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Supreme Court Clarifies Borrower's Rescission Rights Under the Truth in Lending Act

On January 13, 2015, the U.S. Supreme Court unanimously decided that a borrower may simply provide written notice to a lender to exercise its right to rescind under the Truth in Lending Act (TILA). It need not have actually filed suit within the statutory three year period. The Court's decision in *Jesinoski v. Countrywide Home Loans, Inc.* clarified borrowers' rescission right under TILA and resolved a split between Circuits.

TILA not only requires that lenders provide borrowers with specific forms and disclosures, but it also provides borrowers with statutory rights when lenders fail to follow these requirements. When a borrower grants a security interest in its principal dwelling in a consumer non-purchase money mortgage loan transaction, TILA provides the borrower with the right to rescind the transaction in certain circumstances, and requires that the lender provide the borrower with written notice of this right to rescind. To exercise this right, a borrower must provide the lender with notification of its intent to rescind within three business days from closing, delivery of notice of the right to rescind, or delivery of all material disclosures, whichever occurs last.

Borrower's right to rescind does not last forever. If a lender fails to meet TILA's disclosure requirements, a borrower's right to rescind must be exercised within three years after closing of the loan or sale of the property, whichever occurs first. The Sixth, Eighth, Ninth, and Tenth Circuits have interpreted the three-year time limit as extinguishing the right to rescind and barring relief when a borrower fails to file suit within the time limit. The Supreme Court overturned this interpretation in *Jesinoski*.

In *Jesinoski*, borrowers mailed a letter to their lender expressing their intent to rescind a loan. They mailed the letter exactly three years after refinancing their mortgage with the lender. However, borrowers did not file suit for rescission and damages until four

years and one day after the loan was made. Because borrowers did not file suit within three years, the lower court held that borrowers did not effectively exercise their right to rescission. Notably, the parties conceded that a written notice is sufficient to exercise the rescission right if the lender fails to make the required disclosures. But the parties disagreed on whether written notice was sufficient to exercise the rescission right when there is a dispute regarding the adequacy of the disclosures.

The Supreme Court clarified that the three-year time limit under TILA merely provides *when* the right to rescind must be exercised. The Court further explained that the right to rescind is exercised by the borrower notifying the creditor of its intent to rescind. “So long as the borrower notifies [the creditor] 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 Court did not distinguish between disputed or undisputed rescissions. If a lender makes disclosures, but these disclosures are not adequate according to the requirements of TILA, the borrower merely needs to provide written notice to the lender within three years of the origination of the loan to exercise its rescission right.

When borrowers exercise their right to rescission, TILA provides lenders with a process and timeline for effectuating the rescission. If a lender does not comply with this process and wishes to challenge a borrower’s right to rescind, the lender can file suit against the borrower to prove that the borrower received the required disclosures. But lenders should be careful when considering this approach. A lender is subject to civil liability for failure to comply with *any* requirement under TILA, including *any* inadequacy in lender’s disclosure. Thus a lender’s suit challenging the rescission notice, without proper due diligence of the files, may inadvertently expose the institution to statutory damages. While it is clear that TILA’s statute of limitations does not bar a borrower from asserting a violation of TILA as a “defense” to an action to collect debt, it is not clear what statute of limitation, if any, applies when the borrower provides notice of rescission but fails to follow through and file suit.

A well-written *amici curiae* brief was submitted by the leading trade associations for financial institutions. This brief noted that unscrupulous borrowers could utilize the notice, versus lawsuit, requirement to stall a meritorious foreclosure action or to gain improper leverage on the eve of a bankruptcy filing. While the Court's ruling in *Jesinoski* will benefit a few borrowers, it will increase costs for all other consumer borrowers. But the Supreme Court's decision was not driven by the economic merits of arguments advanced by the lending industry – instead, it was based on a bare-bones reading of TILA's language as enacted. This suggests that a legislative fix to the statute's language might be prioritized for action by Congress. In the meantime, however, the *Jesinoski* decision creates the risk that future dispositions of real estate collateral may be unexpectedly entangled, as even the most careful review of public land records will not reveal the delivery of a private rescission notice from a borrower. Thus current best practices should be expanded for purchasers or assignees of loans subject to TILA to require predecessor entities to certify that no qualifying rescission notice has ever been communicated from the borrower in possession.

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