements should increase market efficiency in the payday loan market because it will help solve the information asymmetry problem between lenders and borrowers.[254] The proposed damages provision incentivizes lenders to cure the information asymmetry problem between lenders and borrowers because the provision holds lenders accountable for TILA violations.[255] Incentivizing lenders to fully and accurately make disclosures will help borrowers make better decisions. If enough borrowers respond to this by being more selective in the amount of payday loans they incur, this could lead to a lower market interest rate on payday loans.[256]

This legislative proposal is made with the understanding that, even if implemented perfectly, it will have limitations. The first limiting factor is that consumers using payday loans are largely poor and may be less likely than wealthier individuals to have an existing relationship with a lawyer.[257] However, as discussed above, the proposed legislative solution's simplicity in determining the availability of damages will provide lawyers with an incentive to find clients. This will help blunt the impact of weak connections between the legal community and the payday loan consumer base.

The second, more challenging limiting factor is that this legislative proposal will only be effective insofar as consumers are aware of their rights to recover statutory damages. This legislative proposal gives lawyers a greater incentive to ensure potential clients are aware of their rights under TILA because the proposal simplifies TILA's damages provision. Lawyers should respond to this incentive with increased efforts to make sure potential clients are aware of their rights under TILA. By simplifying TILA's damages provision, this proposal provides consumers an incentive to seek legal assistance in response to a TILA violation and provides lawyers an incentive to seek these potential clients. These incentives should in turn have the

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aggressively opposed the North Carolina [Predatory Lending Act]" and other similar state laws based on a concern "that the administrative and compliance costs imposed by these predatory lending statutes are too severe"); Debra Pogrund Stark, *Unmasking the Predatory Loan in Sheep's Clothing: A Legislative Proposal*, 21 HARV. BLACKLETTER L.J. 129, 135 n.22 (2005) (explaining lenders' responses to subprime market regulatory efforts in Georgia and New Jersey).

254. Reid Kress Weisbord, *The Advisory Function of Law*, 90 TUL. L. REV. 129, 146 (2016) ("Lending disclosure mandates embody the advisory function's core insight—that, in settings where legally uninformed actors are capable of overcoming information deficits, it is often more efficient and effective to address the problem of legal ignorance before the transaction, rather than after the manifestation of financial injury attributable to the user's lack of knowledge.").

255. *Id.*

256. *See supra* Section II.A (discussing how payday loan borrowers generally have a higher default rate than borrowers in long-term credit markets). If some of the most vulnerable payday loan borrowers are able to find ways to avoid taking out a payday loan, this could lower the overall market default rate and result in lower market interest rates. *Id.*

257. *See* Wei Li et al., *supra* note 9 (discussing payday lenders' tendency to concentrate in poor and minority neighborhoods).

ultimate effect of promoting greater lender accountability and compliance with TILA.

V. CONCLUSION

Credit is an extremely important component of the American economy. It allows consumers to borrow today, invest the credit in something potentially valuable, like a home or education, and pay the lender back in the future with interest. Payday lending occupies a unique place in the American credit market, characterized by high interest rates, high fees, and a poor reputation.[258] The payday lending market's unique characteristics make it a ripe target for federal, state, and local regulations.[259] This Note does not question whether these regulations are promulgated with consumers' interests in mind, but instead argues that current regulatory regimes at the state and local levels over-emphasize an aim to decrease the presence of payday loans in credit markets.[260] While policymakers may view payday lenders and loans as a net social negative, borrowers are often heavily reliant on payday loans.[261] When payday loans are removed from markets, borrowers often do not have a viable alternative, and may decide to bounce checks, make late payments, or even seek black market loan sharks.[262] Thus, for many borrowers a payday loan is the least awful of several awful options.

The appropriate regulatory emphasis should be on ensuring lenders provide consumers with adequate disclosures prior to borrowers taking on a high-fee loan.[263] The federal Truth in Lending Act is appropriately aimed at this goal, but judicial decisions have interpreted TILA's damages-providing provision to have very limited application.[264] The damages-providing provision has been interpreted so narrowly to the point that TILA fails to forward its main legislative purpose of ensuring borrowers can make informed credit decisions.[265]

To address this problem, Congress should amend TILA to adopt a damages-providing provision similar to that in the Telephone Consumer Protection Act.[266] The TCPA, using much more straightforward language than TILA, affords plaintiffs the opportunity to recover statutory damages for

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258. *See supra* Sections II.A, II.B (discussing the payday loan market's unique characteristics, including a market that is predominantly comprised of poor and minority lenders, and interest rate levels much higher than most other credit markets).

259. *See supra* Sections II.B, II.C.

260. *See supra* Section II.D.

261. *See supra* Section II.D.2 (discussing payday loan borrowers' heavy reliance on payday loans and the borrowers' inability to obtain other sources of credit).

262. *See supra* Section II.D.2.

263. *See supra* Section II.D.2.

264. *See supra* Section III.A (discussing judicial interpretations of TILA that limit damage availability).

265. *See supra* Section III.A.

266. *See supra* Part IV.

a defendant's TCPA violations.[267] Amending TILA's damages provision, § 1640(a), to more closely resemble the TCPA's damages provision will provide much-needed clarity for courts to assess damages in TILA claims.[268] This change will give consumers the enforcement mechanism they need to incentivize lenders to offer adequate disclosure, thus improving market outcomes for payday borrowers while still maintaining the often vital credit option a payday loan provides.

267. *See supra* Part IV; *see also* 15 U.S.C. § 1601(a) (2012).

268. *Compare supra* Section III.A (providing examples of judicial inconsistency in interpreting TILA's damage-providing provision, § 1640(a)), *with* Beal v. Wyndham Vacation Resorts, Inc., 956 F. Supp. 2d 962, 981 (W.D. Wis. 2013) (finding the plaintiff was owed $14,500 for the defendant's 29 TCPA violations, a number that was calculated simply by multiplying the number of violations (29) by the statutory damages amount per violation ($500)).