

# HIDING IN PLAIN SIGHT: *JESINOSKI* AND THE CONSUMER'S RIGHT OF RESCISSION

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## INTRODUCTION

The purpose of the Truth in Lending Act (TILA)<sup>1</sup> is to enable consumers to make responsible financial decisions and improve efficient use of credit.<sup>2</sup> TILA protects consumers by requiring that lenders give material disclosures concerning certain qualifying loan transactions.<sup>3</sup> TILA also contains the substantive right of rescission, which empowers a consumer to rescind a loan for three days after the transaction is consummated or three days after material disclosures are made, whichever is later.<sup>4</sup> However, the right expires after three years, even if the disclosures are not provided.<sup>5</sup>

The crux of litigation involving rescission under TILA centers on what steps a borrower must take in order to properly rescind a loan.<sup>6</sup> Section 1635 requires that consumers notify the creditor of rescission in accordance with regulations promulgated by the agency responsible for implementing TILA.<sup>7</sup> Regulation Z, which implements TILA, allows for rescission through written notice.<sup>8</sup> Yet, the majority of courts have found that an additional step is required—the consumer must also file suit.<sup>9</sup>

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1. 15 U.S.C.A. §§ 1601–1667f (West 2014).
2. *Id.* § 1601(a).
3. *Id.* § 1635(a).
4. *Id.*
5. *Id.* § 1635(f).
6. *See, e.g.,* Sherzer v. Homestar Mortg. Servs., 707 F.3d 255, 257–58 (3d Cir. 2013) (outlining conflicting views on how rescission is exercised).
7. 15 U.S.C.A. § 1635(a).
8. Regulation Z, 12 C.F.R. § 226.23(a) (2013).
9. Rosenfield v. HSBC Bank, USA, 681 F.3d 1172, 1188 (10th Cir. 2012).

This Commentary explores the reasoning behind those decisions in addition to the arguments put forth by the Petitioners-borrowers (Jesinoskis) and Respondents (Lenders) in *Jesinoski v. Countrywide Home Loans, Inc.*<sup>10</sup> Part II describes the factual background of the case. Part III explains the legislative origins of TILA and subsequent amendments that affected rescission. Part III also covers the circuit split that existed before the Supreme Court’s decision and discusses the limitations on the right of rescission, its scope, when and how it can be exercised, and the effect of exercising the right. Part IV describes the Eighth Circuit’s holding in *Jesinoski* and Part V summarizes the arguments put forth by the parties. Part VI outlines why the Supreme Court, in the shortest opinion of the term so far, correctly read § 1635 to mean what it says: rescission is exercised through written notice, not by filing suit.

### I. FACTUAL BACKGROUND

On February 23, 2007, Larry and Cheryle Jesinoski refinanced the mortgage on their principal home in Minnesota.<sup>11</sup> They obtained the loan from Countrywide Home Loans, Inc. in order to pay off consumer debt.<sup>12</sup> Bank of America and Mortgage Electronic Registration Systems, Inc. were assigned an ownership interest in the loan as well.<sup>13</sup> TILA requires lenders to give each borrower two copies of the Notice of Right to Cancel.<sup>14</sup> Countrywide failed to do so, giving only two copies instead of four.<sup>15</sup> TILA also requires lenders to give a disclosure statement to each borrower.<sup>16</sup> Again, Countrywide failed to do so.<sup>17</sup>

Exactly three years after the transaction was consummated, the Jesinoskis sent written notice of rescission to the Lenders by certified mail.<sup>18</sup> Twenty days passed, but the Lenders took no steps to cancel the security interest as mandated by TILA.<sup>19</sup> Only after three years

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10. *Jesinoski v. Countrywide Home Loans, Inc.*, 135 S. Ct. 790 (2015).

11. Joint Appendix at 29, *Jesinoski v. Countrywide Home Loans, Inc.*, No. 13-684 (U.S. Apr. 28, 2014) [hereinafter Joint Appendix].

12. *Id.*

13. *Id.*

14. *Id.*; see also Regulation Z, 12 C.F.R. § 226.23(a) (2013) (“[A] creditor shall deliver two copies of the notice of the right to rescind to each consumer entitled to rescind.”).

15. Joint Appendix, *supra* note 11, at 29.

16. 15 U.S.C.A. § 1635(a) (West 2014).

17. Joint Appendix, *supra* note 11, at 29.

18. *Id.* at 30.

19. *Id.*; see 15 U.S.C.A. § 1635(a).

passed did Bank of America send a letter refusing to accept rescission.<sup>20</sup>

The Jesinoskis sued the Lenders to enforce the rescission and obtain statutory damages. The district court ruled against them, citing Eighth Circuit precedent interpreting § 1635(f) to require a borrower to file suit within the three-year period, and the Eighth Circuit affirmed.<sup>21</sup> The Jesinoskis successfully petitioned for a writ of certiorari from the Supreme Court.<sup>22</sup>

## II. LEGAL BACKGROUND

### A. *Historical Context: Evolution of TILA and Its Right of Rescission*

Congress enacted TILA “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.”<sup>23</sup> Before its passage, consumers struggled to shop for credit because lenders did not have a uniform way of calculating interest and other fees associated with the loan.<sup>24</sup> As such, TILA is mainly a disclosure statute requiring that creditors provide “clear and accurate disclosures of terms dealing with things like finance charges, annual percentage rates of interest, and the borrower’s rights.”<sup>25</sup> Due to its core remedial nature, TILA is construed liberally in favor of the consumer.<sup>26</sup>

TILA was designed to remedy deceitful and predatory creditor practices on the part of lenders.<sup>27</sup> In response to concerns of predatory lending, Congress sought to empower consumers with a substantive tool—something with “real teeth”—to protect themselves; the right of

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20. Joint Appendix, *supra* note 11, at 30.

21. See *Jesinoski v. Countrywide Home Loans, Inc.*, 729 F.3d 1092, 1093 (8th Cir. 2013), (explaining that the Eight Circuit has reviewed the notice-lawsuit issue and required suit).

22. See *Jesinoski v. Countrywide Home Loans, Inc.*, 134 S. Ct. 1935 (2014) (granting certiorari).

23. 15 U.S.C.A. § 1601 (West 2014).

24. Lea Krivinskas Shepard, *It's All About the Principal: Preserving Consumers' Right of Rescission Under the Truth in Lending Act*, 89 N.C. L. REV. 171, 185 (2010).

25. *Beach v. Ocwen Fed. Bank*, 523 U.S. 410, 412 (1998).

26. *Rosenfield v. HSBC Bank, USA*, 681 F.3d 1172, 1179–80 (10th Cir. 2012).

27. *N. C. Freed Co. v. Bd. of Governors of Fed. Reserve Sys.*, 473 F.2d 1210, 1214 (2d Cir. 1973); 114 CONG. REC. 14,388 (1968) (“[A]nother provision of the bill is also vitally important. That is . . . a series of amendments . . . [seeking] to strike at *home improvement racketeers* who trick homeowners, particularly the poor, into signing contracts at exorbitant rates . . . .”) (remarks of Rep. Sullivan) (emphasis added).

rescission fit the bill.<sup>28</sup> It is a powerful tool that polices the lending process through a set of highly technical rules.<sup>29</sup>

Subsequent amendments<sup>30</sup> generally sought to put constraints on the borrower's right of rescission. In 1974, § 1635(f) was enacted to put a time limit on the borrower's ability to rescind a qualifying loan, even if he received the proper disclosures from the lender.<sup>31</sup> Before the addition of sub-section (f), § 1635 did not place a time limit on the right to rescind for those borrowers who did not receive proper disclosure past the initial three-day period.<sup>32</sup> Section 1635(f) capped this time horizon at three-years.<sup>33</sup> Congress passed sub-section (f) because it was concerned with the risk of clouded title in cases where borrowers rescinded after selling their residence.<sup>34</sup>

The recent financial crisis has thrust the TILA pendulum back in favor of consumers.<sup>35</sup> With the passage of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank),<sup>36</sup> which

28. See 114 CONG. REC. 14,388 (1968) (“I want to emphasize that the rights given to the buyer or borrower under the conference substitute have real teeth. When the debtor gives notice of intention to rescind, that voids the mortgage absolutely and unconditionally.”) (remarks of Rep. Sullivan).

29. See discussion *infra* Part II.B (explaining mechanics of rescission); see, e.g., 15 U.S.C.A. § 1635(b).

30. For a deeper discussion of other amendments that affect the right of rescission, see Francesco Ferrantelli, Jr., *Truth in Lending? The Survival of A Borrower's Statutory Claim for Rescission*, 44 SETON HALL L. REV. 695, 701–05 (2014).

31. Fair Credit Billing Act, Pub. L. No. 93-495, title IV, § 405, 88 Stat. 1500 (1974).

32. 119 CONG. REC. 4596, 4597 (1983).

33. 15 U.S.C.A. § 1635(f).

34. 119 CONG. REC. 4596, 4597 (1983); *Hefferman v. Bitton*, 882 F.2d 379, 384 (9th Cir. 1989).

35. Scholars such as now-Senator Elizabeth Warren warned that, before the Consumer Financial Protection Bureau (CFPB) took over authority, consumer protection took a back-seat to banking industry objectives. Oren Bar-Gill & Elizabeth Warren, *Making Credit Safer*, 157 U. PA. L. REV. 1, 90 (2008) (“The problem is deep and systematic. These agencies are designed with a primary mission to protect the safety and soundness of the banking system. This means protecting banks’ profitability. Consumer protection is, at best, a lesser priority . . .”). Congress’s concern that consumers were not adequately protected does carry force: before the CFPB took over authority, the lending industry had been pushing the Federal Reserve Board (FRB) to not only restrict the right of rescission, but also to eliminate the right altogether. Edward H. Wilson III, Column Student Gallery, *How CFPB Should Rule Regarding Whether Right to Rescission Should Be Removed from TILA*, 2011 AM. BANKR. INST. J., 52, 52. In response, the FRB proposed to drastically limit the right by requiring the consumer to tender principal *before* the creditor terminates its security interest. 75 Fed. Reg. 58,539, 58,547 (proposed Sept. 24, 2010). The issue was eventually punted to the CFPB, which refused to alter the rule, keeping § 1635(b)’s consumer-leaning process intact. 2012 Truth in Lending Act (Regulation Z), 76 Fed. Reg. 79,768, 79,996 (Interim Final Rule Dec. 22, 2011) (“Any security interest giving rise to the right of rescission becomes void when the consumer exercises the right of rescission.”).

36. Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203,

drastically reformed the financial system, Congress launched the Consumer Financial Protection Bureau (CFPB) to “protect families from unfair, deceptive, and abusive financial practices.”<sup>37</sup> President Obama stated that the CFPB was “a new consumer watchdog with just one job: looking out for people—not big banks, not lenders . . . as they interact with the financial system.”<sup>38</sup> Dodd-Frank gave the CFPB exclusive authority over TILA enforcement. Before the passage of the CFPB, consumer protection was divided among seven different agencies.<sup>39</sup> Congress found this process ineffective and streamlined consumer protection through the CFPB.<sup>40</sup>

### *B. The What, When, and How of § 1635: Rescission as It Stands Today*

There are many transactions that fall within the province of TILA but do not create the right of rescission.<sup>41</sup> First, the right only applies to a security interest securing the consumer’s principal dwelling; vacation homes or second homes are exempt.<sup>42</sup> Second, the loan must primarily serve a personal, not commercial, purpose.<sup>43</sup> Third, the right of rescission does not apply to a residential mortgage transaction.<sup>44</sup> Finally, a mortgage refinancing with the same lender is exempt, while refinancing with another creditor bank is not.<sup>45</sup>

#### 1. When Rescission May Be Exercised

Section 1635 gives consumers the right to rescind a loan until midnight of the third business day following (1) consummation (closing) of the transaction, (2) delivery of the required relevant

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124 Stat. 1376 (2010).

37. Consumer Fin. Prot. Bureau, *Creating the Consumer Bureau*, CONSUMER FIN. PROT. BUREAU, <http://www.consumerfinance.gov/the-bureau/creatingthebureau/> (last visited Oct. 27, 2014).

38. President Barack H. Obama, Remarks by the President at Signing of Dodd-Frank Wall Street Reform and Consumer Protection Act (July 21, 2010), <http://www.whitehouse.gov/the-press-office/remarks-president-signing-dodd-frank-wall-street-reform-and-consumer-protection-act>.

39. S. REP. NO. 111-176, at 10 (2010) (“The current system is also too fragmented to be effective. There are seven different federal regulators involved in consumer rule writing or enforcement.”).

40. *Id.*

41. *See, e.g.*, 15 U.S.C.A. § 1603 (West 2014) (listing exemptions).

42. 15 U.S.C.A. § 1635(a) (West 2014).

43. Regulation Z, 12 C.F.R. § 226.1(c) (2013); 12 C.F.R. § 226.2(a)(12).

44. 12 C.F.R. § 226.2(a)(24); 15 U.S.C.A. § 1635(e).

45. *See, e.g.*, *Keiran v. Home Capital, Inc.*, 720 F.3d 721, 724 (8th Cir. 2013) (arising out of refinancing); 15 U.S.C.A. § 1635(e)(1)(B).

rescission forms, and (3) delivery of the material TILA disclosures, whichever is later.<sup>46</sup> Section 1635(a) therefore automatically enables a borrower to unconditionally rescind his loan during the three-day period.<sup>47</sup> However, if a creditor does not deliver the material disclosures and inform the consumer of his right to rescind, the right extends beyond the three-day period.<sup>48</sup> Section 1635(f) limits the borrower's time horizon for exercising rescission even if the creditor did not deliver the required disclosures, providing that the consumer's right "shall expire three years after the date of consummation of the transaction."<sup>49</sup>

## 2. The Effect of Rescission

When a consumer chooses to exercise his right of rescission, § 1635(b) governs the unwinding process.<sup>50</sup> First, the consumer sends the creditor notice of rescission, which immediately voids the creditor's security interest.<sup>51</sup> Second, the *creditor* has twenty days after receipt of the notice to return any consideration and take any action necessary to reflect the termination of the security interest.<sup>52</sup> If the creditor does not return the property within twenty days, it forfeits the principle.<sup>53</sup> Finally, only after the creditor has done his part is the consumer required to return any property.<sup>54</sup> If the consumer has spent the loan money, he must tender "reasonable value."<sup>55</sup> If the lender does not respond, the consumer can sue to enforce rescission and recover costs and attorney's fees.<sup>56</sup>

## 3. How Rescission is Triggered

Both borrowers and lenders agree that TILA enables a borrower to rescind a loan under the right circumstances. The controversy lies in what steps must be taken by the borrower within the three-year period in order to exercise that right.<sup>57</sup> A look at the relevant

46. 15 U.S.C.A. § 1635(a).

47. *Id.* This unconditional three-day right is termed by courts and scholars as the "buyer's remorse" provision. *See, e.g.,* Hefferman v. Bitton, 882 F.2d 379, 383 (9th Cir. 1989).

48. *Id.*

49. 15 U.S.C.A. § 1635(f); Beach v. Ocwen Fed. Bank, 523 U.S. 410, 413 (1998).

50. *Id.* § 1635(b).

51. *Id.*

52. *Id.*

53. *Id.*

54. *Id.*

55. Regulation Z, 12 C.F.R. § 226.23(d)(3) (2013).

56. 15 U.S.C.A. § 1640(a)(3).

57. *Compare* Gilbert v. Residential Funding LLC, 678 F.3d 271, 276 (4th Cir. 2012)

statutory text overwhelmingly indicates that consumers rescind by “notifying the creditor, in accordance with regulations of the Bureau, of his intention to do so.”<sup>58</sup> In turn, Regulation Z allows consumers to notify the creditor through “mail, telegram or other means of written communication.”<sup>59</sup>

### C. Beach’s Effect on the Current Circuit Split

If the text of § 1635 is unambiguous, then why did the majority of circuits require suit instead of written notification? Much of the confusion is rooted in the Supreme Court’s decision in *Beach v. Ocwen Federal Bank*.<sup>60</sup> In *Beach*, the Court found that § 1635(f) completely extinguishes a consumer’s right to exercise rescission once the three-year period ends.<sup>61</sup>

#### 1. Majority Approach: Notice Is Not Enough

The leading case highlighting the majority approach is the Tenth Circuit’s *Rosenfield v. HSBC Bank*.<sup>62</sup> Like *Beach*, *Rosenfield* arose from a mortgage refinancing.<sup>63</sup> Unlike *Beach*, the borrower exercised rescission within the three-year period by notifying the lender.<sup>64</sup> The borrower received no response and stopped making payments.<sup>65</sup> The lender, at this point another bank, initiated foreclosure proceedings against the borrower, who was procedurally barred from making the

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

58. 15 U.S.C.A. § 1635(a).

59. Regulation Z, 12 C.F.R. § 226.23.

60. *Beach v. Ocwen Federal Bank*, 523 U.S. 410 (1998). In *Beach*, the consumer-borrowers refinanced their home, but stopped making payments on the loan five years after the consummation of the transaction. *Id.* at 413. The Beaches alleged that they did not receive required disclosures under TILA and contended that, notwithstanding § 1635(f), they should be able to raise the right of rescission as an affirmative defense. *Id.* The Court rejected this argument. *Id.*

61. In often cited and sweeping language, the Court stated that [Section] 1635(f) says nothing in terms of bringing an action but instead provides that the right of rescission shall expire at the end of the time period. It talks not of a suit’s commencement but of a right’s duration, which it addresses in terms so straightforward as to render any limitation on the time for seeking a remedy superfluous.

*Id.* at 417 (internal quotations omitted). This made sense because Congress could reasonably have believed that an indefinite right to rescission as a defense in recoupment could cloud a bank’s title on foreclosure. *Id.* at 418–19.

62. *Rosenfield v. HSBC Bank*, 681 F.3d 1172, 1172 (10th Cir. 2012).

63. *Id.* at 1175.

64. *Id.*

65. *Id.*

rescission defense.<sup>66</sup> The borrower then filed a separate declaratory suit seeking to rescind the loan.<sup>67</sup>

On appeal, the Tenth Circuit rejected the borrower's contention that written notice was all that is required to exercise rescission.<sup>68</sup> It did so on two grounds. First, it found that *Beach* was "dispositive" of the question—notice alone is not enough to preserve a court's ability to recognize a rescission after the three-year period.<sup>69</sup> According to the Court, § 1635(f) is a statute of repose that completely extinguishes the borrower's right after three years.<sup>70</sup> The basis for the justification was *Beach*,<sup>71</sup> though that opinion never described TILA as a statute of repose. Thus, TILA established a right of action that is redressable only when the party seeks recognition of it through the courts.<sup>72</sup>

Second, the Court discharged the borrower's claims based on contract law and the equitable nature of rescission.<sup>73</sup> It noted that common law rescission is designed to return parties to status quo ante and that rescission under TILA is "analogous[ ] in substance."<sup>74</sup> The Court explained that the rescission remedy is not available "where its application would lead to prohibitively difficult (or impossible) enforcement" and that rescission should not be available for Rosenfield.<sup>75</sup>

The court was particularly concerned with the potential for clouded title that may occur if the borrower exercised rescission but waited an undetermined time before filing suit, during which the loan could have been sold to another bank, thus impeding Congress's commercial certainty concerns.<sup>76</sup> Finally, the court stated that the plain meaning of § 1635 requires written notice, but that written notice alone is not sufficient—the additional step of filing suit must be taken.<sup>77</sup>

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66. *Id.*

67. *Id.*

68. *Id.* at 1178.

69. *Id.* at 1182.

70. *Id.*

71. *Id.* at 1172.

72. *Id.* at 1183.

73. *Id.*

74. *Id.* at 1184.

75. *Id.*

76. *Id.* at 1185.

77. *Id.*



The Jesinoski's home circuit has also taken the more restrictive approach to rescission. The Eight Circuit, in *Keiran v. Home Capital*, parroted the Tenth Circuit's approach and reasoning almost to a tee.<sup>78</sup> *Kieran* is substantively analogous to *Jesinoski*. In *Kieran*, the borrowers showed that they were not given material disclosures by their lenders.<sup>79</sup> The borrowers sent notice, but like the Jesinoski's bank, the lender did not respond to the rescission notice until after the three-year period.<sup>80</sup> The borrowers sued for declaratory relief to enforce the rescission.<sup>81</sup>

The court engaged in a reading of § 1635 similar to that of the Tenth Circuit in *Rosenfield* and found that § 1635(f) acted as a statute of repose that completely barred rescission after the three-year period.<sup>82</sup> Furthermore, it reiterated the clouded title concerns highlighted in *Rosenfield* and explained that remedial economy (returning parties to status quo ante) would not be furthered if written notice were enough to rescind.<sup>83</sup>

## 2. Minority Approach: Written Notice Is Enough

The Third Circuit's decision in *Sherzer v. Homestar Mortgage Services* demonstrates the minority, written-notice-only approach.<sup>84</sup> In *Sherzer*, the borrowers obtained two loans—one for \$171,000 and another for \$705,000—from lender Homestar, which eventually assigned the loans to HSBC.<sup>85</sup> Within the three-year period, the Sherzers sent notice to both lenders of their rescission because Homestar did not provide required disclosures.<sup>86</sup> HSBC agreed to rescind the smaller loan, but refused to accept rescission for the larger loan.<sup>87</sup> The borrowers sued to enforce the rescission.<sup>88</sup>

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78. See *Keiran v. Home Capital, Inc.*, 720 F.3d 721, 728 (8th Cir. 2013) (“Given these considerations, we agree with the Tenth Circuit’s thorough and well-reasoned opinion in *Rosenfield* and hold that a plaintiff seeking rescission must file suit, as opposed to merely giving the bank notice, within three years in order to preserve that right pursuant to § 1635(f).”).

79. *Id.* at 725.

80. *Id.*

81. *Id.*

82. *Id.* at 728.

83. *Id.* at 727–28.

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

85. *Id.* at 256.

86. *Id.*

87. *Id.*

88. *Id.*

The court looked to the plain meaning of the statute and explained that § 1635 clearly requires only written notice.<sup>89</sup> Beginning with § 1635(a) and Regulation Z, the court explained that the text of both referred to notice as the exclusive mechanism for exercising rescission.<sup>90</sup> Section 1635(b), which governs the unwinding process post-rescission, also suggests that “rescission occurs automatically” upon notice.<sup>91</sup> Further support could be derived from § 1635(f), which is silent as to the judicial system.<sup>92</sup>

The *Sherzer* court distinguished *Beach*, finding that it answers when rescission can be triggered, but not how to exercise it.<sup>93</sup> Furthermore, it explained that the lenders would not be subject to clouded title because a notice of rescission enables them to decide whether to unwind the transaction or file suit.<sup>94</sup>

### III. HOLDING

The Eighth Circuit swiftly rejected the Jesinoski’s written-notice approach, explaining that its precedent requires suit in order to rescind.<sup>95</sup> However, two separate concurrences emphasized that this approach was incorrect and that written notice is sufficient.<sup>96</sup>

### IV. ARGUMENTS

#### A. *Jesinoski’s Arguments*

The Jesinoskis hinged their arguments on the plain meaning and purpose of § 1635 as well as congressional intent underlying the right of rescission.<sup>97</sup> Their arguments follow the familiar pattern of statutory interpretation. First, the definition of “notify” suggests that written notice is sufficient.<sup>98</sup> Second, the structure of § 1635 also confirms its

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89. *Id.* at 258.

90. *Id.*

91. *Id.*

92. *Id.* at 260.

93. *Id.* at 262.

94. *Id.* at 265.

95. *Jesinoski v. Countrywide Home Loans, Inc.*, 729 F.3d 1092, 1093 (8th Cir. 2013).

96. *Id.* at 1093 (Melloy, J., concurring); *id.* at 1094 (Colloton, J., concurring).

97. See Brief for Petitioners, *Jesinoski v. Countrywide Home Loans, Inc.* No. 13-684 (U.S. Apr. 28, 2014).

98. The Jesinoskis asserted that both traditional and legal dictionaries define the word “notify” to mean something less than filing a lawsuit; “notify” merely means to inform. *Id.* at 16–18. In addition, TILA contains several other provisions, such as § 1638, § 1640, and § 1641, that also use the word “notify” yet do not require the filing of a lawsuit. *Id.*

plain meaning.<sup>99</sup> Third, the legislative history further indicates that Congress sought to require written notice only.<sup>100</sup>

The Jesinoskis focused on § 1640, TILA's damages provision, and highlighted the differences between § 1635 and § 1640, suggesting that Congress sought to require suit in one but not the other.<sup>101</sup> They further emphasized that the remedial purpose behind TILA suggests that Congress did not want to burden, but instead sought to protect, consumers.<sup>102</sup> Next, the Jesinoskis explained that rescission by notice does not cloud title in the mortgage markets.<sup>103</sup> The Jesinoskis also asserted that the CFPB's opinion should be dispositive.<sup>104</sup> Finally, they contended that § 1635(f) does not bar rescission by written notice.<sup>105</sup> All it does is require rescission to be exercised through the requirements of § 1635(a), which requires written notice.<sup>106</sup>

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99. *Id.* at 18. Section 1635(a) allowed borrowers to exercise both the three-day and the three-year rescissions using the same method of notification. *Id.* at 19. According to the Jesinoskis, requiring only notice during the three-day period but then requiring suit for the extended three-year period is "untenable" because the right of rescission is the same in both instances. *Id.* Furthermore, § 1635(b)'s lengthy and detailed unwinding process cannot operate if the Jesinoskis are required to file suit because its procedures are triggered upon "receipt of a notice of rescission." *Id.* at 20. For example, § 1635(b)'s twenty-day return requirement would not work with the Federal Rules of Civil Procedure responsive pleadings structure. *Id.* at 21.

100. The right of rescission was amended numerous times, yet Congress never added to the rescission requirement. *Id.* at 25.

101. Unlike § 1635, § 1640 creates a cause of action, establishes venue, and sets a statute of limitations, suggesting that Congress knows how to require litigation when it desires. *Id.* at 22.

102. The Jesinoskis claimed that requiring notice only is consistent with remedial purpose behind the statute. *Id.* at 31. In passing § 1635, Congress also sought to codify common law rescission, which does not require rescission to be affected by suit, only notice. *Id.* at 31–32.

103. The Jesinoskis reiterated that once the borrower exercises rescission, the lender has twenty days to decide whether there were any material non-disclosures. *Id.* at 33–34. If there were, the transaction unwinds as dictated by § 1635. If there were not, the lender can sue right away to determine that material disclosures were in fact made. *Id.* at 33–34. Thus, there will be no uncertainty in the transaction unless the lender itself creates it. *Id.* at 33–34. Moreover, even if there were valid policy concerns, it is not up to the courts to disregard the plain text of the statute in order to avoid practical problems created by a statute. *Id.* at 34.

104. This is so because the CFPB is entitled to special deference and because neither the CFPB nor the FRB has ever changed the written notice requirement in Regulation Z since its inception. *Id.* at 35–37. This deference was affirmed when Congress passed authority from the FRB to the CFPB, which accepted the FRB's written notice interpretation. *Id.* at 36–37.

105. Because *Beach* is not dispositive, the Jesinoskis argued that the Court should borrow Minnesota's relevant statute of limitations. *Id.* at 43–45. Here, the statute of limitations is six years, which means that the Jesinoskis did exercise rescission in time. *Id.* at 44–45. Furthermore, if the Court were to apply § 1640(e)'s statute of limitations, the Jesinoskis would also have validly exercised rescission because § 1640's one-year restriction also did not run. *Id.* at 45.

106. *Id.*

### B. *The Lenders' Arguments*

The Lenders<sup>107</sup> also began with the statutory text, asserting that under § 1635(a) there is a distinction between intent to rescind and actual rescission—the latter requires suit.<sup>108</sup> Further, contrary to the Jesinoski's viewpoint, § 1635(a) does not address how and when rescission is effectuated.<sup>109</sup> Instead, § 1635(b) and (g) govern the procedures for rescission, depending on whether the right is disputed.<sup>110</sup>

Congress, by changing the process of common law rescission, purposefully sought to include the court system in the rescission process because under § 1635, rescission is not complete until the borrower does his part to return the parties to status quo ante.<sup>111</sup> Furthermore, the Lenders claimed that § 1635(f), as a statute of repose, completely eliminated the borrower's right after three years.<sup>112</sup> Ignoring the clear wording of § 1635, Lenders contended, would sow uncertainty and lead to clouded title, thwarting congressional intent to clarify the limits to rescission.<sup>113</sup>

Next, the Lenders addressed the Jesinoskis' statute of limitation arguments and warned that applying either § 1640 or the "patchwork" of the fifty states' statute of limitations would lead to problems and inconsistency.<sup>114</sup> The Lenders also confronted the flood of litigation argument, explaining that requiring notice would result in more litigation because creditors would be forced to file suit to clear title.<sup>115</sup> Finally, no deference should be given to the CFPB because Regulation Z does not answer the issue before the Court.<sup>116</sup>

107. Brief for Respondents, *Jesinoski v. Countrywide Home Loans, Inc.* No. 13-684 (U.S. Apr. 28, 2014).

108. Intention to rescind requires notice only and occurs when the lender actually did violate TILA; actual rescission requires the borrower to sue when the lender disputes the rescission. *Id.* at 21–22.

109. *Id.* at 23.

110. Section 1635(b) governs when rescission is uncontested, while §1635(g) considers disputed exercises of rescission. *Id.* at 23. Here, the Lenders claim, because rescission is disputed, § 1635(g) should control, and that provision requires the court to grant an "award" of rescission, which automatically implicates the court system. *Id.* at 24. This view was expressly rejected by the Supreme Court in its decision in this case. *Jesinoski v. Countrywide Home Loans, Inc.*, 135 S. Ct. 790, 792–93 (2015).

111. *Id.* at 30–32.

112. *Id.* at 32–34.

113. *Id.* at 36–37.

114. *Id.* at 37–38.

115. *Id.* at 38–39.

116. *Id.* at 43–45.

## V. ANALYSIS: § 1635 REQUIRES WRITTEN NOTICE, NOT SUIT

The view that a lawsuit must be filed to exercise rescission is fundamentally flawed for numerous reasons. First, it contradicts the plain meaning of § 1635 and Regulation Z. Second, it discards Supreme Court precedent requiring heightened agency deference under TILA. Third, it ignores congressional intent to make rescission a non-judicial process. Finally, by placing the burden on the borrower, it disregards the remedial nature of TILA, which is aimed at protecting borrowers *from* predatory loan practices *by* creditors, not vice versa.

### A. *Plain as Day: The Text of § 1635 Simply Requires Written Notice, Nothing More*

The issue of how rescission is exercised begins and ends with the plain meaning of § 1635. The statute's plain meaning is unavoidable: Borrowers exercise rescission through written notice, not by filing suit. The Supreme Court has stated that the starting point for every case interpreting the construction of a statute is the language itself.<sup>117</sup> In this case, the statute coherently requires written notice because § 1635(a) requires a borrower to exercise rescission by “notifying” the lender according to the regulations of the CFPB.<sup>118</sup> Neither § 1635(a) nor Regulation Z requires borrowers to take any action in court; both refer *exclusively* to written notice as the *sole* mechanism for exercising rescission.<sup>119</sup>

In its entirety, § 1635 is unambiguously silent as to the judicial system. None of the subsections dealing with the right of rescission make any mention of a lawsuit. In *Beach*, the Supreme Court explicitly observed that § 1635(f) “says nothing in terms of bringing an action.”<sup>120</sup> Conversely, both statutes of limitation and statutes of repose usually refer either to causes of action or the commencement of a lawsuit when circumscribing the time period for initiating suit.<sup>121</sup> Put differently, when Congress desires to make commencement of a lawsuit necessary to exercise a statutory right, it does so explicitly.<sup>122</sup>

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117. *Watt v. Alaska*, 451 U.S. 259, 265 (1981).

118. 15 U.S.C.A. § 1635(a) (West 2014).

119. *Id.*

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

121. *Sherzer v. Homestar Mortg. Servs.*, 707 F.3d 259 (3d Cir. 2013).

122. See *Keiran v. Home Capital, Inc.*, 720 F.3d 721, 732–33 (8th Cir. 2013) (Murphy, J., dissenting) (highlighting the Securities Exchange Act of 1934 and Section 413 of the Employee Retirement Income Security Act as examples of statutes of repose that explicitly require suit).

TILA itself is brimming with provisions, such as § 1640, that expressly require suit; § 1635 lacks the same direction.<sup>123</sup>

Only two provisions in § 1635 mention a court and neither address the issue of whether court involvement is necessary to exercise rescission.<sup>124</sup> Thus, nothing in the text of § 1635 supports the proposition that a borrower seeking rescission must file suit, as opposed to merely giving notice.<sup>125</sup> Requiring anything more than written notice would affix additional burdens that Congress did not intend to hoist upon borrowers.<sup>126</sup>

Additionally, the idea that the three-year right to rescission can only be exercised by filing suit is inconsistent with the way the absolute three-day right is treated in the statute. If a borrower who received all material disclosures does not exercise rescission after three days, his right is forever extinguished; he cannot demand rescission the following day. However, if a borrower does exercise his right within the three-day period, the creditor must, “[w]ithin 20 days after receipt of a *notice of rescission*” return any money or property that it received from the borrower.<sup>127</sup> Most importantly, after sending written notice within the three-day period, the borrower may file suit—even *after the three-day period*, in which he had an absolute right, has ended. There is no textual basis for treating the three-year right of rescission differently.<sup>128</sup> Thus, the three-year right of rescission operates in the same way as the three-day right: the borrower’s right expires after three years, but if he properly rescinds through written notice, he can file suit *after* the three-year period has passed.

### *B. The CFPB’s Interpretation of § 1635 Should Be Dispositive*

If § 1635 is construed as ambiguous regarding rescission after the initial three-day “buyer’s remorse” period, the CFPB’s reasonable opinion should be dispositive. The CFPB is empowered with express authority over TILA and receives “heightened” deference from the

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123. 15 U.S.C.A. § 1640.

124. See *Sherzer*, 707 F.3d at 260 (finding that § 1635(b) and § 1635(g) mention courts but “shed no light” on what borrowers must do to exercise rescission).

125. *Keiran*, 720 F.3d at 728.

126. See *Sherzer*, 707 F.3d at 261 (finding that anything more than notice would graft “additional, unwritten requirements with which [borrowers] must comply”).

127. 15 U.S.C.A. § 1635(b) (emphasis added).

128. See *Sherzer*, 707 F.3d at 264 (concluding that the three-day and three-year rights should function in the same manner); see also *Keiran*, 720 F.3d at 733 (Murphy, J., dissenting) (agreeing with *Sherzer*).

judicial system.<sup>129</sup> This expansive power did not just fall from the sky. In *Ford Motor Credit Co. v. Milhollin*, the Court explained that transactions falling under the auspice of TILA were complex, highly technical, and variable.<sup>130</sup> “Expansive” authority was given to implement and interpret the legal framework provided by TILA: “[D]eference [to the CFPB] is *especially appropriate* in the process of interpreting the Truth in Lending Act and Regulation Z. Unless demonstrably irrational, [CFPB] staff opinions construing the Act or Regulation should be *dispositive . . .*.”<sup>131</sup>

On paper and in the courtroom, the CFPB has vigorously championed its position that written notice is all that is needed to rescind.<sup>132</sup> Yet the majority of courts have completely ignored clear congressional intent and Supreme Court precedent mandating agency deference to the CFPB where the statute is silent or ambiguous.<sup>133</sup> Section 1635(a) supplies the relevant text, expressly requiring that a consumer “notify” the creditor of rescission.<sup>134</sup> To the extent that § 1635(f) is construed to require its own definition of how rescission is given, the CFPB is responsible for filling the gap left by Congress.<sup>135</sup>

### *C. Congress Intended to Make Rescission a Private, Non-Judicial Process Worked Out Between Borrower and Creditor*

In addition to finding no textual support, the proposition that suit is required disregards congressional intent to make rescission non-judicial. TILA has existed for over four decades.<sup>136</sup> During that time-period, Congress has changed and reformed TILA in many ways.<sup>137</sup> Yet, over those forty years, Congress never changed the written notice requirement in § 1635(a). Most recently, with the passage of Dodd-Frank, Congress had an ideal opportunity to eliminate or restrict

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129. *Ford Motor Credit Co. v. Milhollin*, 444 U.S. 555, 565 (1980).

130. *Id.*

131. *Id.*

132. *See, e.g.*, Brief of the Consumer Financial Protection Bureau as Amicus Curiae in Support of Plaintiffs-Appellants and Reversal at 3, *Sherzer v. Homestar Mortg. Servs.*, 707 F.3d 255 (3d Cir. 2013) (No. 11-4254) (urging the court to find that written notice is enough to exercise rescission); *see also* 2012 Truth in Lending Act (Regulation Z) 76 Fed. Reg. 79768, 79803 (Interim Final Rule Dec. 22, 2011).

133. *See, e.g.*, *Keiran v. Home Capital, Inc.*, 720 F.3d 721, 728 (8th Cir. 2013) (disagreeing with CFPB).

134. 15 U.S.C.A. § 1635(a) (West 2014).

135. *Ford*, 444 U.S. at 565.

136. *See discussion supra* Part II.A (highlighting origins of TILA).

137. *See, e.g.*, Truth in Lending Act Amendments of 1995, Pub. L. No. 104-29, 109 Stat. 271 (1995).

rescission under TILA. But Congress chose another path, transferring authority to an administrative agency whose sole focus was to protect consumers. This clear signal affirms congressional commitment to preserving rescission in its present form. Consequently, given TILA's consumer-oriented focus, requiring borrowers to file suit would hinder the very class of people whom Congress sought to protect and would substantially frustrate the purpose of TILA.

The legislative history also makes clear that Congress intended for rescission to be resolved privately between borrower and creditor. For example, in expanding from ten to twenty days the time that a creditor must refund a borrower's money after he exercises rescission, Congress intended to give creditors more time to evaluate whether the right of rescission is available to the borrower and "whether it was *properly exercised*."<sup>138</sup> By placing the burden of initial investigation to make sure that rescission was properly exercised upon the creditor and not the borrower, Congress expressed clear intention for rescission to occur without suit.

#### *D. TILA Was Enacted to Protect Consumers from Predatory Creditors, Not Vice Versa*

At its core, TILA is a consumer-oriented statute—courts have expressly held that it should be construed liberally in favor of the consumer, not the creditor.<sup>139</sup> By empowering the borrower with the right of rescission, Congress intended to achieve a specific, overarching goal: protect *borrowers*, especially the poor, from predatory creditor practices.<sup>140</sup> And the threat of predatory lending remains salient today. Congress reaffirmed its concern with the passage of Dodd-Frank, which amended TILA and sought to eradicate "unsound lending practices, including predatory lending tactics" on the part of lenders.<sup>141</sup>

*McOmie-Gray v. Bank of America*<sup>142</sup> is an ideal example of Congress's justified apprehension. In that case, the borrower did not receive an important disclosure from the bank—the date at which her

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138. S. REP. NO. 96-368 at 29 (1980), as reprinted in 1980 U.S.C.C.A.N. 236, 264 (bold in original).

139. *Rosenfield v. HSBC Bank, USA*, 681 F.3d 1172, 1179–80 (10th Cir. 2012).

140. See 114 CONG. REC. 14,388 *supra* note 28 (reiterating that TILA was created to protect consumers from predatory lending).

141. S. REP. NO. 111-176, at 43 (2010).

142. *McOmie-Gray v. Bank of America*, 667 F.3d 1325 (9th Cir. 2012).



right to cancel would expire.<sup>143</sup> Two years later, the borrower sent a letter rescinding the loan.<sup>144</sup> The lender refused to accept rescission.<sup>145</sup> Instead, it stonewalled the borrower until the three-year rescission right expired.<sup>146</sup> Under the Lender's view, a bank would be encouraged to delay a borrower from filing suit to evade responsibility for purposefully or negligently failing to make disclosures—disclosures that would have enabled the borrower to better assess his financial position. Such a result cannot possibly be what Congress intended when it empowered borrowers with rescission.

*E. Rescission by Written Notice Will Not Cloud Title of Mortgages*

Despite TILA's remedial purpose, some appellate circuits reasoned that because rescission is an equitable remedy designed to return the parties to status quo ante, allowing a borrower to rescind without suit would cloud the creditor's title to the property and would thus disregard Congress's "commercial-certainty concerns."<sup>147</sup> However, this argument assumes too much because clouded title lasts only as long as the *creditor desires*. After receiving written notice, the ball is in the creditor's court. Instead of waiting for the borrower to file suit, the creditor can verify whether the disclosures were valid and choose to negotiate or file suit to clear title. Thus, the creditor will never find itself subject to an uncertain clouded title without its own acquiescence.<sup>148</sup>

Even if rescission by written notice does in fact cloud title, as the Lenders claimed, the Court lacks the right to simply discard the text of § 1635.<sup>149</sup> The Court has repeatedly affirmed the principle that unintended consequences of a statute are Congress's responsibility to fix, not the Court's.<sup>150</sup> Consequently, the current majority approach to rescission is *ultra vires*.

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143. *Id.* at 1326.

144. *Id.* at 1327.

145. *Id.*

146. *Id.* at 1326.

147. *Rosenfield v. HSBC Bank, USA*, 681 F.3d 1172, 1187 (10th Cir. 2012); *see also Keiran v. Home Capital, Inc.*, 720 F.3d 721, 728–29 (8th Cir. 2013) (agreeing with *Rosenfield*).

148. *Keiran*, 720 F.3d at 734 (Murphy, J., dissenting).

149. *Caminetti v. United States*, 242 U.S. 470, 490 (1917).

150. *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 79 (1998); *Lewis v. City of Chicago*, 560 U.S. 205, 215 (2010).

*F. Beach Apprises When Rescission Can Be Raised, Not How to Raise It*

The circuit courts requiring suit based their decisions on *Beach*.<sup>151</sup> However, their reliance on *Beach* is misplaced because *Beach* clarifies *when* a borrower may exercise his right to rescind, but does not address *how* he may do so. *Beach* concerned borrowers who attempted to rescind a loan but failed to provide notice of rescission to the creditor *within* the three-year period required by § 1635(f).<sup>152</sup> The Beaches never sent written notice to the bank *nor* did they file suit; they simply stopped making payments.<sup>153</sup> Only after the creditor initiated foreclosure proceedings did they attempt to use rescission as an affirmative defense.<sup>154</sup>

*Beach* is not dispositive for several reasons. First, its facts are substantially different. The Jesinoskis, unlike the borrowers in *Beach*, timely exercised rescission through written notice within the three-year period, subsequently filed suit, and did not raise rescission as an affirmative defense. In other words, *Beach* does not address the issue presented in this case. Under *Beach* a borrower must exercise his right of rescission within three years of the commencement of the loan or else his right is extinguished once the three-year period has passed.<sup>155</sup> The Lenders as well as the majority of Circuits are correct that *Beach* made clear that § 1635 is a statute of repose that serves as an absolute barrier to “bringing suit” after the three-year period passes.<sup>156</sup> But Congress never required suit in the first place—rescission is worked out between the borrower and his lender outside of court.<sup>157</sup> As the Supreme Court highlighted, *Beach* clarifies *when* a borrower can rescind but does not address the vital issue presented here: whether written notice is *enough* to exercise the right to rescission.<sup>158</sup>

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151. See *McOmie-Gray v. Bank of Am. Home Loans*, 667 F.3d 1328 (9th Cir. 2012) (concluding that *Beach* is dispositive but making clear that “[w]ere we writing on a blank slate, we might consider whether notification within three years of the transaction could extend the time limit imposed by § 1635(f)”; see also *Rosenfield v. HSBC Bank, USA*, 681 F.3d 1172, 1182 (10th Cir. 2012) (“[W]e believe that *Beach* is dispositive of the instant question.”)).

152. *Beach v. Ocwen Fed. Bank*, 523 U.S. 410, 413 (1998).

153. *Id.* at 413–14.

154. *Id.*

155. *Id.* at 419.

156. *Id.* at 417.

157. *Belini v. Washington Mut. Bank, FA*, 412 F.3d 17, 25 (1st Cir. 2005).

158. *Jesinoski v. Countrywide Home Loans, Inc.*, 135 S. Ct. 790, 792 (2015).

## VI. CONCLUSION

The Supreme Court could have rejected the Lenders' arguments on numerous grounds; the legislative history, regulatory interpretation, and public policy considerations all weighed in favor of requiring mere notice to rescind. Yet, the Supreme Court did not inquire into any of these justifications. It declined to do so because, at the end of the day, this conflict is about a more fundamental principle—the plain meaning of a congressional statute. And the Court correctly read §1635 to mean what it says: rescission is exercised when the borrower provides written notice of rescission to the creditor.