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## Truth-In-Lending Act loan rescission claims: Filing a suit is unnecessary to rescission

On January 13, 2015, the United States Supreme Court held that a borrower can exercise rescission under the Truth-in-Lending Act (TILA) without filing a lawsuit. Rather, the borrower need only provide written notice of rescission to the lender. This decision, *Jesinoski v. Countrywide Home Loans, Inc.*, No. 13-684, 574 U.S. \_\_\_ (Jan. 13, 2015), will make it easier for residential borrowers to pursue rescission claims. The case may, therefore, increase the number of rescission claims that lenders face and eliminate a defense that lenders might have otherwise been able to pursue.

### TILA rescission explained

TILA is a federal law intended to assure a meaningful disclosure of credit terms so that the consumer will be able to compare the various credit terms available and avoid the uninformed use of credit. 15 U.S.C. § 1601; *see also Carmichael v. The Payment Center, Inc.*, 336 F.3d 636, 639 (7th 2003).

TILA rescission claims have been available to consumers for decades, but became prevalent in the wake of the real estate market collapse. At that time, borrowers facing default began filing an unprecedented number of claims in effort to delay foreclosure and leverage loan modification negotiations. A common claim pursued is that the lender must rescind the loan under TILA due to the bank's failure to properly disclose the material terms of the loan.

Notably, TILA is not a law that provides borrowers the opportunity to undo legitimate transactions that have been accurately disclosed years after the fact when the borrower is unable to make loan payments per their agreement. Accordingly, while TILA contemplates that a borrower may rescind a transaction pursuant to the "buyer's remorse" provision set forth in § 1635, the right to rescind lasts only three days after closing. *See* 15 U.S.C. § 1635(a). Creditors are required to inform borrowers that the right to rescind exists. If a creditor fails to give the required rescission notice, the three-day rescission deadline is not triggered and a borrower may instead have three years to rescind the loan. 15 U.S.C. § 1635(f); 12 C.F.R. § 226.23(a)(3).

### The *Jesinoski* decision

*Jesinoski* addresses the manner in which a borrower rescinds. The Jesinoskis refinanced their home loan on February 23, 2007. Three years later, on February 23, 2010, they mailed a letter to their lender purporting to rescind the loan under TILA. The lender refused to acknowledge rescission. The Jesinoskis then waited a year to commence suit, first filing a claim for TILA rescission on February 24, 2011.

The Jesinoskis' lender filed a successful motion to dismiss on the grounds that the suit was untimely. The federal district court held that TILA requires a borrower seeking rescission to file a lawsuit within three years of the refinance, not simply send a notice of rescission. The Eight Circuit Court of Appeals affirmed the dismissal, but the Supreme Court disagreed with that decision. As held by the high court, TILA requires only that the borrower “notify[] the creditor, in accordance with regulations of the Board, of his intention to [rescind].” TILA does “not also require him to sue within three years.”

## What should a lender do?

In light of *Jesinoski*, lenders should consider letters seeking rescission of a loan governed by TILA as an exercise of the rescission right. There is no need for the borrower to also file suit.

Options for lenders upon receipt of a rescission notice include notifying the borrower that it disputes the right to rescind, demanding that the borrower repay the loan balance in furtherance of the rescission request, or starting a lawsuit to adjudicate the rescission right.

Ultimately, and regardless of what happens after the notice, *Jesinoski* makes it fairly easy for borrowers to rescind under TILA and creates a likelihood that banks will see far more rescission notices from borrowers.

Lenders in receipt of a TILA rescission demand should consider at least the following defenses, both in their response to the borrower and, if need be, in court:

- **All disclosures comply with TILA requirements.** This is an obvious defense but also the most important one, worth making at the start of a brief and supporting it by the signed loan documents.
- **TILA does not apply to the loan at issue.**
  - TILA only applies to “consumer credit transactions” which are defined as transactions in “which the money, property, or services which are the subject of the transaction are primarily for personal, family, or household purposes.” 15 U.S.C. § 1602(h).
  - TILA does not apply to credit transactions involving credit for business or commercial purposes. 15 U.S.C. § 1603(1).
  - Construction loans are exempt from TILA.
  - Purchase money loans (opposed to refinance loans) are exempt from TILA.
  - Agricultural purpose loans are exempt from TILA. 15 U.S.C. § 1603(1).
  - Same creditor refinance exemption: if, in the course of a refinance, the lender advanced new money beyond the original loan balance, only the new advance is subject to TILA rescission. 12 C.F.R. § 226.23(f)(2); Official Staff Commentary § 226.23(f)(4). If the lender did not advance any new money, the loan is fully exempt from TILA. 15 U.S.C. § 1635(e).

- **Inability to tender.** If a borrower cannot pay the loan proceeds back to the lender, the right to rescission is moot. Rescission does not give borrowers a free house. Rather, it unwinds the loan and puts the parties back in the position they would have been in had the loan never been entered, meaning the lender gets its loan money back. Courts have dismissed TILA rescission claims on the grounds that the borrower (often in long-term default) cannot demonstrate an ability to repay the loan.
- **The claim is time barred.** If it is more than 3 days from closing (15 U.S.C. § 1635(a)), and disclosures were proper, the right to rescind has expired. While a borrower may dispute the propriety of the disclosures, the lender should assert that the 3-day statute of limitations governs if it believes proper disclosures were made. Moreover, TILA requires that consumers pursue rescission within 3 years, even if a creditor failed to give the Notice of Right to Cancel form or provided inaccurate disclosures (15 U.S.C. § 1635(f); 12 C.F.R. § 226.23(a)(3)). Often claims are pursued well beyond the 3-year deadline and, regardless of TILA disclosure compliance, are time-barred.
- **Rebuttable presumption.** A borrower signing the Notice of Right to Cancel form required by TILA creates a rebuttable presumption of proper receipt. 15 U.S.C. § 1635(c).
- **TILA does not apply to the fees cited by plaintiff.** See 15 U.S.C. § 1605(a) and (e) for finance charges that must be disclosed and the exempt fees that do not require disclosure.

*The information contained herein is based on a summary of legal principles. It is not to be construed as legal advice. Individuals should consult with legal counsel before taking any action based on these principles to ensure their applicability in a given situation.*

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