

TRUTH IN LENDING? THE SURVIVAL OF A BORROWER'S STATUTORY CLAIM FOR RESCISSION

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I. INTRODUCTION

In the years preceding the financial crisis of 2008, the prevalence of mortgage lenders issuing mortgages to individuals who, for many possible reasons, could not repay the loans created a housing bubble that eventually burst.¹ 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).² 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 the right to rescind would expire.³ This failure to disclose the expiration date violated TILA and entitled Ms. McOmie-Gray to rescission.⁴

Two years later, Ms. McOmie-Gray sought to exercise her rescission right by notifying the lender of her intention to rescind.⁵ The bank, however, refused to honor the rescission and instead

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¹ Jeff Sobern, *Help for the Perplexed Home Buyer*, N.Y. TIMES, July 19, 2012, at A29, 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.”).

² *McOmie-Gray v. Bank of Am. 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 accepted the plaintiff’s allegations as true for purposes of ruling on a motion to dismiss.

³ *Id.*

⁴ 15 U.S.C. § 1635(a) (2012); 12 C.F.R. § 226.23(b) (2011).

⁵ *McOmie-Gray*, 667 F.3d at 1326.

began a year-long negotiation regarding the loan terms.⁶ After negotiations failed, Ms. McOmie-Gray finally filed a claim to enforce the rescission, but the claim was dismissed by the court as untimely.⁷ The court held that because the claim was filed over three years after the loan was created, it was barred under TILA.⁸ 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.⁹ In essence, the bank avoided rescission liability for its own TILA violation by delaying and negotiating with Ms. McOmie-Gray until the statutory time limit expired.¹⁰

TILA¹¹ 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.¹² Though TILA was originally passed in 1968, the surge in foreclosure filings following the bursting of the mortgage bubble in 2008 has brought TILA's disclosure regime to the forefront of policymaking.¹³ Indeed, the issuance of loans to borrowers who simply did not understand the terms of their loans was a significant factor contributing to the mortgage crisis.¹⁴ Thus, disclosure requirements are seen as an essential tool to protect consumers from abusive practices by the lending industry and to avoid another

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*; 15 U.S.C. § 1635(f) (2006).

⁹ *McOmie-Gray*, 667 F.3d at 1326; 15 U.S.C. § 1635(a); 15 U.S.C. § 1635(f); 12 C.F.R. § 226.23(a)(2).

¹⁰ *McOmie-Gray*, 667 F.3d at 1326.

¹¹ 15 U.S.C. §§ 1601–1667f (2012).

¹² 15 U.S.C. § 1601(a) (2012) (“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.’”).

¹³ *See* 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); 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.

¹⁴ *See, e.g.*, Richard Gandon, UNDERSTANDING THE MORTGAGE MELTDOWN WHAT HAPPENED AND WHO'S TO BLAME, <http://www.moneymatters101.com/mortgage/meltdown.asp>.

mortgage bubble.¹⁵ The recent passage of the Dodd-Frank Wall Street Reform and Consumer Protection Act (hereinafter “Dodd-Frank”), a broad piece of legislation focused in large part on protecting consumers from abusive financial services practices, underscores the importance of TILA disclosures in protecting consumers.¹⁶ Under Dodd-Frank, TILA rulemaking authority was transferred from the Federal Reserve to the newly created Consumer Financial Protection Bureau.¹⁷

In addition to mandating disclosure requirements, TILA also provides an important substantive right for consumers: the right to rescind certain mortgage transactions—mostly refinancing arrangements and financing for remodeling efforts on principal dwellings—when adequate disclosures are not provided.¹⁸ As foreclosure filings increased during the financial crisis of 2008, the number of rescission cases also increased.¹⁹ 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.²⁰ Often, for borrowers who have taken on loans they cannot repay due to inadequate lender disclosures, rescission is not only the most powerful remedy, but the *sole* remedy.²¹

¹⁵ CONSUMER FIN. PROTECTION BUREAU, LEARN ABOUT THE BUREAU, <http://www.consumerfinance.gov/the-bureau/> (“An informed consumer is the first line of defense against abusive practices.”).

¹⁶ Preamble, Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010) (“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.”) (emphasis added).

¹⁷ Dodd-Frank § 1100A; *see also* 15 U.S.C. § 1604(a) (2012) (current statute granting TILA rulemaking authority to the Consumer Financial Protection Bureau); 1 THOMPSON & RENUART, TRUTH IN LENDING, § 1.2.11, at 11 (7th ed. 2010).

¹⁸ 15 U.S.C. § 1635 (2012); *see* citations and accompanying text, *supra* notes 47, 48.

¹⁹ Carter Dougherty, *Banks Push Fed to Curb Borrowers’ Right to Rescind Mortgages*, BLOOMBERG (Dec. 16, 2010 12:01 AM), <http://www.bloomberg.com/news/2010-12-16/fed-mortgage-rescission-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).

²⁰ Editorial, *The Fed and Foreclosures*, N.Y. TIMES, Nov. 29, 2010, at A24, *available at* <http://www.nytimes.com/2010/11/29/opinion/29mon2.html>.

²¹ *Id.* (describing rescission as “the most effective legal tool that borrowers have to fight foreclosures”).

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.²² 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.²³ 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 on the issue.²⁴ The Supreme Court has not provided any guidance on this issue. In *Beach v. Ocwen Federal Bank*, the Court described § 1635(f) 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.²⁵

While the statute,²⁶ accompanying regulation,²⁷ and even the model disclosure forms²⁸ all suggest that a borrower exercises rescission by notifying the lender, a dispute has developed among the circuits concerning how the consumer may satisfy the extended three-year limit for exercising rescission. Many courts have correctly concluded that notifying the lender of rescission in accordance with the statute and regulations suffices.²⁹ As the statutory and regulatory language indicates, these courts have held that § 1635(f) does not contain a filing requirement and only limits a borrower’s right to assert rescission. The majority of courts, however, often relying upon the Supreme Court’s decision in *Beach*, have required that a borrower

²² 15 U.S.C. § 1635(a); Jacob Werrett, *Achieving Meaningful Mortgage Reform*, 42 CONN. L. REV. 319, 337 (2009).

²³ 15 U.S.C. § 1635(f) (2012).

²⁴ 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 Am. Home Loans, 667 F.3d 1325 (9th Cir. 2012); *see also* discussion *infra* Part IV.C (arguing in favor of deference to the regulation).

²⁵ *Beach v. Ocwen Fed. Bank*, 523 U.S. 410 (1998); *see* discussion *infra* Part III.B.

²⁶ 15 U.S.C. § 1635(a), (f).

²⁷ 12 C.F.R. § 226.23(a)(2) (2011).

²⁸ 12 C.F.R. § 226, app. H-8 (2011).

²⁹ *See, e.g.,* Sherzer v. Homestar Mortg. Servs., No. 11-4254, 2013 U.S. App. LEXIS 2486 (3d Cir. Feb. 5, 2013); Gilbert v. Residential Funding LLC, 678 F.3d 271 (4th Cir. 2012); 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); *In re* Hunter, 400 B.R. 651 (Bankr. N.D. Ill. 2009).

also file a lawsuit within three years to avoid extinguishment of the rescission right.³⁰ Ms. McOmie-Gray's story typifies the situation of many borrowers after appellate courts adopted this approach. Instead of retaining rescission as a powerful remedial tool for borrowers to use without judicial intervention,³¹ these courts have unfortunately shifted the power of rescission into the hands of banks that can stonewall until the statutory time period expires, even after the borrower makes their intent to rescind clear—the situation that befell Ms. McOmie Gray.

This Comment addresses the unresolved circuit split over what a borrower must do to satisfy the three-year time limitation for rescission under TILA, and argues that § 1635(f) and its accompanying regulation must be read plainly, to only require that borrowers notify the lender to exercise rescission. 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 applied in the most recent Courts of Appeals decisions. Part IV argues for an interpretation of §1635(f) that will protect borrowers without overburdening lenders. Finally, Part V proposes legislative and judicial solutions to solve this problem 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

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.³² TILA was

³⁰ See, e.g., *Keiran v. Home Capital*, 720 F.3d 721 (8th Cir. 2013); *Rosenfield v. HSBC Bank, USA*, 681 F.3d 1172 (10th Cir. 2012); *McOmie-Gray v. Bank of Am. Home Loans*, 667 F.3d 1325 (9th Cir. 2012); *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).

³¹ *Belini v. Wash. 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.”).

³² Truth in Lending Act, Pub. L. No. 90-321, 82 Stat. 146, 146 (1968) (codified as amended in 15 U.S.C. §§ 1601–1667f (2012)); THOMPSON & RENUART, *supra* note 17, § 1.2.1, at 4.

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."³³ By its own terms, the goal of TILA is to ensure meaningful disclosures of credit terms in consumer credit transactions.³⁴ The drafters of TILA reasoned that meaningful disclosure would help consumers avoid the uninformed use of credit, and would protect them from inaccurate and unfair practices related to credit.³⁵ In originally passing TILA, Congress believed that a meaningful disclosure of credit terms would also promote economic stability and competition.³⁶

In addition to the stated goal of TILA, the legislation has always been understood as remedial.³⁷ 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.³⁸ Given TILA's remedial nature, courts have also agreed that the statute should be interpreted liberally to protect consumers.³⁹ TILA's grant of the powerful right of rescission to borrowers for certain loans that violate TILA's requirements is emblematic of Congress's pro-consumer intent, which has also been recognized by the courts.⁴⁰

³³ THOMPSON & RENUART, *supra* note 17, at 5.

³⁴ 15 U.S.C. § 1601(a) (2012).

³⁵ *Id.* 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.

³⁶ 15 U.S.C. § 1601(a).

³⁷ THOMPSON & RENUART, *supra* note 17, at 5 (describing the passage of TILA as the "birth of modern consumer legislative activism").

³⁸ *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. 1980) (finding that TILA action survives as remedial claim, and recognizing that "courts have tended to emphasize the remedial character of the statute").

³⁹ *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. 1986) ("The courts have construed TILA as a remedial statute, interpreting it liberally for the consumer.") (citation omitted); James v. Home Constr. Co., 621 F.2d 727, 729 (5th Cir. 1980) ("[T]he 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.") (citation omitted).

⁴⁰ 15 U.S.C. § 1635 (2012); *see* THOMAS & RENUART, *supra* note 32, § 1.2.1, at 5; *see*

TILA promotes its goals primarily by mandating disclosure requirements for various types of credit transactions. TILA contains disclosure requirements for open-end credit loans⁴¹—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”⁴²—as well as closed-end credit loans,⁴³ which are defined as credit loans that are not open-end, such as mortgages.⁴⁴ For closed-end transactions such as mortgages, TILA requires disclosure of the identity of the creditor, the amount financed, the finance charge, the annualized percentage rate (APR), and more.⁴⁵ To give force to these disclosure requirements, TILA provides consumers with a powerful substantive right: the right to rescind certain loan transactions.⁴⁶ This right applies to any consumer credit transaction secured by a principal dwelling,⁴⁷ except for “residential mortgage transactions,” which are defined as purchase money mortgages on the consumer’s principal dwelling.⁴⁸

Congress revised TILA numerous times in the three decades since its inception.⁴⁹ The first amendment affecting rescission rights occurred in 1974.⁵⁰ While the extended rescission right was initially

cases cited *supra* notes 38, 39.

⁴¹ 15 U.S.C. § 1637 (2012).

⁴² 15 U.S.C. § 1602(j) (2012).

⁴³ 15 U.S.C. § 1638 (2012).

⁴⁴ 12 C.F.R. § 226.2(10) (2011); *King v. California*, 784 F.2d 910, 913 (9th Cir. 1986) (“The transaction here would qualify as closed-end, because it does not fit any of the definitions of an open-end credit transaction.”).

⁴⁵ 12 U.S.C. § 1638.

⁴⁶ 15 U.S.C. § 1635 (2012).

⁴⁷ *Id.* Though the statute does not define “principal dwelling,” the official staff interpretations published by the Federal Reserve Board contain some guidance. 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.”).

⁴⁸ 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) (2012). Thus, generally, the rescission right applies to refinancing loans and home improvement loans with respect to a borrower’s principal dwelling. *Id.*

⁴⁹ For an overview of all of the amendments to TILA, see THOMPSON & RENUART, *supra* note 17, § 1.2.1.

⁵⁰ Fair Credit Billing Act, Pub. L. No. 93-495, title IV, §§ 404, 405, 412, 88 Stat. 1517, 1519 (1974).

open-ended once triggered, Congress responded to complaints from the lending industry by amending the statute to add a three-year time limit for rescission—§ 1635(f).⁵¹ Congress again tweaked the statute in 1980 to limit rescission rights to loans secured by a “principal dwelling,” as opposed to a “residence.”⁵² Despite these minor limitations on the rescission right, TILA remained a significant source of borrower’s rights after the early amendments.⁵³

During the early 1990s, TILA’s rescission requirement became an important consumer defense against the possibility of foreclosure.⁵⁴ Home equity borrowing had increased and had become a primary credit tool.⁵⁵ As a result of the mass securitization of residential mortgages, the homes of many borrowers became exposed to financial risk, and rescission became a vital tool for consumer protection.⁵⁶ In addition, the credit industry was still concerned about the law, especially after an Eleventh Circuit decision, *Rodash v. AIB Mortgage Company*, interpreted TILA’s disclosure requirements in a way that exposed many existing mortgages to rescission.⁵⁷ Thereafter, Congress passed The Truth in Lending Act Amendments of 1995 (the “1995 Amendments”).⁵⁸ The 1995 Amendments adjusted the disclosure requirements and provided retroactive immunity for certain loans exposed to rescission

⁵¹ *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.”).

⁵² Monetary Control Act of 1980, Pub. L. No. 96-221, § 612, 94 Stat. 132 (1980).

⁵³ THOMPSON & RENUART, *supra* note 17, § 1.2.2 at 7.

⁵⁴ *Id.* at § 1.2.5 at 8.

⁵⁵ *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)).

⁵⁶ THOMPSON & RENUART, *supra* note 17, § 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.*

⁵⁷ *Rodash v. AIB Mort. Co.*, 16 F.3d 1142 (11th Cir. 1994) (holding that “intangible taxes” were “finance charges” under TILA—a categorization that made these charges a disclosure requirement). The *Rodash* 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 decision. THOMPSON & RENUART, *supra* note 17, § 1.2.5 at 8–9.

⁵⁸ Truth in Lending Act Amendments of 1995, Pub. L. No. 104-29, 109 Stat. 271 (1995); THOMPSON & RENUART, *supra* note 17, § 1.2.5 at 8.

by the *Rodash* decision.⁵⁹ Important for the right to rescind, the 1995 Amendments created special rules for rescission claims raised as a defense in foreclosure.⁶⁰ In particular, some of the retroactive immunity granted by the law did not apply to these claims, and the tolerance level for disclosure violations was made much lower for parties seeking rescission.⁶¹ 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.⁶²

Subsequent amendments related primarily to the disclosure requirements and had no effect on the rescission remedy.⁶³ Nonetheless, the trend of these amendments was in line with the purpose of TILA: to protect consumers. For instance, an otherwise pro-creditor⁶⁴ bankruptcy amendment package in 2005 actually heightened some disclosure requirements for certain transactions.⁶⁵

Although the 1995 Amendments were considered to be creditor-friendly in some aspects,⁶⁶ the 2008 financial crisis provided the impetus for further amendments intended to protect consumers.⁶⁷

⁵⁹ Truth in Lending Act Amendments §§ 2, 4.

⁶⁰ *Id.* at § 8.

⁶¹ *Id.* The 1995 Amendments also limited rescission in foreclosure to only certain disclosure violations.

⁶² THOMPSON & RENUART, *supra* note 17, § 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.”).

⁶³ The Helping Families Save Their Homes Act of 2009, Pub. L. No. 111-22, 123 Stat. 1632 (2009); 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)); Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, §§ 1301–1309, 119 Stat. 23 (2005).

⁶⁴ See Timothy Egan, *Newly Bankrupt Raking in Piles of Credit Offers*, N.Y. TIMES, Dec. 11, 2005, http://www.nytimes.com/2005/12/11/national/11credit.html?_r=0.

⁶⁵ Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, §§ 1301–1309, 119 Stat. 23 (2005).

⁶⁶ THOMPSON & RENUART, *supra* note 17, § 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 *supra* note 62 and accompanying text.

⁶⁷ See Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 1100A, 124 Stat. 1376 (2010); Credit Card Accountability Responsibility

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.⁶⁸ TILA's rescission right became increasingly important as foreclosure filings increased.⁶⁹ Perhaps in response to criticism that TILA's inadequate disclosure requirements were a partial cause of the mortgage crisis,⁷⁰ Congress once again acted to protect consumers by amending TILA.⁷¹ For instance, the post-financial crisis amendments provided further protection to borrowers by requiring early disclosures of credit terms for loans secured by a principal dwelling.⁷² Congress also provided a safe-harbor for loan servicers from TILA violations to encourage loan modifications in lieu of foreclosure.⁷³ 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.⁷⁴ Originally, rulemaking authority to implement TILA was granted to the Federal Reserve Board.⁷⁵ However, in 2010, a Congress interested in expanding consumer protection transferred rulemaking authority to the newly created CFPB, as part of Dodd-Frank.⁷⁶ In an early

and Disclosure Act of 2009, Pub. L. No. 111-24, 123 Stat. 1734 (2009); Prevent Mortgage Foreclosure and Enhance Mortgage Credit Availability, Pub. L. No. 111-22, § 201, 123 Stat. 1632 (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)).

⁶⁸ See Sovern, *supra* note 1.

⁶⁹ Dougherty, *supra* note 19 (citing an estimate from Kathleen Day, spokeswoman for the Center for Responsible Lending, estimating "thousands" of rescission cases pending due to the economic crisis).

⁷⁰ Sovern, *supra* note 13.

⁷¹ See sources cited, *supra* note 67.

⁷² Housing and Economic Recovery Act of 2008, Pub. L. No. 110-289, § 2502, 122 Stat. 2654 (2008) (to be codified at 15 U.S.C. § 1638(b)(2)). Previously, the law had only required disclosures to be provided "before the credit is extended." 15 U.S.C. § 1638(b)(1) (2012). The Housing and Economic Recovery Act, however, amended TILA to require that disclosures be provided before a consumer was required to pay an application fee for the credit. 15 U.S.C. § 1638(b)(2)(E) (2012).

⁷³ Prevent Mortgage Foreclosure and Enhance Mortgage Credit Availability, Pub. L. No. 111-22, § 201, 123 Stat. 1632 (2009).

⁷⁴ Dougherty, *supra* note 19 ("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.").

⁷⁵ Consumer Credit Protection Act, Pub. L. No. 90-321, § 105, 82 Stat. 148 (1968).

⁷⁶ Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No.

exercise of rulemaking authority, the CFPB has proposed new disclosure guidelines to provide borrowers with simplified information regarding credit terms.⁷⁷

B. The TILA Rescission Process and its Effect on Transactions

Since its inception, TILA has included a substantive right of rescission for the borrowers whose loans are secured by principal dwellings.⁷⁸ This right only applies to loans that are not residential mortgage transactions,⁷⁹ which are secured loans used to finance the acquisition of property or the initial construction of property.⁸⁰ 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.⁸¹ This section provides a brief overview of this rescission process and the legal effect of rescission.

1. The Rescission Process

For the transactions for which the rescission remedy is available, the law requires lenders to disclose the existence of a security agreement, the borrower's general right to rescind, the effect of rescission, the date on which rescission expires, and the method of rescission—with a form for notification of rescission provided.⁸² To help implement TILA, Congress originally granted rulemaking authority to the Federal Reserve Board, which promulgated influential regulations known as “Regulation Z.”⁸³ The regulations provide a sample disclosure form that serves as a guideline to

111-203, § 1100A, 124 Stat. 1376 (2010); *see also* 15 U.S.C. § 1604(a) (2012) (current statute granting TILA rulemaking authority to the Consumer Financial Protection Bureau); THOMPSON & RENUART, *supra* note 17, § 1.2.11, at 11.

⁷⁷ *See* Press Release, Consumer Fin. Protection Bureau, Consumer Financial Protection Bureau Proposes “Know Before You Owe” Mortgage Forms (July 9, 2012), available at <http://www.consumerfinance.gov/pressreleases/consumer-financial-protection-bureau-proposes-know-before-you-owe-mortgage-forms/>; *see also* Sobern, *supra* note 1.

⁷⁸ 15 U.S.C. § 1635 (2012). *See supra* note 47 for information regarding the definition of “principal dwelling.”

⁷⁹ *See* citations and accompanying text, *supra* note 48.

⁸⁰ 15 U.S.C. § 1602(w) (2012).

⁸¹ *See* citations and accompanying text, *supra* note 48.

⁸² 15 U.S.C. § 1635(a) (2012); 12 C.F.R. 226.23(b)(1) (2011).

⁸³ Consumer Credit Protection Act, Pub. L. 90-321, Title I, Ch 1, § 105, 82 Stat. 148 (May 29, 1968); 12 C.F.R. §§ 226–226.59. Congress has since transferred rulemaking authority to the more consumer-oriented Consumer Financial Protection Bureau. Sources cited *supra* note 76.

lenders.⁸⁴

Figure 1—Sample Notice of Right to Cancel, Regulation Z⁸⁵

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

(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

⁸⁴ See *infra* Figure 1.

⁸⁵ 12 C.F.R. § 226, app. H-8 (2011) (emphasis added).

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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.⁸⁶ The law provides a three-day window for the borrower to rescind the transaction⁸⁷—the so-called “buyer’s remorse” provision.⁸⁸ This three-day window begins at either the close of the transaction or delivery of the required disclosure forms, whichever comes later.⁸⁹ 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).⁹⁰ This extension begins at either the close of the transaction or the sale of the property, whichever occurs first.⁹¹

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 [CFPB], of his intention to do so.”⁹² The regulation requires borrowers to “notify the creditor of the rescission by mail, telegram or other means of written communication.”⁹³ Thus, courts agree that notification is sufficient to exercise rescission under the buyer’s remorse provision.⁹⁴ Under § 1635(f)’s three-year time extension, in contrast, the manner in which a borrower must exercise the right to rescind is not

⁸⁶ 15 U.S.C. § 1635 (2012).

⁸⁷ 15 U.S.C. § 1635(a) (2012).

⁸⁸ See Werrett, *supra* note 22.

⁸⁹ § 1635(a) (2012).

⁹⁰ 15 U.S.C. § 1635(f) (2012).

⁹¹ *Id.* The sample notice of right to rescind does not specifically include information regarding this extended right to rescind. See Figure 1.

⁹² § 1635(a).

⁹³ 12 C.F.R. § 226.23(a)(2) (2011).

⁹⁴ 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.”).

specifically described.⁹⁵ On the other hand, § 1635(f) also does not contain a requirement that the borrower must file a lawsuit to exercise the right.⁹⁶

The actual rescission process, once properly exercised by a borrower, is governed by a set of default rules located at § 1635(b) and the implementing regulation.⁹⁷ After the borrower exercises the right, the lender is obligated, within twenty days, to return any money or property that was provided by the borrower back to the borrower.⁹⁸ 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 or, if preferable and reasonable, the property to the lender, in return for cancellation of the security interest.⁹⁹ The aim of this process is to return each party—the borrower and lender—to the status quo before the transaction was consummated.¹⁰⁰

⁹⁵ Compare 15 U.S.C. § 1635(f) (2012) (silent on method of rescission), with 15 U.S.C. § 1635(a) (2012) (rescission exercised by “notifying the creditor, in accordance with regulations of the Bureau, of his intention to do so”).

⁹⁶ 15 U.S.C. § 1635(f).

⁹⁷ 15 U.S.C. § 1635(b) (2012), 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 17 § 1.2.5 at 9; *see also supra* 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) (2012); 12 C.F.R. § 226.23(h) (2011).

⁹⁸ 15 U.S.C. § 1635(b) (2012) (giving a lender 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”).

⁹⁹ 12 C.F.R. § 226.23(d) (2011). Some courts, however, 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 Krivinkas 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).

¹⁰⁰ *See McKenna v. First Horizon Home Loan Corp.*, 475 F.3d 418, 421 (1st Cir. 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.”); *Yamamoto v. Bank of N.Y.*, 329 F.3d 1167, 1172 (9th Cir. 2003) (quoting *Quenzer v. Advanta Mortgage Corp. USA*, 288 B.R. 884, 888 (D. Kan. 2003)) (“[W]ithin 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.”); *Sosa v. Fite*, 498 F.2d 114, 119 (5th Cir. 1974) (“[S]ection 1635(b) is clearly designed to restore the parties as much as possible to 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.”).

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While this procedure may be modified by court order,¹⁰¹ there is no suggestion that a court must oversee the process, which some opinions have characterized as a private non-judicial procedure.¹⁰² Indeed, this process has been described as enhancing common law rescission to provide more protection for consumers in the specific context of mortgages.¹⁰³

In terms of damages, the law allows individuals to recover money damages for various TILA violations.¹⁰⁴ For instance, the lender can be subject to a cause of action seeking damages for failing to honor rescission.¹⁰⁵ TILA allows this by permitting consumers who are forced to file suit to have rescission properly effected to recover costs and attorneys' fees.¹⁰⁶ 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.¹⁰⁷

Practically speaking, rescission is often used by borrowers facing foreclosure to force a refinancing with an entirely new lender.¹⁰⁸ 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.¹⁰⁹ The end result is protecting borrowers from being foreclosed upon on the basis of illegal loans, returning the lender to her status quo by having the principal repaid, and allowing the borrower to live in the home and make payments under a loan that complies with the law.

¹⁰¹ 12 C.F.R. § 226.23(d)(4) (2011).

¹⁰² See, e.g., *Belini v. Wash. Mut. Bank, F.A.*, 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.*”) (emphasis added).

¹⁰³ See Shepard, *supra* note 99, 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.”).

¹⁰⁴ 15 U.S.C. § 1640 (2012).

¹⁰⁵ *Id.* at § 1640(a)(1).

¹⁰⁶ *Id.* at § 1640(a)(3).

¹⁰⁷ *Id.* at § 1640(e).

¹⁰⁸ Dougherty, *supra* note 19.

¹⁰⁹ *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.”).

2. Effecting Rescission: When is the Transaction Voided?

There is also 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 merely advances a claim for rescission that must then be confirmed by a court.¹¹⁰

This issue is important because some courts confuse the issue of effecting rescission with the issue of exercising the rescission right for the purposes of the statute's time limitations.¹¹¹ This Comment is only concerned with the latter issue. The statute's language 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,¹¹² and some courts have adopted this view. In affirming the borrower's right to rescind, for instance, the Northern District of Illinois, in *Lippner v. Deutsche Bank Nat'l Trust Co.*,¹¹³ 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.¹¹⁴ Under this approach, the lender can refuse to honor the rescission and seek a declaratory judgment, but if the rescission was valid the lender has an obligation to respond by initiating the rescission process, and a failure to do so violates TILA.¹¹⁵ Other courts have held that a borrower who

¹¹⁰ 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) (2012) ("[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. Conesco Fin. Servicing Corp.*, 292 F.3d 49, 54–55 (1st Cir. 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.").

¹¹¹ See, e.g., *Rosenfield v. HSBC Bank, USA*, 681 F.3d 1172, 1187 (10th Cir. 2012); *Keiran v. Home Capital*, 720 F.3d 721 (8th Cir. 2013).

¹¹² See 15 U.S.C. § 1635(b) (2012), 12 C.F.R. § 226.23(d)(1) (2011); see cases discussed *supra* note 110.

¹¹³ *Lippner*, 544 F. Supp. 2d at 702.

¹¹⁴ The Third Circuit has also recently adopted this position. See *Sherzer v. Homestar Mortg. Servs.*, No. 11-4254, 2013 U.S. App. LEXIS 2486, at *8 (3d Cir. Feb. 5, 2013) ("[T]he text of § 1635 and its implementing regulation (Regulation Z) supports the view that to timely rescind a loan agreement, an obligor need only send a valid notice of rescission.").

¹¹⁵ *Lippner*, 544 F. Supp. 2d at 702 ("Section 1635 states in unqualified terms that a creditor must honor an obligor's valid demand for rescission by taking the statutorily enumerated steps within 20 days "except when otherwise ordered by

exercises rescission rights “has merely asserted a claim seeking rescission.”¹¹⁶ Under this view, rescission is not recognized by the law until either the lender honors it, or it is confirmed by a court.

Though the issue of when rescission is effected is not the primary subject of this Comment, it is sometimes confused with satisfying the temporal limitation under § 1635(f), which *is* the subject of this Comment.¹¹⁷ For the purposes of exercising rescission within 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).¹¹⁸

III. FROM 1976 TO *BEACH*: EARLY CASE LAW DEVELOPMENTS REGARDING EXERCISING RESCISSION RIGHTS UNDER § 1635(F)

Since § 1635(f) was enacted in 1976, two distinct issues of statutory interpretation have arisen in the courts. Some cases dealt with the method of exercising rescission rights (hereinafter “the Exercising Rights cases”) and others with the nature of the time limitation under §1635(f): whether it is a strict three-year limitation or flexible (“Limitations cases”). Both lines of cases will be summarized in this section. Then, this section summarizes the Supreme Court case that is the definitive Limitations case—*Beach v. Owen Federal Bank*¹¹⁹—upon which many courts have improperly

court” TILA explicitly states that the obligor’s duty to tender the property to the debtor only arises once the creditor’s obligations under [TILA]” are completed.”) (internal quotation omitted).

¹¹⁶ Moore v. Wells Fargo Bank, N.A., 597 F. Supp. 2d 612, 616 (E.D. Va. 2009); *see also, e.g.*, Am. Mortgage Network, Inc. v. Shelton, 486 F.3d 815 (4th Cir. 2007); Yamamoto v. Bank of N.Y., 329 F.3d 1167 (9th Cir. 2003); *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.”).

¹¹⁷ *See, e.g.*, Rosenfield v. HSBC Bank, USA, 681 F.3d 1172, 1187 (10th Cir. 2012). This Comment addresses the problem of borrowers who “lose” the rescission right after three years after reasonably relying on the notice of intent to rescind form—which a reasonable borrower *believes* is sufficient for rescission. Regardless of whether the notice actually *effects* rescission, this Comment argues that the door to the courts should remain open to these borrowers because they have at least satisfied the three-year requirement in § 1635(f).

¹¹⁸ Gilbert v. Residential Funding LLC, 678 F.3d 271 (4th Cir. 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.”).

¹¹⁹ 523 U.S. 410 (1998).

relied in applying its holding to the Exercising Rights issue.

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

1. The Exercising Rights Cases

The courts have never agreed on the proper method of exercising rescission during the three year time window. Some of the first rulings on this issue were in conflict. For example, in *Clemmer v. Liberty Financial Planning, Inc.*,¹²⁰ the Western District of North Carolina held that the borrower properly exercised rescission by sending a rescission letter to the lender. However, in *Jamerson v. Miles*,¹²¹ the Northern District of Texas dismissed an action because the plaintiff failed to file an action seeking enforcement of rescission with three years.¹²²

In later cases, many courts seemed to coalesce around the argument that exercising rescission is accomplished by simply notifying the lender. For example, in *Rowland v. Novus Financial Corp.*,¹²³ the District Court of Hawaii allowed a TILA claim when the borrower asserted the right to rescind within three years.¹²⁴ And in *Rowland v. Magna Millikin Bank, N.A.*,¹²⁵ the Central District of Illinois held that the borrowers exercised rescission and effected rescission by letter to the lender within three years. Finally, in *Stone v. Mehlberg*,¹²⁶ the Western District of Michigan held that the borrowers exercised rescission by notifying the lender by letter.¹²⁷

Of course, some courts still held to the view that a borrower must file an action to satisfy § 1635(f). For instance, the Third Circuit in *Smith v. Fidelity Consumer Discount Company*¹²⁸ noted in dicta

¹²⁰ 467 F. Supp. 272 (W.D.N.C. 1979). This case applied TILA as it existed before the § 1635(f) time limitation was enacted.

¹²¹ 421 F. Supp. 107 (N.D. Tex. 1976).

¹²² *Id.* at 111.

¹²³ 949 F. Supp. 1447, 1455 (D. Haw. 1996).

¹²⁴ *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.”).

¹²⁵ 812 F. Supp. 875 (C.D. Ill. 1992).

¹²⁶ 728 F. Supp. 1341 (W.D. Mich. 1989).

¹²⁷ *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. 1986) (holding that rescission claim survives because “Plaintiff mailed her notice of rescission . . . within three years of all relevant dates”).

¹²⁸ 898 F.2d 896, 903 (3d Cir. 1990).

that a borrower has three years after consummation of a loan “within which to *bring an action* for rescission.”¹²⁹ In many other cases, the issue simply 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.¹³⁰ In sum, there was confusion among the courts as to the method of exercising rescission under § 1635(f) since the inception of TILA.

2. The Limitations Cases

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 Limitations cases held that, even outside the three-year window, rescission could be raised as a defense to foreclosure. For example, in *Dawe v. Merchants Mortgage & Trust Corp.*, the borrower attempted to demand rescission two years after the lender filed suit seeking judgment on the loan.¹³² The Colorado Supreme 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 held 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 similar conclusions, 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 allow a creditor to wait three years to file its suit and thereby defeat the purpose of the Act.”¹³⁶

¹²⁹ *Id.*

¹³⁰ *See, e.g.*, *Hefferman v. Bitton*, 882 F.2d 379, 383–84 (9th Cir. 1989) (declining to decide whether 1635(f) only requires notice); *Dougherty v. Hoolihan, Neils, & Boland*, 531 F. Supp. 717, 721–22 (D. Minn. 1982).

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. 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.*

Concurrently, other courts were holding that the rescission period is strict and that no claims asserted outside the three-year period could survive. These courts explicitly rejected a tolling theory for § 1635(f), finding it to be a strict statute that cannot 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 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

B. The Supreme Court’s Decision in Beach v. Ocwen Federal Bank

The major Supreme Court decision concerning § 1635(f) is *Beach v. Ocwen Federal Bank*.¹⁴⁰ *Beach* was decided in 1998, after the 1995 TILA amendments, and continues to be the primary point of reference for courts interpreting § 1635(f).¹⁴¹

In *Beach*, the defendant borrowers had taken out a loan secured by their home in 1986, and stopped making payments in 1991.¹⁴² The bank initiated foreclosure proceedings in 1992, and the defendants raised rescission as a defense to that action, alleging various disclosure violations.¹⁴³ This rescission defense was raised well outside the three-year time limitation imposed by § 1635(f).¹⁴⁴ The borrowers argued that § 1635(f) only operated as a limitation on borrowers bringing rescission claims, and did not bar a defensive rescission

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).

¹³⁸ *Moor v. Travelers Ins. Co.*, 784 F.2d 632, 634 (5th Cir. 1986) (internal quotation removed); *Great W. Bank v. Shoemaker*, 695 So. 2d 805, 807 (Fla. Dist. Ct. App. 2d Dist. 1997) (“[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.’”) (citation omitted).

¹³⁹ *Beach v. Great W. Bank*, 670 So. 2d 986, 993 (Fla. Dist. Ct. App. 1996), *aff’d*, 523 U.S. 410 (1998) (“[T]he 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.” The court did not, however, rule on how a borrower may properly assert rescission).

¹⁴⁰ 523 U.S. 410 (1998).

¹⁴¹ *See* discussion *infra* Part III.C.

¹⁴² *Beach*, 523 U.S. at 413.

¹⁴³ *Id.*

¹⁴⁴ *Id.*

claim raised outside of the three-year window.¹⁴⁵ As phrased by the Supreme 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.”¹⁴⁶ In other words, the borrowers did not argue that anything they did 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.¹⁴⁷

Justice Souter, in a unanimous opinion for the Court, began the 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.¹⁴⁸ The Court found that § 1635(f) governs the life of the underlying right granted by the statute, and not of a lawsuit’s commencement.¹⁴⁹ 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)”).¹⁵⁰ The Court noted that § 1640(e) contains an exception for claims of TILA violations raised as a defense in recoupment or set-off actions.¹⁵¹ According to § 1640(e), claims for recoupment damages *can* be brought as a defense to any action with no statutory time limitation.¹⁵² The Court held that this indicated that Congress intended to treat § 1635(f)’s rescission time limitation differently, because § 1635(f) contains no similar exception.¹⁵³ The opinion reasoned that allowing rescission to be raised perpetually as a defense in recoupment actions pursuant to § 1640(e) would “cloud the title” of mortgages during foreclosure.¹⁵⁴ 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.¹⁵⁵

Thus, *Beach* stands for the proposition that § 1635(f) is a strict

¹⁴⁵ *Id.* at 415.

¹⁴⁶ *Id.* at 411–12.

¹⁴⁷ See *Gilbert v. Residential Funding LLC*, 678 F.3d 271, 278 (4th Cir. 2012) (“The *Beach* Court did not address the proper method of exercising a right to rescind or the timely exercise of that right.”).

¹⁴⁸ *Beach*, 523 U.S. at 417 (emphasis added).

¹⁴⁹ *Id.*

¹⁵⁰ *Id.* at 418; 15 U.S.C. § 1640(e) (2012).

¹⁵¹ *Beach*, 523 U.S. at 418.

¹⁵² 15 U.S.C. § 1640(e).

¹⁵³ *Beach*, 523 U.S. at 418.

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

three-year limitation, and that even a defense of rescission raised after the three-year period is precluded by the statute.¹⁵⁶ Subsequent cases have interpreted this decision as holding that § 1635(f) is a statute of repose,¹⁵⁷ even though the Supreme Court never used that particular phrase.¹⁵⁸ 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 filing of a lawsuit is an additional requirement.¹⁵⁹ The *Beach* Court only affirmatively rejected any claims raised *outside* the three-year period.¹⁶⁰ The Court addressed the nature of § 1635(f)'s time limitation contemplated by the Limitations cases¹⁶¹ but did not resolve the confusion among the courts expressed in the Exercising Rights cases.¹⁶²

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

After *Beach*, the lower courts continued to split on what a borrower must do to properly exercise rescission rights within the

¹⁵⁶ *Id.*

¹⁵⁷ A statute of repose bars an action unless it is brought within a certain time period after the occurrence of a specified event. *See Bradway v. Am. Nat'l Red Cross*, 992 F.2d 298, 301 (11th Cir. 1993) (“There is a distinct difference between statutes of limitations and statutes of repose A statute of repose stands as an unyielding barrier to a plaintiff’s right of action. The statute of repose is absolute; the bar of the statute of limitations is contingent. The statute of repose destroys the previously existing rights so that, on the expiration of the statutory period, the cause of action no longer exists.”); *see also* 54 C.I.S. *Limitations of Actions* § 7 (2013) (“Statutes of repose and statutes of limitations are sometimes confused The distinguishing feature between the two is the time at which the respective periods commence.”).

¹⁵⁸ *See, e.g., Rosenfield v. HSBC Bank, USA*, 681 F.3d 1172, 1181 (10th Cir. 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.”); *McOmie-Gray v. Bank of Am. Home Loans*, 667 F.3d 1325 (9th Cir. 2012); *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.”). Courts have also held 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. 1998) (“Because § 1635(f) is a statute of repose, the time period stated therein is typically not tolled for any reason.”) (citation omitted).

¹⁵⁹ *See Gilbert v. Residential Funding LLC*, 678 F.3d 271, 278 (4th Cir. 2012) (“The *Beach* Court did not address the proper method of exercising a right to rescind or the timely exercise of that right.”).

¹⁶⁰ *Beach*, 523 U.S. at 418.

¹⁶¹ *See discussion supra* Part III.A.2.

¹⁶² *See discussion supra* Part III.A.1.

three-year time window. 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.¹⁶³ 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.¹⁶⁴ These courts generally improperly relied upon the *Beach* decision, reading in an extra requirement (filing a lawsuit) that is not present in the opinion, statute, or regulations.¹⁶⁵ Most recently, the issue of exercising rescission under TILA has been addressed by the Third, Fourth, Eighth, Ninth, and Tenth Circuits.

1. The Plain Language Approach of the Third and Fourth Circuits

The Fourth Circuit ruled on the proper method of exercising rescission rights to satisfy § 1635(f) in *Gilbert v. Residential Funding LLC*,¹⁶⁶ while the Third Circuit recently addressed the same issue in *Sherzer v. Homestar Mortgage Services*.¹⁶⁷ These courts did not find the *Beach* decision dispositive on the issue.¹⁶⁸ The court conducted a

¹⁶³ See, e.g., *Barnes v. Chase Home Fin., LLC*, No. 11-cv-142, 2011 WL 4950111 (D. Or. Oct. 18, 2011); *Sherzer v. Homestar Mortg. Servs.*, No. 07-5040, 2010 U.S. Dist. LEXIS 137315, at *26–35 (E.D. Pa. May 7, 2010); *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); *Johnson v. Long Beach Mortg. Loan Trust*, 451 F. Supp. 2d 16 (D.D.C. 2006); *In re Hunter*, 400 B.R. 651 (Bankr. N.D. Ill. 2009).

¹⁶⁴ 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.”).

¹⁶⁵ See, e.g., *Carrington*, 2010 U.S. Dist. LEXIS at *7 (citing *Beach v. Ocwen Fed. Bank*, 523 U.S. 410, 418 (1998)) (“15 U.S.C. § 1635(f) operates to extinguish the right of rescission itself Thus no matter what actions [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.

¹⁶⁶ 678 F.3d 271 (4th Cir. 2012).

¹⁶⁷ No. 11-4254, 2013 U.S. App. LEXIS 2486 (3d Cir. Feb. 5, 2013).

¹⁶⁸ *Gilbert*, 678 F.3d at 278 (noting that *Beach* did not address the issue of how a borrower may exercise the rescission right).

plain language analysis of § 1635(f) and concluded that in order to satisfy § 1635(f), a borrower must simply notify the lender of rescission within three years.¹⁶⁹

The bank foreclosed upon the Gilberts within three years of refinancing their mortgage.¹⁷⁰ After the foreclosure was initiated, but before the three-year window had concluded, the borrowers wrote to the lender alleging several TILA violations and notifying the lender of rescission.¹⁷¹ The lender refused to honor the rescission.¹⁷² While the Gilberts appealed the foreclosure decision, they filed a separate lawsuit seeking rescission.¹⁷³ They filed the rescission lawsuit outside of the three-year window under § 1635(f).¹⁷⁴ 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.¹⁷⁵ The Gilberts appealed the dismissal of the TILA claims, and the case eventually reached the United States Court of Appeals for the Fourth Circuit.¹⁷⁶

There, the Gilberts argued that they exercised the right to rescind within the three-year window by sending the letter to the lender.¹⁷⁷ The Fourth Circuit began its analysis by recognizing that nothing in the statute or Regulation Z says anything about requiring a borrower to file a lawsuit.¹⁷⁸ 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.¹⁷⁹ The court also properly distinguished the issue of effecting rescission from exercising the rescission right, finding that TILA only requires a borrower to exercise, but not to effect, rescission within three years.¹⁸⁰ In addition, the court also properly distinguished *Beach*, finding that the decision simply did not address the method of exercising the right of rescission.¹⁸¹ Instead, the court noted that *Beach* addressed

¹⁶⁹ *Id.*

¹⁷⁰ *Id.* at 274.

¹⁷¹ *Id.*

¹⁷² *Id.*, 678 F.3d at 274.

¹⁷³ *Id.* at 274–75.

¹⁷⁴ *Gilbert*, 678 F.3d. at 274–75.

¹⁷⁵ *Id.* at 275.

¹⁷⁶ *Id.*

¹⁷⁷ *Id.*, 678 F.3d. at 276.

¹⁷⁸ *Id.* at 277.

¹⁷⁹ *Id.*; 15 U.S.C. § 1635(f) (2012); 12 C.F.R. § 226.23(a)(2) (2011).

¹⁸⁰ *Gilbert*, 678 F.3d at 277; *see* discussion *supra* Part II.B.2.

¹⁸¹ *Gilbert*, 678 F.3d at 278.

the extinguishment of the right of rescission *after* three years, a completely separate issue.¹⁸² The court concluded that notification of rescission is a proper exercise of rescission rights under TILA and Regulation Z.¹⁸³

In *Sherzer v. Homestar Mortgage Services*,¹⁸⁴ the Third Circuit also held that § 1635(f) only requires a borrower to send notice of intent to rescind to the lender, rather than file a lawsuit. The plaintiffs obtained two loans, one small and one large, from defendant Homestar, but did not receive adequate disclosures.¹⁸⁵ Within three years of the closing, the plaintiffs sent a letter informing co-defendant HSBC (the assignee of the loans) of their intent to rescind both of the loans.¹⁸⁶ HSBC agreed to rescind the smaller loan, but refused to rescind the larger loan.¹⁸⁷ The plaintiffs filed a lawsuit seeking a declaratory judgment for rescission more than three years after the closing, but they argued that the claim was not barred by § 1635(f)

¹⁸² *Id.*

¹⁸³ *Id.* The court then addressed the Gilberts' claim for damages. According to the court, refusal to honor rescission is a separate TILA violation triggering the one year statute of limitations. *Gilbert*, 678 F.3d, at 278; 15 U.S.C. § 1640(e) (2012). 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. *Gilbert*, 678 F.3d at 278–79.

¹⁸⁴ No. 11-4254, 2013 U.S. App. LEXIS 2486 (Feb. 5, 2013). The procedural history of this case is interesting. Initially, United States Magistrate Judge Elizabeth Hey recommended, and the Eastern District Court of Pennsylvania held, that the bank's motion for dismissal be denied, because the statute and regulations only require a borrower to provide notice of intent to rescind to satisfy § 1635(f). *Sherzer v. Homestar Mortg. Servs.*, No. 07-5040, 2010 U.S. Dist. LEXIS 66354 (E.D. Pa. June 30, 2010); *Sherzer v. Homestar Mortg. Servs.*, No. 07-5040, 2010 U.S. Dist. LEXIS 137315 (E.D. Pa. May 7, 2010). The Third Circuit Court of Appeals, however, subsequently issued an opinion in an unrelated case expressly following the restrictive Ninth and Tenth Circuit approaches, reading a filing requirement into § 1635(f). *Williams v. Wells Fargo Home Mortg., Inc.*, 410 Fed. App'x 495 (3d Cir. 2011). The bank in *Sherzer* then submitted another motion to dismiss in light of the *Williams* decision, which the district court granted after resolving a "law of the case" dispute in the bank's favor. *Sherzer*, 849 F. Supp. 2d. But when the *Sherzer* case was then appealed, a separate panel of the Third Circuit Court of Appeals reversed the lower court and adopted a liberal holding similar to the Fourth Circuit's decision in *Gilbert*, as well as the magistrate judge's initial recommendation, without even mentioning the earlier *Williams* decision. Because the original *Williams* decision is also unpublished and because the *Sherzer* appellate decision is more recent and reaches a completely opposite conclusion without mentioning *Williams*, this Comment treats the appellate *Sherzer* decision as the current view of the Third Circuit.

¹⁸⁵ *Sherzer*, 2013 U.S. App. LEXIS 2486, at *3.

¹⁸⁶ *Id.*

¹⁸⁷ *Id.*

because the letter of intent to rescind was sent within three years of the closing.¹⁸⁸

The *Sherzer* opinion analyzed the plain language of the statute of regulations and recognized that there is no mention of filing a lawsuit or action.¹⁸⁹ The opinion concluded that “nothing in the text of the statute supports the view that ‘it is the filing of an action in a court . . . that is required to invoke the right limited by the TILA statute of repose.’”¹⁹⁰ The court also rejected the bank’s attempt to rely on *Beach*, properly distinguishing the case, and found that allowing notice-only rescission would not cloud title.¹⁹¹ The opinion concluded that under § 1635(f), “[the right to rescind] expires if it is not exercised in three years, but borrowers who have exercised the right can file suit after the three-year period has passed.”¹⁹²

2. The Eighth and Tenth Circuits’ Restrictive Approach: Concern with Clouding the Title of Mortgages, and Reliance on *Beach*

While the Third and Fourth Circuits properly distinguished *Beach* and found notification of rescission sufficient to satisfy § 1635(f), the Tenth Circuit reached the opposite conclusion, with which the Eighth Circuit subsequently agreed. In *Rosenfield v. HSBC Bank, USA*,¹⁹³ the Tenth Circuit held that *Beach* is 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.

¹⁸⁸ *Id.* at *4.

¹⁸⁹ *Id.* at *11.

¹⁹⁰ *Id.* at *16–17 (quoting *Rosenfield v. HSBC Bank, USA* 681 F.3d 1172 (10th Cir. 2012)).

¹⁹¹ *Sherzer*, 2013 U.S. App. LEXIS 2486 at *20–26, *31–36.

¹⁹² *Id.* at *28. The *Sherzer* court went further than the Fourth Circuit in *Gilbert*, holding that a valid written notice immediately effects rescission and voids the agreement, in addition to constituting a satisfactory exercise of the rescission right. *Id.* at *8–9 (“[T]o timely rescind a loan agreement, an obligor need only send a valid notice of rescission Although the Lenders’ amici have raised practical concerns that may arise if obligors are permitted to rescind their loans through written notice alone, we find ourselves constrained by the text of § 1635 in spite of those concerns.”). The *Gilbert* court, on the other hand, held that rescission only occurs after either the bank agrees to rescind or a court enters an order declaring the loan rescinded, distinguishing between effecting rescission and satisfying § 1635(f). *Gilbert v. Residential Funding LLC*, 678 F.3d 271, 277 (4th Cir. 2012).

¹⁹³ 681 F.3d 1172 (10th Cir. 2012).

Ms. Rosenfield notified the lender that she intended to rescind the transaction about two years after it refinanced on her home.¹⁹⁴ She claimed that numerous disclosures were not made, including information on rescission rights, adjustable rates, and finance charges.¹⁹⁵ After Ms. Rosenfield defaulted, the lender sought to force a sale of the property by filing a motion with the trial court.¹⁹⁶ Ms. Rosenfield raised rescission as a defense to this proceeding *before* the three-year time window under § 1635(f) had closed.¹⁹⁷ After a foreclosure sale was ordered, the Rosenfields commenced a separate action seeking, among other claims, a declaratory judgment deeming the loan rescinded.¹⁹⁸

Ms. Rosenfield argued that she satisfied § 1635(f)'s time limit when she notified the lender of rescission.¹⁹⁹ 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 exercising rescission.²⁰⁰ It described § 1635(f)'s three-year extension as a strict repose period that precludes satisfaction by merely notifying the lender of rescission.²⁰¹ As support for this, the court characterized the rescission right as one that can only be effected "by invoking the power of the courts."²⁰² Thus, Ms. Rosenfield did not

¹⁹⁴ *Id.* at 1175–76.

¹⁹⁵ *Id.* at 1176.

¹⁹⁶ *Id.* The Colorado Rules of Civil Procedure provide 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. C.R.C.P. 120. It is in this special proceeding that Ms. Rosenfield raised rescission as a defense.

¹⁹⁷ *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* discussion *supra* Parts III.A.1, III.A.2.

¹⁹⁸ *Rosenfield*, 681 F.3d 1172, at 1176.

¹⁹⁹ *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.

²⁰⁰ *Id.*

²⁰¹ *Id.* On the other hand, the opinion noted in dicta that if the lender actually effectively responds to the rescission notice, then it may satisfy § 1635(f)'s time limit without need for judicial intervention. *Id.* at 1183, n.8.

²⁰² *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. The Supreme Court in *Beach*, however, 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

satisfy § 1635(f) because she did not file a lawsuit within three years, even though she notified the lender within the prescribed time period.²⁰³

The court also rejected Ms. Rosenfield's argument on contract principles.²⁰⁴ It first compared TILA's rescission remedy to the common law rescission process.²⁰⁵ The court found the TILA rescission process analogous to common law rescission, and that the underlying purpose behind both is "remedial economy."²⁰⁶ In other words, the purpose of rescission is merely to restore the parties to their positions before the transaction occurred, which is different from the "compensatory goal of a damages award."²⁰⁷ The court reasoned that rescission is not appropriate, therefore, if enforcement is unnecessarily difficult under the circumstances.²⁰⁸ It concluded that allowing borrowers to exercise rescission by notifying lenders would complicate enforcement.²⁰⁹ Specifically, the court was troubled by the prospect of a borrower notifying the lender of rescission, but then waiting for some indeterminate time to seek judicial enforcement of the rescission—this possibility would "cloud a bank's title on foreclosure."²¹⁰

The court then contended with the plain meaning of the statute and the regulations.²¹¹ It held 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.²¹² Instead, with little analysis, the court held that notifying the lender is merely a predicate act to exercising the right of rescission, which is accomplished itself by filing a lawsuit.²¹³ Confusing exercising the rescission right with effecting rescission, it concluded that allowing a borrower to unilaterally exercise the right to rescind would

referring to filing a lawsuit. *See* discussion *infra* Part IV.C.

²⁰³ *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.").

²⁰⁴ *Id.* at 1184–85.

²⁰⁵ *Id.* at 1184.

²⁰⁶ *Id.*

²⁰⁷ *Id.*

²⁰⁸ *Id.*

²⁰⁹ *Rosenfield*, 681 F.3d at 1185.

²¹⁰ *Id.* at 1185, 1186 (quoting *Beach v. Ocwen Fed. Bank*, 523 U.S. 410, at 418–19 (1998)).

²¹¹ *Id.* at 1185–87.

²¹² *Id.* at 1185.

²¹³ *Id.*

impermissibly enlarge the time period for rescission and would cloud the title of property indefinitely.²¹⁴

In *Keiran v. Home Capital*, the Eighth Circuit agreed with the Tenth Circuit's conclusion in *Rosenfield*.²¹⁵ The *Keiran* decision resolved two consolidated cases involving the satisfaction of TILA's period for rescission.²¹⁶ Both the plaintiffs—the Slobeniaks and Keirans—showed that the bank failed to comply with TILA disclosure requirements by not providing multiple copies of certain disclosure statements.²¹⁷ In the *Keiran* case, notification of rescission was delivered to the bank mortgagee and servicer within three years from the defective disclosure delivery, but the banks waited three months to respond—conveniently for the bank, this response happened to be issued right after the three year period for rescission had expired.²¹⁸ The Slobeniaks also notified the mortgagee within the three-year period.²¹⁹ Both the Keirans and Slobeniaks sued to enforce the rescission after the three-year period had expired.²²⁰

The *Keiran* decision reached the same conclusion as the *Rosenfield* court, holding that both plaintiffs' actions were barred. The court based its opinion on *Rosenfield's* reasoning—the *Keiran* court engaged in a similar reading of the statute and the *Beach* decision, and cited, in support, *Rosenfield's* application of the public policy in favor of “remedial economy” in rescission actions.²²¹ To the court, allowing plaintiffs to exercise rescission through notice would, borrowing a phrase from *Beach* and the Tenth Circuit, result in “casting a cloud on the property's title.”²²² Therefore, the court concluded that the statute explicitly requires the filing of a lawsuit to enforce rescission within three years from the date of the TILA violation.²²³

²¹⁴ *Id.* at 1187.

²¹⁵ *Keiran v. Home Capital*, 720 F.3d 721 (8th Cir. 2013).

²¹⁶ *Id.* at 724.

²¹⁷ *Id.* at 724–25.

²¹⁸ *Id.* at 725.

²¹⁹ *Id.* at 724.

²²⁰ *Id.* at 724–25.

²²¹ *Keiran*, 720 F.3d at 726–29.

²²² *Id.* at 728.

²²³ *Id.*

3. The Ninth Circuit's Reliance on *Beach* to Require Borrowers to File a Lawsuit

The Ninth Circuit also recently ruled on the method of exercising rescission for the purposes of § 1635, in *McOmie-Gray v. Bank of America Home Loans*.²²⁴ The court reached the same restrictive outcome as the *Rosenfeld* court, but produced a less detailed opinion. The court found *Beach* dispositive in ruling that a borrower must file a lawsuit within three years to satisfy § 1635.

In *McOmie-Gray*, the plaintiff, Ms. McOmie-Gray, closed a first deed trust loan in 2006 and was provided with various disclosure documents to sign.²²⁵ The lender failed to inform her of the date on which this right to rescind would expire, a key disclosure requirement.²²⁶ Two years after the loan was consummated, she sent a letter to the lender seeking to rescind the loan, but the bank refused rescission.²²⁷ Instead, according to Ms. McOmie-Gray, the bank negotiated with her for over a year regarding the rescission.²²⁸ After these negotiations failed, she filed suit to rescind the loan, which at that point was outside of § 1635(f)'s three-year time period.²²⁹

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.²³⁰ The court then held *Beach* dispositive, as well as Ninth Circuit precedent establishing § 1635(f) as a statute of repose, and thus rejected Ms. McOmie's claim.²³¹ She 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, relying on the Supreme Court's characterization of § 1635(f) as a strict limitation on the rescission right.²³² The court did not distinguish between deciding upon the legal effect of rescission on the loan agreement and the effect of

²²⁴ 667 F.3d 1325 (9th Cir. 2012).

²²⁵ *McOmie-Gray v. Bank of Am. Home Loans*, 667 F.3d 1325, 1326 (9th Cir. 2012).

²²⁶ *Id.*; see *supra* Figure 1; 12 C.F.R. § 226.23(b)(1) (2011).

²²⁷ *McOmie-Gray*, 667 F.3d at 1326–27.

²²⁸ *Id.* at 1327.

²²⁹ *Id.*

²³⁰ *Id.*

²³¹ *Id.* at 1329.

²³² *Id.*

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exercising rescission for the purposes of § 1635(f).²³³ Instead, it 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 into TILA. The recent trend of 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 plain language of a statute and even conflicting with the statute's explicitly stated purpose. As the Third and Fourth Circuits concluded, § 1635(f) only requires borrowers to exercise rescission within three years of consummating the transaction, and the rescission rights of borrowers must be protected if they notify the lender of intent to rescind in accordance with § 1635(f) and its accompanying regulation within three years.

A. A Rule that Borrowers May Exercise Rescission via Notification is Consistent with Congressional Intent and is Sensible Policy

Section 1635(f) must be read in the light most favorable to the consumer to be consistent with congressional intent. 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. Exercise of Rescission by Notification is Consistent with Congress's Intent to use TILA and Regulation Z to Protect Consumers

Courts generally agree that TILA is a remedial statute.²³⁴ Its stated purpose is "to assure a meaningful disclosure of credit terms" and "to protect the consumer against inaccurate and unfair credit billing and credit card practices."²³⁵ Given TILA's remedial nature,

²³³ *McOmie-Gray*, 667 F.3d at 1327–29. 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 *supra* Part III.B, *infra* Part IV.B.2.

²³⁴ See discussion *supra* Part II.A.

²³⁵ 15 U.S.C. § 1601(a) (2012); 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.*

courts have also agreed that the statute should be interpreted liberally to protect consumers.²³⁶

In addition to the well-established policy goals of TILA, developments in the law reflect Congress's continuing concern with ensuring that borrowers' rescission rights remain strong. Since TILA became law in 1968, Congress has had numerous opportunities to amend the rescission right but has chosen to keep the protection intact.²³⁷ And even after the 1995 Amendments sought to make compliance with disclosure requirements easier for lenders, rescission remained a powerful consumer protection.²³⁸ Congress had another chance to revisit TILA when it passed Dodd-Frank, a piece of legislation aimed at protecting consumers from abusive financial services practices.²³⁹ Rather than limit borrower's rights in any way, Dodd-Frank's main impact on TILA was to transfer rulemaking authority away from the Federal Reserve Board (FRB) to the newly created, consumer-protection focused Consumer Financial Protection Bureau (CFPB).²⁴⁰

This transfer of power has had a great impact on the direction of TILA. Under pressure from lenders, the FRB had proposed making rescission more difficult under the statute's default rules by requiring borrowers to first tender the amount due—reversing the normal process for TILA rescission.²⁴¹ Before these rules could be implemented, however, Congress transferred rule making authority to the CFPB, effective July 2011.²⁴² The CFPB rejected the FRB's lender-friendly attempt to change the rules, and instead issued an

Reserve Sys., 473 F.2d 1210, 1214 (2d Cir. 1973)) (“The Act . . . designed to prevent ‘unscrupulous and predatory creditor practices’ . . . is remedial.”).

²³⁶ See cases cited, *supra* note 39.

²³⁷ See discussion *supra* Part II.A.

²³⁸ *Id.*; THOMPSON & RENUART, *supra* note 17, § 1.2.5, at 9 (“[T]he 1995 amendments provided some additional leeway to creditors in making certain TIL disclosures.”).

²³⁹ See Preamble to Dodd-Frank, *supra* note 16.

²⁴⁰ *Id.*, § 1100A; see 15 U.S.C. §1604(a) (2012) (current statute granting TILA rulemaking authority to the CFPB); see also THOMPSON & RENUART, *supra* note 17, § 1.2.11, at 11; FALL 2011 STATEMENT OF REGULATORY PRIORITIES, <http://www.consumerfinance.gov/regulations/fall-2011-statement-of-regulatory-priorities/>

(“[T]he 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.”).

²⁴¹ 75 Fed. Reg. 58539, 58700–58704 (Sept. 24, 2010); see also Dougherty, *supra* note 19; discussion *supra* Part II.B.1.

²⁴² *Id.*

interim final order affirming the default practice that the consumer must tender only after the creditor has canceled the security interest.²⁴³ 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.²⁴⁴ 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

The *Rosenfield* court was especially concerned with the issuing of clouded mortgage titles, first expressed by the Supreme Court in *Beach*.²⁴⁵ 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.

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.²⁴⁶ The issue would be resolved without involving the court.²⁴⁷ Alternatively, the lender may not honor the rescission. In this scenario, the borrower would obviously cease

²⁴³ 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.").

²⁴⁴ See Press Release, Consumer Financial Protection Bureau Proposes "Know Before You Owe" Mortgage Forms, *supra* note 77; see also Sovern, *supra* note 1.

²⁴⁵ See discussion *supra* Part III.C.2.

²⁴⁶ See discussion *supra* Part II.B.1. For a real world example of a bank agreeing to rescind without the courts, see *Sherzer v. Homestar Mortg. Servs.*, No. 11-4254, 2013 U.S. App. LEXIS 2486, at *3 (3d Cir. Feb. 5, 2013) ("On May 11, 2007—less than three years after the closing date—the Sherzers' counsel . . . informed the Lenders that the Sherzers were exercising their right to rescind the loan agreements under 15 U.S.C. § 1635. HSBC agreed to rescind the smaller of the two loans.").

²⁴⁷ As noted earlier, a lender must begin to take action to reflect the termination of the security interest within twenty days of receiving the notice of intent to rescind, ensuring the rapid commencement of the non-judicial rescission process. 15 U.S.C. § 1635(b) (2012). Moreover, this process would not cloud title—under TILA, the lender and borrower would necessarily engage in steps that result in the complete removal of the encumbrance from the property. See citations *supra*, notes 97–103.

payments on the mortgage if he or she believes it is rescinded. The borrower may decide to take affirmative action to seek judicial enforcement of the rescission. Or, after repeated missed payments, the lender would pursue foreclosure, 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.²⁴⁸ If there are no TILA violations, they would be resolved during litigation as part of the foreclosure proceeding—an inevitable outcome after the borrower ceases payments—and the title will be clear.²⁴⁹ 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 the borrower would be estopped under common law rescission.²⁵⁰ Indeed, at common law when a party rescinds a contract she is bound to adhere to the rescission.²⁵¹ Under any scenario, then, it is hard to imagine how allowing the borrower to exercise rescission via notification clouds the title of mortgages.²⁵²

²⁴⁸ See 15 U.S.C. § 1635(b) (“When an obligor exercises his right to rescind under subsection (a) of this section, 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.”).

²⁴⁹ Indeed, most of the cases involved in the Circuit Split that this comment addresses, all dealing with rescission, were connected to already-existing foreclosure actions. See discussion *supra* Part III.C.

²⁵⁰ 17B C.J.S. *Contracts* § 647 (2013) (“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 (2013) (“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.”).

²⁵¹ *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.”) (emphasis added).

²⁵² It is important to note that exercising the rescission right is not the same as effecting rescission. See discussion *supra* 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.²⁵³ Indeed, it accomplished this quite effectively by precluding tolling of § 1635(f) and construing it strictly.²⁵⁴ When using the “cloud the title” language, the Court addressed whether to allow rescission claims to be raised *at any time* as defenses to recoupment action.²⁵⁵ In other words, the Court addressed whether an exception can be made to § 1635(f)’s three-year window, and answered that question negatively to prevent mortgage titles from being clouded.²⁵⁶ 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.²⁵⁷ The Court simply did not address the method of exercising rescission *within* the three-year period. The issue of clouding title of mortgages is inapplicable to such rescissions.²⁵⁸ Courts should not create additional statutory requirements in a misguided attempt to promote *Beach*’s principles, because it involved an entirely separate issue.

3. Considerations of Public Policy Call for Allowing Borrowers to Exercise Rescission via Notification

It is sensible policy to allow notification of rescission to constitute an exercise of rescission. The housing bubble that preceded the foreclosure crisis was precipitated by many borrowers accepting loans that they could not hope to repay; some argue that a primary cause of this was the inadequacy of TILA’s disclosure requirements.²⁵⁹ While the adequacy of the disclosure requirements has been questioned,²⁶⁰ those consumers who have not received 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.

²⁵³ *Beach v. Ocwen Fed. Bank*, 523 U.S. 410, 418 (1998).

²⁵⁴ See discussion *supra* Part III.B.

²⁵⁵ *Beach*, 523 U.S. at 418.

²⁵⁶ *Id.*; see also *Jones v. Saxon Mortg.*, 537 F.3d 320, 327 (4th Cir. 1998) (“[A]llowing 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.”) (emphasis added).

²⁵⁷ *Beach*, 523 U.S. at 418.

²⁵⁸ *Jones*, 537 F.3d at 327.

²⁵⁹ *Sovern*, *supra* note 1; *Sovern*, *supra* note 13.

²⁶⁰ *Id.*

Indeed, as foreclosure filings increased during the economic crisis, rescission became an increasingly powerful tool for consumers.²⁶¹ Thus, as the number of foreclosure filings increased, so have the number of rescission cases.²⁶² 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. Any policy to the contrary should come from Congress, not the courts, due to the prevalence and complicated nature of the problem.

Moreover, the statutory scheme articulated by TILA and Regulation Z works most efficiently when consumers can satisfy the limitations period by merely 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.²⁶³ Reading § 1635(f) to require borrowers to file a lawsuit complicates this process further. Filing a lawsuit is costly,²⁶⁴ and borrowers who have been saddled with loans that they cannot repay should not be required to outlay money to initiate a lawsuit.²⁶⁵ TILA recognizes the precarious position these borrowers are in, which is why its default rules only require tender of payment *after* the lender voids the security interest—a clear reversal of the traditional common law rescission process.²⁶⁶ Requiring borrowers to initiate

²⁶¹ *The Fed and Foreclosures*, *supra* note 20 (describing rescission as “the most effective legal tool that borrowers have to fight foreclosures”).

²⁶² Dougherty, *supra* note 19 (citing an estimate from Kathleen Day, spokeswoman for the Center for Responsible Lending, estimating “thousands” of rescission cases pending due to the economic crisis).

²⁶³ 15 U.S.C. § 1635 (2012); 12 C.F.R. § 226.23(d) (2011).

²⁶⁴ *How Much Do Lawsuits Cost?*, California Labor and Employment Law Blog (last visited Apr. 4, 2013), <http://www.calaborlaw.com/2008/09/26/how-much-do-lawsuits-cost/>.

²⁶⁵ TILA is a fee-shifting statute. 15 U.S.C. § 1640(a)(3). Nonetheless, filing a lawsuit remains a huge financial risk for borrowers in the event that the case is lost or a contingent-fee attorney is unavailable.

²⁶⁶ Shepard, *supra* note 99; discussion *infra* Part 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 99. Courts are not always involved in rescission, however, and not all courts require a showing of tender. *See* discussion *supra* Part 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 19.

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.²⁶⁷ The statutory scheme has been described as an enhancement of common law rescission.²⁶⁸ 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 frustrate that purpose.²⁶⁹ Furthermore, the regulatory requirement that a consumer send a notice of intent to rescind form to the lender would be superfluous if the only way a consumer could exercise rescission is by filing a lawsuit, because service of process as part of the lawsuit also constitutes sufficient notice.²⁷⁰

Another concern is that without exercise via notification, banks violating TILA could simply not respond to a borrower's letter, or stonewall until the three-year period expires and then foreclose.²⁷¹ The facts alleged in the *McOmie-Gray*²⁷² case are a perfect example of this.²⁷³ The bank in that case responded to the notice of rescission by negotiating with Ms. McOmie until the limitations period expired.²⁷⁴ Ms. McOmie-Gray was therefore precluded from a remedy for any disclosure violations.²⁷⁵ 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

²⁶⁷ See discussion *supra* Part II.B.1.

²⁶⁸ Shepard, *supra* note 99, at 188.

²⁶⁹ See, e.g., *Belini v. Wash. 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.”); *Andrews v. Chevy Chase Bank*, 545 F.3d 570, 573–574 (7th Cir. 2008) (“TILA rescission is therefore considered a purely personal remedy It is intended to operate privately, at least initially, ‘with the creditor and debtor working out the logistics of a given rescission.’”) (quoting *McKenna v. First Horizon Home Loan Corp.*, 475 F.3d 418, 421 (1st Cir. 2007)).

²⁷⁰ See *supra* Figure 1; 12 C.F.R. § 226.23(b)(1)(iii) (2011).

²⁷¹ See Patrick Pulatie, *TILA and RESPA Rescission Ineffective in Real-World Foreclosure Defense*, I AM FACING FORECLOSURE BLOG (Aug. 13, 2009), <http://iamfacingforeclosure.com/blog/2009/08/13/tila-and-respa-rescission-ineffective/> (“The lender will respond [to a demand for rescission letter] in one of two ways: (a) *ignore the letter altogether*, or (b), send a reply where they deny that there are any violations of TILA and that they refuse to honor rescission.”) (emphasis added).

²⁷² *McOmie-Gray v. Bank of Am. Home Loans*, 667 F.3d 1325, 1326 (9th Cir. 2012).

²⁷³ See discussion of the facts of *McOmie-Gray*, *supra* Part III.C.3.

²⁷⁴ *McOmie-Gray*, 667 F.3d at 1326.

²⁷⁵ *Id.*

consumers from deceptive lenders.²⁷⁶

Finally, 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.²⁷⁷ 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.²⁷⁸ The model form provided by the regulations clearly indicates that rescission is exercised by simply sending the form to the lender within three days.²⁷⁹ Consumers are given clear instructions to exercise rescission by notifying the creditor, and courts should not read additional requirements that do not appear in the statute, regulations, or notice forms. For a court to impose additional requirements on consumers through judicial decree unfairly burdens those consumers who reasonably on the clear instructions they are provided.

B. The Plain Language of the Statute Supports Exercise of Rescission via Notification, and this Interpretation is Consistent with Supreme Court Precedent and the Common Law

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.

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

It is an axiom of statutory interpretation that courts initially “presume that a legislature says in a statute what it means and means in a statute what it says there.”²⁸⁰ Thus, the starting point of any statutory analysis is the language of the statute itself.²⁸¹ To aid in

²⁷⁶ See discussion *supra* Part IV.A.1.

²⁷⁷ 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).

²⁷⁸ 12 C.F.R. § 226.23(b)(1)(iii) (2011).

²⁷⁹ See *supra* Figure 1.

²⁸⁰ *Conn. Nat’l Bank v. Germain*, 503 U.S. 249, 253–54 (1992).

²⁸¹ *Kaiser Aluminum & Chem. 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

understanding statutory language, the statute must be read in context with all of its various provisions.²⁸² Moreover, the Supreme Court has noted that courts should resist reading words into a statute when its plain meaning appears on its face.²⁸³ The Court has also stated that when a statute prescribes action by a particular mode, it precludes action by alternative modes not mentioned in the statute.²⁸⁴

In addition, the right of action created by § 1635 and § 1640 did not exist at common law.²⁸⁵ Though rescission rights generally do exist at common law,²⁸⁶ the right to rescind in response to TILA disclosure violations is statutorily-created. Because TILA created the right of rescission, any limitations on the right should be discerned from the statute itself.²⁸⁷ Before limiting a statutory right, therefore, courts should rely upon the contours of that right as defined by the statute.

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.²⁸⁸ 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

language must ordinarily be regarded as conclusive.”).

²⁸² *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.”).

²⁸³ *Dean v. United States*, 556 U.S. 568, 572 (2009) (quoting *Bates v. United States*, 522 U.S. 23, 29 (1997)) (stating that courts should “ordinarily resist reading words or elements into a statute that do not appear on its face”).

²⁸⁴ *Christensen v. Harris Cnty.*, 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.”).

²⁸⁵ *James v. Home Constr. Co.*, 621 F.2d 727, 729 (5th Cir. 1980) (“§ 1635 is a statutorily created right.”); *Beach v. Great W. Bank*, 670 So. 2d 986, 992 (Fla. Dist. Ct. App. 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.”); *Jenkins v. Landmark Mortg. Corp.*, 696 F. Supp. 1089, 1092 (W.D. Va. 1988) (“The rights which plaintiff seeks to invoke are wholly statutory creatures.”).

²⁸⁶ See discussion *infra* Part IV.B.3.

²⁸⁷ *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.”).

²⁸⁸ Cf. *Sherzer v. Homestar Mortg. Servs.*, No. 11-4254, 2013 U.S. App. LEXIS 2486 (3d Cir. Feb. 5, 2013).

accordance with the regulations.²⁸⁹ Section 1635(f) simply states that the right of rescission expires after three years.²⁹⁰ Read together, these two provisions state that the right to *rescind by notification* in accordance with the regulations expires *after three years* of the date of the transaction.

Because § 1635(f) 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. Nothing in the language of the statutes differentiates between exercising rescission under the buyer's remorse provision or under § 1635(f).²⁹¹ Indeed, the Supreme Court itself has recognized that § 1635 says nothing in terms of filing a lawsuit.²⁹² 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.²⁹³

i. Sub-Issue: How Long do Borrowers have to Seek Judicial Enforcement 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 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?

²⁸⁹ 15 U.S.C. § 1635(a) (2012) (“[T]he obligor *shall have the right to rescind* the transaction until midnight of the third business day following the consummation of the transaction or the delivery of the information and rescission forms required under this section together with a statement containing the material disclosures required under this title, whichever is later, *by notifying the creditor, in accordance with regulations of the Bureau, of his intention to do so.*”) (emphasis added).

²⁹⁰ 15 U.S.C. § 1635(f) (2012) (“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, notwithstanding the fact that the information and forms required under this section or any other disclosures required under this chapter [15 USCS §§ 1631 et seq.] have not been delivered to the obligor.”) (emphasis added).

²⁹¹ *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.”).

²⁹² *Beach v. Ocwen Fed. Bank*, 523 U.S. 410, 417 (1998).

²⁹³ *See Sherzer*, 2010 U.S. Dist. LEXIS 137315, at *32.

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.²⁹⁴ Under this view, borrowers have one year after notifying of rescission to seek enforcement and damages from the lender's failure to honor rescission. While the one-year limit to seek a damage award for failure to honor rescission is clearly appropriate under the statute, however, it is unclear whether this can or should be used as a limit on seeking judicial enforcement of rescission, an equitable remedy.²⁹⁵ The courts have essentially read this one-year limitation on judicial enforcement of rescission into the statute to put a firm time limit on enforcement.²⁹⁶ Perhaps the difficulty of resolving this issue is what has inspired some courts to regard notification as an insufficient exercise of rescission, in spite of the statutory language to the contrary.²⁹⁷

Nonetheless, it is difficult to imagine a case where the 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 actively seeking judicial enforcement.²⁹⁸ In the rare instance where a borrower induces a lender to keep accepting

²⁹⁴ See *Gilbert v. Residential Funding LLC*, 678 F.3d 271 (4th Cir. 2012); *Santos v. Countrywide Home Loans*, No. 09-912, 2009 U.S. Dist. LEXIS 71736, at *4-5 (E.D. Cal. Aug. 14, 2009); *Toney v. LaSalle Bank Nat'l Ass'n*, 2012 U.S. Dist. LEXIS 143164, at *27-28 (D.S.C. Aug. 9, 2012); *In re Hunter*, 400 B.R. 651, 660-61 (Bankr. N.D. Ill. 2009). Many courts have held that 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.

²⁹⁵ 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). See text accompanying *infra* note 294.

²⁹⁶ For authority for the imposition of an analogous statute of limitations onto a federal right of action, see *Graham Cnty. Soil & Water Conservation Dist. v. United States ex rel. Wilson*, 545 U.S. 409, 414 (2005) ("To determine the applicable statute of limitations for a cause of action created by a federal statute, we first ask whether the statute expressly supplies a limitations period. If it does not, we generally 'borrow' the most closely analogous state limitations period.").

²⁹⁷ See discussion *supra* Part IV.B.1.

²⁹⁸ See discussion *supra* 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).

payments after having purported to rescind the loan, axioms of the common law of contracts and the doctrine of equitable estoppel may be more appropriate to protect the lender than TILA's one-year damages limitation, as discussed above.²⁹⁹ 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.³⁰⁰

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

As detailed above, in *Beach*, the Supreme Court held that TILA "permits no federal right to rescind, defensively or otherwise, *after* the three-year period of § 1635(f) has run."³⁰¹ However, the court made no effort to explain what actually constitutes an exercise of the right to rescind *within* the three-year period—whether it is accomplished by notice or lawsuit.³⁰² The issue of properly exercising rescission within the three-year period had already arisen by the time *Beach* was decided,³⁰³ and if the Court had intended to address the issue, it likely 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.³⁰⁴ 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.³⁰⁵ This policy concern is simply not present, however, in the context of deciding whether notice is a sufficient exercise of the rescission right for the purposes of § 1635(f).³⁰⁶ 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 reasonable time prior to or during the foreclosure

²⁹⁹ See discussion *supra* Part IV.A.2.

³⁰⁰ In a foreclosure action, the borrower in this type of case would be estopped from asserting the rescission defense. See authorities quoted *supra* notes 287, 288.

³⁰¹ *Beach v. Ocwen Fed. Bank*, 523 U.S. 410, 419 (1998) (emphasis added); see discussion *supra* Part III.B.

³⁰² See discussion *supra* Part III.B.

³⁰³ See discussion *supra* Part III.A.1.

³⁰⁴ See discussion *supra* Part III.B.

³⁰⁵ *Beach*, 523 U.S. at 418.

³⁰⁶ See discussion *supra* Part IV.A.2.

proceeding itself.³⁰⁷ Therefore, the view that notice of rescission satisfies § 1635(f) is completely consistent with both the holding of *Beach* and its underlying rationale, and any additional, judicially-constructed requirements are premised upon a misinterpretation of *Beach*'s holdings.³⁰⁸

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

It is a principle of statutory construction that statutes should be construed with reference to common law principles, and that statutes should not be read to incorporate changes to the common law unless clearly prescribed.³⁰⁹ On the other hand, principles of the common law cannot be used to override the intentions of Congress.³¹⁰

Rescission as a contract remedy has existed at the common law for many years.³¹¹ At the common law, rescission was exercised when the aggrieved party with the right to rescind expresses it.³¹² Thus, courts have held that common law rescission is a “fact” that is “complete” when the aggrieved party makes that fact known to the other party, either by lawsuit or by unequivocal notice.³¹³ Under the

³⁰⁷ *Id.*

³⁰⁸ *Cohens v. 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.”).

³⁰⁹ 82 C.J.S. *Statutes* § 473 (2013) (“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.”)).

³¹⁰ *Mohamad v. Palestinian Auth.*, 132 S. Ct. 1702, 1709 (2012) (“Congress plainly can override those [common law] principles.”).

³¹¹ *See, e.g., Grymes v. Sanders*, 93 U.S. 55 (1876).

³¹² 17B C.J.S. *Contracts* § 648 (2013) (“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.”).

³¹³ *E.g., 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.”); *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

common law, the other party has the opportunity to accept the rescission, and the issue is resolved without the involvement of courts.³¹⁴ If the other party rejects rescission, however, the borrower may file a lawsuit to enforce the rescission, but cannot seek damages under the contract.³¹⁵ 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.³¹⁶ Traditionally under the common law, tender by the borrower of property received was necessary before a court would grant the equitable remedy of rescission.³¹⁷ 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.³¹⁸

TILA's rescission remedy enhances the protections that the common law rescission remedy provides to consumers.³¹⁹ The procedures outlined by the statute seem to acknowledge the common

the other party, whether by a suit or in any other unequivocal way, the rescission is complete.”).

³¹⁴ C. Brown Trucking Co. Inc. v. Henderson, 305 Ga. App. 873, 874 (2010) (“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.”) (citation omitted).

³¹⁵ 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 (2013) (“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.”).

³¹⁶ 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.”).

³¹⁷ 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.”).

³¹⁸ 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*.”); 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.”).

³¹⁹ Shepard, *supra* note 99, 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.”).

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law framework for rescission,³²⁰ 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.³²¹ Additionally, TILA provides borrowers three years to rescind the contract,³²² whereas under the common law rescission must be brought within a “reasonable time.”³²³ And, significantly, TILA reverses the tender requirement, requiring the lender to void the security interest before the borrower is required to tender payment.³²⁴ By reversing the tender requirement, TILA provides consumers with extra leverage and more time to obtain financing to tender.³²⁵

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,³²⁶ but the court is petitioned to either confirm or deny the validity of the rescission and to govern the restitution process.³²⁷ Similarly, the common law grants the right to rescind to certain parties in certain circumstances, and the right may be exercised by a unilateral expression of intent to rescind.³²⁸ The right must be *invoked* within a reasonable time upon

³²⁰ See discussion *supra* Part II.B.1.

³²¹ Shepard, *supra* note 99, at 189.

³²² 15 U.S.C. § 1635(f) (2012).

³²³ 17B C.J.S. *Contracts* § 641 (2013) (“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.”).

³²⁴ 15 U.S.C. § 1635(b) (2012); 12 C.F.R. § 226.23(d) (2011). Some courts have re-ordered the statutory rescission process by implementing a conditional rescission requirement that depends on the borrower’s ability to make a showing of ability to tender. See *generally* Shepard, *supra* note 99; 15 U.S.C. § 1635(b) (“The procedures prescribed by this subsection shall apply except when otherwise ordered by a court.”).

³²⁵ Shepard, *supra* note 99, at 192.

³²⁶ *Rosenfield v. HSBC Bank, USA*, 681 F.3d 1172, 1183 n.8 (10th Cir. 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).

³²⁷ *Belini v. Wash. Mut. Bank, F.A.*, 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.*”) (emphasis added).

³²⁸ 17B C.J.S. *Contracts* § 646 (2013) (“As a general rule, to effect a rescission of a

discovery of the cause for rescission,³²⁹ and a court may later grant an equitable remedy of rescission if the party seeking to rescind was justified.³³⁰ Section 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 on common law grounds its restrictive holding that § 1635(f) requires the filing of a lawsuit.³³¹ While the court accurately described TILA rescission as analogous to common law rescission,³³² the court nonetheless found that a key policy behind common law rescission—“remedial economy”—justified its restrictive view of § 1635(f).³³³ The court reasoned 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.³³⁴ The *Rosenfield* court’s argument is based upon the erroneous assumption that permitting the exercise of rescission via notification would cloud the title of mortgages. Because invoking rescission via notification does not burden mortgage titles,³³⁵ the *Rosenfield* court’s argument is undercut. Instead, the Fourth Circuit’s reading of § 1635(f) is

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.”). Again, to say that rescission is exercised unilaterally is not the same as saying that rescission is effected unilaterally. *See* discussion *supra* Part II.B.2.

³²⁹ 17B C.J.S. *Contracts* § 641 (2013) (“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.”).

³³⁰ *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.”).

³³¹ *Rosenfield*, 681 F.3d at 1184–85.

³³² *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.]”).

³³³ *Id.* (“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.”) (internal quotation omitted).

³³⁴ *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.”).

³³⁵ *See* discussion *supra* Part IV.A.2.

indeed consistent with common law rescission.

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

None of the Federal Circuit Courts of Appeals that addressed the proper method of exercising rescission under § 1635(f) deferred to the CFPB's³³⁶ interpretation of the statute.³³⁷ If any ambiguity is to be found in the statute, courts will give deference to the accompanying regulation if it is a reasonable interpretation of the statute. Here, such deference is warranted because Regulation Z's provisions regarding rescission are a reasonable interpretation of § 1635.

Before considering whether the agency's interpretation of § 1635 is entitled to deference, it is helpful to review what the regulations relating to rescission actually prescribe. Regulation Z states generally that to exercise the right to rescind, a borrower must "notify the creditor of rescission by mail, telegram or other means of written communication."³³⁸ Unlike the statute, this regulatory provision does not differentiate between buyer's remorse rescission (§ 1635(a)) and exercising the extended rescission right under § 1635(f).³³⁹ The following provision, under the same general heading of "Consumer's Right to Rescind," describes the applicable time periods for a consumer to exercise either buyer's remorse or § 1635(f) rescission, but states nothing further regarding the *method* of exercising rescission.³⁴⁰ Thus, the regulations clearly state that rescission, regardless of which rescission period applies, is exercised only by notification.³⁴¹ The CFPB's proposed rescission rule

³³⁶ Though the original regulations were promulgated by the FRB, this Part of the Comment refers to the promulgating agency as the CFPB for simplicity's sake. See discussion *supra* p. 11. Since the CFPB currently has the authority to implement TILA regulations, its interpretation is the most relevant going forward.

³³⁷ See discussion *supra* Part III.C. The failure of these courts to address administrative deference issues is indicative of the wider phenomenon of opinions failing to address these issues in cases where they are relevant. See generally William N. Eskridge, Jr. & Lauren E. Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from Chevron to Hamdan*, 96 GEO. L.J. 1083 (2008).

³³⁸ 12 C.F.R. § 226.23(a)(2) (2011) (emphasis added).

³³⁹ *Id.*

³⁴⁰ 12 C.F.R. § 226.23(a)(3).

³⁴¹ In other words, since the only mention of exercising rescission is contained in § 226.23(a)(2), which explicitly declares notice sufficient and refers generally to the rescission right regardless of which period applies, notice is sufficient for either the

maintains this organization of the regulation,³⁴² and the CFPB itself has taken the position in litigation that § 1635(f) only requires rescission via notification.³⁴³ This raises the question of whether the CFPB's interpretation is entitled to deference by the courts.

The hallmark case regarding judicial deference to the interpretations of statutes by executive agencies remains *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, wherein the Supreme Court established a two-part test to determine whether such interpretations are entitled to deference.³⁴⁴ Before applying the two-part test, however, in what some commentators refer to as “*Chevron Step Zero*,”³⁴⁵ courts determine whether the agency was properly delegated the authority to promulgate the regulation in the first place.³⁴⁶ Thus, it is essential to the analysis that TILA expressly provides the CFPB with broad authority to promulgate regulations

three-day or three-year rescission period.

³⁴² 2012 Truth in Lending Act (Regulation Z) (Interim Final Rule), Docket No. CFPB–2011–0031, 76 Fed. Reg. 79768, 79803 (Dec. 22, 2011).

³⁴³ Brief for Amicus CFPB, *Rosenfield v. HSBC Bank, USA*, 681 F.3d 1172 (10th Cir. 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.*, No. 12-1053 (8th Cir. filed Jan. 9, 2012), available at http://files.consumerfinance.gov/f/201204_CFPB_Sobieniak-amicus-brief.pdf.

³⁴⁴ 467 U.S. 837 (1984); see also *City of Arlington v. FCC*, 133 S. Ct. 1863 (2013) (reaffirming *Chevron*'s importance and applying it to uphold an FCC interpretation of its own jurisdictional scope of authority).

³⁴⁵ Scott A. Keller, *How Courts Can Protect State Autonomy from Federal Administrative Encroachment*, 82 S. CAL. L. REV. 45, 66–69 (2008).

³⁴⁶ *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988) (“It is axiomatic that an administrative agency’s power to promulgate legislative regulations is limited to the authority delegated by congress.”). A proper delegation of authority was traditionally one that provides the agency with an “intelligible principle.” See *Indus. Union Dep’t, AFL-CIO v. API*, 448 U.S. 607, 685–86 (1980) (Rehnquist, J., concurring). After the decision in *Whitman v. Am. Trucking Ass’ns*, 531 U.S. 457 (2001), in which the Supreme Court upheld a broad delegation for the Environmental Protection Agency to set air quality standards at a level “requisite to protect the public health,” courts will find a delegation to be proper as long as Congress has not delegated “something approaching blank-check legislative rulemaking authority to an agency.” Thomas W. Merrill, *Rethinking Article I, Section 1: From Nondelegation to Exclusive Delegation*, 104 COLUM. L. REV. 2097, 2099 (2004). Indeed, the Supreme Court has stated that “administrative implementation of a particular statutory provision qualifies for *Chevron* deference when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority.” *United States v. Mead Corp.*, 533 U.S. 218, 226–27 (2001) (emphasis added).

implementing the statute.³⁴⁷ As a result, the analysis can proceed to the two-step analysis under *Chevron*.

In the first step of the *Chevron* test, courts ask whether Congress has directly spoken on the precise question at issue.³⁴⁸ If the statutory language or Congressional intent is clear, courts—and the regulatory agency—must give effect to the intent of Congress and this ends the inquiry.³⁴⁹ If the statute is silent or ambiguous, courts apply one of two levels of analysis to determine whether an agency interpretation within a regulation is entitled to deference. If Congress has *explicitly* left a gap in the statute for the agency to fill, this is considered an “express delegation” to “elucidate a specific provision of the statute by regulation.”³⁵⁰ If there is such an explicit gap, courts ask whether the regulation is “arbitrary, capricious, or manifestly contrary to the statute.”³⁵¹ If, however, Congress left an *implicit* gap in the statute, “a court may not substitute its own construction of a statutory provision for a *reasonable interpretation* made by the administrator of an agency.”³⁵²

With respect to the first prong of *Chevron*, § 1635(f) is ambiguous: unlike the buyer’s remorse provision, § 1635(f) is silent on the proper method of exercising rescission. Because the buyer’s remorse provision specifies exercise of rescission via notification, but § 1635(f) does not specify *any* particular method of exercising the right, this may be considered an implicit gap for the implementing agency to fill.³⁵³ In addition, Congress has not directly spoken on the

³⁴⁷ 15 U.S.C. § 1604(a) (2012) (“The Bureau shall prescribe regulations to carry out the purposes of this title.”). In 2010, TILA was amended to strengthen the CFPB’s authority to promulgate rules. See Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 1022(b)(4)(B), 124 Stat. 1376 (2010) (codified at 15 U.S.C. § 1604(h) (2012)) (“[T]he deference that a court affords to the Bureau with respect to a determination by the Bureau regarding the meaning or interpretation of any provision of a Federal consumer financial law shall be applied as if the Bureau were the only agency authorized to apply, enforce, interpret, or administer the provisions of such Federal consumer financial law.”).

³⁴⁸ *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842 (1984).

³⁴⁹ *Id.* at 842–43.

³⁵⁰ *Id.* at 844; see also *United States v. Mead Corp.*, 533 U.S. 218, 227 (2001) (“When Congress has ‘explicitly left a gap for an agency to fill, there is an express delegation of authority . . .’ and any ensuing regulation is binding in the courts unless procedurally defective, arbitrary or capricious in substance, or manifestly contrary to the statute.”) (quoting *Chevron*, 467 U.S. at 843–44).

³⁵¹ *Id.*

³⁵² *Id.* (emphasis added).

³⁵³ As described above, Regulation Z fills this gap by merging both the buyer’s remorse provision and § 1635(f) into the same subheading and indicating that both

issue of properly exercising rescission rights.³⁵⁴ Though the congressional intent behind TILA, and particularly its recent transfer of rulemaking authority to the CFPB, suggests that recently Congress has been interested in easing requirements for borrowers,³⁵⁵ this can hardly be considered a clear statement on the specific issue by Congress. Nor does anything in the legislative history of TILA or its amendments constitute a clear statement on the issue.

These considerations allow the analysis to proceed to the second part of *Chevron*. The first issue is whether the relevant regulation exists as the result of an *express* delegation from Congress, or whether Congress left an *implicit* gap for the agency to fill as part of its general rule-making authority.³⁵⁶ It is plain from the language of the statute that determining the method of preserving the rescission right for the purposes of § 1635(f) is not expressly delegated to the CFPB.³⁵⁷ Thus, the power to resolve the ambiguity must have been implicitly delegated to the CFPB as part of the agency's general authority to promulgate rules implementing TILA.³⁵⁸

Since the relevant portion of Regulation Z was promulgated pursuant to an *implicit* delegation of authority, the "reasonable interpretation" standard applies.³⁵⁹ In examining the reasonableness of the interpretation, it must be noted that the Supreme Court has often favored a deferential approach to regulations contained in Regulation Z.³⁶⁰ Moreover, the interpretation's reasonableness is

rescission procedures are exercised the same way. In other words, Regulation Z interprets the statute the same way that the Fourth Circuit and this Comment do. See discussions *supra* Parts III.C.1, IV.B.1.

³⁵⁴ This is, of course, assuming that the statutory language itself is ambiguous, a position this Comment strenuously argues against but assumes for the purposes of the *Chevron* argument.

³⁵⁵ See discussion *supra* Part IV.A.1.

³⁵⁶ As noted above, different standards of deference apply depending on whether the regulation is an expressly or implicitly delegated exercise of authority.

³⁵⁷ TILA expressly delegates the authority to determine what constitutes *notice*. 15 U.S.C. § 1602(a) (2012) ("The Bureau shall prescribe regulations to carry out the purposes of this title."). The statute, however, does not expressly delegate the power to determine whether notice is a valid *exercise* of rescission such that it satisfies the time limitation of § 1635(f).

³⁵⁸ See § 1604(a). The reason for assuming an implicit delegation is that Congress is silent on the method of exercising rescission under § 1635(f), and only the implementing agency, with general authority to promulgate regulations, is situated to fill that gap.

³⁵⁹ *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984).

³⁶⁰ See, e.g., *Household Credit Servs. v. Pfennig*, 541 U.S. 232, 238–39 (2004); *Anderson Bros. Ford v. Valencia*, 452 U.S. 205, 219 (1981) ("[A]bsent some obvious

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.³⁶¹ The Regulation Z interpretation is also consistent with the Supreme Court's reasoning and policy rationale outline in *Beach*,³⁶² and with the process of common law rescission.³⁶³ And finally, the interpretation is in accordance with the principle that a remedial statute should be construed liberally to protect the people it seeks to help.³⁶⁴

Another testament to Regulation Z's reasonableness is that the regulation's interpretation of § 1635(f) is consistent with similar limitations statutes in other contexts. For instance, the Uniform Commercial Code contains a one-year statute of repose that requires bank customers to object within one year of receiving notice of an unauthorized wire transfer.³⁶⁵ If objection is not made, the right to be reimbursed by the bank extinguishes.³⁶⁶ And in some states, a valid claim against a public entity is extinguished unless the potential claimant notifies the State of the claim within a specified time period.³⁶⁷ Just as Regulation Z allows preservation of the rescission right via notification, these limitation statutes are satisfied not by

repugnance to the statute, the . . . regulation implementing [TILA] should be accepted by the courts."); *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."). These cases typically involved the application of *Chevron* to more technical regulations, such as regulations governing specific disclosure requirements.

³⁶¹ See discussion *supra* Part IV.A.1.

³⁶² See discussion *supra* Part IV.B.2.

³⁶³ See discussion *supra* Part IV.B.3.

³⁶⁴ See, e.g., *King v. California*, 784 F.2d 910, 915 (9th Cir. 1986) ("The courts have construed TILA as a remedial statute, interpreting it liberally for the consumer.") (citation omitted).

³⁶⁵ See, e.g., U.C.C. § 4A-505 (2003); *Regatos v. North Fork Bank*, 5 N.Y.3d 395, 403 (N.Y. 2005) ("[A] bank has an obligation to refund the principal regardless of notice, provided such notice is given within one year in accordance with UCC4A-505 The period of repose in section 4A-505 is essentially a jurisdictional attribute of the "rights and obligations" contained in UCC 4A-204 (1).") (citations omitted).

³⁶⁶ U.C.C. § 4A-505 (2003).

³⁶⁷ MASS. GEN. LAWS ch. 258 § 4 (2012); see also N.J. STAT. ANN. § 59:8-8 (West 2012), N.M. STAT. ANN. § 41-4-16 (LexisNexis 2013). Since tort claims against a state are only allowed to proceed due to the state's waiver of sovereign immunity, these statutes are examples of notification satisfying a repose period to preserve a right granted by the state.

filing a lawsuit, but by engaging in some other sort of action to preserve a right granted by statute. Since these types of statutes exist in other contexts, Regulation Z's interpretation of § 1635(f) to be this type of statute is reasonable and is therefore entitled to deference from the courts under *Chevron*.

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

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

The Supreme Court's decision in *Beach* and the subsequent surge in foreclosure filings that occurred during the financial crisis of the 2000s are the causes of the split between the circuits concerning the exercise of rescission rights.³⁶⁸ The Third and Fourth Circuits have read § 1635(f) to only require notice of rescission, but the Ninth and Tenth circuits have reached the opposite conclusion largely by relying, albeit erroneously, on the *Beach* decision.³⁶⁹ Both 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 in that case 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

³⁶⁸ See discussion *infra* Part 695III.C.

³⁶⁹ *Id.*

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subsequent proceeding.³⁷⁰

B. A Legislative Amendment To Clarify § 1635(f)

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.³⁷¹ Regulation Z, by incorporating both modes of exercising rescission into the same regulatory heading, supports this interpretation.³⁷² 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.³⁷³

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 before expiration by notifying the creditor, in accordance with regulations of the Bureau, of the obligor's intention to rescind. ...

VI. CONCLUSION

TILA's right of rescission is an important remedy for many borrowers, particularly those borrowers who have unwittingly become saddled with loans they will not be able to repay. The rescission right is a strict liability right to rescind certain loans, and the right extends

³⁷⁰ 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 *supra* Part II.B.2. This Comment does not take a position on that issue.

³⁷¹ See discussion *supra* Part IV.B.1.

³⁷² 12 C.F.R. § 226.23(a) (2011).

³⁷³ *Infra* Figure 2.

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 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, such as Ms. McOmie-Gray, 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 Supreme Court itself 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.

TILA 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. As noted, the plain language of TILA and its regulations support the Third and Fourth Circuits' 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 of 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 in the light most favorable to borrowers, the plain language of the statute should be relied upon by courts interpreting § 1635(f), which would allow borrowers to satisfy the time limitation through notice alone.