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Truth in Lending: Is Notice Enough to Exercise the Right of Rescission?

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INTRODUCTION

Imagine your home needs repairs so you hire a contractor. However, you do not have the money to pay the contractor, so you take out a loan from your local bank with your home acting as collateral. Two years later, you fall behind on your payments, and the bank is about to foreclose on your home. After consulting with an attorney, you conclude that the bank did not provide you with all the disclosures that are required by law. Upon this realization, you send your bank a notice of rescission. Your bank receives your rescission notice but denies your claim, arguing that you received all required disclosures. Now, three years and two months after receiving the loan, you decide to file suit naming the bank as the defendant in an effort to force the bank to recognize the rescission. But can you bring suit more than three years after the loan was commenced?

This issue has led to a circuit split among federal courts of appeals,[1] and on April 28, 2014, the Supreme Court granted certiorari.[2] Some courts have held that the borrower may bring suit after three years, when the statute of repose has run, as long as notice was sent within the three-year period as authorized under the Truth in Lending Act (TILA).[3] Other courts have held that in addition to the requirement that notice be sent within the three-year period, suit must also be brought within that period.[4] This split has led to different treatment throughout the country.[5]

This Note, which deals only with closed-end credit loans,[6] argues that the borrower should only be required to send notice within the three-year period, consistent with the holdings of the Third, Fourth, and Eleventh Circuits. Part I introduces TILA and Regulation Z, the regulation that implements TILA. Part II discusses the facts and holdings of the seven circuit court opinions[7] that have weighed in on this issue, as well as the

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1. Robert Boutwell, *Federal Circuits Split on Required Action to Effect Rescission Under Truth-in-Lending Act*, BOSTON BANKING LAW BLOG (Nov. 26, 2013), http://www.bostonbankinglawblog.com/2013/11/federal-circuits-split-on-required-action-to-effect-rescission-under-truth-in-lending-act.shtml.

2. *Jesinoski v. Countrywide Home Loans, Inc.*, SCOTUSBLOG.COM, http://www.scotusblog.com/case-files/cases/jesinoski-v-countrywide-home-loans-inc/ (last visited Dec. 30, 2014).

3. Sherzer v. Homestar Mortg. Servs., 707 F.3d 255, 261 (3d Cir. 2013); Gilbert v. Residential Funding L.L.C., 678 F.3d 271, 277–78 (4th Cir. 2012).

4. 15 U.S.C. § 1635(f) (2012) ("An obligor's right of rescission shall expire three years after the consummation of the transaction . . . ."); Lumpkin v. Deutsche Bank Nat'l Trust Co., 534 F. App'x 335, 338 (6th Cir. 2013); Keiran v. Home Capital, Inc., 720 F.3d 721, 728 (8th Cir. 2013); Rosenfield v. HSBC Bank, USA, 681 F.3d 1172, 1188 (10th Cir. 2012); McOmie-Gray v. Bank of Am. Home Loans, 667 F.3d 1325, 1329 (9th Cir. 2012).

5. *See* infra Part II.

6. *See* infra Part I for definition of closed-end credit loans.

7. The Third, Fourth, Sixth, Eighth, Ninth, Tenth, and Eleventh Circuits have weighed in on the present issue.

Supreme Court decision in *Beach v. Ocwen Federal Bank*[8] that has played a role in the disparate treatment throughout the country. Part III discusses why the ruling in *Beach* is not dispositive of the instant issue. Part IV illustrates why notice should be sufficient for exercising one's right to rescind. Part V explains some of the concerns the Eighth, Ninth, and Tenth Circuits had with not requiring suit within the three-year period, why these concerns are likely overstated, and proposes a solution that eases these concerns, regardless of whether they are warranted or not.

I. THE TRUTH IN LENDING ACT AND REGULATION Z

In 1968, Congress passed TILA.[9] TILA was "the first consumer credit law passed by Congress."[10] Congress's stated purpose for passing TILA was to "assure a meaningful disclosure of credit terms" so that the consumer can easily compare "various credit terms available to him."[11] Congress found that the informed use of credit would strengthen "competition among the various financial institutions and other firms engaged in the extension of consumer credit" [12] and that "economic stabilization would be enhanced." [13] Prior to the enactment of TILA, consumers had no easy way of comparing various credit terms offered by different creditors since there was no "uniform way of calculating interest or a single system for defining what additional charges would be included in the interest rate."[14]

TILA directed the Federal Reserve Board to "prescribe regulations [that] carry out the purposes" of TILA.[15] As such, the Federal Reserve Board implemented procedures through Regulation Z.[16] However, with the passing of the Dodd-Frank Wall Street Reform and Consumer Protection Act,[17] the Consumer Financial Protection Bureau (CFPB) was created and given rule-writing as well as enforcement and supervisory authority with regards to Regulation Z. [18] Similar to TILA, the stated purpose of Regulation Z is "to promote the informed use of consumer credit by requiring disclosures about its terms and cost."[19]

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8. Beach v. Ocwen Fed. Bank, 523 U.S. 410 (1998).

9. ELIZABETH RENUART & KATHLEEN KEEST, NAT'L CONSUMER LAW CTR., TRUTH IN LENDING § 1.2.1, at 4 (7th ed. 2010).

10. DENNIS REPLANSKY, TRUTH-IN-LENDING AND REGULATION Z: A PRACTICAL GUIDE TO CLOSED-END CREDIT 6 (1984).

11. 15 U.S.C. § 1601(a) (2012).

12. *Id.*

13. *Id.*

14. RENUART & KEEST, *supra* note 9, § 1.1.1, at 1.

15. 15 U.S.C. § 1604(a) (2012).

16. 12 C.F.R. § 226.1(a) (2011).

17. Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010) (codified in scattered sections of the U.S.C.).

18. RENUART & KEEST, *supra* note 9, § 1.2.11, at 13.

19. *Id.* § 226.1(b).

Regulation Z applies to "each individual or business that offers or extends credit when four conditions are met,"[20] as follows:

> (i) The credit is offered or extended to consumers;
>
> (ii) The offering or extension of credit is done regularly;
>
> (iii) The credit is subject to a finance charge or is payable by a written agreement in more than four installments; and
>
> (iv) The credit is primarily for personal, family, or household purposes.[21]

Different requirements are imposed depending on whether the transaction is an open-end credit loan or a closed-end credit loan.[22]

Open-end credit is consumer credit that is extended under a plan in which:

> (i) The creditor reasonably contemplates repeated transactions;
>
> (ii) The creditor may impose a finance charge[23] from time to time on an outstanding unpaid balance; and
>
> (iii) The amount of credit that may be extended to the consumer during the term of the plan (up to any limit set by the creditor) is generally made available to the extent that any outstanding balance is repaid.[24]

Closed-end credit is all consumer credit that does not fit into the definition of open-end credit.[25] Since this Note deals with an issue arising from a closed-end transaction, all future discussion of TILA and Regulation Z will focus on the requirements of a closed-end credit loan.

Certain disclosures must be made for a loan to comply with TILA.[26] The CFPB is in charge of prescribing the disclosure guidelines.[27] All

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20. *Id.* § 226.1(c)(1).

21. *Id.*

22. *Compare* 12 C.F.R. §§ 1026.5–.16 (2012) (Regulation Z provisions dealing with Open-End Credit), *with* 12 C.F.R. §§ 1026.17–.24 (Regulation Z provisions dealing with Closed-End Credit).

23. Regulation Z defines the finance charge as

> the cost of consumer credit as a dollar amount. It includes any charge payable directly or indirectly by the consumer and imposed directly or indirectly by the creditor as an incident to or a condition of the extension of credit. It does not include any charge of a type payable in a comparable cash transaction.

Id. § 1026.4(a).

24. *Id.* § 1026.2(a)(20).

25. *Id.* § 1026.2(a)(10).

26. 15 U.S.C. § 1601(a) (2012) ("It is the purpose of this subchapter to assure a meaningful disclosure of credit terms . . . .").

27. *Id.* § 1604(a) ("The Bureau shall prescribe regulations to carry out the purposes of this subchapter . . . . [S]uch regulations may contain such additional requirements, classifications, differentiations, or other provisions, and may provide for such adjustments and exceptions for all or any class of transactions, as in the judgment of the Bureau are necessary or proper to effectuate

required disclosures must be clearly written, and in a tangible form the consumer may keep.[28] Additionally, disclosures must be made to each and every person obligated in the transaction[29] prior to the consummation of the transaction.[30] Some of the information that is required to be disclosed by Regulation Z includes the identity of the creditor, the amount being financed, the finance charge, and the annual percentage rate.[31]

In addition to required disclosures, Congress gave the borrower the right to rescind a transaction as a form of protection.[32] The goal of rescission was to protect homeowners from questionable practices by contractors.[33] The right of rescission acts as a cool-off period[34] and demonstrates Congress's goal of "giv[ing] the consumer the opportunity to reconsider any transaction which would have the serious consequence of encumbering the title to his [or her] home."[35] The right to rescind is available in most consumer credit transactions "in which a security interest . . . is or will be retained . . . in any property which is used as the principal dwelling of the person to whom credit is extended."[36] However, the right to rescind is not available in all consumer credit transactions.[37] TILA § 1635(e) mentions four transactions where the right to rescind is not available.[38] These transactions are a "residential mortgage transaction";[39] a

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the purposes of this subchapter, to prevent circumvention or evasion thereof, or to facilitate compliance therewith.").

28. 12 C.F.R. § 1026.17(a)(1) (2012).

29. RENUART & KEEST, *supra* note 9, § 4.1.4, at 172; *see also* 15 U.S.C. § 1631(a) (2012).

30. 12 C.F.R. § 1026.17(b) (2012).

31. *Id.* § 1026.18.

32. RENUART & KEEST, *supra* note 9, § 1.2.1, at 5.

33. *See* Zakarian v. Option One Mortg. Corp., 642 F. Supp. 2d 1206, 1213 (D. Haw. 2009) ("Originally, the Congressional purpose in creating the statutory rescission right was to protect home owners from certain sharp practices of home improvement contractors (and those financing such contractors), by creating a rescission right for home improvement loans that were secured by residential mortgages on existing dwellings." (citing Heuer v. Forest Hill State Bank, 728 F. Supp. 1199, 1200 (D. Md. 1989))); *see also id.* at 1213 ("This federal remedy was thought necessary to protect consumers against surprise and oppression stemming from mortgages unwittingly executed on homes to pay for often questionable 'home improvements.'"); *see also* Lee Krivinskas Shepard, *It's All About the Principal: Preserving Consumers' Right of Rescission Under The Truth In Lending Act*, 89 N.C. L. Rev. 171, 191 (2010) ("It is clear that Congress intended to protect homeowners from abuse by dishonest home improvement contractors who made questionable 'home improvements' financed by loans secured by borrowers' homes.") (alteration in original).

34. Shepard, *supra* note 33, at 186–87 ("Congress believed that by imposing a 'mandatory period for reflection and evaluation, consumers would be less susceptible to high-pressure or fraudulent creditor practices [that] resulted in an encumbrance on and possible loss of the homestead.'").

35. Rodash v. AIB Mortg. Co., 16 F.3d 1142, 1145 (11th Cir. 1994) (citing S. Rep. No. 96-368, at 28 (1980), *reprinted in* 1980 U.S.C.C.A.N. 236, 264); *see also* RENUART & KEEST, *supra* note 9, § 10.1, at 575.

36. 15 U.S.C. § 1635(a) (2012).

37. *Id.* § 1635(e).

38. *Id.*

"refinancing or consolidation" of a loan by the same creditor secured by the consumer's principal dwelling;[40] transactions involving a state agency as a creditor;[41] and "advances under a preexisting open end credit plan."[42] In addition to these four exempt transactions, Regulation Z exempts "a renewal of optional insurance premiums that is not considered a refinancing under section 1026.20(a)(5)."[43]

In transactions where the right to rescind is available, consumers have three business days following consummation of the transaction or when all required disclosures have been made to exercise that right, whichever is later.[44] However, if the creditor fails to make the required disclosures, the consumer's right of rescission expires "three years after the date of consummation of the transaction or upon the sale of the property, whichever occurs first."[45]

According to TILA, if a consumer wants to rescind an eligible transaction he must notify the creditor of his intention to do so.[46] Regulation Z expands on this and states that "[to] exercise the right to rescind, the consumer shall notify the creditor of the rescission by mail, telegram or other means of written communication."[47]

Once the consumer exercises his right to rescind, in accordance with 15 U.S.C. § 1635(a), the consumer

> 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. Within 20 days after receipt of a notice of rescission, the creditor shall return to the obligor any money or property given as earnest money, downpayment, or otherwise, and shall take any action necessary or appropriate to reflect the termination of any security interest created under the transaction.[48]

Upon completion of the creditor's obligations, the consumer must return any money or property that the creditor has delivered.[49]

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39. *Id.* § 1635(e)(1). A residential mortgage transaction is defined as "a transaction in which a mortgage, deed of trust, purchase money security interest arising under an installment sales contract, or equivalent consensual security interest is created or retained against the consumer's dwelling *to finance the acquisition or initial construction of such dwelling*." *Id.* § 1602(x) (emphasis added).

40. *Id.* § 1635(e)(2).

41. *Id.* § 1635(e)(3).

42. *Id.* § 1635(e)(4).

43. 12 C.F.R. § 1026.23(f)(5) (2012).

44. 15 U.S.C. § 1635(a) (2012).

45. *Id.* § 1635(f).

46. *Id.* § 1635(a).

47. 12 C.F.R. § 1026.23(a)(2) (2012).

48. 15 U.S.C. § 1635(b) (2012); *see also* 12 C.F.R. § 1026.23(d).

49. 15 U.S.C. § 1635(b); *see also* 12 C.F.R. § 1026.23(d).

II. IS NOTICE ENOUGH? CASE HISTORIES

The circuit split on this topic stems from a case decided by the Supreme Court in 1998. In *Beach v. Ocwen Federal Bank*, the Supreme Court of the United States decided the question of whether the right to rescind can be raised as an affirmative defense by the borrowers when the suit is brought more than three years after the consummation of the transaction.[50] In deciding whether the borrowers could raise the right to rescind as an affirmative defense, the Supreme Court was tasked with determining whether 15 U.S.C. § 1635(f) was a statute of limitation or a statute of repose.[51] A statute of limitation limits the period in which a claim can be brought, but the underlying right is not extinguished and thus recoupment can be pled.[52] However, with a statute of repose the underlying right is terminated.[53] The Supreme Court held that the right of rescission was a statute of repose, not limitation, since § 1635(f) states the "right of rescission shall expire."[54] Thus, the liability was extinguished when the three-year period in § 1635(f) ran, leaving the Beaches unable to assert the right of rescission as an affirmative defense.[55]

Since the decision in *Beach*, six circuit courts have been presented with the issue of whether notice alone (without being accompanied by litigation) in the three-year period is enough to rescind. Four of the circuit courts have held that suit must also be brought within the three-year period,[56] while two have held notice is sufficient.[57] In addition, the Eleventh Circuit, in a case decided prior to *Beach*, while not directly addressing the present issue noted that sending notice is sufficient to exercise the right of rescission.[58] The following sections will briefly describe the facts of these cases as well as the reasoning for their holdings.

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50. Beach v. Ocwen Fed. Bank, 523 U.S. 410, 411–12 (1998).

51. *Id.* at 416.

52. *Id.* at 415 ("[A] statute of limitation govern[s] only the institution of suit and accordingly has no effect when a [defendant] claims . . . a 'defense of recoupment.'"); 51 AM. JUR. 2D *Limitation of Actions* § 10 (2013).

53. 51 AM. JUR. 2D *Limitation of Actions* § 24 (2013).

54. 15 U.S.C. § 1635(f) (2012); *Beach*, 523 U.S. at 416.

55. *Beach*, 523 U.S. at 411–12; Rosenfield v. HSBC Bank, USA, 681 F.3d 1172, 1183 (10th Cir. 2012) ("Statutes of repose are intended to demarcate a period of time within which a plaintiff must bring claims or else the defendant's liability is extinguished." (quoting Joseph v. Wiles, 223 F.3d 1155, 1168 (10th Cir. 2000))).

56. Lumpkin v. Deutsche Bank Nat'l Trust Co., 534 F. App'x 335 (6th Cir. 2013); Keiran v. Home Capital, Inc., 720 F.3d 721 (8th Cir. 2013); *Rosenfield*, 681 F.3d at 1172; McOmie-Gray v. Bank of Am. Home Loans, 667 F.3d 1325 (9th Cir. 2012) (all holding suit must also be filed within the three-year period).

57. Sherzer v. Homestar Mortg. Servs., 707 F.3d 255 (3d Cir. 2013); Gilbert v. Residential Funding L.L.C., 678 F.3d 271 (4th Cir. 2012) (both holding that notice is sufficient to rescind within the three-year period).

58. Williams v. Homestake Mortg. Co., 968 F.2d 1137, 1139 (11th Cir. 1992).

A. CIRCUITS HOLDING NOTICE IS ENOUGH TO RESCIND

a. The Eleventh Circuit

In *Williams v. Homestake Mortgage Co.*, the Eleventh Circuit was presented with the question of whether the district court had the authority to "condition [the] voiding of the security interest upon Williams' return of the loan proceeds."[59] In reaching its conclusion on the presented issue, the Eleventh Circuit made clear that § 1635(a) and Regulation Z gave the consumer the right to rescind "solely by notifying the creditor."[60] Since then, when presented with the issue of whether notice is sufficient, district courts have followed the dicta of *Williams* in holding notice to be sufficient.[61]

b. The Fourth Circuit

The Fourth Circuit was the first circuit court post-*Beach* to hold notice to be sufficient. In *Gilbert v. Residential Funding LLC*, the Fourth Circuit was presented with the question of whether notice is enough to exercise rescission.[62] In May 2006, the Gilberts refinanced a loan secured by their home.[63] Less than three years later, a foreclosure action was filed against the Gilberts.[64] Approximately one month shy of three years from the consummation of the loan, counsel for the Gilberts sent notice of rescission, and requested that all security interests on the property be removed and all consideration paid by the Gilberts be returned due to TILA violations.[65] About a week later, counsel for GMAC, as subservicer of the mortgage,[66] stated that they would not rescind the transaction due to finding "no basis to conclude that there were any material disclosure errors that would give rise to an extended right of rescission."[67] On September 14, 2009, the Gilberts filed suit in hopes of rescinding their mortgage and preventing the foreclosure sale.[68] In holding for the Gilberts, the Fourth Circuit Court said that *Beach* was not dispositive of this issue and that the Gilberts were not

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59. *Id.*
60. *Id.* at 1139, 1141.
61. Carson v. Wells Fargo Bank, N.A., No. 8:10-CV-2362-T17-EAJ, 2011 WL 2470099, at *3 (M.D. Fla. June 20, 2011) (citing Williams v. Homestake Mortg. Co., 968 F.2d 1137, 1141–42 (11th Cir. 1992)); Williams v. Saxon Mortg. Co., No. 06-0799-WS-B, 2008 WL 45739, at *3 (S.D. Ala. January 2, 2008) ("[A]ll that the consumer need do is notify the creditor of his intent to rescind. The agreement is then automatically rescinded . . . ." (quoting Williams v. Homestake Mortg. Co., 968 F.2d 1137, 1140 (11th Cir. 1992))).
62. *Gilbert*, 678 F.3d at 271.
63. *Id.* at 274.
64. *Id.*
65. *Id.*
66. *Id.*
67. *Id.*
68. *Id.* at 274–75.

barred from filing suit after the three-year period.[69] The court held that all that is required to rescind is notice as prescribed by 15 U.S.C. § 1635(f) and Regulation Z.[70]

c. The Third Circuit

Similar to the Fourth Circuit, the Third Circuit has held that notice is sufficient to exercise one's right to rescind under TILA.[71] However, when first confronted with the issue, the Third Circuit held that notice was not sufficient and that suit must also be filed within the three-year period.[72]

The court first addressed this issue of whether notice is enough to exercise the right of rescission in *Williams v. Wells Fargo Home Mortgage, Inc*.[73] In this case, Williams' sent notice of rescission a little over two years after taking out the loan.[74] Never hearing from Wells Fargo, Williams commenced action against the bank approximately nine months after the three-year period lapsed.[75] The court found that *Beach* was dispositive and that suit must be filed within the three-year period to enforce the right of rescission under § 1635(f).[76]

Approximately two years later, in *Sherzer v. Homestar Mortgage Services*, the Third Circuit again was confronted with the issue of whether suit must be filed within the three-year period. In *Sherzer*, within three years of taking out the loans, the Sherzers sent a letter to Homestar and HSBC[77] indicating they were rescinding their loans under TILA.[78] HSBC accepted the rescission with respect to one of the loans the Sherzers took out but found rescission wasn't appropriate for the other.[79] Approximately three months after the three-year period expired, the Sherzers filed suit.[80] This time the Third Circuit found for the borrowers holding that "the 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."[81] Thus, the Sherzers had the right to bring suit to exercise their right to rescind since notice was sent within the appropriate time period.[82]

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69. *Id.* at 277–78.
70. *Id.*
71. Sherzer v. Homestar Mortg. Servs., 707 F.3d 255, 267 (3d Cir. 2013).
72. Williams v. Wells Fargo Home Mortg., 410 F. App'x 495, 498–99 (3d Cir. 2011).
73. *Id.* at 498.
74. *Id.* at 497.
75. *Id.*
76. *Id.* at 498–99.
77. The loans were originally with Homestar, but Homestar "assigned both loans to HSBC . . . ." Sherzer v. Homestar Mortg. Servs., 707 F.3d 255, 256 (3d Cir. 2013).
78. *Id.*
79. *Id.*
80. *Id.*
81. *Id.* at 258.
82. *Id.* at 267.

B. CIRCUITS HOLDING NOTICE IS NOT ENOUGH TO RESCIND

a. The Ninth Circuit

The Ninth Circuit was the first circuit court to be presented with the present issue. In *McOmie-Gray v. Bank of America Home Loans*, the Court held that suit must also be filed prior to the three-year period in § 1635(f) expiring.[83] McOmie-Gray sent notice within the three-year period. The bank, however, refused to grant McOmie-Gray's claim of rescission.[84] McOmie-Gray filed suit seeking rescission, but not until the three-year period expired.[85] The court, feeling bound by the Supreme Court and prior case law in its circuit, held that sending notice within the three-year period was not enough.[86]

b. The Tenth Circuit

The Tenth Circuit was the second circuit court to find that sending notice within the three-year period is not enough, and that suit must also be filed within the three-year period.[87] Ms. Rosenfield refinanced an existing loan on her home in November 2006.[88] In September 2008, Ms. Rosenfield sent a "Notice of Rescission to the lender."[89] However, Ms. Rosenfield never received a response by HSBC. She stopped making payments as required under the loan agreement, which led to HSBC "institut[ing] foreclosure proceedings."[90] On December 21, 2009, over three years after Ms. Rosenfield refinanced the loan on her home, Ms. Rosenfield filed suit.[91] Ms. Rosenfield argued that she sent written notice within the three-year period and that it was enough to exercise rescission.[92] The Court disagreed with Ms. Rosenfield's argument, finding *Beach* to be "dispositive of the [present issue]" and that "written notice to rescind is not enough for a consumer to invoke [his or her] right to rescission."[93]

c. The Eighth Circuit

Approximately one year after the Ninth and Tenth Circuits held notice is not enough, the Eighth Circuit held similarly in *Keiran v. Home Capital, Inc.*[94] *Keiran* consolidated two cases with similar issues.[95] In the first case,

83. McOmie-Gray v. Bank of Am. Home Loans, 667 F.3d 1325, 1328 (9th Cir. 2012).
84. *Id.* at 1326–27.
85. *Id.*
86. *Id.* at 1328.
87. Rosenfield v. HSBC Bank, USA, 681 F.3d 1172, 1182 (10th Cir. 2012).
88. *Id.* at 1175.
89. *Id.* at 1176.
90. *Id.*
91. *Id.*
92. *Id.* at 1182.
93. *Id.*
94. Keiran v. Home Capital, Inc., 720 F.3d 721, 728 (8th Cir. 2013).

the Sobieniaks took out a loan secured by their principal residence in March 2007.[96] Less than three years after receiving the loan, in January 2010, the Sobieniaks sent a notice of rescission to the lender who later denied the request.[97] Almost four years after receiving the loan, the Sobieniaks filed suit in January 2011.[98]

In the second case, the Keirans took out a loan secured by their home in December 2006.[99] In October 2009, the Keirans sent a rescission notice to the lender.[100] On January 7, 2010, the Keirans were informed that "no basis for rescission exists."[101] Subsequently, the Keirans filed suit in October 2010.[102]

The Eighth Circuit, relying on the reasoning laid out by the Ninth and Tenth Circuits, held that notice is not enough and suit must be filed within the three-year period.[103] The Eighth Circuit Court of Appeals has affirmed that giving notice by itself is insufficient in *Hartman v. Smith*[104] and in *Jesinoski v. Countrywide Home Loans, Inc.*,[105] with the latter granted certiorari by the Supreme Court.[106]

d. The Sixth Circuit

The latest circuit court to hear the issue is the Sixth Circuit in *Lumpkin v. Deutsche Bank Nat'l Trust Co.*[107] In *Lumpkin*, plaintiff Lumpkin purchased a home in May of 2007.[108] In April 2009, Lumpkin went into default, and a month later, an agent of Lumpkin's sent a letter, labeled as a "Qualified Written Request," to the mortgage company.[109] Lumpkin then filed an action against Deutsche Bank on September 2, 2010.[110] On appeal, Lumpkin argued the "Qualified Written Request" was his notice of rescission and that this notice exercised his right.[111] However, the appellate court disagreed holding that "[t]he three years defined by § 1635(f) were over by the time this suit was filed, and so Lumpkin's right to bring a

95. *Id.* at 724.
96. *Id.*
97. *Id.*
98. *Id.*
99. *Id.*
100. *Id.* at 725.
101. *Id.*
102. *Id.*
103. *Id.* at 728.
104. Hartman v. Smith, 734 F.3d 752, 760 (8th Cir. 2013).
105. Jesinoski v. Countrywide Home Loans, Inc., 729 F.3d 1092, 1093 (8th Cir. 2013).
106. SCOTUSBLOG.COM, *supra* note 2.
107. Lumpkin v. Deutsche Bank Nat'l Trust Co., 534 F. App'x 335 (6th Cir. 2013).
108. *Id.* at 336.
109. *Id.*
110. *Id.* at 337.
111. *Id.*

rescission suit had expired, regardless of when and whether he notified the lender of his rescission within those three years."[112]

III. *BEACH* IS NOT DISPOSITIVE

While some of the circuit courts have found *Beach* to be dispositive of the present issue, *Beach* did not discuss how one "must exercise his right of rescission within that three-year period."[113] In fact, the Beaches did not attempt to rescind in any manner within the three-year period.[114] The Beaches even "concede[d] that any right they may have had to institute an independent proceeding for rescission under § 1635 lapsed."[115] What the Beaches sought to do was claim the "§ 1635 right of rescission as a 'defense in recoupment' to a collection action."[116] However, since the right is one of repose, and not limitation as the Beaches argued, they were unable to raise the right as a defense.[117] Since the circumstances in *Beach* are dissimilar from the cases discussed in Part II,[118] the holding of *Beach* does not settle the issue.[119] The only aspect of *Beach* relevant to the present issue is that the right of rescission is a statute of repose instead of a statute of limitation.[120]

Furthermore, the circuit courts that found *Beach* to be dispositive err in holding that since rescission under TILA is a statute of repose, the right must be exercised through an action brought with the courts.[121] As noted by

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112. *Id.* at 338.

113. Sherzer v. Homestar Mortg. Servs., 707 F.3d 255, 262 (3d Cir. 2013); Gilbert v. Residential Funding L.L.C., 678 F.3d 271, 278 (4th Cir. 2012) ("The *Beach* Court did not address the proper method of exercising a right to rescind . . . .").

114. Keiran v. Home Capital, Inc., 720 F.3d 721, 732 (8th Cir. 2013) (Murphy, J., concurring in part and dissenting in part); *Sherzer*, 707 F.3d at 262 ("The borrowers in *Beach* refinanced their house in 1986, and took no action between 1986 and 1989 that could be construed as exercising their right to rescind.").

115. Beach v. Ocwen Fed. Bank, 523 U.S. 410, 415 (1998).

116. *Id.*

117. *Keiran*, 720 F.3d at 727.

118. The cases discussed in Part II all sent notice within the three-year period while the Beaches never sent notice.

119. *See Keiran*, 720 F.3d at 725 (noting how on October 8, 2009 the Keirans sent rescission notices within three years of receiving the loan). *See also Sherzer*, 707 F.3d at 256, 262 (noting how the Sherzers sent notice of rescission on May 11, 2007, which was less than three years after consummation of the loan and how the Beaches took no action during the three year period); Rosenfield v. HSBC Bank, USA, 681 F.3d 1172, 1176 (10th Cir. 2012) (noting how Rosenfield sent notice within the three year period); Gilbert v. Residential Funding L.L.C., 678 F.3d 271, 274 (4th Cir. 2012) (noting how the Gilberts sent notice within the three year period); McOmie-Gray v. Bank of Am. Home Loans, 667 F.3d 1325, 1326 (9th Cir. 2012) (noting how McOmie-Gray sent notice of her intent to rescind less than two years after receiving the loan).

120. *Beach*, 523 U.S. at 416.

121. The circuits holding that notice is not enough are the Sixth, Eighth, Ninth, and Tenth. *See Rosenfield*, 681 F.3d at 1183 ("[T]he concept of repose itself . . . fundamentally *limits* the ability to file an action."); *see also Keiran*, 720 F.3d at 727 ("[I]t is the filing of an action in a court . . . that is required to invoke the right limited by the TILA statute of repose . . . ." (citing *Rosenfield*, 681 F.3d at 1183)).

the dissent in *Keiran*, and the CFPB in its amici briefs filed in the *Rosenfield*, *Keiran*, and *Sherzer* cases, when exercising a right that is governed by a statute of repose there is no requirement that the action taken to exercise that right must be by way of a lawsuit.[122] While "Congress may choose to use a statute of repose to make the filing of a lawsuit necessary in order to exercise a statutory right, . . . when it has chosen to do so, it has done [so] explicitly."[123] For example, in § 413 of the Employee Retirement Income Security Act (ERISA), which provides an example of a statute of repose,[124] Congress clearly set out that the action taken must be a lawsuit when it drafted the statute as saying "'[n]o action may be commenced' more than six years after the alleged breach of fiduciary duty occurred."[125] Additionally, "[t]he Securities Exchange Act of 1934 [which] provides that '[n]o action shall be maintained to enforce any liability created under this section, unless brought within one year after the discovery of the facts constituting the violation and within three years after such violation'"[126] was found to be a statute of repose.[127] Here, both ERISA § 413 and the Securities Exchange Act of 1934, describe actions having been "commenced"[128] or "maintained"[129] to signal court involvement.

In contrast, there are instances where a statute of repose does not require the filing of a lawsuit.[130] For instance, the New York version of the Uniform Commercial Code (N.Y. UCC) contains a "'statute of repose' pursuant to which consumers must 'notif[y] the bank of [their] objection' to

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122. *Keiran*, 720 F.3d at 732 (Murphy, J., concurring in part and dissenting in part) ("Once a statute of repose has been triggered, a party faces a deadline within which it must act, but there is no requirement that the action be a lawsuit."). *See also* Brief for the Consumer Financial Protection Bureau as Amicus Curiae in Support of Plaintiff-Appellant and Reversal at 19, Rosenfield v. HSBC Bank, USA, 681 F.3d 1172 (10th Cir. 2012) (No. 10-1442) ("[T]here is no general rule that a statute of repose can be satisfied only by filing a lawsuit . . . ."); Brief for the Consumer Financial Protection Bureau as Amicus Curiae in Support of Plaintiffs-Appellants and Reversal at 20, Sobieniak v. BAC Home Loans Servicing, LP, 835 F. Supp. 2d 705 (D. Minn. 2011), *aff'd sub nom.* Keiran v. Home Capital, Inc., 720 F.3d 721 (8th Cir. 2013) (No. 12-1053) ("[T]here is no rule that a statutes of repose can be satisfied only by filing lawsuits . . . ."); Brief for the Consumer Financial Protection Bureau as Amicus Curiae in Support of Plaintiffs-Appellants and Reversal at 21, Sherzer v. Homestar Mortg. Servs., 707 F.3d 255 (3d Cir. 2013) (No. 11-4254) ("There is no rule that statutes of repose can be satisfied only by filing lawsuits . . . .").

123. *Keiran*, 720 F.3d at 732 (Murphy, J., concurring in part and dissenting in part).

124. *Id.* (recognizing that 29 U.S.C. § 1113 is a statute of repose (citing Radford v. Gen. Dynamics Corp., 151 F.3d 396, 400 (5th Cir. 1998) (per curiam))).

125. *Id.* (quoting 29 U.S.C. § 1113).

126. *Id.* (citing 15 U.S.C. § 78i(f)).

127. *Id.* (identified 15 U.S.C. § 78i(f) as a statute of repose (citing Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson, 501 U.S. 350, 360 (1991))).

128. 29 U.S.C. § 1113 (2012).

129. 15 U.S.C. § 78i(f) (2012).

130. Brief for the Consumer Financial Protection Bureau as Amicus Curiae in Support of Plaintiffs-Appellants and Reversal at 22–23, Sherzer v. Homestar Mortg. Servs., 707 F.3d 255 (3d Cir. 2013) (No. 11-4254) (noting how statutes of repose frequently require some action other than filing a lawsuit to occur before the right expires).

an unauthorized wire transfer from their account 'within one year of receiving notice of the account's debit.'"[131] The N.Y. UCC clearly indicated that notifying the bank was the action required to exercise the right.[132]

While it is agreed upon that rescission under TILA is a statute of repose, it is unclear why the courts that held notice alone to be insufficient found *Beach* dispositive of the present issue. TILA's right of rescission is written similarly to the N.Y. UCC by clearly stating notice is the method of enforcing the right of rescission. Since it is clear that a statute of repose does not always require a suit to be commenced, and the facts from *Beach* are dissimilar to the facts of the cases discussed in Part II, *Beach* is not dispositive of the present issue.

IV. NOTICE SHOULD BE SUFFICIENT TO EXERCISE RESCISSION

A. PLAIN MEANING CALLS FOR NOTICE TO BE SUFFICIENT TO EXERCISE RIGHT OF RESCISSION UNDER TILA AND REGULATION Z

Statutory interpretation begins with the plain language of the statute.[133] When reading the plain language, courts must presume that the legislature meant what the statute says.[134] "The Supreme Court has repeatedly emphasized the importance of the plain meaning rule, stating that if the language of a statute or regulation has a plain and ordinary meaning, courts need look no further and should apply the regulation as it is written."[135]

The statute clearly states in 15 U.S.C. § 1635(a) that "the obligor shall have the right to rescind the transaction . . . by notifying the creditor, in accordance with regulations of the Bureau, of his intention to do so."[136] Further, Regulation Z states that "[t]o exercise the right to rescind, the consumer shall notify the creditor of the rescission by mail, telegram or other means of written communication."[137]

The plain meaning of this statute is simple—notice is the action required in order to rescind. Similar to the statute of repose in N.Y. UCC section 4-A-505 where customers are only required to "notif[y] the bank of

131. *Id.* (citing Ma v. Merrill Lynch, 597 F.3d 84, 88–89 (2d Cir. 2010) (discussing N.Y. UCC § 4-A-505)).

132. N.Y. U.C.C. § 4-A-505 (McKinney 2013).

133. Gilbert v. Residential Funding L.L.C., 678 F.3d 271, 276 (4th Cir. 2012) (citing United States v. Bly, 510 F.3d 453, 460 (4th Cir. 2007)).

134. *Id.* (citing Conn. Nat'l Bank v. Germain, 503 U.S. 249, 253–54 (1992)).

135. *Id.* (citing Textron, Inc. v. Comm'r, 336 F.3d 26, 31 (1st Cir. 2003)); *see also* Keiran v. Home Capital, Inc., 720 F.3d 721, 731 (8th Cir. 2013) (Murphy, J., concurring in part and dissenting in part) ("When a statutory text is clear the 'sole function of the courts is to enforce the plain language of the statute.'" (citing Coop v. Frederickson, 545 F.3d 652, 656 (8th Cir. 2008))).

136. 15 U.S.C. § 1635(a) (2012).

137. 12 C.F.R. § 1026.23(a)(2) (2012).

[their] objection[,]" to a debit from their account,[138] all 15 U.S.C. § 1635(a) and Regulation Z require the customer to do is send notice. The plain language and ordinary meaning of rescission under § 1635(a) and Regulation Z clearly state that the borrower needs to give notice.[139] "Both refer exclusively to written notification as the means by which an obligor exercises his right of rescission."[140] Accordingly, the natural reading only requires notice to be sent for the right of rescission to be exercised.[141]

B. NOTICE IS SUFFICIENT BASED ON THE STATUTORY INTERPRETATION

Even if not satisfied that the plain meaning of the statute is not sufficiently convincing that all a borrower must do is provide notice to exercise the right to rescind, statutory analysis points to notice being sufficient as well.

If Congress wanted the borrower to exercise his right to rescind by filing suit within the three-year period, Congress would have *clearly* stated so.[142] Section 1635 discusses the right of rescission.[143] Two of the major sections on rescission are § 1635(a) and § 1635(f). Section 1635(a) discusses how to rescind[144] and § 1635(f) discusses when the right of rescission expires.[145] Neither indicates a lawsuit is necessary to exercise the

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138. N.Y. U.C.C. § 4-A-505 (McKinney 2013).

139. 15 U.S.C. § 1635(a); 12 C.F.R. § 1026.23(a)(2).

140. Sherzer v. Homestar Mortg. Servs., 707 F.3d 255, 258 (3d Cir. 2013).

141. *Id.* at 267.

142. *See* Gilbert v. Residential Funding L.L.C., 678 F.3d 271, 276 (4th Cir. 2012) ("[C]ourts must presume that a legislature says in a statute what it means and means in a statute what it says there." (citing Conn. Nat'l Bank v. Germain, 503 U.S. 249, 253–54 (1992))).

143. 15 U.S.C. § 1635 (2012).

144. 15 U.S.C. § 1635(a) states in full:

> Except as otherwise provided in this section, in the case of any consumer credit transaction (including opening or increasing the credit limit for an open end credit plan) in which a security interest, including any such interest arising by operation of law, is or will be retained or acquired in any property which is used as the principal dwelling of the person to whom credit is extended, the 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 subchapter, whichever is later, by notifying the creditor, in accordance with regulations of the Bureau, of his intention to do so. The creditor shall clearly and conspicuously disclose, in accordance with regulations of the Bureau, to any obligor in a transaction subject to this section the rights of the obligor under this section. The creditor shall also provide, in accordance with regulations of the Bureau, appropriate forms for the obligor to exercise his right to rescind any transaction subject to this section.

145. 15 U.S.C. § 1635(f) states in full:

> 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 part have not been delivered to the obligor,

right to rescind.[146] In fact, "only two provisions of § 1635 make any mention" of court involvement,[147] and neither provision mentions "whether court involvement is necessary to effect rescission."[148]

The first provision to mention court involvement is § 1635(b), which outlines the obligations of each party following rescission being exercised. Since § 1635(b) deals with obligations arising once the right of rescission is exercised, any mention of court involvement intuitively should have no effect on whether a suit is required in order to exercise one's right to rescind. This provision provides the court with the power to modify the process that is invoked after rescission is exercised, if a court is so inclined.[149] To illustrate, imagine a lender brings suit after the borrower sends notice of rescission. The lender claims it would be inequitable to require the termination of any security interest prior to the borrower returning the outstanding money owed. This provision allows the court to condition the obligations of the lender on the borrower fulfilling his duties. "[I]n no way [does this provision] suggest[] that court involvement is a *sine qua non* for rescission."[150]

The second provision that discusses court involvement is § 1635(g).[151] This provision deals with additional relief that may be granted and states that "[i]n any action in which it is determined that a creditor has violated this section, in addition to rescission the court may award relief under section 1640 of this title for violations of this subchapter not relating to the right to rescind."[152] This provision was added to clarify that seeking relief under § 1635 does not preclude one from seeking damages under § 1640; they are not mutually exclusive.[153]

Since neither TILA nor Regulation Z says anything about the filing of a lawsuit when exercising one's right to rescind, the courts should not "graft

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except that if (1) any agency empowered to enforce the provisions of this subchapter institutes a proceeding to enforce the provisions of this section within three years after the date of consummation of the transaction, (2) such agency finds a violation of this section, and (3) the obligor's right to rescind is based in whole or in part on any matter involved in such proceeding, then the obligor's right of rescission shall expire three years after the date of consummation of the transaction or upon the earlier sale of the property, or upon the expiration of one year following the conclusion of the proceeding, or any judicial review or period for judicial review thereof, whichever is later.

146. Keiran v. Home Capital, Inc., 720 F.3d 721, 733 (8th Cir. 2013) (Murphy, J., concurring in part and dissenting in part).

147. Sherzer v. Homestar Mortg. Servs., 707 F.3d 255, 260 (3d Cir. 2013).

148. *Id.*

149. *Id.*; 15 U.S.C. § 1635(b) (2012) ("The procedures prescribed by this subsection shall apply except when otherwise ordered by a court.").

150. *Sherzer*, 707 F.3d at 260.

151. 15 U.S.C. § 1635(g) (2012).

152. *Id.*; *see also Sherzer*, 707 F.3d at 260.

153. *Sherzer*, 707 F.3d at 260.

such a requirement upon [the borrowers]."[154] It should not be assumed that "Congress has omitted from its adopted text requirements that it nonetheless intends to apply, and [courts'] reluctance [should be] even greater when Congress has shown elsewhere in the same statute that it knows how to make such a requirement manifest."[155]

On the other hand, § 1635(b) places obligations upon the lender.[156] These obligations, which include returning to the borrower any money paid and taking any action necessary to ensure the reflection of the terminated security interest, arise upon the borrower sending notice of rescission in accordance with § 1635(a).[157] Based on the interpretation of this provision, it is clear that the lender must perform obligations indicating that the right of rescission has been exercised once notice is received—not after a judgment by a court.

Lastly, TILA provides a statute of limitations for bringing damages claims under § 1640, but does not provide such a limit when bringing a suit for rescission.[158] Section 1640(e) provides that "any action under this section may be brought in any United States district court, or in any other court of competent jurisdiction, within one year from the date of the occurrence."[159] Here, Congress clearly set out a statute of limitations for bringing suit.[160] However, no such requirement was set out for rescission.[161] If Congress desired for there to be a limit governing suits for rescission under § 1635, it would have clearly done so as it did under § 1640 on damages.[162] As such, no requirement should be written into the statute, since actions or inactions of Congress must be thought of as intentional.[163] Accordingly, the statutory interpretation of the relevant statutes, along with the plain meaning, should sufficiently lead one to the conclusion that notice is sufficient to exercise one's right to rescind under TILA.

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154. Gilbert v. Residential Funding LLC, 678 F.3d 271, 277 (4th Cir. 2012). *See* 15 U.S.C. § 1635(a).

155. Hartman v. Smith, 734 F.3d 752, 763 (8th Cir. 2013) (quoting Jama v. Immigration & Customs Enforcement, 543 U.S. 335, 341 (2005)).

156. 15 U.S.C. § 1635(b) (2012).

157. *Id.* ("Within 20 days after receipt of a *notice* of rescission, the creditor shall . . . .") (emphasis added).

158. *Hartman*, 734 F.3d at 762.

159. 15 U.S.C. § 1640(e) (2012). 15 U.S.C. § 1640 discusses civil liability and damages.

160. *Hartman*, 734 F.3d at 762.

161. *Id.*

162. *Id.*

163. *See id.* at 763 ("[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." (quoting Bates v. United States, 522 U.S. 23, 29–30 (1997) (alteration in original))).

C. POLICY REASONS FOR WHY NOTICE SHOULD BE SUFFICIENT

By holding notice to be sufficient, consistency will remain throughout the statute. By allowing notice to be all that is required, courts are ensuring consistency with the three-day absolute right of rescission and the three-year right of rescission.[164] Borrowers are given an absolute three-day right of rescission under § 1635(a).[165] If a borrower sends notice stating his intent to exercise his right to rescind, the borrower is now going to wait up to twenty days to see if the lender performs the obligations that have arisen under § 1635(b) due to the notice of rescission.[166] However, if the lender does not perform as required under § 1635(b) within the twenty days and the borrower then brings suit to exercise his rights, no court is going to say the right expired when the three days were up. The borrower has no obligation to file suit in the three-day period, partially since the "consumer would seemingly have no basis for filing a suit during that time."[167] When the borrower brings suit after the lender ignored or denied the notice to rescind, the borrower is not trying to exercise his right to rescind, which clearly expired, but to exercise the rights that have arisen from properly invoking the right to rescind.[168]

The three-year period of exercising right to rescind should work the same way.[169] When the borrower sends his notice of rescission within the three-year period that he is afforded, he should not have to file suit within that three-year period to properly invoke the right to rescind. The suit should be thought of as for the enforcement of the rights that arose after rescission is exercised, not for exercising the right to rescind.[170] In fact, if a borrower sends notice one day before this right expires, he should not be able to sue until twenty days have passed or until the lender informs the borrower of his unwillingness to perform the obligations that have arisen under § 1635(b); no cause of action should exist before then. [171] If the borrower ultimately needs to bring suit, he must have a cause of action and therefore the suit is not for the purpose of exercising the right to rescind, but to determine whether the borrower had the right to rescind and if so to

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164. *See* Sherzer v Homestar Mortg. Servs., 707 F.3d 255, 264 (3d Cir. 2013) (noting how the three-year period should work in the same manner as the three-day period).

165. 15 U.S.C. § 1635(a) (2012).

166. *See id.* § 1635(b).

167. *Sherzer*, 707 F.3d at 264.

168. *See id.* ("After the three-day period has expired, the obligor no longer has a 'right to rescission'—but because he exercised that right in a timely manner, he now has a statutory right to his property and to clear title.").

169. *Id.* (noting that the three year period should work in the same manner as the three-day period).

170. *See id.* ("[The borrower] can file suit to compel the lender to comply with § 1635(b) if the lender does not . . . .").

171. These circumstances are the same circumstances that need to unfold under the three-day period, namely the borrower needs to wait until the lender denies the notice of rescission or the twenty days pass. *See* 15 U.S.C. § 1635(b) (2012).

enforce the obligations that arose from exercising that right.[172] As the CFPB points out, rescission in this context occurs upon notice.[173] There is nothing in the statute to indicate that the three-year right of rescission should operate differently or inconsistently from the method that the three-day right operates by.

Additionally, policy requires that the views of the CFPB be given consideration [174] and deference [175] as the administration charged with implementing and interpreting TILA. The CFPB which has filed briefs with some of the circuit courts explaining their position of whether notice is sufficient,[176] has argued that the proper interpretation and the one consistent with legislative intent, plain meaning, and statutory interpretation is that notice alone is sufficient to exercise rescission.[177]

The CFPB also argues that the process for rescinding a transaction under TILA is clear from a model form that the CFPB promulgated.[178] The App'x H. Model Form H-8 has a section titled "how to cancel."[179] Under

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172. *See* Brief for the Consumer Financial Protection Bureau as Amicus Curiae in Support of Plaintiffs-Appellants and Reversal at 18, Sobieniak v. BAC Home Loans Servicing, LP, 835 F. Supp. 2d 705 (D. Minn. 2011), *aff'd sub nom*. Keiran v. Home Capital, Inc., 720 F.3d 721 (8th Cir. 2013) (No. 12-1053) (noting that the purpose of litigation is not to cancel the contract but to enforce the obligations arising from the cancelled contract).

173. *Id.* at 17. ("[T]he rescission is effective as of the notice date or not at all . . . .").

174. Hartman v. Smith, 734 F.3d 752, 764 (8th Cir. 2013) ("[C]aution requires attentiveness to the views of the administrative entity appointed to apply and enforce a statute." (citing Ford Motor Credit Co. v. Milhollin, 444 U.S. 555, 565 (1980))).

175. *Id.* ("[D]eference is especially appropriate in the process of interpreting [TILA] and Regulation Z . . . ." (citing Ford Motor Credit Co. v. Milhollin, 444 U.S. 555, 565 (1980))).

176. *Id.*

177. *See* Brief for the Consumer Financial Protection Bureau as Amicus Curiae in Support of Plaintiff-Appellant and Reversal at 25, Rosenfield v. HSBC Bank, USA, 681 F.3d 1172 (10th Cir. 2012) (No. 10-1442) ("The decision below holding that consumers must both notify their lender of their decision to rescind and sue their lender to resolve any disputes arising from the rescission within the three-year period set forth in § 1635(f) should be reversed."). *See also* Brief for the Consumer Financial Protection Bureau as Amicus Curiae in Support of Plaintiffs-Appellants and Reversal at 26, Sobieniak v. BAC Home Loans Servicing, LP, 835 F. Supp. 2d 705 (D. Minn. 2011), *aff'd sub nom.* Keiran v. Home Capital, Inc., 720 F.3d 721 (8th Cir. 2013) (No. 12-1053) ("This Court should reject a construction of § 1635 that also would require consumers to file suit against their lenders within the same three-year timeframe . . . ."); Brief for the Consumer Financial Protection Bureau as Amicus Curiae in Support of Plaintiffs-Appellants and Reversal at 27, Sherzer v. Homestar Mortg. Servs., 707 F.3d 255 (3d Cir. 2013) (No. 11-4254) ("This Court should reject a construction of § 1635 that also would require consumers to file suit against their lenders within the same three-year timeframe . . . .").

178. Brief for the Consumer Financial Protection Bureau as Amicus Curiae in Support of Plaintiff-Appellant and Reversal at 6, Rosenfield v. HSBC Bank, USA, 681 F.3d 1172 (10th Cir. 2012) (No. 10-1442); Brief for the Consumer Financial Protection Bureau as Amicus Curiae in Support of Plaintiffs-Appellants and Reversal at 6, Sobieniak v. BAC Home Loans Servicing, LP, 835 F. Supp. 2d 705 (D. Minn. 2011), *aff'd sub nom.* Keiran v. Home Capital, Inc., 720 F.3d 721 (8th Cir. 2013) (No. 12-1053); Brief for the Consumer Financial Protection Bureau as Amicus Curiae in Support of Plaintiffs-Appellants and Reversal at 6, Sherzer v. Homestar Mortg. Servs., 707 F.3d 255 (3d Cir. 2013) (No. 11-4254).

179. 12 C.F.R. Pt. 1026 (2012), App. H. Model form H-8. See *infra* Appendix A for a blank Model Form H-8.

that section, a person who "decide[s] to cancel this transaction . . . may do so by notifying us in writing."[180] Additionally, the form states that rescinding parties "may use any written statement that is signed and dated by [them] and states [their] intention to cancel, or [they] may use this notice by dating and signing below."[181] Nowhere on the form is there any mention of a lawsuit.[182] In fact, the form acknowledges that upon notice being received, the lender has twenty days to take the necessary steps acknowledging that the right of rescission has been exercised.[183] It is clear from this form that the intent has always been that notice constitutes rescission.

Furthermore, rescission under TILA operates in the same manner as rescission at law.[184] "[C]ourts have recognized two types of rescission—rescission in equity and rescission at law."[185] Rescission in equity requires a court to rescind the contract,[186] while rescission at law is accomplished by "the unilateral act of one of the parties to [rescind] the contract."[187] The text of TILA and Regulation Z make clear that TILA is "in the nature of rescission at law."[188] Section 1635(a) and Regulation Z provide consumers the right to rescind by notifying the creditor.[189] After sending notice, § 1635(b) places obligations on the lender, such as removing the security interest on the property that was part of the loan transaction.[190] If the sections are read together, it is clear that rescission under TILA operates in the same manner as rescission at law.[191] By operating the way rescission at law does, court intervention is not a requirement for rescission to be exercised.

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180. *Id.*

181. *Id.*

182. *See id.*

183. *Id.*

184. Brief for the Consumer Fininancial Protection Bureau as Amicus Curiae in Support of Plaintiffs-Appellants and Reversal at 18, Sherzer v. Homestar Mortg. Servs., 707 F.3d 255 (3d Cir. 2013) (No. 11-4254) ("This understanding of the purpose of litigation under § 1635 is consistent with rescission at law in other contexts.").

185. *Id.* at 15 (citing Griggs v. E.I. DuPont de Nemours & Company, 385 F.3d 440, 445–46 (4th Cir. 2004)).

186. *Id.*

187. 12A C.J.S. *Cancellation of Inst.* § 5 (2013).

188. Brief for the Consumer Financial Protection Bureau as Amicus Curiae in Support of Plaintiffs-Appellants and Reversal at 16, Sherzer v. Homestar Mortg. Servs., 707 F.3d 255 (3d Cir. 2013) (No. 11-4254).

189. 15 U.S.C. § 1635(a) (2012); 12 C.F.R. § 1026.23(a)(2) (2012).

190. 15 U.S.C. § 1635(b).

191. Brief for the Consumer Financial Protection Bureau as Amicus Curiae in Support of Plaintiffs-Appellants and Reversal at 16, Sherzer v. Homestar Mortg. Servs., 707 F.3d 255 (3rd Cir. 2013) (No. 11-4254).

V. LENDER'S FEARS AND CONCERNS AND A SOLUTION TO EASE THESE CONCERNS

One of the major reasons why the Eighth, Ninth, and Tenth Circuits held that notice was not enough was a fear of the title being held by banks becoming cloudy.[192] When one takes out a home mortgage, the bank holds title to the house until the loan is paid back. When a borrower exercises his right to rescind, the title transfers back to the borrower.[193] However, when there is a disagreement over whether the borrower has a right to rescission, it is unclear who holds title to the home—leading to a figurative cloud over the title.[194] While this may be of concern, lenders have the ability to resolve any uncertainty regarding title by bringing a suit to clear up the uncertainty.[195] Another option the lender can take to resolve any uncertainty is to work out an agreement privately with the borrower.[196] Since the lender has control over how long the uncertainty in title lasts, the fear of a cloudy title should not override all the reasoning for allowing notice to be sufficient.[197] Placing the burden on the lender to clear up uncertainty with the title encourages the lender to work out a private settlement with the borrower.[198] While permitting notice to be sufficient will likely add costs, such as monitoring and response costs, which will be borne by the

192. *See* Keiran v. Home Capital, Inc., 720 F.3d 721, 728 (8th Cir. 2013) ("[U]ncertainties as to title that would likely occur if the right is not effectuated by court filing within three years of the underlying transaction, [is a] compelling [reason] for the conclusion that we draw."); *see also* Rosenfield v. HSBC Bank, USA, 681 F.3d 1172, 1187 (10th Cir. 2012) ("[A]ccepting a consumer's *unilateral* notice of an intent to rescind as a legally effective exercise of rescission, where the creditor has not in any sense *actually* acted on the consumer's wishes . . . could work to cloud the title of the property for an indefinite period of time.").

193. 15 U.S.C. § 1635(b) (2012) ("When an obligor exercises his right to rescind . . . any security interest given by the obligor . . . becomes void upon such a rescission.").

194. *See Cloud on Title*, THEFREEDICTIONARY.COM, http://legal-dictionary.thefreedictionary.com/Cloud+on+Title (last visited Dec. 20, 2013) (citing West's Encyclopedia of American Law).

195. Sherzer v. Homestar Mortg. Servs., 707 F.3d 255, 266–67 (3d Cir. 2013) ("Once alerted to the cloud on its title, a lender could sue to confirm that the obligor's rescission was invalid . . . .").

196. Keiran, 720 F.3d at 734 (Murphy, J., concurring in part and dissenting in part).

197. *Id.* (The lender "can never be subject to an indefinitely clouded title without its own tacit consent."); *see supra* Part IV.

198. Danielle Godfrey, Note, *Giving David Back His Stone: How Gilbert v. Residential Funding Revitalizes the Truth In Lending Rescission Right and Enhances Consumer Protection Under the Truth In Lending Act*, 48 WAKE FOREST L. REV. 547, 564 (2013).

borrower, this is not a reason to ignore the text of the statute.[199] It is for Congress to determine whether the increased costs are warranted.[200]

In addition to fear of a cloudy title, there is a concern that not requiring suit within the three-year period will allow borrowers to abuse the system.[201] The fear is that borrowers will send notices of rescission, even if the borrower knows that no claim exists, in an attempt to pressure the lender into a settlement.[202] Therefore, by requiring suit, a borrower will only send a rescission notice when the borrower is certain to have a non-frivolous claim.[203] However, this fear of borrowers abusing the system is likely overblown.[204] Even if this fear is accurate, the lenders would likely adjust to the fear, either with increased costs passed onto the borrowers or through some adjustment in their business practices.

While fear of cloudy title or borrowers abusing the system may have some theoretical merit, requiring suit to be filed within the three-year period will have unwanted consequences that outweigh any negative impact from not requiring suit within the first three years. Lenders, with knowledge that a suit must be filed, will be encouraged to ignore rescission notices until a suit is brought.[205] Additionally, the lenders, who respond to the notice, will be encouraged to "stonewall" borrowers.[206] When "stonewalling" borrowers, the lender will inform the borrower that they are looking into the rescission notice to see if a cause of action exists.[207] The lender will continue assuring the borrower that it is looking into the matter when in reality the lender is just holding the borrower off until the three-year period expires.[208] Ultimately, these two practices will lead to borrowers filing suit

199. Rosenfield v. HSBC Bank, USA, 681 F.3d 1172, 1185 (10th Cir. 2012) (noting how over time circumstances are likely to change making enforcement costly and difficult); *Sherzer*, 707 F.3d at 267 (noting how allowing rescission through notice potentially imposes additional costs on banks, but that increased costs is not a reason to disregard the text of the statute); Levi Smith, Comment, *Notice is Not Enough: Why TILA Requires More Than a Letter of Intent*, 2 U. MICH. J.L. REFORM 13A, 14A–15A (2013) (noting how not knowing whether a loan transaction is final will add monitoring and response costs).

200. *Sherzer*, 707 F.3d at 267 (noting how many TILA regulations increase costs for lenders and it is up to Congress to determine how to proceed).

201. Smith, *supra* note 199, at 14A–15A.

202. *Id.* at 15A.

203. *Id.*

204. *Cf. id.* ("Given that asserting an intention to rescind is without cost (unlike a lawsuit), it's likely that lenders will receive more of these notices in an attempt by borrowers to influence restructuring and foreclosure negotiations by threatening full rescission, even beyond the three-year period.").

205. Godfrey, *supra* note 198, at 565.

206. Brief for the Consumer Financial Protection Bureau as Amicus Curiae in Support of Plaintiff-Appellant and Reversal at 19, Rosenfield v. HSBC Bank, USA, 681 F.3d 1172 (10th Cir. 2012) (No. 10-1442).

207. Godfrey, *supra* note 198, at 566.

208. *Id.*

immediately,[209] further congesting an already swamped legal system, instead of attempting to work the matter out privately as Congress envisioned.[210]

While a suit should not be required within the three-year period, there must be a limit on how long the borrower has to bring suit.[211] While no solution is going to be perfect, any solution should ease lenders' concerns, protect consumers, and conform to Congressional intent. A statute of limitation period for bringing suit within a certain time frame from when the lender rejects notice or the three-year period imposed by § 1635(f) expires, whichever is later, would satisfy the above criteria. Since Congressional intent was for the matter to be worked out privately,[212] the time limit set should be long enough to foster good faith negotiations, and at the same time, not too long so that the parties do not feel some pressure to work out an agreement. Additionally, by starting the time limit from when the lender rejects the rescission notice, lenders are prevented from being able to "stonewall" or ignore rescission notices.[213] Furthermore, by setting a limit on how long the consumer has to bring suit, if needed, the lender is protected by any concerns, whether warranted or not, over cloudy title.[214] This solution conforms to Congressional intent, plain language of the statute, and statutory interpretation of the statute.[215] By protecting consumers and easing lenders concerns while at the same time conforming to what Congress intended, this solution acts as a fair compromise.

CONLUSION

TILA requires lenders to make certain disclosures to borrowers.[216] If the lender does not make all of the required disclosures, the borrower has three years from the consummation of the transaction to rescind the contract.[217] Notwithstanding the opinions of the Sixth, Eighth, Ninth, and Tenth Circuits, all the borrower needs to do to rescind the contract is to

209. Brief for the Consumer Financial Protection Bureau as Amicus Curiae in Support of Plaintiff-Appellant and Reversal at 18–19, Rosenfield v. HSBC Bank, USA, 681 F.3d 1172 (10th Cir. 2012) (No. 10-1442) (noting how borrowers will file suit immediately instead of working privately with the lender).

210. Keiran v. Home Capital, Inc., 720 F.3d 721, 734 (8th Cir. 2013) (Murphy, J., concurring in part and dissenting in part) (Congress's goal was to make "the rescission process a private one . . . ." (citing Belini v. Wash. Mut. Bank, FA, 412 F.3d 17, 25 (1st Cir. 2005))).

211. Sherzer v. Homestar Mortg. Servs., 707 F.3d 255, 267 (3d Cir. 2013) ("[I]f the obligor mails a notice of rescission but takes no action for ten years, the lender can at least be assured that the obligor will not be able to file a timely court action.").

212. *Keiran*, 720 F.3d at 734 (8th Cir. 2013) (Murphy, J., concurring in part and dissenting in part) (Congress's goal was to make "the rescission process a private one . . . ." (citing Belini v. Wash. Mut. Bank, FA, 412 F.3d 17, 25 (1st Cir. 2005))).

213. *See supra* Part V.

214. *Id.*

215. *Id.*

216. 15 U.S.C. § 1631 (2012).

217. 15 U.S.C. § 1635(f).

send notice within the three-year period.[218] The Supreme Court should follow the Third, Fourth, and Eleventh Circuits,[219] and hold that suit does not need to be filed within the three-year period. Ultimately, it may be up to Congress and the CFPB to adjust TILA and Regulation Z to make it clear that all that is required is notice, especially if the Supreme Court sides with the circuits requiring suit to be filed.

Ethan Schlussel[*]

218. *See supra* Part V.

219. *See* Sherzer v. Homestar Mortg. Servs., 707 F.3d 255 (3d Cir. 2013); *see also* Gilbert v. Residential Funding L.L.C., 678 F.3d 271 (4th Cir. 2012).

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Appendix A

H-8—Rescission Model Form (General)

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 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