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The Truth in Lending Act: The Survival of a Borrower's Claim for Rescission

Francesco Ferrantelli Jr.

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I. Introduction

In the years preceding the financial crisis of 2008, the prevalence of mortgage lenders issuing home equity loans to individuals who, for many possible reasons, could not repay the loans, created a housing bubble that eventually burst.[2] One of these loans was given to Kathryn McOmie-Gray, who closed a first deed trust loan in 2006 and was provided with various disclosure documents to sign pursuant to the Truth In Lending Act (TILA).[3] While these documents informed Ms. McOmie-Gray of her right to rescind the transaction, the lender failed to inform her of the date on which this right to rescind would expire.[4] This failure resulted in the disclosure being defective under the Truth in Lending Act and entitling Ms. McOmie-Gray to rescission.[5] Two years later, Ms. McOmie-Gray sought to exercise her rescission right by notifying the lender of her intention to rescind.[6] The bank, however, refused to honor the rescission and instead began a year-long negotiation regarding the loan terms.[7] After negotiations failed, Ms. McOmie-Gray finally filed a claim to enforce the rescission, but the claim was dismissed by the court as untimely.[8] The court found that because the claim was filed

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[2] Jeff Sovern, *Help for the Perplexed Home Buyer*, THE NEW YORK TIMES, July 19, 2012, *available at* http://www.nytimes.com/2012/07/19/opinion/a-guide-for-the-new-mortgage-form.html?_r=0 ("During the housing bubble, countless borrowers took on mortgages they could not repay.").

[3] McOmie-Gray v. Bank of America Home Loans, 667 F.3d 1325, 1326 (9th Cir. 2012). The facts of *McOmie-Gray* as reproduced in this section are taken from the opinion of the court which, as the court was ruling upon a motion to dismiss, accepted the plaintiff's allegations as true.

[4] *Id.*

[5] 15 U.S.C. § 1635(a) (2006); 12 C.F.R. § 226.23(b) (2011).

[6] *McOmie-Gray*, 667 F.3d at 1326.

[7] *Id.*

[8] *Id.*

over three years after the loan was created, it was barred under TILA.[9] The court precluded relief even though Ms. McOmie-Gray exercised the right to rescind by notifying the lender a year earlier, in accordance with the statutory and regulatory requirements.[10] In essence, the bank was able to avoid rescission liability for its own TILA violation by delaying and negotiating with Ms. McOmie-Gray until the statutory time limit expired.[11]

The Truth In Lending Act[12] requires lenders to make a number of disclosures to consumers before finalizing loans, in order to promote the informed use of credit and to protect consumers against deceptive lender practices.[13] Though the Act was originally passed in 1968, the surge in foreclosure filings following the burst of the mortgage bubble in 2008 has brought TILA's emphasis on disclosure to the forefront of policymaking.[14] This is because a significant cause of the mortgage crisis is considered to be the issuance of loans to borrowers who simply did not understand the terms of the loans they were taking on.[15] Thus, disclosure requirements are seen as an essential tool to protect consumers from abusive practices by the lending industry and to avoid another mortgage bubble.[16]

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[9] McOmie-Gray v. Bank of America Home Loans, 667 F.3d 1325, 1326 (9th Cir. Feb. 8, 2012); 15 U.S.C. § 1635(f).
[10] *McOmie-Gray*, 667 F.3d at 1326; 15 U.S.C. § 1635(a); 15 U.S.C. § 1635(f) (2006); 12 C.F.R. § 226.23(a)(2).
[11] *McOmie-Gray*, 667 F.3d at 1326.
[12] 15 U.S.C. §§ 1601 *et seq.*(2006).
[13] 15 U.S.C. 1601(a) § (2006) ("It is the purpose of this title 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."); *see also* Chase Bank USA, NA v. McCoy, 131 S. Ct. 871, 874-75 (2011) (quoting 15 U.S.C. § 1601(a)) ("Congress passed TILA to promote consumers' 'informed use of credit' by requiring 'meaningful disclosure of credit terms'").
[14] Les Christie, *Foreclosures up a record 81% in 2008*, CNN MONEY (Jan. 15, 2009, 3:48 AM), http://money.cnn.com/2009/01/15/real_estate/millions_in_foreclosure/index.htm; Jeff Sovern, *Preventing Future Economic Crises Through Consumer Protection Law or How the Truth in Lending Act Failed the Subprime Borrowers*, 71 OHIO ST. L.J. 761 (2010).
[15] Richard Gandon, UNDERSTANDING THE MORTGAGE MELTDOWN WHAT HAPPENED AND WHO'S TO BLAME, http://www.moneymatters101.com/mortgage/meltdown.asp;
[16] LEARN ABOUT THE BUREAU, http://www.consumerfinance.gov/the-bureau/ ("An informed consumer is the first line of defense against abusive practices.").

In addition to mandating disclosure requirements, TILA also provides an important substantive right for the consumers who do not receive adequate disclosures, for loans secured by a principal dwelling: the right to rescind the transaction.[17] As foreclosure filings increased during the financial crisis of 2008, the number of rescission cases also increased.[18] Rescission has become an effective tool for borrowers seeking to protect their homes against lenders who, in the lead-up to the financial crisis, engaged in abusive or deceptive credit practices by failing to provide required disclosure forms.[19] For borrowers who have taken on loans they cannot repay due to inadequate lender disclosures, rescission is often the most powerful, and sometimes the sole, remedy.[20]

TILA provides a general three-day period for a borrower to rescind the transaction, which is exercised by notifying the lender – when rescission is exercised within this three-day period, it is known as "buyer's remorse" rescission.[21] If required disclosures are never provided, under 15 U.S.C. § 1635(f) (hereinafter "§ 1635(f)") the right of rescission extends to three years after the close of the transaction or sale of the property.[22] While it is clear that a borrower must simply notify the lender to exercise the three-*day* buyer's remorse rescission, the method of exercising rescission during the extended three-*year* rescission period under § 1635(f) is less clear because that specific subsection of the statute is silent as to the method of exercising rescission.[23] The Supreme Court has not provided any guidance on this issue. In *Beach v. Ocwen Fed. Bank,* the

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[17] 15 U.S.C. § 1635.
[18] Carter Dougherty, *Banks Push Fed to Curb Borrowers' Right to Rescind Mortgages*, BLOOMBERG.COM (Dec. 16, 2010 12:01am), *available at* http://www.bloomberg.com/news/2010-12-16/fed-mortgage-recission-plan-sparks-fight-between-lenders-consumer-groups.html (citing an estimate from Kathleen Day, spokeswoman for the Center for Responsible Lending, estimating "thousands" of rescission cases pending due to the economic crisis).
[19] Editorial, *The Fed and Foreclosures*, THE NEW YORK TIMES, (November 29, 2010), *available at* http://www.nytimes.com/2010/11/29/opinion/29mon2.html.
[20] *Id.* (describing rescission as "the most effective legal tool that borrowers have to fight foreclosures.").
[21] 15 U.S.C. § 1635(a); Jacob Werrett, *Achieving Meaningful Mortgage Reform*, 42 CONN. L. REV. 319, 337 (2009).
[22] 15 U.S.C. § 1635(f) (2006).
[23] 15 U.S.C. § 1635(f). The accompanying regulation states that a borrower exercises rescission the same way under § 1635(f) as under § 1635(a), but this has not been enough to allay the confusion among the circuits. *See e.g.*, McOmie-Gray v. Bank of America Home Loans, 667 F.3d 1325 (9th Cir. Feb. 8, 2012).

Court described § 1635(f)'s as a strict bar on claims filed *outside* the three year period, but the Court did not address the actual method of properly exercising rescission *within* the three-year period.[24]

While the statute,[25] accompanying regulation,[26] and even the model disclosure forms[27] all suggest that a borrower exercises rescission by notifying the lender, a dispute has developed among the circuits concerning how exactly the consumer may satisfy the extended three year limit for exercising rescission. Many courts have correctly concluded that a consumer satisfies the time limit by notifying the lender of rescission in accordance with the statute and regulations. These courts have found that, as the statutory and regulatory language indicates, § 1635(f) only limits a borrower's right to assert rescission, and does not contain a filing requirement.[28] However, the majority of courts, often relying upon the Supreme Court's decision in *Beach*, have read into the statute that a borrower must also file a lawsuit within three years to avoid extinguishment of the rescission right.[29] Ms. McOmie-Gray's story is typical of the situation many borrowers have found themselves in following the recent trend by the Courts of Appeals reading a filing requirement into the statute. Instead of rescission remaining a powerful remedial tool for borrowers to use without judicial intervention,[30] these courts have unfortunately shifted the power of rescission into the hands of the banks that can, as they did to Ms. McOmie-Gray,

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[24] Beach v. Ocwen Fed. Bank, 523 U.S. 410 (1998); *See* discussion *infra* Part III.B.
[25] 15 U.S.C. § 1635(a), (f).
[26] 12 C.F.R. § 226.23(a)(2) (2011).
[27] 12 C.F.R. § 226, app. H-8 (2011).
[28] *See e.g.*, Gilbert v. Residential Funding LLC, 678 F.3d 271 (4th Cir. N.C. 2012); In re Hunter, 400 B.R. 651 (Bankr. N.D. Ill. 2009); Barnes v. Chase Home Fin., LLC, No. 11-cv-142, 2011 WL 4950111 10 (D. Or. Oct. 18, 2011); Johnson v. Long Beach Mortg. Loan Trust, 451 F. Supp. 2d 16 (D.D.C. 2006)).
[29] *See e.g.*, Rosenfield v. HSBC Bank, USA, 681 F.3d 1172 (10th Cir. Colo. 2012); McOmie-Gray v. Bank of America Home Loans, 667 F.3d 1325 (9th Cir. Feb. 8, 2012); Williams v. Wells Fargo Home Mortg., Inc., 410 Fed. Appx. 495 (3d Cir. Pa. 2011); Geraghty v. BAC Home Loans Serv. LP, No. 11-336, 2011 WL 3920248 (D. Minn. Sept. 7, 2011); Bradford v. HSBC Mortg. Corp., 799 F. Supp. 2d 625 (E.D. Va. 2011); DeCosta v. U.S. Bancorp, No. 10-0301, 2010 WL 3824224 (D. Md. Sept. 27, 2010)).
[30] Belini v. Washington Mut. Bank, FA, 412 F.3d 17, 25 (1st Cir. 2005) ("[S]ection 1635 is written with the goal of making the rescission process a private one, worked out between creditor and debtor without the intervention of the courts.").

stonewall until the statutory time period expires even after the borrower makes the intent to rescind clear.

This comment addresses the unresolved circuit split over what a borrower must do to satisfy the three year time limitation for rescission under TILA. Part II provides an overview of TILA and the history of its passage, and details the statutory mechanism for rescission under TILA and the accompanying regulations. Part III describes the recent circuit split regarding TILA's rescission requirements and provides summaries of the reasoning in the most recent Courts of Appeals decisions. In Part IV, this Comment argues for an interpretation of §1635(f) that will protect borrowers without overburdening lenders. This Comment concludes that § 1635(f) and its accompanying regulation must be read plainly, to only require borrowers to notify the lender to exercise rescission, and proposes solutions to effect that outcome uniformly throughout the circuits. Courts that have read a filing requirement into the statute have misread the statute, misinterpreted Supreme Court precedent, and misunderstood important policy implications.

II. Overview of Rescission under the Truth In Lending Act

This section provides a brief background of the Truth in Lending Act and contextualizes its passage and major subsequent amendments. After contextualizing TILA, this section then provides of overview of the rescission remedy provided by the statute. This overview includes a detailing of the statutory rescission procedure as well as an explanation of the actual legal effect of rescission.

A. Background of the Truth In Lending Act

In 1968 President Johnson signed the Consumer Credit Protection Act, which included the Truth In Lending Act (TILA).[31] TILA was passed as one of the later legislative achievements of President Johnson's Great Society agenda, and its passage is now considered to be the "birth of modern consumer legislative activism."[32] By its own terms, the goal of TILA is to assure meaningful disclosures of credit terms in consumer credit transactions.[33] The purpose of this goal is twofold: so that consumers may avoid the uninformed use of credit, and to protect consumers from inaccurate and unfair practices related to credit.[34] In passing TILA, Congress believed that a meaningful disclosure of credit terms would also promote economic stability and competition.[35]

In addition to the stated goals of TILA, the legislation has always been understood as a remedial consumer protection statute.[36] Courts agree that TILA is a remedial statute because of its clear purpose to protect consumers against the uninformed use of credit offered by potentially deceptive creditors.[37] Given TILA's remedial nature, courts have also agreed that the statute should be interpreted liberally to protect consumers.[38] TILA's grant of the powerful right of

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[31] Truth in Lending Act, Pub. L. No. 90-321, 82 Stat. 146, 146 (1968) (codified as amended in 15 U.S.C. §§ 1601 *et seq.* (2012)); THOMPSON & RENUART, TRUTH IN LENDING, Vol. 1, § 1.2.1, at 4 (7th ed. 2010).
[32] Thompson & Renuart, *supra* note 31, at 5.
[33] 15 U.S.C. § 1601(a) (2006).
[34] 15 U.S.C. § 1601(a). The language pertaining to protecting consumers from unfair and inaccurate credit practices was added by Congress in a 1974 amendment. P.L. 93-495 (Oct. 28, 1974), Title III, § 302; 88 Stat. 1511.
[35] 15 U.S.C. § 1601(a).
[36] *See infra* note 26 (describing the passage of TILA as "birth of modern consumer legislative activism.")
[37] *See* Littlefield v. Walt Flanagan & Co., 498 F.2d 1133, 1136 (10th Cir. 1974) (quoting N. C. Freed Co. v. Bd. of Governors of Fed. Reserve Sys., 473 F.2d 1210, 1214 (2d Cir. 1973)) ("The Act . . . designed to prevent 'unscrupulous and predatory creditor practices' . . . is remedial"); Begala v. PNC Bank, N.A., 163 F.3d 948, 950 (6th Cir. Ohio 1998) ("We have repeatedly stated that TILA is a remedial statute."); Smith v. No. 2 Galesburg Crown Finance Corp., 615 F.2d 407, 415 (7th Cir. Ill. 1980) (finding that TILA action survives as remedial claim, and recognizing that "courts have tended to emphasize the remedial character of the statute.").
[38] *See* Bragg v. Bill Heard Chevrolet, Inc., 374 F.3d 1060, 1065 (11th Cir. 2004) ("As a remedial statute, TILA must be construed liberally in favor of the consumer."); *Begala*, 163 F.3d at 950 ("We have repeatedly stated that TILA is a remedial statute and, therefore, should be given a broad, liberal construction in favor of the consumer."); King v. California, 784 F.2d 910, 915 (9th Cir. Cal. 1986) (citation omitted) ("The courts have construed TILA as a remedial statute, interpreting it liberally for the consumer."); James v. Home Constr. Co., 621 F.2d 727, 729 (5th Cir. Ala. 1980) (citation omitted) (". . . the Truth-in-Lending Act, a remedial act, has usually been given a broad liberal interpretation since it is assumed that was the intent of Congress").

rescission to borrowers for certain loans that violate TILA's requirements is symbolic of the consumer-oriented intent of Congress that has also been recognized by the courts.[39]

TILA promotes its goals primarily by mandating disclosure requirements for various types of credit transactions. TILA contains disclosure requirements for open-end credit loans[40] (defined as "plan[s] under which the creditor reasonably contemplates repeated transactions, which prescribes the terms of such transactions, and which provides for a finance charge which may be computed from time to time on the outstanding unpaid balance"[41]) as well as closed-end credit loans,[42] which are defined as credit loans that are not open-end, such as mortgages.[43] For closed-end transactions such as mortgages, TILA requires disclosure of the identity of the creditor, the amount financed, the finance charge, APR, and more.[44] To give force to these disclosure requirements, TILA provides consumers with a powerful substantive right: the right to rescind certain loan transactions, which arises when a lender fails to provide the mandated disclosures.[45] This right applies to any consumer credit transaction secured by a principal dwelling, [46] except for residential mortgage transactions.[47]

TILA has faced numerous amendments and revisions in its over thirty-year history.[48] The first amendment affecting rescission rights occurred in 1974.[49] While the extended

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[39] 15 U.S.C § 1635 (2006); *See* THOMAS & RENUART, *supra* note 31, § 1.2.1, at 5; *see infra* notes 37, 38.
[40] 15 U.S.C. § 1637 (2006).
[41] 15 U.S.C. § 1602(j) (2006).
[42] 15 U.S.C. § 1638 (2006).
[43] 12 C.F.R. § 226.2(10) (2011); King v. California, 784 F.2d 910, 913 (9th Cir. Cal. 1986) ("[t]he transaction here would qualify .as closed-end, because it does not fit any of the definitions of an open-end credit transaction").
[44] *15 U.S.C. § 1638.*
[45] 15 U.S.C. § 1635 (2006).
[46] 15 U.S.C. § 1635. The statute does not define "principal dwelling." The official staff interpretations published by the Federal Reserve Board contain some guidance, however. 12 C.F.R. § 226, Supp. I at 226.23(a)(1)(1997) ("A consumer can only have one principal dwelling at a time . . . A vacation or other second home would not be a principal dwelling.").
[47] 12 C.F.R. 226.23(f)(1) (2011). A "residential mortgage transaction" is defined as a "transaction in which a mortgage ... is created or retained against the consumer's dwelling to finance the acquisition or initial construction of such dwelling." 15 U.S.C. § 1602(w) (2006). Thus, generally, the rescission right applies to refinancing loans and home improvement loans with respect to a borrower's principal dwelling.
[48] For an overview of all of the amendments to TILA, see THOMPSON & RENUART, *supra* note 31, § 1.2.1.

rescission right was initially open-ended once triggered, Congress, in response to complaints from the lending industry, amended the statute to add a three year time limit for rescission – § 1635(f).[50] Another amendment affecting rescission occurred in 1980, when Congress tweaked the statute to limit rescission rights to loans secured by a "principal dwelling," as opposed to a "residence."[51] Despite these minor limitations on the rescission right, TILA remained a significant source of borrower's rights after the early amendments.[52]

During the early 1990s, TILA's rescission requirement became an important consumer defense against the possibility of foreclosure.[53] Home equity borrowing had increased and had become a primary credit tool.[54] As a result of the mass securitization of homes, the homes of many borrowers became exposed to financial risk and rescission became a vital tool for consumer protection.[55] In addition, the credit industry still had complaints concerning the law, especially after an Eleventh Circuit, *Rodash v. AIB Mortgage Co.,* decision interpreted TILA's disclosure requirements in a way that exposed many existing mortgages to rescission.[56] Subsequently, Congress passed The Truth in Lending Act Amendments of 1995 (the 1995

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[49] Fair Credit Billing Act, Pub. L. No. 93-495, Title IV, §§ 404, 405, 412, 88 Stat. 1517, 1519 (1974).
[50] Jamerson v. Miles, 421 F. Supp. 107, 110, (N.D. Tex. 1976) ("The open-ended nature of the rescission right, however, ended on October 28, 1974, when Congress amended section 1635 to include a new subsection (f), which imposed a three-year limitation on the right to rescind.").
[51] Monetary Control Act of 1980, Pub. L. No. 96–221, § 612, 94 Stat. 132 (1980).
[52] THOMPSON & RENUART, *supra* note 31, § 1.2.2 at 7.
[53] *Id.* § 1.2.5 at 8.
[54] *Id.* (citing NATIONAL CONSUMER LAW CENTER, THE COST OF CREDIT: REGULATION, PREEMPTION, AND INDUSTRY ABUSES § 2.4 (4th ed. 2009 and Supp.) (discussing the deregulation of the residential mortgage market).
[55] THOMPSON & RENUART, *supra* note 31, § 1.2.5 at 8. A number of questionable creditor practices also contributed to a proliferation of TILA violations. For instance, some creditors "unbundled" the costs of originating loans, and instead passed the costs onto consumers piece-by-piece without disclosing these costs at the initial transaction. *Id.* For a discussion of other creditor practices that result in widespread TILA violations and created an impetus behind the 1995 amendments, see *id.*
[56] Rodash v. AIB Mortgage Co., 16 F.3d 1142 (11th Cir. Fla. 1994). In *Rodash*, the court ruled that "intangible taxes" were "finance charges" under TILA – a categorization that made these charges a disclosure requirement. This decision resulted in some borrowers rushing to refinance their loans into rescindable mortgage transactions because most creditors did not quickly update their disclosure terms to reflect the *Rodash* decision. THOMPSON & RENUART, *supra* note 31, § 1.2.5 at 8-9.

Amendments).[57] The 1995 Amendments tweaked the disclosure requirements and provided retroactive immunity for certain loans exposed to rescission by the *Rodash* decision.[58] Importantly for the right to rescind, the 1995 Amendments created special rules for rescission claims raised as a defense in foreclosure.[59] In particular, some of the retroactive immunity granted by the law did not apply to these rescission claims, and the tolerance level for disclosure violations was made much lower for these claims.[60] Congress's decision to provide special treatment to rescission claims raised in foreclosure and to retain rescission as a powerful consumer remedy ensured the importance of rescission as a remedy for borrowers who did not receive proper disclosure forms.[61]

Subsequent amendments related primarily to the disclosure requirements and had no effect on the rescission remedy.[62] Nonetheless, the trend of these amendments was in line with the purpose of TILA – to protect consumers. For instance, in an otherwise pro-creditor[63] bankruptcy amendment package in 2005, some disclosure requirements were heightened for certain transactions.[64]

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[57] Truth in Lending Act Amendments of 1995, Pub. L. No. 104-29, 109 Stat. 271 (1995); THOMPSON & RENUART, *supra* note 31 , § 1.2.5 at 8.
[58] Truth in Lending Act Amendments of 1995, §§ 2, 4.
[59] *Id.* § 8.
[60] *Id.* The 1995 Amendments also limited rescission in foreclosure to only certain disclosure violations.
[61] THOMPSON & RENUART, *supra* note 31, § 1.2.5 at 9 ("[T]he retention of the rescission remedy and the relatively low tolerance for defensive claims re-emphasized the particular important of TILA in providing a remedy for borrowers in foreclosure.").
[62] Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109–8, §§ 1301-1309, 119 Stat 23 (2005); Higher Education Opportunity Act of 2008, Pub. L. 110-315, 122 Stat. 3078 (2008); Housing and Economic Recovery Act of 2008, Pub. L. No. 110-289, §§ 2502(a), 122 Stat. 2654 (2008) (codified at 15 U.S.C. § 1638(b)(2)); The Helping Families Save Their Homes Act of 2009, Pub. L. No. 111-22, 123 Stat.1632 (2009).
[63] *See* Timothy Egan, *Newly Bankrupt Raking in Piles of Credit Offers*, THE NEW YORK TIMES (Dec. 11, 2005), *available at* http://www.nytimes.com/2005/12/11/national/11credit.html?_r=0.
[64] Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109–8, §§ 1301-1309, 119 Stat 23 (2005).

Though the 1995 Amendments were considered in some aspects to be creditor-friendly,[65] the 2008 financial crisis provided the impetus for further amendments to TILA intended to protect consumers.[66] The crisis was fueled by a mortgage industry collapse caused in large part by the mass issuance of loans to borrowers who could not afford them.[67] TILA's rescission right became increasingly important as foreclosure filings increased.[68] Perhaps in response to criticism that TILA's inadequate disclosure requirements were a cause of the mortgage crisis,[69] Congress once again acted to protect consumers by amending TILA.[70] For instance, Congress provided further protection to borrowers by requiring early disclosures of credit terms for loans secured by a principal dwelling.[71] Congress also provided a safe-harbor for loan servicers from TILA violations to encourage loan modifications in lieu of foreclosure.[72] And most importantly, an amendment in 2010 created and transferred rule-making authority for implementing TILA to an agency with a decidedly more consumer-oriented approach.[73] Originally, rulemaking

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[65] THOMPSON & RENUART, *supra* note 31, § 1.2.5 at 9 ("[T]he 1995 amendments provided some additional leeway to creditors in making certain TIL disclosures."). The credit-friendly nature of the 1995 amendments should not be overstated, however, considering that rescission remained a powerful remedy and rescission claims raised in foreclosure, though limited to only certain disclosure violations, were provided with lower tolerance for disclosure violations compared to other claims. *See infra* note 61.

[66] *See* Credit Card Accountability Responsibility and Disclosure Act of 2009, Pub. L. No. 111-24, 123 Stat 1734 (2009); Higher Education Opportunity Act, Pub. L. 110–315, § 1101, 122 Stat 3078 (2008); Housing and Economic Recovery Act of 2008, Pub. L. No. 110-289, §§ 2502(a), 122 Stat. 2654 (2008) (to be codified at 15 U.S.C. § 1638(b)(2)); Prevent Mortgage Foreclosure and Enhance Mortgage Credit Availability, Pub. L. No. 111-22, § 201, 123 Stat 1632 (2009); Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 1100A, 124 Stat. 1376 (2010).

[67] *See* Sovern, *Help for the Perplexed Home Buyer supra* note 2.

[68] Dougherty, *supra* note 18 (citing an estimate from Kathleen Day, spokeswoman for the Center for Responsible Lending, estimating "thousands" of rescission cases pending due to the economic crisis).

[69] Sovern, *supra* note 14.

[70] *See infra* note 66.

[71] Housing and Economic Recovery Act of 2008, Pub. L. No. 110-289, §§ 2502(a), 122 Stat. 2654 (2008) (to be codified at 15 U.S.C. § 1638(b)(2)).

[72] Prevent Mortgage Foreclosure and Enhance Mortgage Credit Availability, Pub. L. No. 111-22, § 201, 123 Stat 1632 (2009).

[73] Dougherty, *supra* note 18 ("Since the financial crisis began, the Fed has come under criticism for having failed to meet its existing legal mandate to protect consumers from deceptive mortgages and other financial products. That track record was one reason behind Congress's push to create an independent consumer agency.").

authority to implement TILA had been granted to the Federal Reserve Board.[74] However, in 2010 a Congress interested in expanding consumer protection transferred rulemaking authority to the newly-created Consumer Financial Protection Bureau, as part of the Dodd-Frank Wall Street Reform and Consumer Protection Act.[75] In an early exercise of rulemaking authority, the Consumer Financial Protection Bureau has proposed new disclosure guidelines to provide borrowers with simplified information regarding credit terms.[76]

B. Rescission under TILA

Since its inception, TILA has included a substantive right of rescission for the borrowers whose loans are secured by principal dwellings.[77] This right only applies to loans that are not residential mortgage transactions,[78] which are secured loans used to finance the acquisition of property or the initial construction of property.[79] Thus, the rescission right applies most often to loans that are refinancing arrangements on principal dwellings, and loans that are given to finance remodeling efforts on principal dwellings. This section provides a brief overview of this rescission process and the legal effect of rescission.

1. The Rescission Process

For the transactions to which the rescission remedy is available, the law requires lenders, as an additional disclosure requirement, to disclosure the existence of a security agreement, the borrower's general right to rescind, the method of rescission with a form provided, the effect of

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[74] Consumer Credit Protection Act, Pub. L. No. 90-321, § 105, 82 Stat. 148 (1968).
[75] Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 1100A, 124 Stat. 1376 (2010); *see also* 15 U.S.C. § 1604(a) (2006) (current statute granting TILA rulemaking authority to the Consumer Financial Protection Bureau); THOMPSON & RENUART, *supra* note 31, § 1.2.11, at 11.
[76] *See* CONSUMER FINANCIAL PROTECTION BUREAU PROPOSES "KNOW BEFORE YOU OWE" MORTGAGE FORMS, http://www.consumerfinance.gov/pressreleases/consumer-financial-protection-bureau-proposes-know-before-you-owe-mortgage-forms/; *see also* Sovern, *Help for the Perplexed Home Buyer supra* note 2.
[77] 15 U.S.C. § 1635 (2006). *See infra* note 46 for information regarding the definition of "principal dwelling."
[78] *See infra* note 47.
[79] 15 U.S.C. § 1602(w) (2006).

rescission, and the date on which rescission expires.[80] To help implement TILA, Congress originally granted rulemaking authority to the Federal Reserve Board, which promulgated influential regulations known as "Regulation Z."[81] The regulations provide a sample disclosure form that serves as a guideline to lenders.[82]

Figure 1: Sample Notice of Right to Cancel, Regulation Z[83]

NOTICE OF RIGHT TO CANCEL
Your Right to Cancel

You are entering into a transaction that will result in a [mortgage/lien/security interest] [on/in] your home. You have a legal right under federal law to cancel this transaction, without cost, within three business days from whichever of the following events occurs last:

(1) the date of the transaction, which is _____; or
(2) the date you received your Truth in Lending disclosures; or
(3) the date you received this notice of your right to cancel.

If you cancel the transaction, the [mortgage/lien/security interest] is also cancelled. Within 20 calendar days after we receive your notice, we must take the steps necessary to reflect the fact that the [mortgage/lien/security interest] [on/in] your home has been cancelled, and we must return to you any money or property you have given to us or to anyone else in connection with this transaction.

You may keep any money or property we have given you until we have done the things mentioned above, but you must then offer to return the money or property. If it is impractical or unfair for you to return the property, you must offer its reasonable value. You may offer to return the property at your home or at the location of the property. Money must be returned to the address below. If we do not take possession of the money or property within 20 calendar days of your offer, you may keep it without further obligation.

How to Cancel

If you decide to cancel this transaction, you may do so by notifying us in writing, at

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[80] 15 U.S.C. § 1635(a) (2006); 12 § C.F.R. 226.23(b)(1) (2011).
[81] Consumer Credit Protection Act, Pub. L. 90-321, Title I, Ch 1, § 105, 82 Stat. 148 (May 29, 1968); 12 C.F.R. §§ 226 *et seq.* Congress has since transferred rulemaking authority to the more consumer-oriented Consumer Financial Protection Bureau. *Infra* note 75.
[82] *See infra* Figure 1.
[83] 12 C.F.R. § 226, app. H-8 (2011) (emphasis added).

(creditor's name and business address).

You may use any written statement that is signed and dated by you and states your intention to cancel, or you may use this notice by dating and signing below. Keep one copy of this notice because it contains important information about your rights.

If you cancel by mail or telegram, you must send the notice no later than midnight of (date) (or midnight of the third business day following the latest of the three events listed above). If you send or deliver your written notice to cancel some other way, it must be delivered to the above address no later than that time.

I WISH TO CANCEL

_____ _____

Consumer's Signature Date

Delivery of the rescission notice, along with other disclosure forms, is only the first step in the TILA rescission process. The law provides a three day window for the borrower to rescind the transaction[84] – the so-called "buyer's remorse" rescission provision.[85] This three day window begins at either the close of the transaction or delivery of the required disclosure forms, whichever comes later.[86] In the event that the required disclosure forms are never provided, the borrower's window to exercise the right to rescind is extended for three years under § 1635(f).[87] This extension begins at either the close of the transaction or the sale of the property, whichever occurs first.[88]

To exercise rescission during the three-day buyer's remorse window, the statute is clear that the borrower may rescind the transaction by "notifying the creditor, in accordance with regulations of the Bureau, of his intention to do so."[89] The regulation requires borrowers to

[84] 15 U.S.C. § 1635(a).
[85] Jacob Werrett, *Achieving Meaningful Mortgage Reform*, 42 CONN. L. REV. 319, 337 (2009).
[86] 15 U.S.C. § 1635(a).
[87] 15 U.S.C. § 1635(f).
[88] *Id.* The sample notice of right to rescind does not specifically include information regarding this extended right to rescind. *See* Figure 1.
[89] 15 U.S.C. § 1635(a).

"notify the creditor of the rescission by mail, telegram or other means of written communication."[90] Thus, courts agree that notification is sufficient to exercise rescission under the buyer's remorse provision.[91] Under § 1635(f)'s three-year time extension, in contrast, the manner in which a borrower must exercise the right to rescind is not specifically described.[92] Nor does § 1635(f) contain a requirement that the borrower file a lawsuit to exercise the right.[93] Moreover, Regulation Z's admonishment that rescission is exercised by notifying the creditor of rescission does not specify that it refers to buyer's remorse rescission, § 1635(f) rescission, or both.[94] Courts disagree over whether a borrower must simply notify a lender to satisfy § 1635(f)'s time limitation, or whether a borrower must also file a lawsuit within the three year period to preserve the rescission right.[95]

The actual rescission process, once properly exercised by a borrower, is governed by § 1635(b) and its implementing regulation.[96] After the borrower exercises the right to rescind, the lender is obligated to, within twenty days, return any money or property that was provided by the borrower back to the borrower.[97] Thus, the onus is on the lender to cancel the security interest. Only then is the borrower required to tender the money given in return for the security interest

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[90] 12 C.F.R. § 226.23(a)(2) (2011).

[91] *See e.g.*, Aquino v. Pub. Fin. Consumer Disc. Co., 606 F. Supp. 504, 507-08 (E.D. Pa. 1985) ("Section 1635(a) only requires the obligor to notify the creditor of his or her intention to rescind in accordance with regulations promulgated by the Board . . . If Congress had wished either to place an additional burden on the obligor or to grant the creditor additional time to respond to this type of rescission notice, it would have done so.").

[92] *Compare* 15 U.S.C. § 1635(f) (2006) (silent on method of rescission) *with* 15 U.S.C. § 1635(a) (rescission exercised by "notifying the creditor, in accordance with regulations of the Bureau, of his intention to do so.").

[93] *Id.*

[94] *Id.* For an argument that this regulation refers to exercising rescission under *both* the buyer's remorse provision and § 1635(f), see *infra* Part IV.C.

[95] *See* discussion *infra* III.C.

[96] 15 U.S.C. § 1635(b) (2006), 12 C.F.R. § 226.23(d) (2011). The 1995 TILA amendments created special rules regarding rescission raised as a shield against foreclosure. THOMPSON & RENUART, *supra* note 31 § 1.2.5 at 9; *see also infra* Part II.A. These rules limit rescission after foreclosure to one of two disclosure failures: (1) when the mortgage broker fee is not included in the finance charge disclosure, and (2) when the required rescission rights disclosure forms are not provided. 15 U.S.C. § 1635(i) (2006); 12 C.F.R. § 226.23(h) (2011).

[97] 15 U.S.C. § 1635(b) (Lender must within twenty days "return to the obligor any money or property given as earnest money, downpayment, or otherwise, and... take any action necessary or appropriate to reflect the termination of any security interest created under the transaction.").

or, if preferable and reasonable, the property to the lender, in return for cancellation of the security interest.[98] The aim of this process is to return each party – the borrower and lender – to the status quo before the transaction was consummated.[99]

While Regulation Z states that this procedure may be modified by court order,[100] there is no suggestion that a court must oversee this process, which has been characterized as a private non-judicial procedure.[101] Indeed, this process has been described as enhancing common law rescission to provide more protection for consumers in the specific context of mortgages.[102]

Practically speaking, rescission is often used by borrowers facing foreclosure to force a loan modification involving an entirely new lender.[103] The original lender is required to return interest and fees to the consumer, and a second lender pays the principal due to the first lender while negotiating a new loan with the borrower.[104] The end result is protecting borrowers from being foreclosed upon on the basis of illegal loans, returning the lender to the status quo by

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[98] 12 C.F.R. § 226.23(d). However, some courts have used their equitable power over the TILA rescission process to require a showing that the borrower has the ability to tender before granting rescission. *See generally*, Lea Krivinskas Shepard, *It's All About the Principal: Preserving Consumers' Right of Rescission Under the Truth In Lending Act*, 89 N.C.L. REV. 171 (2010).

[99] *See* McKenna v. First Horizon Home Loan Corp., 475 F.3d 418, 421 (1st Cir. Mass. 2007) ("Rescission essentially restores the status quo ante; the creditor terminates its security interest and returns any monies paid by the debtor in exchange for the latter's return of all disbursed funds or property interests."); Sosa v. Fite, 498 F.2d 114, 119, 1974 (5th Cir. Tex. 1974) ("[S]ection 1635(b) is clearly designed to restore the parties as much as possible to the status quo ante."); Yamamoto v. Bank of N.Y., 329 F.3d 1167, 1172 (9th Cir. Haw. 2003) (quoting Quenzer v. Advanta Mortgage Corp. USA, 288 B.R. 884, 888 (D. Kan. 2003)) ("within the meaning of [TILA], 'rescission' does not mean an annulment that is definitively accomplished by unilateral pronouncement, but rather a remedy that restores the status quo ante."); Bynum v. Equitable Mortg. Group, No. 99 CV 2266-SBC-JMF, 2005 U.S. Dist. LEXIS 6363, at *41 (D.D.C. Apr. 7, 2005) ("[§ 1635(b)] is clearly designed to restore the parties as much as possible to the status quo ante.").

[100] 12 C.F.R. § 226.23(d)(4).

[101] *See* Belini v. Washington Mut. Bank, F.A., 412 F.3d 1517, 25 (1st Cir. 2005) (emphasis added) ("[S]ection 1635 is written with the goal of making the rescission process a *private one*, worked out between creditor and debtor *without the intervention of the courts*.").

[102] *See* Shepard, *supra* note 98, at 188 ("TILA's rescission provisions shift significant leverage to consumers by enhancing the protections provided to consumers under common law causes of action and remedies.").

[103] Dougherty, *supra* note 18.

[104] *Id.* ("Borrowers usually exercise the right of rescission during a foreclosure or other legal proceedings, effectively forcing a loan modification. The borrower seeks a new lender, the original lender returns interest and fees, and the principal is repaid by the second lender.").

having the principal repaid, and allowing the borrower to live in the home and make payments under a loan that complies with the law.

In terms of damages, the law allows individuals to recover money damages for various TILA violations.[105] For instance, the lender can be subject to a cause of action seeking damages for failing to honor rescission.[106] TILA allows this by creating a right to costs and attorneys' fees for borrowers who are forced to file suit to have rescission properly effected.[107] The cause of action seeking damages for a TILA violation, such as failing to honor the rescission properly demanded by the borrower, must be brought within one year of the violation occurring.[108]

2. Effecting Rescission

There is currently a dispute among the courts as to whether exercising the right to rescind in accordance with § 1635(b) and the accompanying regulations effectively voids the transaction, or if it merely advances a claim for rescission that must be confirmed by a court.[109]

This issue is important to note because some courts confuse the issue of effecting rescission with the issue of exercising the rescission right.[110] This Comment is only concerned with the latter issue. The language of the statute and Regulation Z suggest that the loan (and security interest) is automatically voided as a matter of law when the borrower exercises the rescission right,[111] and some courts have adopted this view. In affirming the borrower's right to

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[105] 15 U.S.C. § 1640 (2006).
[106] 15 U.S.C. § 1640(a)(3) (2006).
[107] *Id.*
[108] 15 U.S.C. § 1640(e) (2006).
[109] *Compare* Lippner v. Deutsche Bank Nat'l Trust Co., 544 F. Supp. 2d 695 (N.D. Ill. 2008) (borrower entitled to rescission when lender failed to respond to rescission notice) *and* 15 U.S.C. § 1635(b) ("[W]hen an obligor exercises his right to rescind under [§ 1635(a)], he is not liable for any finance or other charge, and any security interest given by the obligor, including any such interest arising by operation of law, becomes void upon such a rescission.") *with* Large v. Conseco Fin. Servicing Corp., 292 F.3d 49, 54-55 (1st Cir. R.I. 2002) ("[T]he security interest becomes void when the obligor 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.").
[110] *See e.g.*, Rosenfield v. HSBC Bank, USA, 681 F.3d 1172, 1187 (10th Cir. Colo. 2012).
[111] *See* 15 U.S.C. § 1635(b) (2006), 12 C.F.R. § 226.23(d)(1) (2011); *see infra* note 109.

rescind, for instance, the court in *Lippner v. Deutsche Bank Nat'l Trust Co.*,[112] allowed rescission as a remedy even after a judgment of foreclosure and sale was entered, because the borrower had demanded rescission earlier in a notice that was ignored by the lender. Under this approach, the lender can refuse to honor the rescission and seek a declaratory judgment. Other courts have found that a borrower who exercises rescission rights "has merely asserted a claim seeking rescission."[113] Under this view, rescission is not recognized by the law until either the lender honors it or it is confirmed by a court.

The issue of effecting rescission is not the subject of this Comment and is mentioned in passing only as an issue that frequently appears in the cases. Moreover, the issue of when rescission is effected is sometimes confused with satisfying the temporal limitation under § 1635(f), which *is* the subject of this Comment.[114] For the purposes of exercising rescission with three years to satisfy § 1635(f), the moment at which rescission is recognized by the law is irrelevant. Indeed, it is consistent for a court to hold that an exercise of rescission did not automatically void the transaction, but that it was timely under § 1635(f).[115]

III. 1976 to *Beach*: Early Case Law Developments Regarding Exercising Rescission Rights Under 1635

Since § 1635(f) was enacted in 1976, two distinct issues of statutory interpretation arose in the courts. Some cases dealt with the issue of exercising rescission rights (hereinafter "the Exercising Rights cases") and other cases dealt with the nature of the time limitation under

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[112] *Lippner*, 544 F. Supp. 2d at 702.

[113] Moore v. Wells Fargo Bank, N.A, 597 F. Supp. 2d 612, 616 (E.D. Va. 2009); *see also, e.g.,* In re Merriman, 329 B.R. 710, 719 (D. Kan. 2005) ("The plain language of the statute indicates that exercising the right to rescind is a discrete event; and rescission is a separate discrete event."); Yamamoto v. Bank of New York, 329 F.3d 1167 (9th Cir. 2003); American Mortgage Network, Inc. v. Shelton, 486 F.3d 815 (4th Cir. 2007).

[114] *See e.g., Rosenfield*, 681 F.3d at 1187;

[115] Gilbert v. Residential Funding LLC, 678 F.3d 271 (4th Cir. N.C. 2012) ("We must not conflate the issue of whether a borrower has exercised her right to rescind with the issue of whether the rescission has, in fact, been completed and the contract voided. The former is the concern of § 1635(f) and Regulation Z, and a borrower exercises her right of rescission by merely communicating in writing to her creditor her intention to rescind.").

§1635(f): whether it is a strict three year limitation or flexible ("Limitation cases"). Both lines of cases will be summarized in this section. Then, this section summarizes the Supreme Court case that is the definitive Limitation case – *Beach v. Ocwen Fed. Bank*[116] – which has been relied on improperly by many courts applying its holding to the Exercising Rights issue.

A. Pre-*Beach* Cases Interpreting § 1635(f)

1. The Exercising Rights Cases

There was never agreement among the courts as to the proper method of exercising rescission during the three year time window. Some of the first courts to rule on this issue were in conflict. For example, in *Clemmer v. Liberty Financial Planning, Inc.*,[117] the court found that the borrower exercised rescission by sending a rescission letter to the lender. However, in *Jamerson v. Miles*,[118] the court dismissed an action because the plaintiff failed to file an action seeking enforcement of rescission with three years.[119] The proper method of exercising rescission has been a subject of dispute from the inception of § 1635(f).

In later cases, many courts seemed to coalesce around the argument that exercising rescission is accomplished for the purposes of § 1635(f) by simply notifying the lender. For example, in *In re Porter*,[120] the court found that the borrower was entitled to rescission when she notified lender of rescission within three years of loan consummation.[121] Similarly, the court in *Rowland v. Novus Fin. Corp.*[122] allowed a TILA claim when the borrower asserted the right to

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[116] 523 U.S. 410 (1998).
[117] 467 F. Supp. 272 (W.D.N.C. 1979). This case applied TILA as it existed before the § 1635(f) time limitation was enacted.
[118] 421 F. Supp. 107 (N.D. Tex. 1976).
[119] *Id.* at 111.
[120] 961 F.2d 1066 (3d Cir. Pa. 1992).
[121] *Id.* at 1078 (emphasis added) ("[The bank]'s failure extended [the borrower's] time to *request rescission* to three years from the date of the 1987 loan . . . Therefore her 1990 letter request to rescind was timely.").
[122] 949 F. Supp. 1447, 1455 (D. Haw. 1996).

rescind within three years.[123] And in *Rowland v. Magna Millikin Bank, N.A.*,[124] the court found that the borrowers exercised rescission and effected rescission by letter to the lender within three years. Finally, the court in *Stone v. Mehlberg*,[125] found that the borrowers exercised rescission by notifying the lender by letter.[126]

Of course, some courts still held to the view that a borrower must file an action to satisfy § 1635(f). For instance, the court in *Smith v. Fidelity Consumer Disc. Co.*[127] noted *in dicta* that a borrower has three years after consummation of a loan "within which to *bring an action* for rescission."[128] In other cases, the issue did not arise because a lawsuit seeking rescission was filed within the three year window anyway or because the court declined to rule on the issue.[129] In any event, these cases shows that there was confusion among the courts as to the method of exercising rescission under § 1635(f) even before the Supreme Court decision in *Beach*. The *Beach* court did not resolve the issue contemplated by these cases, which has continued the confusion among the courts and has caused a recent Circuit split as rescission cases dramatically increased during the financial crisis of the 2000s.[130]

2. The Limitation Cases

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[123] *Id.* at 1455 ("Plaintiff asserted his right to rescind [within three years of consummation of the loan]. This notice of rescission was timely if, as Plaintiff alleges, Defendant did not provide the requisite notice of right to rescind or the material disclosures.").
[124] 812 F. Supp. 875 (C.D. Ill. 1992).
[125] 728 F. Supp. 1341 (W.D. Mich. 1989).
[126] *Id.* at 1347 (borrowers "properly exercised their right by informing the [lenders] of their intent to rescind by letter."). *See also, e.g.*, McCoy v. Harriman Utility Bd., 790 F.2d 493 (6th Cir. Tenn. 1986) (holding that rescission claim survives because "Plaintiff mailed her notice of rescission . . . within three years of all relevant dates").
[127] 898 F.2d 896, 903 (3d Cir. 1990).
[128] *Id.*
[129] *See e.g., Dougherty v. Hoolihan, Neils, & Boland*, 531 F. Supp. 717, 721-722 (D. Minn. 1982); *Hefferman v. Bitton*, 882 F.2d 379, 383-384 (9th Cir. Cal. 1989) (declining to decide whether 1635(f) only requires notice).
[130] *See* discussion *infra* Parts III.B, III.C.

Another line of cases arose parallel to the Exercising Rights cases, dealing with the issue of the nature of § 1635(f)'s three year time window. The split in these cases was resolved by the 1998 Supreme Court decision in *Beach.*[131]

Some of the Limitation cases found that even outside the three year window, rescission could be raised as a defense to foreclosure. For example, in *Dawe v. Merchants Mortg. & Trust Corp.*, the borrower attempted to demand rescission two years after the lender filed suit seeking judgment on the loan.[132] The court allowed the rescission claim to survive § 1635(f)'s time limit, even though it was raised outside of the three year time window.[133] The court found that rescission raised as a defense in the nature of recoupment is not barred by § 1635(f).[134] A number of other courts throughout the country reached a similar conclusion, characterizing rescission claims raised defensively in recoupment actions as exceptions to § 1635(f).[135] These courts reasoned that an alternative reading of the statute would "would allow a creditor to wait three years to file its suit and thereby defeat the purpose of the Act."[136]

Concurrently, other courts were holding that the rescission period is strict and that no claims asserted outside the three year period could survive. Some courts explicitly rejected a tolling theory for § 1635(f), finding it to be a strict statute that can not be tolled.[137] Other courts rejected the exception for rescission raised as a defense to recoupment, holding that a borrower "cannot revive a time-barred claim by characterizing his suit as a defense to an illegal claim

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[131] *See* discussion *infra* Part III.B.
[132] 683 P.2d 796 (Colo. 1984).
[133] *Id.* at 801.
[134] *Id.* ("[P]etitioners' demand for rescission constitutes a defense in the nature of recoupment and is not barred by the limitations period set forth in 15 U.S.C. § 1635(f).").
[135] *See e.g.*, In re Barsky, 210 B.R. 683, 685 (Bankr. E.D. Pa. 1997) ("holding that "rescission can be asserted defensively even if it is effected after the § 1635(f) three-year period has run."); Westbank v. Maurer, 276 Ill. App. 3d 553, 564 (Ill. App. Ct. 2d Dist. 1995) ("[B]ecause defendant raised her claim for rescission of the mortgage in response to plaintiff's foreclosure action, she was not barred by the three-year limitation contained in section 1635(f) of the Act.").
[136] *Id.*
[137] *E.g.*, In re Shaw, 178 B.R. 380, 386 (Bankr. D.N.J. 1994) (tolling the statutory rescission period is improper because 1635(f) is a strict time limitation on asserting claims).

under the recoupment theory provided by the statute."[138] These courts characterized § 1635(f) as a strict repose period for the "right of rescission," but did not rule on whether notification of rescission within the repose period satisfies the statute.[139]

The split in the Limitation cases was resolved when the Supreme Court decided *Beach.*[140] There, the Court endorsed the strict view of § 1635(f)'s three year period but, just as the other courts in the Limitation line of cases, was silent as to the proper method of exercising rescission.[141]

B. The Supreme Court's Decision in *Beach v. Ocwen Fed.Bank.*

The major Supreme Court decision concerning § 1635(f) is *Beach v. Ocwen Fed. Bank.*[142] *Beach* was decided in 1998, after the 1995 TILA amendments. *Beach* continues to be the primary point of reference for courts interpreting § 1635(f).[143]

In *Beach,* the defendant borrowers had taken out a loan secured by their home in 1986, and stopped making payments in 1991.[144] The bank initiated foreclosure proceedings in 1992, and the defendants raised rescission as a defense to that action, alleging various disclosure violations.[145] This rescission defense was raised well outside the three year time limitation imposed by § 1635(f).[146] The borrowers argued that § 1635(f) only operated as a limitation on borrowers bringing rescission on their own, and did not bar defenses of rescission raised outside

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[138] Moor v. Travelers Ins. Co., 784 F.2d 632, 634 (5th Cir. Miss. 1986) (internal quotation removed); Great W. Bank v. Shoemaker, 695 So. 2d 805, 807 (Fla. Dist. Ct. App. 2d Dist. 1997) (citation omitted) ("[S]ection 1635 'mirrors a statute of repose' and 'unambiguously expresses Congress's intent to extinguish the statutory right of rescission three years after the transaction's closing.'").

[139] Beach v. Great W. Bank, 670 So. 2d 986, 993 (Fla. Dist. Ct. App. 4th Dist. 1996) *aff'd* 523 U.S. 410 (1998) (holding "that the statutory right of rescission under TILA expires three years after the closing of the transaction and may not be revived as a defense in recoupment in an action to collect the debt upon the buyer's default," but not ruling on how a borrower may properly assert rescission.").

[140] *See* discussion *infra* Part III.B.

[141] *Id.*

[142] 523 U.S. 410 (1998).

[143] *See* discussion *infra* Part III.C.

[144] *Beach*, 523 U.S. at 413.

[145] *Id.*

[146] *Id.*

the three year window.[147] The borrowers argued this because, at the time, there was a circuit split concerning whether rescission raised as a defense is an exception to § 1635(f)'s time limitation.[148] As phrased by the court, the issue presented was "whether a borrower may assert this right to rescind as an affirmative defense in a collection action brought by the lender more than three years after the consummation of the transaction."[149] In other words, the borrowers did not argue that anything they satisfied the three year time limit imposed by § 1635(f) – instead, they argued that their defense should survive even though it was raised outside of the three year period.[150]

The Court in *Beach* began its analysis by noting that § 1635(f) "says *nothing* in terms of bringing an action" and instead provides a time period for expiration of the right of rescission.[151] The court found that § 1635(f) governs the life of the underlying right granted by the statute, and not of a lawsuit's commencement.[152] The Court then compared § 1635(f)'s three year time limitation to the one year statute of limitations for actions arising out of TILA violations ("§ 1640(e)").[153] The Court noted that § 1640(e) contains an exception for claims of TILA violations raised as a defense in recoupment or set-off actions.[154] According to § 1640(e), claims for recoupment damages *can* be brought as a defense to any action with no statutory time limitation.[155] The Court found that this amounted to Congressional intent for separate treatment to apply to § 1635(f)'s time limitation, because § 1635(f) contains no similar exception.[156] The

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[147] *Id.* at 415.
[148] *Beach*, 523 U.S. at 415; *see* discussion *infra* Part III.A.2.
[149] *Beach*, 523 U.S. at 411-412.
[150] *See* Gilbert v. Residential Funding LLC, 678 F.3d 271, 278 (4th Cir. N.C. 2012) ("The Beach Court did not address the proper method of exercising a right to rescind or the timely exercise of that right.").
[151] *Beach*, 523 U.S. at 417 (emphasis added).
[152] *Id.*
[153] *Id.* at 418; 15 U.S.C. § 1640(e) (2006).
[154] *Beach*, 523 U.S. at 418.
[155] 15 U.S.C. § 1640(e).
[156] *Beach*, 523 U.S. at 418.

Court reasoned that allowing rescission claims to be raised perpetually as defenses in recoupment actions pursuant to § 1640(e) would "cloud the title" of mortgages during foreclosure.[157] The Court concluded that § 1635(f)'s three year time extension must be an absolute bar on rescission, raised defensively or otherwise, if asserted outside the three year period.[158]

Thus, *Beach* stands for the proposition that § 1635(f) is a strict three year limitation, and that even a defense of rescission raised after the three year period is precluded by the statute.[159] Subsequent cases have interpreted this decision as holding § 1635(f) to be a statute of repose, even though the Supreme Court never used that particular phrase in the *Beach* opinion.[160] The Court left open the exact method of exercising the rescission right *within* the three year statutory period – whether notice to the lender is sufficient, or if the filing of a lawsuit is an additional requirement.[161] Instead, the *Beach* court affirmatively rejected any claims raised *outside* the three year period. Thus, the Supreme Court addressed the nature of § 1635(f)'s time limitation contemplated by the Limitation cases[162] but did not resolve the confusion among the courts expressed in the Exercising Rights cases.[163]

C. The Post-*Beach* Circuit Split Concerning the Method of Exercising the Right to Rescind

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[157] *Id.*
[158] *Id.*
[159] *Id.*
[160] *See e.g.,* Rosenfield v. HSBC Bank, USA, 681 F.3d 1172, 1181 (10th Cir. Colo. 2012) (quoting *Beach*, 523 U.S. at 417) ("[T]he [Beach] Court . . . held that [1635(f)] 'govern[s] the life of the underlying right [of rescission],' and is therefore not a statute of limitations, but one of repose."); Doss v. Clearwater Title Co., 551 F.3d 634, 638 (7th Cir. 2008); U.S. Bank Nat'l Ass'n v. Manzo, 960 N.E.2d 1238, 1245 (Ill. App. Ct. 1st Dist. 2011) ("The Supreme Court . . . found that the three-year deadline in section 1635(f) was not a statute of limitations but a statute of repose."); McOmie-Gray v. Bank of America Home Loans, 667 F.3d 1325 (9th Cir. 2012).
Courts have also found that, as with all statutes of repose, equitable tolling is impossible. *See e.g.*, Jones v. Saxon Mortg., 537 F.3d 320, 327 (4th Cir. Va. 1998) (citation omitted) ("Because § 1635(f) is a statute of repose, the time period stated therein is typically not tolled for any reason.").
[161] *See* Gilbert v. Residential Funding LLC, 678 F.3d 271, 278 (4th Cir. N.C. 2012) ("The Beach Court did not address the proper method of exercising a right to rescind or the timely exercise of that right.").
[162] *See* discussion *infra* Part III.A.2.
[163] *See* discussion *infra* III.A.1

As noted above,[164] the Supreme Court in *Beach* ruled definitively that § 1635(f) is a strict three year time limitation on the federal right to rescind – raised "defensively or otherwise."[165] However, the Court did not touch upon the question of how a borrower must exercise rescission *within* the three year time limit – instead, the Court was ruling on whether certain claims raised *outside* the three year period could survive, and held that they could not.[166] Thus, after *Beach*, the split among the lower courts concerning what a borrower must do to properly exercise rescission rights within the three year time window continued. Many cases properly allowed borrowers to satisfy § 1635(f) by notifying the lender of intent to rescind in accordance with the statute's language and Regulation Z.[167] However, a majority of cases denied relief to borrowers who notified the lender of rescission within three years, if a lawsuit was not also filed within the three year period.[168] These courts generally improperly relied upon the *Beach* decision and applied it to the Exercising Rights issue, reading in an extra requirement (filing a lawsuit) that is not present in the statute or regulations.[169] Most recently, the issue of exercising rescission under TILA has been visited by the Third, Ninth, Fourth, and Tenth Circuits.

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[164] *See infra* Part III.B.

[165] Beach v. Ocwen Fed. Bank, 523 U.S. 410, at 418 (1998).

[166] *Id.*

[167] *See e.g.*, Jozinovich v. JP Morgan Chase Bank, N.A., No. C09-03326, 2010 U.S. Dist. LEXIS 3358, at *16, (N.D. Cal. Jan. 14, 2010) (rescission permitted because notice of rescission was mailed within three years.); Jackson v. CIT Group, No. 06-543, 2006 U.S. Dist. LEXIS 78897, at *2 (W.D. Pa. Oct. 30, 2006); Sherzer v. Homestar Mortg. Servs., No. 07-5040, 2010 U.S. Dist. LEXIS 137315, at *26-35 (E.D. Pa. May 7, 2010); In re Hunter, 400 B.R. 651 (Bankr. N.D. Ill. 2009); Barnes v. Chase Home Fin., LLC, No. 11-cv-142, 2011 WL 4950111 (D. Or. Oct. 18, 2011); Johnson v. Long Beach Mortg. Loan Trust, 451 F. Supp. 2d 16 (D.D.C. 2006).

[168] *See e.g.*, Geraghty v. BAC Home Loans Serv. LP, No. 11-336, 2011 WL 3920248 (D. Minn. Sept. 7, 2011); Bradford v. HSBC Mortg. Corp., 799 F. Supp. 2d 625 (E.D. Va. 2011); DeCosta v. U.S. Bancorp, No. 10-0301, 2010 WL 3824224 (D. Md. Sept. 27, 2010); Chevy Chase Bank, F.S.B. v. Carrington, No. 6:09-cv-2132-Orl-31GJK, 2010 U.S. Dist. LEXIS 17724, at *7 (M.D. Fla. Mar. 1, 2010); Falcocchia v. Saxon Mortg., Inc., 709 F. Supp. 2d 860, 868 (E.D. Cal. 2010) ("[P]laintiffs did not file a claim seeking rescission within the three year period . . . plaintiffs' allegation that they sent a notice of rescission within the three year period is irrelevant."); Ramos v. Citimortgage, Inc., No. CIV. 08-02250, 2009 WL 86744 (E.D. Cal. Jan. 8, 2009) ("[B]ecause plaintiff filed his Complaint over three years from the date on which he consummated his loan, the court is without jurisdiction to consider his claim for rescission under TILA.").

[169] *See e.g., Carrington*, 2010 U.S. Dist. LEXIS at *7 (citing Beach v. Ocwen Fed. Bank, 523 U.S. 410, at 418 (1998)) ("15 U.S.C. § 1635(f) operates to extinguish the right of rescission itself . . . Thus no matter what actions

1. The Plain Reading Approach of the Fourth Circuit.

The Fourth Circuit ruled on the proper method of exercising rescission rights to satisfy § 1635(f) in *Gilbert v. Residential Funding LLC.*[170] The *Gilbert* court did not find the *Beach* decision dispositive on the issue.[171] The court conducted a plain reading analysis of § 1635(f) and concluded that all a borrower must due to satisfy § 1635(f) is notify the lender of rescission within three years.

In *Gilbert*, the Gilberts were foreclosed upon within three years of refinancing their mortgage.[172] After the foreclosure was initiated, but before the three year window had concluded, the borrowers had written to the lender alleging several TILA violations and notifying the lender of rescission.[173] The lender had responded with a refusal to honor the rescission.[174] While the Gilberts appealed the foreclosure decision, they filed a separate lawsuit seeking rescission.[175] This rescission lawsuit was filed outside of the three year window under § 1635(f).[176] Though the Gilberts were successful in their appeal of the foreclosure, the separate rescission action alleging TILA violations was dismissed by a lower court as untimely.[177] The Gilberts appealed the dismissal of the TILA claims, and the case eventually reached the 4th Circuit Court of Appeals.[178]

[Lender] took or failed to take, [Borrower]'s right to rescind was extinguished . . . well before he filed the instant suit."); *see* discussion *infra* Part IV.

[170] 678 F.3d 271 (4th Cir. N.C. 2012).

[171] *Id.* at 278 (noting that *Beach* did not address the issue of how a borrower may exercise the rescission right).

[172] *Id.* at 274.

[173] *Id.*

[174] *Id.*

[175] *Gilbert*, 678 F.3d at 274-275.

[176] *Id.*

[177] *Id.* at 275.

[178] *Id.*

The Gilberts based their appeal on the argument that they exercised the right to rescind within the three year window by sending the letter to the lender.[179] The court began its analysis by recognizing that nothing in the statute or Regulation Z says anything about requiring a borrower to file a lawsuit.[180] The court relied on the plain language of the statute and the regulation, which both suggest that notification is a proper and sufficient exercise of rescission.[181] The court also properly distinguished the issue of effecting rescission with exercising rescission – finding that TILA only requires a borrower to exercise the right of rescission within three years, not to effect it.[182] In addition, the court also properly distinguished *Beach*, finding that the *Beach* decision simply did not address the method of exercising the right of rescission.[183] Instead, the court noted that *Beach* addressed the extinguishment of the right of rescission *after* three years, a completely separate issue.[184] The court concluded that notification of rescission is a proper exercise of rescission rights under TILA and Regulation Z.[185]

The court then addressed the Gilberts' claim for damages. According to the court, refusal to honor rescission is a separate TILA violation and triggers the one year statute of limitations.[186] Because the lawsuit seeking rescission was filed within one year of the Gilberts' letter seeking rescission, the court held that the Gilberts' could also seek damages for the refusal to honor the rescission, in addition to being entitled to rescission itself.[187]

2. The Tenth Circuit's Restrictive Approach: Concerned with Clouding the Title of Mortgages and Reliance on *Beach*.

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[179] *Id.* at 276.
[180] *Id.* at 277.
[181] *Gilbert*, 678 F.3d at 277 (4th Cir. N.C. 2012); 15 U.S.C. § 1635(f) (2006); 12 C.F.R. § 226.23(a)(2) (2011).
[182] *Gilbert*, 678 F.3d at 277; *see* discussion *infra* Part II.B.2.
[183] *Id.* at 278.
[184] *Id.*
[185] *Id.*
[186] *Id.*; 15 U.S.C. § 1640(e) (2006).
[187] *Gilbert*, 678 F.3d at 278-279.

While the Fourth Circuit in *Gilbert* properly distinguished *Beach* and found notification of rescission sufficient to satisfy § 1635(f), the Tenth Circuit reached the opposite conclusion. In *Rosenfield v. HSBC Bank, USA*,[188] the Tenth Circuit found *Beach* dispositive on the issue of how borrowers may exercise the rescission right, and read an additional implied requirement into the statute: that a borrower must not only notify the lender of rescission within three years, but must also file a lawsuit enforcing rescission with three years of the transaction.

Ms. Rosenfield notified the lender that she intended to rescind the transaction about two years after they refinanced on their home.[189] She claimed that numerous disclosures were not made, including information on rescission rights, adjustable rates, and finance charges.[190] After Ms. Rosenfield defaulted, the lender sought to force a sale of the property by filing a motion with the trial court.[191] Ms. Rosenfield raised rescission as a defense to this proceeding – *before* the three year time window under § 1635(f) had expired.[192] After a foreclosure sale was ordered, the Rosenfields commenced a separate action seeking, among other claims, a declaratory judgment deeming the loan rescinded.[193]

Ms. Rosenfield argued that she satisfied § 1635(f)'s time limit when she notified the lender of rescission.[194] The court rejected Ms. Rosenfield's argument on two grounds. First, the court found the Supreme Court decision in *Beach* to be "dispositive" of the question of

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[188] 681 F.3d 1172 (10th Cir. Colo. 2012).
[189] *Id.* at 1175-1176.
[190] *Id.* at 1176.
[191] *Id.* C.R.C.P. 120 provides an expedited judicial foreclosure proceeding, allowing a secured creditor to file a verified motion with a trial court to order the sale of the property. It is in this special proceeding that Ms. Rosenfield raised rescission as a defense.
[192] *Rosenfield*, 681 F.3d at 1176. This is a key factual distinction with *Beach*. In *Beach*, the borrower raised rescission as a defense *after* the three year window had expired. *See* Beach v. Ocwen Fed. Bank, 523 U.S. 410, at 413 (1998). The Tenth Circuit's reliance on *Beach* in this different context is demonstrative of the confusion between the issue of the nature of the three year time limitation – whether it is strict or can be tolled – and the issue of how to exercise the rescission right for the purpose of § 1635(f). *See* Parts III.A.1, III.A.2.
[193] *Rosenfield*, 681 F.3d 1172, at 1176 (10th Cir. Colo. 2012).
[194] *Id.* at 1182. Ms. Rosenfield also argued that she satisfied the statute by raising rescission as a defense in the foreclosure proceeding, but that is not the subject of this comment. Nevertheless, the court rejected this argument as well.

exercising rescission.[195] The court described § 1635(f)'s three year extension as a strict repose period that precludes satisfaction by merely notifying the lender of rescission.[196] As support for this, the court characterized the rescission right as one that can only be redressed "by invoking the power of the courts."[197] On the other hand, the court noted *in dicta* that if the lender actually effectively responds to the rescission notice, then this may satisfy § 1635(f)'s time limit without need for judicial intervention.[198] Thus, the court found that Ms. Rosenfield did not satisfy § 1635(f) because she did not file a lawsuit within three years, even though she notified the lender within the proscribed time period.[199]

The court also rejected Ms. Rosenfield's argument on contract principles.[200] The court first compared TILA's rescission remedy to the common law rescission process.[201] The court found the TILA rescission process to be analogous to common law rescission, and that the underlying purpose behind both is "remedial economy."[202] The court reasoned that rescission is not appropriate, therefore, if enforcement is difficult under the circumstances.[203] The court concluded that allowing borrowers to exercise rescission by notifying lenders would complicate enforcement.[204] Specifically, the court was troubled by the prospect of a borrower notifying the

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[195] *Id.*
[196] *Id.*
[197] *Id.* at 1183. The *Rosenfield* court relied on case law concerning statutes of repose ruled upon in other contexts and upon the common understanding that a statute of repose bars claims – the filing of a lawsuit. *Id.* at 1182-83. However, the Supreme Court in *Beach* never used the term "statute of repose" and there are other limitation statutes that limit the time for an assertion of a right without specifically referring to filing a lawsuit. *See* discussion *infra* Part IV.C.
[198] *Rosenfield*, 681 F.3d at 1183, n. 8 (10th Cir. Colo. 2012). The contrast between the court's position that a court is necessary for an exercise of rescission by the borrower, and their assertion that a court is *not* necessary when a lender acknowledges rescission, is a clear example of the court's improper shifting of bargaining power away from the borrower and toward the lender. In essence, the court took a statute that was designed to provide borrowers with enhanced bargaining power, and flipped it around to strengthen the lender's position. *Infra* Part IV.B.3
[199] *Rosenfield*, 681 F.3d at 1188 ("[N]otice, by itself, is not sufficient to exercise (or preserve) a consumer's right of rescission under TILA. The commencement of a lawsuit within the three-year TILA repose period was required.").
[200] *Id.* at 1184-85.
[201] *Id.* at 1184.
[202] *Id.*
[203] *Id.*
[204] *Id.*, 681 F.3d at 1185.

lender of rescission, but then waiting for some indeterminate time to seek judicial enforcement of the rescission – the court found that this possibility would "cloud a bank's title on foreclosure."[205]

The court then contended with the plain meaning of the statute and the regulations.[206] The court found that the language of § 1635 and Regulation Z does require borrowers to notify lenders of rescission, but that this was not sufficient to exercise the right.[207] Instead, with little analysis, the court found that notifying the lender is merely a predicate act to exercising the right of rescission, which is accomplished by filing a lawsuit.[208] The court, confusing exercising rescission rights with effecting rescission, concluded that allowing a borrower to unilaterally exercise the right to rescind would impermissibly enlarge the time period for rescission and would cloud the title of property indefinitely.[209]

3. The Third and Ninth Circuits' Reliance on *Beach* to Require Borrowers to File Lawsuit.

The Third and Ninth Circuits have also recently ruled on the method of exercising rescission for the purposes of § 1635, in *Williams v. Wells Fargo Home Mortg., Inc.*[210] and *McOmie-Gray v. Bank of America Home Loans.*[211] Both courts reached the same restrictive outcome as the *Rosenfield* court, but produced less detailed opinions. In addition, both courts found *Beach* dispositive in ruling that a borrower must file a lawsuit within three years to satisfy § 1635.

In *Williams*, a disabled and blind homeowner decided to remodel her home.[212] Ms. Williams received a balloon loan secured by her home that was signed on November 22, 2004.[213]

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[205] *Rosenfield*, at 1185, 1186 (quoting Beach v. Ocwen Fed. Bank, 523 U.S. 410, at 418-419 (1998)).
[206] *Id.* at 1185-1187.
[207] *Id.* at 1185.
[208] *Id.*
[209] *Id.* at 1187.
[210] 410 Fed. Appx. 495 (3d Cir. Pa. 2011).
[211] 667 F.3d 1325 (9th Cir. Feb. 8, 2012).
[212] *Williams*, 410 Fed. Appx. at 496.

In April 2003, Ms. Williams was $20 short on a mortgage payment and the bank refused to accept the insufficient amount.[214] The bank obtained a default judgment in a foreclosure action by September of that year.[215] After initiating a civil action and seeking bankruptcy protection in an attempt to save her home, Williams notified the lender of her intent to rescind the transaction based on TILA violations on November 22, 2004.[216] The lender did not respond to this letter.[217] An action to enforce the rescission was not filed until August 22, 2006.[218]

The borrowers argued that the three year limitation period is satisfied when rescission is exercised by notifying the lender.[219] The court, with very little analysis, deferred to the Supreme Court's holding in *Beach*.[220] The court found that the Supreme Court "implicitly recognized" that a claim for rescission must be filed with the court within the three-year period, in addition to notice to the lender.[221] The court then concluded that a legal action enforcing rescission must be brought within three years.[222]

In *McOmie-Gray*, Ms. McOmie-Gray closed a first deed trust loan in 2006 and was provided with various disclosure documents to sign.[223] The lender failed to inform her of the date on which this right to rescind would expire, a key disclosure requirement.[224] Two years after the loan was consummated, Ms. McOmie-Gray sent a letter to the lender seeking to rescind the loan, but the bank refused rescission.[225] Instead, according to Ms. McOmie, the bank

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[213] *Id.*
[214] *Id.* at 497.
[215] *Id.*
[216] *Id.*
[217] *Id.*
[218] *Williams*, 410 Fed. Appx. at 497.
[219] *Id.* at 498.
[220] *Id.*
[221] *Id.* at 499.
[222] *Id.*
[223] McOmie-Gray v. Bank of America Home Loans, 667 F.3d 1325, 1326 (9th Cir. 2012).
[224] *Id.*; *See infra* Figure 1; 12 C.F.R. § 226.23(b)(1) (2011).
[225] *McOmie-Gray*, 667 F.3d at 1326-1327.

negotiated with her for over a year regarding the rescission.[226] After these negotiations failed, Ms. McOmie-Gray filed suit to rescind the loan, but by that point she filed outside of § 1635(f)'s three year time period.[227]

The *McOmie-Gray* court's sparse analysis first addressed the legal effect of rescission under TILA. The court found that notifying the lender merely advances a claim for rescission, and that rescission is not automatic upon notification.[228] The court then found *Beach*, as well as Ninth Circuit precedent establishing § 1635(f) as a statute of repose, dispositive, and rejected Ms. McOmie's claim.[229] Ms. McOmie-Gray had argued that the lender's failure to honor the rescission notice extended the time period for seeking rescission by another year, but the court rejected this argument, relying on the Supreme Court's characterization of § 1635(f) as a strict limitation on the rescission right.[230] The court did not distinguish between deciding upon the legal effect of rescission on the loan agreement and the effect of exercising rescission for the purposes of § 1635(f).[231] Instead, the court seemed to hold that because notifying the lender does not completely effect rescission of the loan agreement, it is also not an exercise of the rescission right.

IV. Borrowers Should be Able to Satisfy § 1635(f)'s Three Year Time Limit on Rescission by Notifying the Lender of Rescission

Courts should not read additional burdensome requirements for borrowers under TILA. The recent trend of courts requiring borrowers to file a lawsuit to satisfy § 1635(f)'s three year limit for rescission is a prime example of judicial activism overriding the plan language of a

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[226] *Id.* at 1327.
[227] *Id.*
[228] *Id.*
[229] *Id.* at 1329.
[230] *Id.*
[231] *McOmie-Gray*, 667 F.3d at 1327-1329. The *McOmie-Gray* court did not seem to consider that the notification of rescission itself is what may satisfy § 1635(f)'s time restriction. Instead, the court took it as a matter-of-course that *Beach*'s holding requires borrowers to file lawsuits to exercise rescission, which is an incorrect reading of *Beach*. *See* discussion *infra* Parts III.B, IV.B.2.

statute even when in conflict with the statute's explicitly stated purpose. As the Fourth Circuit concluded in *Gilbert,* § 1635(f) only requires borrowers to exercise rescission within three years of consummating the transaction, and the rescission rights of borrowers who notify the lender of intent to rescind in accordance with § 1635(f) and its accompanying regulation within three years should be protected.

A. The Fourth Circuit's Reading of § 1635(f) is Consistent with Congressional Intent and is Sensible Policy.

§ 1635(f) must be read in the light most favorable to the consumer to be consistent with Congressional intent. A reading of § 1635(f) that creates additional onerous requirements is in direct contrast with the goals of Congress. Moreover, allowing borrowers to satisfy § 1635(f) via notification will not in any way cloud the title of mortgages during foreclosure. And finally, a broad reading of § 1635(f) that allows borrowers to satisfy the three year window via notification is sensible public policy.

1. The Fourth Circuit's Reading of § 1635(f) is Consistent with Congress's Intent to use TILA and Regulation Z to Protect Consumers.

A reading of § 1635(f) that creates additional requirements contrary to the plain language of the statute is in direct contrast with Congressional intent. Courts generally agree that TILA is a remedial statute.[232] Its stated purpose is to protect consumers against the uninformed use of credit offered by unscrupulous creditors.[233] Given TILA's remedial nature, courts have also agreed that the statute should be interpreted liberally to protect consumers.[234]

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[232] *See* discussion *infra* Part II.A.

[233] 15 U.S.C. § 1601(a) (2006); *see also* Littlefield v. Walt Flanagan & Co., 498 F.2d 1133, 1136 (10th Cir. 1974) (quoting N. C. Freed Co. v. Bd. of Governors of Fed. Reserve Sys., 473 F.2d 1210, 1214 (2d Cir. 1973)) ("The Act . . . designed to prevent 'unscrupulous and predatory creditor practices' . . . is remedial.").

[234] *See* Bragg v. Bill Heard Chevrolet, Inc., 374 F.3d 1060, 1065 (11th Cir. 2004) ("As a remedial statute, TILA must be construed liberally in favor of the consumer."); Begala v. PNC Bank, Ohio, Nat'l Ass'n, 163 F.3d 948, 950 (6th Cir. 1998) ("We have repeatedly stated that TILA is a remedial statute and, therefore, should be given a broad, liberal construction in favor of the consumer."); King v. California, 784 F.2d 910, 915 (9th Cir. Cal. 1986) (citation omitted) ("The courts have construed TILA as a remedial statute, interpreting it liberally for the consumer."); James

In addition to the well-established policy goals of TILA, developments in the law reflect Congress' continuing concern with ensuring that borrowers' rescission rights remain strong. Since TILA's passage in 1968, Congress has had numerous opportunities to amend the rescission right but has chosen to keep the protection in tact.[235] And even after the 1995 Amendments sought to make compliance with disclosure requirements easier for lenders, rescission remained a powerful consumer protection.[236] Congress had another chance to revisit TILA when it passed the Dodd-Frank Wall Street Reform and Consumer Protection Act (hereinafter "Dodd-Frank.")[237] Dodd-Frank was passed with the goal, among others, of protecting consumers from abusive financial services practices.[238] Dodd-Frank's main impact on TILA was to transfer rulemaking authority away from the Federal Reserve Board (FRB) and to the newly-created Consumer Financial Protection Bureau (CFPB), an agency established with the goal of providing consumers with financial information and preventing unfair business practices.[239]

An example of the impact this transfer of power had on the direction of TILA is evidenced by both agencies' differing approaches to the rules for rescission under TILA. Under pressure from lenders, the FRB had proposed making rescission more difficult by requiring

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v. Home Constr. Co., 621 F.2d 727, 729 (5th Cir. Ala. 1980) (citation omitted) (". . . the Truth-in-Lending Act, a remedial act, has usually been given a broad liberal interpretation since it is assumed that was the intent of Congress.").

[235] *See* discussion *infra* II.A.

[236] *Id.*; THOMPSON & RENUART, *supra* note 31, § 1.2.5 at 9 ("[T]he 1995 amendments provided some additional leeway to creditors in making certain TIL disclosures."); THOMPSON & RENUART, *supra* note 31, § 1.2.5 at 9 ("[T]he retention of the rescission remedy and the relatively low tolerance for defensive claims re-emphasized the particular important of TILA in providing a remedy for borrowers in foreclosure.").

[237] Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010).

[238] *Id.*, Preamble (emphasis added) ("An Act To promote the financial stability of the United States by improving accountability and transparency in the financial system, to end "too big to fail", to protect the American taxpayer by ending bailouts, to protect consumers from abusive financial services practices, and for other purposes.").

[239] *Id.*, § 1100A; *see* 15 U.S.C. §1604(a) (2006) (current statute granting TILA rulemaking authority to the Consumer Financial Protection Bureau); *see also* THOMPSON & RENUART, *supra* note 31, § 1.2.11, at 11; FALL 2011 STATEMENT OF REGULATORY PRIORITIES, http://www.consumerfinance.gov/regulations/fall-2011-statement-of-regulatory-priorities/ ("the purpose of the CFPB is to implement and enforce Federal consumer financial laws consistently for the purpose of ensuring that all consumers have access to markets for consumer financial products and services and that such markets are fair, transparent, and competitive.").

borrowers to first tender the amount due – reversing the normal process for TILA rescission.[240] However, before these rules could be implemented, Congress transferred rule making authority to the CFPB, effective July 2011.[241] The CFPB rejected the FRB's lender-friendly attempt to change the rules, and instead issued an interim final order affirming the practice that the consumer must tender only after the creditor has canceled the security interest.[242] Though the CFPB has proposed rule changes to implement the Dodd-Frank regulations and simplify disclosure requirements, it has rejected the Board's last-ditch effort to limit rescission rights and has not once proposed limiting rescission rights.[243] Congress's transfer of authority from the FRB to the CFPB represents its continuing intent to promote the consumer protections provided by statutes such as TILA, including the right to rescind. Therefore, TILA must continue to be interpreted with Congress's goal of protecting the consumer in mind.

2. Allowing Borrowers to Exercise Rescission via Notification will not Cloud the Title of Mortgages.

Allowing consumers to satisfy the limitations period by notifying the lender would not cloud the title of mortgages. The *Rosenfield* court was especially concerned with this issue, first expressed by the Supreme Court in *Beach*.[244] However, while the issue *Beach* dealt with did have serious implications for clouding the title of mortgages, that concern is not present in the context of borrowers exercising the rescission right.

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[240] 75 Fed. Reg. 58539, 58700-58704 (Sept. 24, 2010); *see also* Dougherty, *supra* note 18; discussion *infra* Part II.B.1.
[241] *Id.*
[242] Official Comment to Interim Final Rule, 76 Fed. Reg. 79768, 79996 (Dec. 22, 2011) (Supplement Part I to 1026) ("Once the creditor has fulfilled its obligations under § 1026.23(d)(2), the consumer must tender to the creditor any property or money the creditor has already delivered to the consumer.").
[243] *See e.g.*, CONSUMER FINANCIAL PROTECTION BUREAU PROPOSES "KNOW BEFORE YOU OWE" MORTGAGE FORMS, http://www.consumerfinance.gov/pressreleases/consumer-financial-protection-bureau-proposes-know-before-you-owe-mortgage-forms/; *see also* Sovern, *Help for the Perplexed Home Buyer supra* note 2.
[244] *See* discussion *infra* Part III.C.2.

If a borrower exercises the rescission right by notifying the creditor, one of two things will happen. First, the lender may honor the rescission by complying with the procedures outlined in the statute and Regulation Z.[245] The issue would be resolved without involving the court. Alternatively, the lender would not honor the rescission. In this scenario, the borrower would obviously cease payments on the mortgage if he or she believes it is rescinded. Either the borrower would take affirmative action to seek judicial enforcement of the rescission, or a foreclosure proceeding would be brought, and the issue would be litigated and resolved before the judgment and sale would be allowed to proceed.

The only effect of allowing borrowers to exercise rescission this way is that if there *are* TILA violations, the borrower would be protected from foreclosure on an illegal loan. If there are no TILA violations, this would be resolved during litigation as part of the foreclosure proceeding – an inevitable proceeding after the borrower ceases payments – and the title will be clear. In the hard-to-imagine scenario where a borrower exercises rescission, but does not cease payments in an attempt to fool the lender, the borrower will likely be equitably estopped from asserting rescission as a defense, just as under common law rescission.[246] Under any scenario, then, it is hard to imagine how allowing the borrower to exercise rescission via notification clouds the title of mortgages.[247]

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[245] *See* discussion *infra* Part II.B.1.

[246] 17B C.J.S. *Contracts* § 647 ("An election to rescind the contract must be made by the party who has the right to rescind, and once the election is made, that party must adhere to it."); 31 C.J.S. *Estoppel and Waiver* § 159 ("The doctrine of equitable estoppel precludes a person from maintaining a position or attitude which is inconsistent with another position or attitude sought to be maintained at the same time or which was asserted at a previous time.").

[247] It is important to note that exercising the rescission right is not the same as effecting rescission. *See* discussion *infra* Part II.B.2. While the issue of when the rescission is *effected* does indeed affect the mortgage – if rescission is effected unilaterally by notice, then some mortgages will have no force of law without the lender knowing – the issue of when the rescission right is exercised does not affect the mortgage title.

The *Beach* court clearly intended to prevent rescission from clouding the title of mortgages during foreclosure.[248] However, the *Beach* court accomplished this quite effectively by precluding tolling of § 1635(f) and construing it strictly.[249] Indeed, the specific argument that the Court was addressing when using the "cloud the title" language was whether to allow rescission claims to be raised *at any time* as defenses to recoupment action.[250] In other words, the Court addressed whether an exception can be made to § 1635(f)'s three year window, and answered that question negatively on the basis of preventing mortgage titles from being clouded.[251] By construing § 1635(f) strictly and preventing tolling, the Supreme Court prevented rescission issues from clouding the title of mortgages. After *Beach*, the rescission right may *not* be asserted – whether as a filed claim, a notice of rescission, or as a defense to recoupment – *after* the three year period. The Court simply did not address the method of exercising rescission *within* the three-year period, to which the issue of clouding title of mortgages is inapplicable.

Courts should not read additional statutory requirements in a misguided attempt to promote *Beach*'s principles, because it involved an entirely separate issue. Clouding the title of mortgages is simply not an issue for the issue of exercising rescission under § 1635(f).

3. It is Sensible Policy to Allow Notification of Rescission to Constitute an Exercise of Rescission Under § 1635(f).

It is sensible policy to enforce the plain language of § 1635(f) because rescission is a powerful remedy for consumers that should not be subverted by activist courts seeking to read additional requirements into the statute. A policy that favors rescission is especially important

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[248] Beach v. Ocwen Fed. Bank, 523 U.S. 410, 418 (1998).
[249] *See* discussion *infra* Part III.B.
[250] *Beach*, 523 U.S. at 418.
[251] *Id.*; *see also* Jones v. Saxon Mortg., 537 F.3d 320, 327 (4th Cir. Va. 1998) (emphasis added) ("allowing tolling under § 1635(f) and permitting a party to rescind *after* a foreclosure sale would create uncertainty in any chain of title of real estate purchased from a foreclosure sale. Real estate purchased from a foreclosure sale would be less marketable if purchasers could somehow later be divested of title. Similarly, title to real estate purchased from a foreclosure sale would be clouded.").

after the recent surge in foreclosures, possibly caused in part by the lack of effectiveness of disclosure requirements, has placed the homes of many borrowers at risk. Allowing consumers to satisfy § 1635(f) via notification would enable the rescission statute and regulation to proceed more efficiently and effectively.

The powerful remedy of rescission is even more essential after the recent explosion in foreclosure litigation. The housing bubble that preceded the foreclosure crisis was precipitated by many borrowers accepting loans that they could not hope to repay, and some argue that a primary cause of this was the inadequacy of TILA's disclosure requirements.[252] While the inadequacies of the disclosure requirements have been questioned,[253] those consumers who have not received even the disclosures required by law are often left with rescission as the sole way to keep their home and obtain a loan they can actually repay. Indeed, as foreclosure filings increased during the economic crisis, rescission became an increasingly powerful tool for consumers.[254] Thus, as the number of foreclosure filings increased, so have the number of rescission cases.[255] One observer has even referred to rescission as "the biggest hammer in the toolkit for a lawyer helping someone to save their home."[256] As a result of these considerations, it is in the public's interest to ensure that consumers who have been misled as a result of the practices of the mortgage industry have recourse to rescind these faulty transactions. It is not appropriate to read extra requirements into § 1635 that would preclude borrowers from receiving this protection. Any public policy to the contrary should come from Congress, not the courts, due to the prevalence and complicated nature of the problem.

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[252] Sovern, *Help for the Perplexed Home Buyer supra* note 2.; Sovern, *supra* note 14.
[253] *Id.*
[254] THE NEW YORK TIMES, *supra* note 19 (describing rescission as "the most effective legal tool that borrowers have to fight foreclosures.").
[255] Dougherty, *supra* note 18 (citing an estimate from Kathleen Day, spokeswoman for the Center for Responsible Lending, estimating "thousands" of rescission cases pending due to the economic crisis).
[256] *Id.* (quoting Ira Rheingold, executive director, National Association of Consumer Advocates).

Moreover, the statutory scheme articulated by TILA and Regulation Z works most efficiently when consumers can satisfy the limitations period by notifying the lender of rescission. Requiring borrowers to file a lawsuit to satisfy the limitations period is burdensome to the very consumers that Congress intended to protect. Under the statutory scheme, lenders are given twenty days to void the security transaction, after which point the borrower must tender payment.[257] Reading § 1635(f) to require borrowers to file a lawsuit complicates this process further. Filing a lawsuit is often costly, and borrowers who have been saddled with loans that they cannot repay should not be required to outlay money to initiate the lawsuit. TILA recognizes the precarious position these borrowers are in, which is why it only requires tender of payment *after* the lender voids the security interest – a clear reversal of the traditional common law rescission process.[258] Requiring borrowers to initiate litigation to satisfy the limitations period would upset this delicate balance. Indeed, neither the statute nor the regulation requires a court to oversee the rescission process. The statutory scheme has been described as an enhancement of common law rescission.[259] The purpose of § 1635 is to allow rescission without judicial intervention, and requiring borrowers to file a lawsuit to satisfy the limitation period would completely upend this process.[260] A rule that encourages borrower's to file suit as soon as notifying the lender flies in the face of this non-judicial purpose of § 1635.

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[257] 15 U.S.C. § 1635 (2006); 12 C.F.R. § 226.23(d) (2011).

[258] Shepard, *supra* note 98; *infra* IV.B.3. Some courts have required a borrower to make a showing that she will be able to tender payment, before they will recognize rescission. *See generally* Shepard, *supra* note 98. However, courts are not always involved in rescission and not all courts require a showing of tender. *See* discussion *infra* II.B.1. In any case, the borrower does not have to actually tender any amount until after the security interest has been voided. Moreover, in many cases the borrower will negotiate a new loan with a new lender who will provide the tender to the original lender. *See* Dougherty, *supra* note 18.

[259] Shepard, *supra* note 98, at 188.

[260] *See e.g.*, Belini v. Washington Mut. Bank, FA, 412 F.3d 17, 25 (1st Cir. 2005) ("[S]ection 1635 is written with the goal of making the rescission process a private one, worked out between creditor and debtor without the intervention of the courts.").

Moreover, banks could, if they violated TILA, simply not respond to the borrower's letter or stonewall until the three-year period expires and then foreclose. The facts alleged in the *McOmie-Gray*[261] case are a perfect example of this.[262] The bank in that case responded to the notice of rescission by negotiating with Ms. McOmie until the limitations period expired.[263] Ms. McOmie was therefore precluded from a remedy for any disclosure violations.[264] A rule that encourages lenders to ignore letters of rescission or to stonewall until the limitations period has expired is unacceptable given TILA's broad objective of protecting consumers from deceptive lenders.[265]

In addition, providing two separate methods of exercising the rescission right – the treatment of each depending on whether the right is exercised within the first three days or within the extended three year window – is likely to confuse consumers.[266] The current rule requires the notice of intent to rescind to include how to exercise the right to rescind, and for the lender to include a form of rescission with the lender's address on it.[267] The model form provided by the regulations clearly indicates that rescission is exercised by simply sending the form to the lender within three days.[268] Consumers are given clear instructions to exercise rescission by notifying the creditor – courts should not read additional requirements that do not appear in the statute, regulations, or notice forms. This will just confuse consumers who are never informed of the need to file a lawsuit within three years.

B. The Plain Language of the Statute and Regulation Support Exercise via Notification

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[261] McOmie-Gray v. Bank of America Home Loans, 667 F.3d 1325, 1326 (9th Cir. Feb. 8, 2012).
[262] *See McOmie-Gray* summary *infra* III.C.3.
[263] *McOmie-Gray*, 667 F.3d at 1326.
[264] *Id.*
[265] *See* discussion *infra* Part IV.A.1.
[266] A proposed rule by the Federal Reserve Board noted that "[c]onsumers were confused when presented with a single disclosure that provided information about the three-business-day right to rescind and an extended right to rescind . . ." 75 Fed. Reg. 58539 (Sept. 24, 2010).
[267] 12 C.F.R. § 226.23(b)(1)(iii) (2011).
[268] *See* Figure 1.

The Fourth Circuit's plain language reading of § 1635(f) is appropriate because the language is unambiguous. Moreover, the right of rescission for disclosure violations did not exist at common law and therefore should be governed strictly by the statute. After applying a plain language analysis relying solely on the words of the statute and accompanying regulation, it is clear that § 1635(f) only requires borrowers to exercise the rescission right via notification within three years. This interpretation is also completely consistent with the Supreme Court's holding ultimate holding in *Beach*, as well as principles of common law rescission.

1. A Plain Language Reading Supports Exercise of Rescission via Notification.

A plain language reading of § 1635 supports the Fourth Circuit's conclusion that notification of rescission is sufficient to satisfy § 1635(f). The right of action created by § 1635 and § 1640 did not exist at common law.[269] Though rescission rights generally do exist at common law,[270] the right to rescind in response to TILA disclosure violations is statutorily-created.[271] Because TILA created the right of rescission, any limitations on the right should be discerned from the statute itself.[272] Before limiting a statutory right, therefore, courts should rely upon the contours of that right as defined by the statute. Moreover, it is an axiom of statutory interpretation that courts initially "presume that a legislature says in a statute what it means and

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[269] Beach v. Great W. Bank, 670 So. 2d 986, 992 (Fla. Dist. Ct. App. 4th Dist. 1996) ("The right of rescission of a security interest for material violations of TILA disclosures is not a right existing under the common law. It is clearly and only the creation of statute."); James v. Home Constr. Co., 621 F.2d 727, 729 (5th Cir. Ala. 1980) ("§ 1635 is a statutorily created right.").

[270] *See* discussion *infra* Part IV.B.3.

[271] *See* Littlefield v. Walt Flanagan & Co., 498 F.2d 1133, 1136 (10th Cir. 1974) (quoting N. C. Freed Co. v. Bd. of Governors of Fed. Reserve Sys., 473 F.2d 1210, 1214 (2d Cir. 1973)) ("The Act . . . designed to prevent 'unscrupulous and predatory creditor practices ' . . . is remedial"); Begala v. PNC Bank, N.A., 163 F.3d 948, 950 (6th Cir. Ohio 1998) ("We have repeatedly stated that TILA is a remedial statute."); Smith v. No. 2 Galesburg Crown Finance Corp., 615 F.2d 407, 415 (7th Cir. Ill. 1980) (finding that TILA action survives as remedial claim, and recognizing that "courts have tended to emphasize the remedial character of the statute.").

[272] *Great W. Bank*, 670 So. 2d at 992 ("While the legislature may be without power to abolish common law rights, the legislature may create other rights and impose on them such limitations as it deems advisable. When it does, those limitations form part of the assertion of the right itself.").

means in a statute what it says there."[273] Thus, the starting point of any statutory analysis is the language of the statute itself.[274] To aid in understanding statutory language, the statute must be read in context with all of its various provisions.[275] In addition, the Supreme Court has noted that courts should resist reading words into a statute that appears plain on its face.[276] And finally, the Supreme Court has stated that when a statute prescribes action by a particular mode, it precludes action by alternative modes not mentioned in the statute.[277]

Applying these principles to the language of § 1635 reveals that the statute simply states that the right of rescission is exercised via notification of intent to rescind to the lender. Though § 1635(f) itself is silent as to the proper method of exercising rescission, read in context it is clearly an extension of the same right guaranteed by the buyer's remorse provision. In reference to the three-day buyer's remorse rescission, § 1635(a) states that a borrower may rescind the transaction by notifying the lender of his intent to do so in accordance with regulations.[278] § 1635(f) simply states that the right of rescission expires after three years.[279] Read together, these two provisions state that the right to *rescind by notification* in accordance with regulations expires *after three years* of the date of the transaction.

Because § 1635 is an extension of the same right provided for by the buyer's remorse provision, there is no reason to suggest that the statute contains an additional burden for borrowers asserting the right under § 1635(f) as opposed to the buyer's remorse provision.

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[273] Connecticut Nat'l Bank v. Germain, 503 U.S. 249, 253-254 (1992).
[274] Kaiser Aluminum & Chemical Corp. v. Bonjorno, 494 U.S. 827, 835 (1990) (quoting Consumer Product Safety Comm'n v. GTE Sylvania, Inc., 447 U.S. 102, 108 (1980)) ("Absent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive.").
[275] Graham County Soil & Water Conservation Dist. v. U.S. ex rel. Wilson, 545 U.S. 409, 415 (2005) ("Statutory language has meaning only in context.").
[276] Dean v. United States, 556 U.S. 568, 572 (2009) (quoting Bates v. United States, 522 U.S. 23, at 29 (1997)) (courts should "ordinarily resist reading words or elements into a statute that do not appear on its face.").
[277] Christensen v. Harris County, 529 U.S. 576, 583 (2000) (quoting Raleigh & Gaston R. Co. v. Reid, 80 U.S. (13 Wall.) 269, 270 (1872)) ("[W]hen a statute limits a thing to be done in a particular mode, it includes a negative of any other mode.").
[278] 15 U.S.C. § 1635(a) (2006).
[279] 15 U.S.C. § 1635(f) (2006).

Nothing in the language of the statutes differentiates between exercising rescission under the buyer's remorse provision or § 1635(f).[280] Indeed, the Supreme Court itself has recognized that § 1635 says nothing in terms of filing a lawsuit.[281] The Supreme Court ruled that § 1635(f) contains no lawsuit requirement and instead governs the life of the underlying rescission right[282] – the same exact right provided in the buyer's remorse provision, which is clearly exercised via notification.[283] Therefore, it is a simple and logical inference that rescission is also exercised via notification for the purposes of § 1635(f). Since notice of rescission is clearly sufficient to exercise rescission within three days, it is also sufficient to exercise rescission within three years under the terms of the statute.[284]

Because the language is clear, courts should resist reading additional requirements, such as a filing requirement, into the statute. Courts should especially resist adding requirements when they are burdensome hurdles for the very same borrowers that TILA, a remedial statute, is intended to protect.[285] Under the clear language of § 1635(f), a borrower must notify the lender of rescission within three years to exercise rescission. If the borrower fails to do this, the right of rescission expires after the three year period runs.

i. Sub-Issue: How Long do Borrowers have to Seek Judicial of Unacknowledged Rescissions?

TILA's language is not as clear on the issue of the time limitation for borrowers to seek *judicial enforcement* of rescission when rescission is proper but the lender fails to honor it. In

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[280] Sherzer v. Homestar Mortg. Servs., No. 07-5040, 2010 U.S. Dist. LEXIS 137315, at *32 (E.D. Pa. May 7, 2010) ("[N]either the statute nor the regulation requires the filing of suit within the time period, and neither differentiates between the notice required to invoke rescission within the three-day or the three-year period.").
[281] Beach v. Ocwen Fed. Bank, 523 U.S. 410, 417 (1998).
[282] *Id.*
[283] 15 U.S.C. § 1635(a).
[284] *Sherzer*, 2010 U.S. Dist. LEXIS 137315 at *32.
[285] *Infra* note 37.

other words, if a borrower properly exercises the right to rescind by notifying the creditor, how long does she have under TILA to seek judicial enforcement if the lender fails to respond?

Many courts applying the plain language analysis of § 1635 have imposed the one-year statute of limitations under § 1640(e) to this type of situation.[286] Under this view, borrowers have one year after notifying of rescission to seek enforcement and damages from the lender's failure to honor rescission. However, while the one-year limit to seek a damage award for failure to honor rescission is clearly appropriate under the statute, it is unclear whether this can or should be used as a limit on seeking judicial enforcement of rescission.[287] The courts have essentially read this one-year limitation on judicial enforcement into the statute. Perhaps the difficulty of resolving this issue is what has inspired some courts to make notification an insufficient exercise of rescission, in spite of the statutory language to the contrary.[288]

Nonetheless, it is hard to imagine the case where a borrower exercises rescission but does not seek to enforce it, either by refusing to make payments on the loan and forcing foreclosure or modification, or by seeking judicial enforcement.[289] In the rare instance where a borrower induces a lender to keep accepting payments after having purported to rescind the loan, the doctrine of equitable estoppel and axioms of common law contracts may be more appropriate to

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[286] *See* In re Hunter, 400 B.R. 651, 660-61 (Bankr. N.D. Ill. 2009); Santos v. Countrywide Home Loans, No. 09-912, 2009 U.S. Dist. LEXIS 71736, at *4-5 (E.D. Cal. Aug. 14, 2009); Gilbert v. Residential Funding LLC, 678 F.3d 271 (4th Cir. N.C. 2012). Many courts have found a lender's failure to honor rescission creates a private cause of action for money damages. Because this action would be for money damages, § 1640(e)'s one year limitation would clearly apply and begin to run at the date of the lender's failure to honor.

[287] The appropriateness of utilizing § 1640(e) to limit rescission actions is questionable because that provision is focused on actions seeking money damages and clearly does not encompass enforcement of equitable remedies such as rescission. The issue of seeking money damages for failure to honor rescission, on the other hand, is clearly contemplated by § 1640(e). *Infra* note 286.

[288] *See* discussion *infra* Part IV.B.1

[289] *See* discussion *infra* Part IV.A.2. Moreover, no court disputes that exercising rescission in the initial three-day buyer's remorse period is satisfied via notification. The issue of the time limit on seeking judicial enforcement is as present in that situation as under the three year statute of repose – even if it does not arise nearly as often. Since it is not a problem under § 1635(a), it should not be a problem under § 1635(f).

protect the lender than TILA's one-year damages limitation.[290] For instance, under common law rescission, once a party rescinds a contract she is bound to adhere to the rescission.[291] And the doctrine of equitable estoppel would protect the lender if a borrower seeks to enforce rescission after acting inconsistently with rescission.[292] Either of these doctrines would prevent bad faith borrowers from asserting rescission as a failsafe plan against some contemplated future default. These doctrines would also protect good faith lenders who fail to void the security interest, after relying upon a borrower's actions as opposed to her words.

2. The Plain Language Reading is Consistent with *Beach*.

As noted above, the plain language of § 1635 indicates that notice of rescission is a proper exercise of the rescission right for the purposes of § 1635(f).[293] Though some courts have found that the Supreme Court's decision in *Beach* mandates the opposite conclusion,[294] this reading is completely consistent with *Beach*.

In *Beach*, the Court held that § 1635(f) is a strict repose period for the rescission right.[295] As part of its holding, the Court stated that TILA "permits no federal right to rescind, defensively or otherwise, after the 3-year period of § 1635(f) has run."[296] However, the court made no effort to explain what actually constitutes an exercise of the right to rescind.[297] Indeed, the *Beach*

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[290] 15 U.S.C. § 1640(e) (2006).
[291] 17B C.J.S. *Contracts* § 647 ("An election to rescind the contract must be made by the party who has the right to rescind, and once the election is made, that party must adhere to it."); Grymes v. Sanders, 93 U.S. 55, 62 (1876) ("Where a party desires to rescind upon the ground of mistake or fraud, he must, upon the discovery of the facts, at once announce his purpose, and adhere to it. If he be silent, and continue to treat the property as his own, he will be held to have waived the objection, and will be conclusively bound by the contract, as if the mistake or fraud had not occurred. He is not permitted to play fast and loose. Delay and vacillation are fatal to the right which had before subsisted.").
[292] 31 C.J.S. *Estoppel and Waiver* § 159 ("The doctrine of equitable estoppel precludes a person from maintaining a position or attitude which is inconsistent with another position or attitude sought to be maintained at the same time or which was asserted at a previous time.").
[293] *See* discussion *infra* Part IV.B.1.
[294] *See* discussion *infra* Part III.C.
[295] *See* discussion *infra* Part III.B.
[296] Beach v. Ocwen Fed. Bank, 523 U.S. 410, 419 (1998).
[297] *See* discussion *infra* Part III.B.

decision was expressly concerned with rescission being asserted *outside* the three year time period contained in § 1635(f); the Court did not explain how to properly assert the rescission right *within* the allowed three year period.[298] Therefore, *Beach* stands simply for the proposition that § 1635(f) governs the life of the underlying rescission right, which expires after three years. But the Court did not explain the proper method of exercising rescission within three years – whether it is accomplished by notice or lawsuit. Tellingly, the Court noted that § 1635(f) does not mention filing a lawsuit.[299] The issue of properly exercising rescission within the three-year period had already arisen by the time *Beach* was decided,[300] and if the Court had intended to address the issue it would have done so clearly.

Even the underlying policy rationale of the *Beach* decision is consistent with borrowers exercising the rescission right for the purposes of § 1635(f) via notification. In *Beach*, the Court was concerned with whether rescission claims could be raised as defenses to recoupment actions outside of 1635(f)'s three year window.[301] The Court worried that allowing rescission claims to be raised perpetually as defenses in recoupment actions pursuant to § 1640(e) would "cloud the title" of mortgages during foreclosure.[302] However, this policy concern is simply not present in the context of deciding whether notice is a sufficient exercise of the rescission right for the purposes of § 1635(f).[303] Allowing borrowers who properly notify the lender of rescission *within* three years to be entitled to rescission has no effect on *Beach*'s policy of preventing the clouding of mortgages, because the question of whether the loan was rescinded will be resolved within a

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[298] *Id.*
[299] *Beach*, 523 U.S. at 417 ("Subsection 1635(f) . . . says nothing in terms of bringing an action . . . It talks not of a suit's commencement but of a right's duration.").
[300] *See* discussion *infra* Part III.A.1.
[301] *See* discussion *infra* Part III.B.
[302] *Beach*, 523 U.S. at 418.
[303] *See* discussion *infra* Part IV.A.2.

reasonable time or during the foreclosure proceeding itself.[304] Therefore, the view that notice of rescission satisfies § 1635(f) is completely consistent with both the holding of *Beach* and its underlying rationale. Courts should not read additional requirements into the statute based on a misguided attempt to promote *Beach*'s principles.[305]

3. Principles of Common Law Rescission Also Support the Plain Reading of § 1635(f).

It is a principal of statutory construction that statutes should be construed with reference to common law principals, and that statutes should not be read to incorporate changes to the common law unless clearly prescribed.[306] On the other hand, principles of the common law cannot be used to override the intentions of Congress.[307]

Rescission as a contract remedy has existed at the common law for many years.[308] At the common law, rescission was exercised when the aggrieved party that has the right to rescind expresses it.[309] Thus, courts have held that rescission is a "fact" that is "complete" whether the aggrieved party makes the fact known to the other party, either by lawsuit or by unequivocal notice.[310] Under the common law, the other party has the opportunity to accept the rescission,

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[304] *Id.*

[305] Cohens v. State of Virginia, 19 U.S. (6 Wheat.) 264, 399–400, 5 L.Ed. 257 (1821) ("[G]eneral expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision.").

[306] 82 C.J.S. *Statutes* § 473 ("In case of ambiguity, statutes are to be construed with reference to the principles of the common law in force at the time of their passage, and statutes are not to be interpreted as effecting any change in the common law beyond that which is clearly indicated."); Moragne v. States Marine Lines, Inc., 398 U.S. 375, 392 (1970) ("It has always been the duty of the common-law court to perceive the impact of major legislative innovations and to interweave the new legislative policies with the inherited body of common-law principles."); Robert C. Herd & Co. v. Krawill Mach. Corp., 359 U.S. 297, 304 (1959) (quoting Shaw v. Merchants' Nat. Bank, 101 U.S. 557, 565 (1879) ("(n)o statute is to be construed as altering the common law, farther than its words import.").

[307] Mohamad v. Palestinian Auth., 132 S. Ct. 1702, 1709 (2012) ("Congress plainly can override those [common law] principles.").

[308] *See e.g.*, Grymes v. Sanders, 93 U.S. 55 (1876).

[309] 17B C.J.S. *Contracts* § 648 ("A clear, unambiguous, and unequivocal notice of rescission from the aggrieved party to the other party to the contract generally is necessary to effect a rescission of the contract.").

[310] *E.g.*, Cunningham v. Pettigrew, 169 F. 335, 341 (8th Cir. 1909) ("Rescission is a fact, the assertion by one party to avoidable contract of his right (if such he had) to avoid it, and when the fact is made known to the other party,

and the issue is resolved without the involvement of courts.[311] However, if the other party rejects rescission, the borrower may file a lawsuit to enforce the rescission, but cannot seek damages under the contract.[312] If notice of rescission was given and is considered valid, the judicial proceeding is an equitable proceeding to determine whether to confirm or deny the rescission – in other words, to confirm or deny the earlier exercise of the rescission right, to establish whether the aggrieved party had the right in the first place, and to restore the parties through restitution.[313] Traditionally, under the common law a showing of tender by the borrower was necessary before a court would grant the equitable remedy of rescission.[314] The purpose of this common law process is to restore the parties to the *status quo ante*, as if the contract was never signed in the first place.[315]

TILA's rescission remedy has been viewed as enhancing the protections that the common law rescission remedy provides to consumers.[316] The procedures outlined by the statute seem to

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whether by a suit or in any other unequivocal way, the rescission is complete."); Griggs v. E.I. DuPont de Nemours & Co., 385 F.3d 440, 445-56 (4th Cir. 2004) ("[R]escission itself is effected when the plaintiff gives notice to the defendant that the transaction has been avoided and tenders to the defendant the benefits received by the plaintiff under the contract.").

[311] C. Brown Trucking Co. Inc. v. Henderson, 305 Ga. App. 873, 874 (2010) (citation omitted) ("Parties may by mutual consent abandon an existing contract between them so as to make it not thereafter binding and the contract may be rescinded by conduct as well as by words.").

[312] Hooker v. Norbu, 899 N.E.2d 655, 658 (Ind. Ct. App. 2008) ("[R]escission of such contract terminates it with restitution."); 17B C.J.S. *Contracts* § 656 ("The rescission of a contract precludes the recovery of damages for breach of contract, since rescission and damages for breach of contract are inconsistent remedies and the decision to pursue one remedy bars the other remedy.").

[313] *See e.g.*, Peterson v. Highland Music, Inc., 140 F.3d 1313, 1322 (9th Cir. 1998) ("When a party gives notice of rescission, it has effected the rescission, and any subsequent judicial proceedings are for the purpose of confirming and enforcing that rescission.").

[314] Williams v. Homestake Mortg. Co., 968 F.2d 1137, 1140 (11th Cir. 1992) ("Under common law rescission, the rescinding party must first tender the property that he has received under the agreement before the contract may be considered void.").

[315] Grymes v. Sanders, 93 U.S. 55, 62 (1876) ("A court of equity is always reluctant to rescind, unless the parties can be put back *in statu quo*. If this cannot be done, it will give such relief only where the clearest and strongest equity imperatively demands it."); Am. Serv. Ins. Co. v. United Auto. Ins. Co., 409 Ill. App. 3d 27, 35 (2011) ("Rescission is the cancellation of a contract thereby restoring the parties to their initial status.").

[316] Shepard, *supra* note 98, at 188 (2010) ("TILA's rescission provisions shift significant leverage to consumers by enhancing the protections provided to consumers under common law causes of action and remedies, the oldest and most basic forms of consumer protection.").

acknowledge the common law framework for rescission,[317] but add a few key differences to protect consumers. For instance, whereas grounds for rescission under the common law for fraud must have been pled with particularity to be confirmed, TILA liberalizes the requirements by establishing disclosure violations as strict liability for the purposes of rescission.[318] Additionally, TILA provides borrowers with up to three years to rescind the contract,[319] whereas under the common law rescission must be brought within a reasonable time.[320] And significantly, TILA reverses the tender requirement, requiring the lender to void the security interest before the borrower is required to tender payment.[321] By reversing the tender requirement, TILA provides consumers with extra leverage and more time to obtain financing to tender.[322]

Despite the few changes to the rescission process made by TILA, the plain reading interpretation of § 1635(f) is consistent with the basic principles of common law rescission. Under this view, rescission may be resolved without involvement of the courts,[323] but the court is petitioned to either confirm or deny the validity of the rescission and to govern the restitution process.[324] Similarly, the common law grants the right to rescind to certain parties in certain

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[317] *See* discussion *infra* Part II.B.1.
[318] Shepard, *supra* note 98, at 189.
[319] 15 U.S.C. § 1635(f) (2006).
[320] 17B C.J.S. *Contracts* § 641 ("The right to rescind a contract must be exercised promptly or within a reasonable time on discovery of facts from which the right arises, but what constitutes a reasonable time depends on the circumstances of the particular case.").
[321] 15 U.S.C. § 1635(b) (2006); 12 C.F.R. § 226.23(d) (2011). Some courts have re-ordered the statutory rescission process by implementing a conditional rescission requirement. *See generally* Shepard, *supra* note 98; 15 U.S.C. § 1635(b) ("The procedures prescribed by this subsection shall apply except when otherwise ordered by a court.").
[322] Shepard, *supra* note 98, at 192.
[323] Rosenfield v. HSBC Bank, USA, 681 F.3d 1172, 1183 n.8 (10th Cir. Colo. 2012) (recognizing *in dicta* that if the lender responds affirmatively to the borrower's notice of intent to rescind under TILA, rescission may be "complete" and enforceable by a court in equity.).
[324] Belini v. Washington Mut. Bank, F.A., 412 F.3d 1517, 25 (1st Cir. 2005) (emphasis added) ("[S]ection 1635 is written with the goal of making the rescission process a *private one,* worked out between creditor and debtor *without the intervention of the courts.*").

circumstances, and the right may be exercised by a unilateral expression of intent to rescind.[325] The right must be *invoked* within a reasonable time upon discovery of the cause for rescission,[326] and a court may later grant an equitable remedy of rescission if the party seeking to rescind was justified.[327] § 1635(f) changes this common law process by mandating the time limit for the rescission right to be invoked: instead of being limited by "reasonableness," the period to exercise rescission is expanded to three years. In most other respects, this reading of § 1635(f) is consistent with the underlying process involved at common law rescission.

The *Rosenfield* court sought to justify its restrictive holding that § 1635(f) requires the filing of a lawsuit on common law grounds.[328] While the court accurately described TILA rescission as analogous to common law rescission,[329] the court nonetheless found that a key policy behind common law rescission – "remedial economy" – justified its restrictive view of § 1635(f).[330] The court found that the difficulties in enforcing the Fourth Circuit's view of § 1635(f) would jeopardize remedial economy by clouding the title of mortgages with the potential for rescission indefinitely.[331] However, the *Rosenfield* court's argument is based upon the erroneous assumption that permitting rescission to be exercised via notification would cloud the title of mortgages. Because invoking rescission via notification does not burden mortgage

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[325] 17B C.J.S. Contracts § 646 ("As a general rule, to effect a rescission of a contract, an affirmative act on the part of the person desiring to rescind is necessary, and a contract may be rescinded by the parties by their conduct as well as by words.").

[326] 17B C.J.S. *Contracts* § 641 ("The right to rescind a contract must be exercised promptly or within a reasonable time on discovery of facts from which the right arises, but what constitutes a reasonable time depends on the circumstances of the particular case.").

[327] Peterson v. Highland Music, Inc., 140 F.3d 1313, 1322 (9th Cir. 1998) ("When a party gives notice of rescission, it has effected the rescission, and any subsequent judicial proceedings are for the purpose of confirming and enforcing that rescission.").

[328] *Rosenfield*, 681 F.3d at 1184-1185.

[329] *Id.* at 1184 ("[W]e ascertain no basis for concluding that the TILA rescission remedy differs in any material respect from the general form of rescission available [at common law.]").

[330] *Id.* at 1184 (internal quotation omitted) ("The primary justification of rescission, however, is remedial economy . . . *it is not an appropriate remedy in circumstances where its application would lead to prohibitively difficult (or* impossible) enforcement.").

[331] *Id.* at 1185 ("The problem with [the exercise via notification] argument is that, in a significant number of instances, the remedial economy of the remedy would be jeopardized.").

titles,[332] the *Rosenfield* court's argument is undercut. Instead, the Fourth Circuit's reading of § 1635(f) is indeed consistent with common law rescission.

C. To the Extent that § 1635(f) is Silent or Ambiguous, Courts Should Defer to Regulation Z's interpretation.

If any silence or ambiguity is to be found in the statute itself, courts should give deference to the accompanying regulation. TILA provides the CFPB with the authority to promulgate regulations implementing TILA and to determine what constitutes notification of rescission.[333] Regulation Z clearly states that for a consumer to exercise the right to rescind, the consumer must "notify the creditor of rescission by mail, telegram or other means of written communication."[334] The regulation then states that the right of rescission expires after three years if certain disclosures are not made.[335] Read together, these regulations state that the right to rescind "by mail, telegram, or other means of written communication" expires after three years if certain disclosures are not made. Nothing in the language of either the statute or the regulation requires the filing of a lawsuit to assert rescission. Moreover, the regulation does not differentiate between exercising rescission under § 1635(f) and under the buyer's remorse provision. Indeed, the regulations governing the method of exercising rescission, providing buyer's remorse rescission, and extending the right to three years are all under the general "Consumer's Right to Rescind" heading.[336] The CFPB's proposed rescission rule maintains this organization of the regulation,[337] and the CFPB itself has taken the position in litigation that §

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[332] *See* discussion *infra* Part IV.A.2.
[333] 15 U.S.C. § 1602(a) (2006) ("The Bureau shall prescribe regulations to carry out the purposes of this title,"); 15 U.S.C. § 1635(a) (2006) ("[T]he obligor shall have the right to rescind . . . by notifying the creditor, in accordance with regulations of the Bureau, of his intention to do so.").
[334] 12 C.F.R. § 226.23(a)(2) (2011).
[335] 12 C.F.R. § 226.23(a)(3).
[336] 12 C.F.R. § 226.23(a).
[337] 2012 Truth in Lending Act (Regulation Z) (Interim Final Rule), Docket No. CFPB–2011–0031, 76 Fed. Reg. 79768, 79803 (December 22, 2011).

1635(f) only requires rescission via notification.[338] Thus, Regulation Z's interpretation of § 1635(f) is that a borrower's notification of rescission satisfies the three year time extension. Whereas § 1635(f) may be considered vague or at least imprecise on the issue, Regulation Z suggests that exercising rescission is the same under either the buyer's remorse provision or § 1635(f). This raises the question of whether this interpretation is entitled to deference by the courts.

The hallmark case concerning judicial deference to executive agencies remains *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*[339] With respect to Regulation Z in particular, the Supreme Court has often favored the deferential *Chevron* approach.[340] *Chevron* established a two-part test to determine whether a regulation is binding on the courts. First, courts ask whether Congress has directly spoken on the interpretation problem at issue.[341] If the statutory language or Congressional intent is clear, courts – and the regulatory agency – must give effect to the intent of Congress.[342] Next, courts ask whether the regulation is "arbitrary, capricious, or manifestly contrary to the statute."[343] If the regulation is reasonable, it is given controlling weight.[344] When an agency has expressed its opinion in an informal manner that

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[338] Brief for Amicus CFPB, Rosenfield v. HSBC Bank ,USA, 681 F.3d 1172 (10th Circ. Colo. 2010) (No. 10-1442), *available at* http://files.consumerfinance.gov/f/201203_cfpb_Rosenfield_vs_HSBC_Amicus.pdf; Brief for Amicus CFPB, Sobieniak v. BAC Home Loans Servicing, L.P. (2012) (No. 12-1053), *available at* http://files.consumerfinance.gov/f/201204_CFPB_Sobieniak-amicus-brief.pdf.

[339] 467 U.S. 837 (1984).

[340] *See e.g.*, Ford Motor Credit Co. v. Milhollin, 444 U.S. 555, 565 (1980) ("[C]aution must temper judicial creativity in the face of legislative or regulatory silence . . . deference is especially appropriate in the process of interpreting the Truth in Lending Act and Regulation Z."); Anderson Bros. Ford v. Valencia, 452 U.S. 205, 219 (1981) ("[A]bsent some obvious repugnance to the statute, the . . . regulation implementing [TILA] should be accepted by the courts."); Household Credit Servs. v. Pfennig, 541 U.S. 232, 238 (2004); Household Credit Servs. v. Pfennig, 541 U.S. 232, 238-239 (2004).

[341] *Id.* at 842.

[342] *Id.* at 842-843.

[343] *Id.* at 843-844.

[344] *Id.*

lacks the force of law, such as an opinion letter, the agency's opinion is not entitled to *Chevron* deference but is still entitled to respect as an aid to statutory interpretation.[345]

With respect to the first prong of *Chevron*, § 1635(f) may be said to be ambiguous because, unlike the buyer's remorse provision, § 1635(f) does not specify the proper method of rescission. Though the context of the statute suggests Congressional intent to have rescission exercised the same way under either provision,[346] it is possible that the inartful lack of precision in the language of § 1635(f) may be interpreted as a gap in the statute. Similarly, though the Congressional intent behind TILA, and particularly its recent transfer of rulemaking authority to the CFPB, suggests that Congress is interested in easing requirements for borrowers,[347] this can hardly be considered a clear statement on this specific issue by Congress.

These considerations allow the analysis to proceed to the second part of *Chevron*: whether the regulation is a reasonable construction of the statute. Regulation Z's interpretation of § 1635(f) is not arbitrary or capricious and therefore should be given deference. First, the regulation's interpretation of § 1635(f) is consistent with similar statutes of repose in many other contexts. Look for "bar date" deadline to file claims in bankruptcy For instance, the Universal Commercial Code as enacted in New York contains a one-year statute of repose that requires bank customers to object within one year of receiving notice of an unauthorized wire transfer.[348] If objection is not made, the right to be reimbursed by the bank extinguishes.[349] This is an example of a statute of repose that is satisfied not by filing a lawsuit, but by engaging in some other sort of action to preserve a right granted by statute. Since these types of statutes – granting

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[345] Christensen v. Harris County, 529 U.S. 576, 587 (2000) (internal quotation omitted) ("Interpretations such as those in opinion letters-like interpretations contained in policy statements, agency manuals, and enforcement guidelines, all of which lack the force of law-do not warrant *Chevron*-style deference . . . Instead, interpretations contained in formats such as opinion letters are entitled to respect.).
[346] *See* discussion *infra* Part IV.B.1.
[347] *See* discussion *infra* Part IV.A.1.
[348] *See e.g.*, N.Y. UCC § 4-A-505.
[349] *Id.*

a right, but allowing it to be preserved by an action other than filing a lawsuit within a set time period – exist in other contexts, Regulation Z's interpretation of § 1635(f) to be this type of statute is hardly arbitrary.

In addition, Regulation Z's lack of arbitrariness is evident from considerations of Congressional intent, Supreme Court precedent, and principles of common law. As noted above, a borrower-friendly reading of § 1635(f) is consistent both with the underlying goals of TILA and the recent actions by Congress seeking to expand consumer protection laws.[350] The Regulation Z interpretation is also consistent with the Supreme Court's reasoning and policy rationale outline in *Beach*,[351] and with the process of common law rescission.[352] Finally, Regulation Z's interpretation is in accordance with the principal that remedial statutes should be construed liberally to protect the people the statute sought to help.[353] Thus, Regulation Z's interpretation can not be considered arbitrary or capricious.

None of the Courts of Appeals ruling on this issue even passed on the issue of providing deference to the regulation.[354] However, to the extent that § 1635(f) is silent concerning the proper method of exercising rescission, Regulation Z should be given deference as an administrative gap-filler.

V. Proposed Solutions

Though the statutory and regulatory language appear to state that exercise of rescission is accomplished via notification to the lender, either Congress or the Supreme Court may act to resolve the split among the circuits. A gross misinterpretation of a Supreme Court case, as well

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[350] *See* discussion *infra* Part IV.A.1
[351] *See* discussion *infra* Part IV.B.2.
[352] *See* discussion *infra* IV.B.3.
[353] *See e.g.*, King v. California, 784 F.2d 910, 915 (9th Cir. Cal. 1986) (citation omitted) ("The courts have construed TILA as a remedial statute, interpreting it liberally for the consumer.").
[354] *See* discussion *infra* Part III.C.

as an inartfully drawn statute, has placed into jeopardy the rescission rights of many borrowers. The following two fixes should repair the situation.

A. The Supreme Court Can Resolve the Split Created by *Beach*.

The split between the circuits concerning the exercise of rescission rights has largely been the result of the Supreme Court's decision in *Beach* and the subsequent surge in foreclosure filings that occurred during the financial crisis of the 2000s.[355] The Fourth Circuit has read § 1635(f) to only require notice of rescission, but the Third, Ninth, and Tenth circuits have reached the opposite conclusion largely by relying on the *Beach* decision.[356] The issue is currently pending before the Eighth Circuit,[357] and district and bankruptcy courts throughout the country have disagreed on this issue.

As a result of this confusion, the Supreme Court should revisit § 1635(f). The Court should clarify that *Beach* only stood for the proposition that § 1635(f) is a strict three year time limitation on rescission claims, and that the Court did not rule on the proper method of exercising the right to rescind within the three year period. Instead, the Court should confirm that the plain meaning of the statute and accompanying regulations detail the exercise of the rescission right. The Court should clarify that, as under buyer's remorse rescission, a borrower can exercise the right to rescind under § 1635(f) by notifying the lender of rescission. If the lender is properly and timely notified, the rescission right has been exercised and a court may confirm or deny the rescission in a subsequent proceeding.[358]

B. A Legislative Amendment To Clarify § 1635

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[355] *Id.*
[356] *Id.*
[357] Sobieniak v. BAC Home Loans Servicing, No. 12-1053 (8th Cir.).
[358] The Court may also seek to answer the growing question of whether notification immediately voids the transaction, or whether the transaction is only legally voided after confirmation by a court. *See* discussion *infra* Part II.B.2. This Comment does not take a position on this issue.

As discussed, under the terms of the statute there is little reason to conclude that exercising the three-day rescission right is any different from exercising the three-year extended rescission right.[359] Regulation Z, by incorporating both modes of exercising rescission into the same regulatory heading, agrees with this interpretation.[360] Nonetheless, a legislative amendment can make the statute even more clear. Such an amendment must clearly indicate that the mode of exercising the rescission right is the same under either buyer's remorse rescission or § 1635(f). A simple amendment to § 1635(f) would accomplish this. An example of proposed legislation is provided in Figure 2, with the proposed amended language underlined.[361]

Figure 2 – Sample Proposed Legislation to Clarify the Exercise of Rescission Rights under § 1635(f).

§ 1635. Right of rescission as to certain transactions

. . .

(f) Time limit for exercise of right. An obligor's right of rescission shall expire three years after the date of consummation of the transaction or upon the sale of the property, whichever occurs first, unless the right of rescission is exercised by notifying the creditor, in accordance with regulations of the Bureau, of his intention to rescind, . . .

VI. Conclusion

The Truth In Lending Act's right of rescission is an important remedy for many borrowers, particularly those borrowers who have accepted loans with no hope of repayment. The rescission right is a strict liability right to rescind certain loans, and the right extends to up to three years after the date of the transaction pursuant to § 1635(f) of TILA. Since the collapse of the housing industry, and subsequent drop in the value of homes, many borrowers are in no position to hire a lawyer and initiate costly litigation just to have the right of rescission survive the statutorily-prescribed period. Moreover, many of these borrowers have made good-faith

[359] *See* discussion *infra* Part IV.B.1
[360] 12 C.F.R. § 226.23(a) (2011).
[361] *Infra* Figure 2.

attempts to comply with the law, by relying on indications on the notice of rescission form that rescission is accomplished via notification, but have had their rescission claims rejected by courts as untimely. Other borrowers have encountered lenders that, after receiving notice of rescission, cynically stonewall with hopeless negotiations until the repose period for rescission expires, after which point they file a foreclosure complaint.

The Truth In Lending Act must be read to allow rescission claims to survive if notice of rescission has been provided to the lender within three years of the consummation of the loan. A contrary reading of the statute punishes good faith borrowers who discover disclosure violations late – presumably, after encountering trouble keeping up with payments. These borrowers are often in financial distress and lack legal sophistication. Moreover, requiring these borrowers to file a lawsuit rewards the cynical lenders who choose to either ignore notices of intent to rescind or, as in the case of Ms. McOmie-Gray, goad the borrower with negotiation only to foreclosure after the three year period expires.

The Supreme Court itself has noted that neither the statute nor regulations discuss any requirement that borrowers must file a lawsuit in order for their rescission claims to survive the repose period. Indeed, as the Fourth Circuit and many lower courts concluded, the plain language of TILA simply requires borrowers to notify the lender of intention to rescind within three years. Other circuits have read an additional requirement into the law, requiring borrowers to notify lenders of rescission and to file a lawsuit seeking rescission within three years. These courts have largely relied on and misinterpreted Supreme Court doctrine. A correction of these misinterpretations is necessary to protect good faith borrowers and prevent lenders from escaping liability for TILA violations by stonewalling borrowers.

As noted, the plain language of TILA and the regulations support the Fourth Circuit view that notice is a sufficient exercise of rescission. This interpretation is completely consistent with the holdings of Supreme Court precedent, as well as the underlying policy rationales behind that precedent. This interpretation is also consistent with the principles underlying common law rescission, and the recent public policies pursued by a Congress interested in protecting borrowers from unfair credit practices. Finally, given TILA's nature as a remedial statute, and the courts' admonishment that it must be interpreted it in the light most favorable to borrowers, the plain language of the statute should be relied upon by courts interpreting § 1635(f).