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Tuesday, September 2, 2014

TILA versus TILA: Rescission by Notice or Lawsuit

Commentary and Analysis
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Here's something to ponder on:

> "Whether the Truth in Lending Act entitles homeowners to rescind their mortgage commitment by notifying the lender in writing within the period specified by the statute, or whether the homeowner must file a lawsuit to make the rescission effective."[1]

The foregoing ponderable – ably condensed into a single contemplation by the American Civil Liberties Union in announcing its amicus brief – is expected to be adjudicated by the US Supreme Court in its next term. The ACLU's amicus brief is in favor of written notification.

Before we get started, it should be noted that the ACLU is hardly alone in offering an amicus brief favoring written notification: Attorney General of New York, Eric T. Schneiderman, has announced that he is leading a coalition of more than 25 states in filing an amicus brief urging the U.S. Supreme Court "to uphold consumer rescission rights under the federal Truth in Lending Act (TILA)."[2]

Indeed, in addition to the private litigants, the United States as well as several organizations have filed an amicus brief in favor of written notification, such as the American Association of Retired Persons, National Consumer Law Center, National Association of Consumer Advocates, and the Center for Responsible Lending.

Given the immense legal implications, especially with respect to the loan flow process from point of sale through portfolio and securitization, I would urge a familiarity with the positions taken by both parties to the litigation.

Would you like to venture a guess on the outcome?

For the time being, while we explore this case, please put on hold whatever you know, thought you knew, or assumed regarding rescission. You might find your view challenged by the contours of this lawsuit.

So, let's ponder this issue that is flaring up from the Truth in Lending Act ("TILA" or "Act')!

Throughout this article, I will refer to the subject case as "Jesinoski v. Countrywide" or just "Jesinoski."[3]

The Big Question

Jesinoski v. Countrywide cites Section 1635 of TILA to present the foundation upon which the deliberations are to proceed.[4] In that section, it states that a borrower "shall have the right to rescind the transaction until midnight of the third business day following … the delivery of the information and rescission forms required under this section … **by notifying the creditor**

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… of his intention to do so."[5] (My emphasis.) With regards to the timeframe available to the borrower, the well-known three year time frame is cited, to wit, a time limit "for [the] exercise of [this] right," providing that the borrower's "right of rescission shall expire three years after the date of consummation of the transaction" even if the "disclosures required … have not been delivered."[6]

Now comes the question that logically follows from the phrase emphasized above – "notifying the creditor" – insofar as, by operation of law, what shall constitute acceptable notification. As posed in Jesinoski:

> "Does a borrower exercise his right to rescind a transaction in satisfaction of the requirements of Section 1635 by "notifying the creditor" in writing within three years of the consummation of the transaction, as the Third, Fourth, and Eleventh Circuits have held, or must a borrower file a lawsuit within three years of the consummation of the transaction, as the First, Sixth, Eighth, Ninth, and Tenth Circuits have held?"[7]

In other words, within three years of consummation of the loan transaction, is "notification" met where the borrower has provided written notification to the creditor, thereby exercising the right of rescission, or only where the borrower brings a lawsuit against the creditor?

Please note that several Circuit Courts have considered the question in related litigation, with differing decisions, such cases brought by plaintiff's with certain claims somewhat similar to Jesinoski, as the litigation has steadily moved up the chain of command until it has arrived at the US Supreme Court.[8] [9]

Staking Out the Position

This battle goes all the back to 2007, when the Jesinoskis claimed that they did not receive complete disclosures on the home they had refinanced. They refinanced their home mortgage with Countrywide Home Loans, Inc., but, it is claimed, Countrywide failed to furnish them all the information and disclosures required by the Act. TILA creates a "right to rescind" the loan transaction within "three business days" of the delivery of all the required disclosures, and a borrower exercises that right simply "by notifying the creditor."[10]

Furthermore, the Act provides that the rescission right "shall expire three years" after the closing of the transaction, even if all the required disclosures have not been delivered.[11]
But when the Jesinoskis sought to exercise their rescission right by sending their creditors a written notice, within the three year timeframe, the creditors refused to honor their right to rescind.

Thus followed the lawsuit, as the Jesinoskis brought an individual suit to enforce the rescission. Their suit was in line with similar suits filed by other parties. The First, Sixth, Eighth, Ninth, and Tenth Circuit Courts refused to recognize that these plaintiffs had validly rescinded their mortgage. Regarding the Jesinoskis, the court held that the Act required the Jesinoskis to file a lawsuit to rescind. But, in such similar cases, the Third, Fourth, and Eleventh Circuits held that written notification is all that was required. Battle lines drawn, the case moved to its perch at the US Supreme Court.

The Three Year Gauntlet

Stepping through the rescission timeframe toward the three year mark, this is a brief outline of how TILA[12] sets forth the obligations of borrower and creditor:

1. A borrower who secures the loan with a principal dwelling "shall have the right to rescind the transaction until midnight of the third business day following the consummation of the transaction or the delivery of the information and rescission forms required under this section … whichever is later" by notifying the creditor of the intention to do so.[13]

   > This means that the borrower has an unconditional right to rescind for business three days after the consummation of the transaction and, as a remedy for a creditor's violation of the Act's disclosure requirements, extends that right to rescind until three days following the ultimate delivery of the required disclosures.

2. A borrower's exercise of the right to rescind "sets in motion a series of automatic steps to unwind the transaction,"[14] imposing obligations on both the creditor and the borrower. When a borrower "exercises his right to rescind, he is not liable for any finance or other charge, and any security interest given by the borrower becomes void upon such a rescission."[15]

3. Following the borrower giving notice to rescind, and within 20 days after receipt of a notice of rescission,

the creditor must return to the borrower any money or property given as … down payment … and "shall take any action necessary or appropriate to reflect the termination of any security interest created under the transaction."[16]

4. The borrower's time limit for exercising the right of rescission is three years from the transaction's consummation,[17] even if a creditor never delivers the disclosures required by the Act.[18] [19] [20]

What Constitutes a Written Notice?

Regulation Z specifically states the procedural features of a written notice with respect to the borrower's notification requirement for exercising a right of rescission, and I quote:

"To exercise the right to rescind, the consumer shall notify the creditor of the rescission by mail, telegram or other means of written communication. Notice is considered given when mailed, when filed for telegraphic transmission or, if sent by other means, when delivered to the creditor's designated place of business."[21]

Pretty clear, yes? What is there to dispute about the foregoing words? Not so fast!

The Facts and Nothing but the Facts

On February 23, 2007, Larry and Cheryle Jesinoski refinanced the mortgage on their primary residence in Eagan, Minnesota.[22] The promissory note was for $611,000 with Countrywide Home Loans, Inc. At the closing of the transaction, the creditor actually did provide some of the disclosures required by the Act, but, importantly, and in violation of the Act,[23] is alleged to have failed to include two copies of a Notice of Right to Cancel for each of the Jesinoskis and two copies of a Truth in Lending Disclosure Statement. Indeed, the creditor allegedly never delivered the additional required disclosures.

On February 23, 2010, within the three year limitation period set by Section 1635(f), the Jesinoskis exercised their right to rescind the transaction by sending written notice of the rescission to the respondents. The compliance timeframe itself is not in dispute.

However, on March 12, 2010, Bank of America Home Loans (hereinafter and collectively for all respondents, "Respondents") replied to the Jesinoskis' notice of rescission refusing to acknowledge the rescission. (No other interested party responded to the Jesinoskis' notice of rescission.) The creditor subsequently failed to take, within 20 days of receipt of the notice of rescission, any of the steps required by Section 1635(b) to reflect the termination of the security interest in the Jesinoskis' home. This failure to comply with this requirement of Section 1635(b), is also not in dispute.

What happened next, winding through the judicial process, provides the central argument to the litigation, ultimately requiring a decision by the US Supreme Court.

Taking Sides

On February 24, 2011, the Jesinoskis filed a complaint in the United States District Court for the District of Minnesota, seeking to enforce the rescission they had exercised by notifying their creditors in writing of their intention to rescind.[24] Their amended complaint, filed on July 22, 2011, sought a declaration that the mortgage transaction had been rescinded *by that written notice*, plus requesting damages under Section 1640 for the respondents' violations of the Act, and damages under state law causes of action arising from violations of federal mortgage regulatory law.

The respondents answered, moving for judgment on the pleadings on the ground that the Jesinoskis' suit was barred because the complaint – a lawsuit – was filed *more than three years after the consummation of the transaction*. Speaking operationally, this is called "time-barred."

The district court granted the respondents' motion. Following other decisions in that district, the court held that "*a suit for rescission* filed more than three years after consummation of an eligible transaction is barred by [the Act's] statute of repose," per Section 1635(f). (My emphasis.) Thus, concluding that because "there is no dispute that [the Jesinoskis] *failed to file suit within the three-year period*," the court held that "their claims are time barred." (My emphasis.).

The litigation moved to the Eighth Circuit on appeal, which affirmed the district court's judgment. The Eighth Circuit issued a *per curiam* opinion, noting that "… a party seeking to rescind a loan transaction must *file suit within three years of consummating the loan*."[25] (My emphasis.) On essentially that ground alone, the court of appeals panel sided in favor of the lenders.

The Jesinoskis petitioned for a rehearing *en banc* – which is a session where a case is heard before all the judges of a court (viz., before the entire bench) rather than by a panel selected from them. The Eighth

Circuit denied by a vote of 6 to 4. One of the judges stated, in concurring in the denial of the rehearing *en banc*, that "no matter how this court decides this case, there will remain a well-developed conflict in the circuits on the question how a consumer may exercise his or her right to rescind under the Truth in Lending Act, 15 U.S.C. § 1635(f)."[26]

Is a lawsuit needed?

According to the respondents, however, there is a common legal question in these cases that is "narrower than the question presented in each of the petitions."[27] The question is not whether a borrower in all circumstances is required to file suit within the three-year statute of repose prescribed by 15 U.S.C. § 1635(f) in order to rescind a mortgage loan. Instead, the question presented is really this:

> "Whether, when a borrower seeks to rescind his mortgage loan after TILA's three-day unconditional rescission period and *the lender disputes the existence of the condition precedent to the borrower's right to rescind – specifically, a failure to provide the required disclosures* – the borrower must sue for rescission before any right to rescind 'expire[s]?'"[28] (My emphasis.)

Permit be to translate the forgoing question into a clarifying narrative: in cases where the lender disputes the existence of the borrower's right to rescind, a borrower cannot unilaterally rescind the mortgage *simply by notifying the lender of the intent to do so*.[29] Instead, the borrower must file suit within the three-year statute of repose.

The respondents claim that this interpretation of the relevant statute is consistent with the text and purpose of TILA in particular, and statutes of repose more generally. They further claim that it is consistent with settled law governing the right of rescission. Their view, in short, asserts that if the petitioners were to prevail, there would be an indefinite tolling[30] of TILA's statute of repose "until such time as the borrower sees fit to file suit, unsettling the lender's expectations and vitiating the certainty of title that Congress sought to ensure through enactment of the three-year statute of repose in § 1635(f)."[31]

Let's deconstruct the respondents' legal logistics into more of a formulaic analysis.

1. TILA grants a borrower "an unconditional right of rescission for the first three days following the consummation of the transaction."[32] This unconditional right is the central objective of § 1635; that is, it provides a brief 'cooling off' period for loans in which a borrower has granted a security interest on the primary residence as part of the deal. This right can be invoked for any reason or for no reason – the borrower need not offer any explanation or allege any violation of TILA.[33]

2. During the three-business-day period after closing, the rescission process is simple and straightforward, given that lenders cannot object, "loan funds typically have not been disbursed yet," and no security interests have been recorded.[34]

3. Congress required that this unconditional right be exercised quite quickly - within three days – per § 1635(a) requirements for meeting that deadline simply by sending notice to the lender.

4. Upon notice from the borrower, the lender must execute the remedial steps prescribed in the statute to return the parties to the *status quo ante*. Specifically, within 20 calendar days after receipt of the notice of rescission, the lender must return any money or property given in connection with the transaction and take all necessary action to reflect the termination of the security interest.[35]

5. Thereafter, the borrower "is not liable for any finance charge or other charge, and any security interest given by the obligor … becomes void upon such a rescission."[36]

6. When the lender has performed its obligations, the consumer must tender the money or property to the lender or, if that is impracticable or inequitable, must tender the property's reasonable value.[37]

7. Outside of the initial three-business-day period, TILA provides another possibility for rescission, but only on the condition that "the creditor fails to deliver certain forms and to disclose certain information" at the loan closing, that is, when the lender has in fact violated TILA.[38] The rescission process here can be (and frequently is) "problematic," given that funds have already been disbursed, security interests perfected, and, most importantly, the claimed right itself can be contested.[39]

8. When a borrower asserts a right of rescission in this context, the lender may agree that it violated TILA and rescind the loan. In such cases, the borrower and lender may follow the statutory process for unwinding the mortgage.[40]

9. If the lender disputes that it failed to deliver the requisite disclosures at closing, an adjudication of the parties' rights is required.[41]

10. Congress understood the need for such resolution and provided for litigation as part of a contested

rescission: TILA recognizes the availability of (a) an "action in which it is determined that a creditor has violated" § 1635;[42] (b) such "action in which a person is determined to have a right of rescission under section 1635;"[43] [44] (c) thereby establishes a "rebuttable presumption" that a borrower who signs an acknowledgement of receipt in fact received the required disclosure forms;[45] and (d) expressly contemplates court orders in the rescission process.[46]

Thus, the respondents concluded that, outside of the three-day unconditional rescission period, TILA does not impose any obligation on lenders to rescind a mortgage upon a borrower's unilateral demand.

One of the lynchpins in Jesinoski is that on February 23, 2010, three years to the day after the loan closing, the Jesinoskis notified the respondents of their intent to rescind the loan, on the ground that while Countrywide provided the required disclosures at closing, *Countrywide allegedly failed to provide the required number of copies of the disclosures*. At the time, the Jesinoskis' home was in foreclosure.[47] But much more was at stake in this matter than whether the lender provided the required number of disclosures.

On March 12, 2010, the respondents replied to the Jesinoskis' notice and refused to recognize the rescission. The Jesinoskis then filed suit on February 24, 2011 – four years and one day after the loan closed – but they but did not serve the respondents with the complaint until "the last few days of the 120 days for service mandated by Federal Rules of Civil Procedure.[48] The Jesinoskis filed an amended complaint on July 22, 2011, seeking a declaration that the mortgage transaction had been rescinded by their February 23, 2010 written notice as well as damages for respondents' alleged violations of TILA.

At that point, the respondents moved for judgment on the pleadings on the ground that the Jesinoskis' suit was barred by TILA's three-year statute of repose, *because the complaint was filed more than four years after the loan closed*.[49] The district court granted the respondents' motion, holding that "a suit for rescission filed more than three years after consummation of an eligible transaction is barred by TILA's statute of repose." In other words, enforcing this limitation according to its terms is consistent with the general nature of a statute of repose as a bar that completely extinguishes the right being claimed after it lapses.

Although the district court did not address the contested issue of whether the Jesinoskis received the requisite number of copies, it did note that the "assertion that they did not receive the required number of disclosures is undermined by documents submitted by Defendants demonstrating that Plaintiffs signed the disclosure documents acknowledging receipt by each Plaintiff of sufficient copies."[50]

Furthermore, the respondents argue, if a plaintiff must only notify the lender of an "intent" to rescind, at some uncertain future date the plaintiff may or may not take action upon that intent, "serving as a cloud on the bank's title if the property proceeded to foreclosure before any action was taken."[51]

As to the Bureau, the Eighth Circuit disagreed with the CFPB's position – as set forth by the Bureau in an amicus brief to other, related litigation – which requires mere notice from a borrower within three years of the loan to effectuate a rescission. As the respondents point out, the court found that the Bureau's interpretation was "not only inconsistent with the text of the statute, but also flawed in failing to provide any guidance as to how rescission is to be effectuated when the lender disputes the borrower's right to rescind."[52] The court rejected the Bureau's position that, in such cases, "the bank, rather than the obligor, should be required to file suit to essentially prevent rescission. This would create a situation wherein rescission is complete, in effect, simply upon notice from the borrower, whether or not the borrower had a valid basis for such remedy."[53]

Divided We Stand: Circuits in Conflict

The following is my tally of where the circuits stand on the "written notification" versus the "lawsuit" issue.[54] The Eighth Circuit's decision in this case highlighted a significant conflict among eight circuits, by holding that a borrower must file suit within three years of the consummation of a loan to exercise the right to rescind the transaction under Section 1635.

The Third, Fourth, and Eleventh Circuits rejected such a requirement, holding that the plain text of the statute and its implementing Regulation Z dictate that written notice to the creditor is sufficient, and that neither the statute nor the regulation makes any mention of a further requirement to sue within the three year time limit.

But the Eighth Circuit's holding – which was shared by the First, Sixth, Ninth, and Tenth Circuits – looked past the text of the statute and regulation, by "extrapolating" from its own decision in the case of Beach v. Ocwen Federal Bank ("Beach"),[55] which imposed a requirement that under Section 1635(f) "the [borrower] must file a rescission action in court" within three years.[56]

The litigation having arrived now at the US Supreme Court, a decision is being sought that resolves the "stark division in authority and to establish uniform national requirements for a borrower's exercise of the

right to rescind under Section 1635."[57]

Here's my tally, in brief:

A. The Third, Fourth, and Eleventh Circuits hold that notifying a creditor in writing within three years of the consummation of the transaction is sufficient to exercise the right to rescind.

B. The First, Sixth, Eighth, Ninth, and Tenth Circuits hold that a borrower must file a lawsuit within three years of the consummation of the transaction to exercise the right to rescind.

The major difference between the Third, Fourth, and Eleventh Circuits and the First, Sixth, Eighth, Ninth, and Tenth Circuits is that the latter group departs from the former group's straightforward interpretation of the statutory text and its implementing regulation, instead requiring that a borrower must file a lawsuit within three years to exercise the right to rescind.

Courts versus the Bureau

The First Circuit, though not yet considering this issue in the context of enforcing a rescission, has held that a notification within the three-year period did not effectuate a rescission without suit being filed within the three years. This circuit would base its position on another case, previously adjudged by them, in a kind of sleight-of-hand substitution of "court" with "arbitrator."

In this other case, Large v. Conseco Finance Servicing Corp. ("Large"),[58] the First Circuit reached the conclusion in enforcing an arbitration provision in the loan agreement in which a homeowner had attempted to rescind via written notice to the creditor within three years. In that litigation, the court rejected the homeowner's argument that the letter notifying the creditors of the intention to rescind "in fact rescinded the transaction the moment it was mailed."[59] The First Circuit instead held that "neither Section 1635 nor Regulation Z "establishes that a borrower's mere assertion of the right of rescission has the automatic effect of voiding the contract."[60] Rather, the court suggested, the "natural reading of this language is that the security interest becomes void when the [borrower] exercises a right to rescind that is available in the particular case, either because the creditor acknowledges that the right of rescission is available or because the appropriate decision maker has so determined."[61] The court further inferred that, if "a lender disputes a borrower's purported right to rescind," as was the case in Large, "the designated decision maker," the arbitrator, "must decide whether the conditions for rescission have been met," and, until such a decision is made "the [borrower] ha[s] only advanced a claim seeking rescission." Thus, the court was holding that written notice alone does not exercise the right to rescind unless "the grounds for rescission have been established, either by agreement or by an appropriate decision maker."[62]

I think it is worth noting that in the Eighth Circuit's previous holding, in Keiran v. Home Capital, Inc., the court had surveyed the split among the other circuits before joining the Ninth and Tenth Circuits in holding that a plaintiff seeking rescission must file suit, as opposed to merely giving "the bank notice, within three years, in order to preserve the right to rescind under Section 1635(f)."[63] The court based its decision by extrapolating from another case, the aforesaid Beach case,[64] to infer that, "to accomplish rescission within the meaning of [Section] 1635(f), the [borrower] must file a rescission action in court."[65] To put it bluntly: the court seems to have disregarded the interpretation of Regulation Z, already provided by the Consumer Financial Protection Bureau ("Bureau"). The court suggested that "while Regulation Z sets forth one of the things [a borrower] must do to rescind the loan – give written notice to the bank – it does not set forth the entirety of the things necessary to accomplish rescission."[66] As a result, the court imposed the additional burden on the borrower to file suit within three years.

Let me be clear: the Bureau's position is unequivocally in favor of written notice to effectuate rescission, as stated in an amicus brief in other litigation (viz., Rosenfield v. HSBC Bank, USA) .[67] The Bureau has reiterated in numerous amicus briefs before appellate courts its view that a borrower need only notify a creditor to exercise the right to rescind.[68] The Bureau has confirmed that it interprets Section 1635 to require only notice to the creditor in order for the borrower to exercise the right to rescind and that "consumers are not required also to sue their lender within the three-year period provided under [Section] 1635(f)."[69]

One would think that the Bureau's interpretation in an amicus brief of its own regulation is itself entitled to deference to dispel ambiguity. After all, in another case, Chase Bank USA, N.A. v. McCoy, the court opined that "we find Regulation Z ambiguous as to the question presented, and must therefore look to the [Bureau's] own interpretation of the regulation for guidance in deciding this case." [70]

In effect, the plaintiffs can argue that the Eighth Circuit would seem to be misinterpreting the Act by its failure to afford proper regard to the Bureau's implementing Regulation Z, such reading resulting from its misapplication of its own decision in Beach. Accordingly, why would the Bureau's interpretation of Section 1635 and Regulation Z not be accepted to hold that the notice of rescission to a creditor is sufficient to exercise the right to rescind?

Section 1635

The text of Section 1635(a) provides these two caveats: (1) it creates a right of rescission, and (2) it specifies the method of its exercise. The statute indisputably provides that the borrower "shall have the right to rescind the transaction."[71] The statute further details the manner in which that right may be exercised by specifying that the borrower shall have the right to rescind "until midnight of the third business day" after the closing or the delivery of proper disclosures "by notifying the creditor, in accordance with regulations of the Bureau, of his intention to do so."[72] The clear meaning of this statutory text is that a borrower exercises his "right to rescind" a transaction "by notifying the creditor."[73]

Section 1635(f)'s text confirms that interpretation, stating that there is a "time limit for [the] exercise of [the] right," but does not restrict the manner in which that right may be exercised within that time limit.

Beyond Section 1635(a)'s affirmative statement that a borrower exercises his right to rescind by "notifying the creditor" and Section 1635(f)'s notable silence on the issue, neither section gives any indication of a further requirement that the borrower must sue within the three-year time limit. Indeed, neither section even mentions a court or legal proceedings.[74]

A sampling of some case history provides the following citations:

- "[T]he absence of any reference to causes of action or the commencement of suits in [Section] 1635 also suggests that rescission may be accomplished without a formal court filing."[75]
- "Simply stated, neither [Section] 1635(f) nor Regulation Z says anything about the filing of a lawsuit, and we refuse to graft such a requirement upon them."[76]
- "Regulation Z says nothing about filing suit."[77]

Indeed, we can construe that Section 1635 does not impose a requirement on a borrower to sue in order to exercise the right to rescind, because, in fact, the very absence of language requiring the borrower to sue is notable in a statute that elsewhere explicitly establishes legal causes of action, creating cause of action damages for violations of the Act and a statute of limitations thereto.[78]

Legislative History and Common Sense

I have taken the time to read through the legislative history on the Act's right of rescission provisions. I can draw no other conclusion than that Congress did not expect a borrower to effectuate rescission only through the intervention of courts.

There is no contest, as an initial matter, that a borrower has an unconditional right to rescind under Section 1635(a) for three days after the closing of the transaction. There is not one court anywhere, in precedent case history, holding that a borrower must file a lawsuit within three days to exercise that unconditional right. How, then, does it make sense to interpret this unconditional right to rescind – requiring only written notice, while interpreting the extended right to rescind, created by the very same clause in the very same sentence of Section 1635(a) – nevertheless also to require the filing of a lawsuit because the timeframe is extended to three years and not just the initial three days?

I outlined above the Act's procedures to unwind the loan transaction, when a borrower exercises the right of rescission. The procedures are enunciated plainly enough in Section 1635. No mention of court intervention. No mention of arbitration. No mention of an alternative timeframe to void the security interest, subject to a court's finding.

Reasonable Interpretation

Even if it could somehow be interpreted that a lawsuit is required to rescind the loan transaction, within the specified timeframe, Section 1635's procedures clearly do not contemplate how a court proceeding could be held in a timely manner.

Recall that the statute expressly states that within 20 days after receipt of a notice of rescission, the creditor must return any "money or property given as earnest money, down payment, or otherwise" and "shall take any action necessary or appropriate to reflect the termination of any security interest created under the transaction."[79] The provision specifies that those procedures of Section 1635(b) are triggered by "receipt of notice of rescission," not by a lawsuit. Moreover, the time limits established here and elsewhere in Section 1635(b) are tied to the actions of the borrower and creditor.[80] Therefore, operationally, to comply with the pleadings timeframe, the statute would be inconsistent with the established rules to commence legal action set forth in the Federal Rules of Civil Procedure for establishing times for responsive pleadings.[81]

A reasonable interpretation of Section 1635,[82] therefore, is that the notice to a creditor triggers rescission, and the default procedures of Section 1635(b) follow automatically in due course from that

notice, without requiring the initiation of a court proceeding.

If ever there were a way to flood the courts with thousands and thousands of unnecessary lawsuits, this would surely be the way to do it!

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[1] *Announcement: Amicus Brief*, ACLU, July 28, 2014, https://www.aclu.org/racial-justice/jesinoski-v-countrywide-home-loans-inc-amicus-brief

[2] *A.G. Schneiderman Leads Multistate Coalition Urging U.S. Supreme Court To Protect Consumer Rights Under The Truth In Lending Act*, July 24, 2014, http://www.ag.ny.gov/press-release/ag-schneiderman-leads-multistate-coalition-urging-us-supreme-court-protect-consumer Attorney General Schneiderman's brief, for New York, is joined by these twenty-five other states: Arizona, Arkansas, Connecticut, Delaware, Hawaii, Illinois, Indiana, Iowa, Kentucky, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Nevada, New Hampshire, New Mexico, North Carolina, Oregon, Rhode Island, Tennessee, Vermont, Washington, and West Virginia. The coalition is also joined by the District of Columbia.

[3] Supreme Court of the United States, Larry D. Jesinoski and Cheryle Jesinoski, Individuals, Petitioners, v. Countrywide Home Loans, Inc., Subsidiary of Bank of America N.A., D/B/A America's Wholesale Lender, Et Al., Respondents, On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit, 12/6/13, Docket 13-684. Parties: LARRY D. JESINOSKI AND CHERYLE JESINOSKI, Petitioners, v. COUNTRYWIDE HOME LOANS, INC., SUBSIDIARY OF BANK OF AMERICA, N.A., D/B/A AMERICA'S WHOLESALE LENDER, et al., Respondents; ALAN G. KEIRAN AND MARY JANE KEIRAN, Petitioners, v. HOME CAPITAL, INC., et al., Respondents; STEVEN J. SOBIENIAK AND VICTORIA MCKINNEY, Petitioners, v. BAC HOME LOANS SERVICING, LP, AS SUCCESSOR IN INTEREST TO COUNTRYWIDE HOME LOANS SERVICING, LP, et al., Respondents; ROCKY FUJIO TAKUSHI, INDIVIDUALLY AND AS TRUS- TEE OF THE ALBERT G. TAKUSHI REVOCABLE LIVING TRUST DATED APRIL 11, 2007, Petitioner, v. BAC HOME LOANS SERVICING, LP, et al., Respondents.

[4] 15 U.S.C. § 1635(a)

[5] Ibid

[6] 15 U.S.C. § 1635(f)

[7] Op. cit. 3, *Question Presented*

[8] To track the recent litigation, visit Scotusblog.com at http://www.scotusblog.com/case-files/cases/jesinoski-v-countrywide-home-loans-inc/

[9] The issue to be decided by the Supreme Court, as stated in the Docket summary: "Whether a borrower exercises his right to rescind a transaction in satisfaction of the requirements of the Truth in Lending Act, 15 U.S.C. § 1635, by 'notifying the creditor' in writing within three years of the consummation of the transaction, as the Third, Fourth, and Eleventh Circuits have held, or must instead file a lawsuit within three years of the consummation of the transaction, as the First, Sixth, Eighth, Ninth, and Tenth Circuits have held."

[10] Op. cit. 4

[11] Op. cit. 6

[12] 15 U.S.C. § 1635(a)

[13] Ibid

[14] Op. cit. 3, p 4

[15] 15 U.S.C. § 1635(b)

[16] Idem

[17] Although the Act originally extended the three-day rescission right until the creditor delivered proper disclosures and notices, whenever that might be, Congress later limited to three years the time within which a borrower may exercise the right to rescind.

[18] See Act of Oct. 28, 1974, Pub. L. No. 93-495, § 405, 88 Stat. 1500, 1517 (codified at 15 U.S.C. § 1635(f))

[19] 15 U.S.C. § 1635(f)

[20] See also Regulation Z, 12 C.F.R. § 226.23(a)(3)

[21] 12 C.F.R. § 226.23(a)(2)

[22] Op. cit. 3, source of this fact pattern.

[23] 12 C.F.R. § 226.23(b)

[24] Op. cit. 3, source of this litigation history.

[25] The court noted that it had "recently weighed in on the circuit split regarding this precise issue." Keiran v. Home Capital, Inc., 720 F.3d 721, 726-29 (8th Cir. 2013)

[26] Colloton, Circuit Judge, concurring in denial of rehearing *en banc*, United States Court of Appeals, Eighth Circuit, Jesinoski v. Countrywide Home Loans, Inc., 736 F.3d 1134 (8th Cir. 2013), decided November 13, 2013

[27] Nos. 13-684, 13-705, 13-884, Larry D. Jesinoski and Cheryle Jesinoski, Petitioners, v Countrywide Home Loans, Inc., Subsidiary of Bank of America, N.A., D/B/A America's Wholesale Lender, et al., Respondents, and other Petitioners and Respondents, On petitions for writs of certiorari to the United States of Appeals for the Eighth and Ninth Circuits, Response to Petitions for Certiorari. Certain citations will be based on, referred to, or quoted from this document.

[28] Per 15 U.S.C. § 1635(f)

[29] Op. cit. 26, p 3

[30] In this context, "tolling" means a pausing or delaying of the running of the period of time set forth by a statute of limitations

[31] Idem

[32] Thompson v. Irwin Home Equity Corp., 300 F.3d 88, 89 (1st Cir. 2002)

[33] McKenna, 475 F.3d at 421
[34] 75 Fed. Reg. 58,539, 58,547 (Sept. 24, 2010)
[35] 15 U.S.C. § 1635(b); 12 C.F.R. §§ 1026.15(d)(2), 1026.23(d)(2)
[36] 15 U.S.C. § 1635(b); 12 C.F.R. §§ 1026.15(d)(1), 1026.23(d)(1)
[37] 15 U.S.C. § 1635(b); 12 C.F.R. §§ 1026.15(d)(3), 1026(d)(3)
[38] Op. cit. 30, Thompson, 300 F.3d at 89
[39] 75 Fed. Reg. at 58,547
[40] Keiran App. 12a n. 4
[41] Large v. Conesco Finance Servicing Corp., 292 F.3d 49, 52 (1st Cir. 2002)
[42] 15 U.S.C. § 1635(g)
[43] Idem
[44] See § 1640(a)(3)
[45] See § 1635(c)
[46] See § 1635(b)
[47] Am. Compl. ¶¶ 3, 5, Dkt. 7, No. 11-cv-0474, Jesinoski v. Countrywide Home Loans, Inc. (D. Minn. July 22, 2011)
[48] Fed. R. Civ. P. 4(m): "Time Limit for Service. If a defendant is not served within 120 days after the complaint is filed, the court – on motion or on its own after notice to the plaintiff – must dismiss the action without prejudice against that defendant or order that service be made within a specified time. But if the plaintiff shows good cause for the failure, the court must extend the time for service for an appropriate period."
[49] Op. cit. 26, p 13
[50] Op. cit. 26, p14
[51] Op. cit. 26, p 16
[52] Keiran App. 11a
[53] Idem
[54] Op. cit. 3, pp 9-18. Where possible, my tally is based on, refers to, or quotes from this section of this document.
[55] 523 U.S. 410, 412 (1998)
[56] Keiran v. Home Capital, Inc., 720 F.3d 721, 728 (8th Cir. 2013)
[57] Op. cit. 3, p 10
[58] Large v. Conseco Finance Servicing Corp., 292 F.3d 49 (1st Cir. 2002)
[59] Idem at 54
[60] Idem
[61] Idem at 54-55
[62] Idem
[63] Keiran v. Home Capital, Inc., 720 F.3d 726-28 (8th Cir. 2013)
[64] Beach v. Ocwen Federal Bank, 523 U.S. 410, 412 (1998)
[65] Id. at 728
[66] Idem
[67] Brief of the Consumer Financial Protection Bureau as Amicus Curiae in Support of Plaintiff-Appellant and Reversal, Rosenfield v. HSBC Bank, USA, 681 F.3d 1172 (10th Cir. 2012) (No. 10-1442) (filed March 26,
2012), 2012 WL 1074082
[68] Idem
[69] Idem at *14
[70] Chase Bank USA, N.A. v. McCoy, 131 S. Ct. 871, 880 (2011)
[71] 15 U.S.C. § 1635(a)
[72] Idem
[73] Idem
[74] Op. cit. 3, p 21
[75] Sherzer v. Homestar Mortgage Services, 707 F.3d 255 at 260 (3d Cir. 2013)
[76] Gilbert v. Residential Funding LLC, 678 F.3d 271 at 277 (4th Cir. 2012)
[77] Keiran v. Home Capital, Inc., 720 F.3d 726-28 at 728 (8th Cir. 2013)
[78] 15 U.S.C. § 1640
[79] 15 U.S.C. § 1635(b)
[80] Keiran v. Home Capital, Inc., 720 F.3d 726-28 at 733 (8th Cir. 2013)
[81] Fed. R. Civ. P. 12(a): "Time to Serve a Responsive Pleading. (1) In General. Unless another time is specified by this rule or a federal statute, the time for serving a responsive pleading is as follows: (A) A defendant must serve an answer: (i) within 21 days after being served with the summons and complaint; or (ii) if it has timely waived service under Rule 4(d), within 60 days after the request for a waiver was sent, or within 90 days after it was sent to the defendant outside any judicial district of the United States."
[82] Op. cit. 3, p 22

Labels: Consumer Financial Protection, Jesinoski v. Countrywide, Right of Rescission, TILA, Truth in Lending Act

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