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Tuesday, January 13, 2015

TILA versus TILA: Resolved in Favor of Consumers

On September 2, 2014, I published an article, entitled "TILA versus TILA: Rescission by Notice or Lawsuit." To read the website article, please visit HERE. If you want the PDF version, please visit HERE or HERE. The US Supreme Court has just ruled today in favor of the consumer![1]

The litigation I discussed, specifically, was Jesinoski v. Countrywide Home Loans, Inc. Jesinoski v. Countrywide cited Section 1635 of the Truth in Lending Act ("Act") to present the foundation upon which the deliberations were to proceed. My article took up a review of the central question that was on its way to the US Supreme Court for adjudication in this case:

> "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."

At issue in the subject case was the question of notification by the borrower to the lender regarding rescission within a required time frame itself; to wit, 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?

It may seem that the answer is pretty much clear, based on the actual verbiage of the applicable provision in the Act. But, as the saying goes, that's what courts are for!

Several Circuit Courts had considered the question in tangentially related litigation brought by other plaintiffs, with differing decisions, such cases brought by plaintiff's with certain claims somewhat similar to Jesinoski. The Jesinoski litigation has steadily moved up the chain of command until it recently arrived at the U. S. Supreme Court. The First, Sixth, Eighth, Ninth, and Tenth Circuit Courts refused to recognize that all these plaintiffs had validly rescinded their mortgage. Regarding the Jesinoskis, the Eight Circuit 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. The case moved to the US Supreme Court.

Here was my tally in September 2014:

- The Third, Fourth, and Eleventh Circuits held that notifying a creditor in writing within three years of the consummation of the transaction is sufficient to exercise the right to rescind.
- The First, Sixth, Eighth, Ninth, and Tenth Circuits held 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 was that the latter group departed 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.

This litigation harkens 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 was claimed, Countrywide failed to furnish them all the information and disclosures required by the Act. On February 23, 2007, petitioners Larry and Cheryle Jesinoski refinanced the mortgage on their home by borrowing $611,000 from respondent Countrywide Home Loans, Inc.

Exactly three years later, on February 23, 2010, the Jesinoskis mailed respondents a letter purporting to rescind the loan. Respondent Bank of America Home Loans replied on March 12, 2010, refusing to acknowledge the validity of the rescission. On February 24, 2011, the Jesinoskis filed a lawsuit in Federal District Court seeking a declaration of rescission and damages.

The Jesinoski's position can be briefly stated thus:

> 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." 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.

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 the Jesinoski's right to rescind.

The respondent's view, which was affirmed by the Eight Circuit, was that a borrower can exercise the rescission right pursuant to the Act[2] only by filing a lawsuit within three years of the date the loan was consummated. Therefore, the Jesinoskis' complaint, filed four years and one day after the loan's consummation, was ineffective.

The respondents claimed that in loan transactions 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. Instead, the borrower must file suit within the three-year statute of repose. According to the respondents, there is a common law question in these cases that is "narrower than the question presented in each of the petitions." For the respondents, the question was not whether a borrower in all circumstances is required to file suit within the three-year statute of repose prescribed by 15 USC § 1635(f) in order to rescind a mortgage loan. Instead, the question presented should really be:

> "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]?'" (My emphasis.)

Where did the Consumer Financial Protection Bureau ("Bureau") come down on this issue? The Bureau's position was unequivocally in favor of written notice to effectuate rescission, as stated in an amicus brief in other litigation.[3] 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. The Bureau had 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)."

My own analysis led to the conclusion that a reasonable interpretation of Section 1635, 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. And I quipped that 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!

Now the Supreme Court has weighed in and dispelled the fog of this long-winding litigation. Justice Scalia delivered the opinion for a unanimous Court.

The Court ruled that:

> "a borrower exercising his right to rescind under the Act need only provide written notice to his lender within the 3-year period, not file suit within that period. Section 1635(a)'s unequivocal terms - a borrower "*shall have the right to rescind . . . by notifying the creditor . . . of his intention to do so*" (emphasis added in the original) - leave no doubt that rescission is effected when the borrower notifies the creditor of his intention to rescind."

Furthermore, this conclusion is not altered by § 1635(f), which states:

> "when the right to rescind must be exercised, but says nothing about how that right is exercised."

Nor does § 1635(g) support respondents' view that rescission is necessarily a consequence of judicial action, which states that:

> "in addition to rescission the court may award relief . . . not relating to the right to rescind" And the fact that the Act modified the common-law condition precedent to rescission at law, see § 1635(b), hardly implies that the Act thereby codified rescission in equity."

So, what about the respondent's interpretations of the applicable statute and law, as set forth in the litigation?

The Supreme Court found that the Eight Circuit's holding, which supported the respondent's position, was an "error", because it relied on a misreading of Section 1635(a). According to the Court's interpretation of the applicable statute, borrowers have an "unconditional right" to rescind for three days, after which they may rescind only if the lender failed to satisfy the Act's disclosure requirements. But this right to rescind does not last forever. Even if a lender never makes the required disclosures, the "right of rescission shall expire three years after the date of consummation of the transaction or upon the sale of the property, whichever comes first." The Eighth Circuit's affirmance in the present case rested upon its holding in Keiran v. Home Capital, Inc.[4] That case held that, unless a borrower has filed a suit for rescission within three years of the transaction's consummation, § 1635(f) extinguishes the right to rescind and bars relief.

To reiterate, Section 1635(a) explains in "unequivocal terms" how the right to rescind is to be exercised:

> "It provides that a borrower "*shall have the right to rescind . . . by notifying the creditor, in accordance with regulations of the Board, of his intention to do so*" (emphasis added in original). The language leaves no doubt that rescission is effected when the borrower notifies the creditor of his intention to rescind. It follows that, so long as the borrower notifies within three years after the transaction is consummated, his rescission is timely. The statute does not also require him to sue within three years."

The respondents rebuttal to this was not to dispute § 1635(a), which requires only written notice of rescission. In fact, they conceded that written notice suffices to rescind a loan within the first three days after the transaction is consummated. They even conceded that written notice suffices after that period if the parties agree that the lender failed to make the required disclosures. But the respondents argued that if the parties dispute the adequacy of the disclosures - and thus the continued availability of the right to rescind - then written notice does not suffice. To me this seemed to be advancing a position that is not supported by the text at all, because in Section 1635(a) nowhere is there a distinction between *disputed* and *undisputed rescissions*, much less that a lawsuit would be required for the latter.

Having tried this gambit, the respondents went for arguing that the phrase "award relief" "in addition to rescission" – which is a feature of § 1635(g) – confirms that rescission is a consequence of judicial action. However, § 1635(g) states merely that, "[i]n any action in which it is determined that a creditor has violated this section, in addition to rescission the court may award relief under section 1640 of this title for violations of this subchapter not relating to the right to rescind." Thus the respondents argued that the phrase "award relief " "in addition to rescission" confirms that rescission is a consequence of judicial action. But the Court observed that the fact that this can be a consequence of judicial action when § 1635(g) is triggered in no way suggests that it can only follow from such action. Actually, § 1635(g) makes clear that a court may not only award rescission and thereby relieve the borrower of his financial obligation to the lender, but may also grant any of the remedies available under §1640 (including statutory damages). Thus, § 1635(g) "has no bearing upon whether and how borrower-rescission under § 1635(a) may occur."

Conclusively, according to the Court, the fact that it can be a consequence of judicial action when § 1635(g) is triggered *in no way suggests that it can only follow from such action*.

The respondent's common law argument was essentially demolished because,although it is true "that rescission traditionally required either that the rescinding party return what he received before a rescission could be effected (rescission at law), or else that a court affirmatively decree rescission (rescission in equity),"[5] it is also true that the Act "disclaims the common-law condition precedent to rescission at law that the borrower tender the proceeds received under the transaction."[6] But the negation of rescission-at-law's tender requirement hardly implies that the Act codifies rescission in equity.

So the Court stated emphatically that "nothing in our jurisprudence, and no tool of statutory interpretation, requires that a congressional Act must be construed as implementing its closest common-law analogue."[7] The conclusion reached, then, was that the clear import of § 1635(a) is that "a borrower need only provide written notice to a lender in order to exercise his right to rescind." To the extent § 1635(b) alters the traditional process for unwinding such a unilaterally rescinded transaction, this is simply a case in which statutory law modifies common-law practice.

We now have a clear and unambiguous position on this matter by the Supreme Court.

The Jesinoskis mailed respondents written notice of their intention to rescind within three years of their loan's consummation. Because this is all that a borrower must do in order to exercise his right to rescind under the Act, the Eighth Circuit court erred in dismissing the complaint.

[1] Jesinoski v Countrywide Home Loans, Inc., 729 F. 3d 1092, reversed and remanded, Argued November 4, 2014 - Decided January 13, 2015
[2] See 15 USC § 1635(a), (f)
[3] Rosenfield v. HSBC Bank, USA
[4] §1635(f). The Eighth Circuit's affirmance in the present case rested upon its holding in Keiran v. Home Capital, Inc., 720 F. 3d 721, 727–728 (2013). Please see my cited article for further analysis.
[5] 2 D. Dobbs, Law of Remedies §9.3(3), pp. 585–586 (2d ed. 1993)
[6] 15 U. S. C. § 1635(b)
[7] Cf. Astoria Fed. Sav. & Loan Assn. v. Solimino, 501 U. S. 104–109 (1991)


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

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