NO. 10-1442

IN THE

United States Court of Appeals

FOR THE TENTH CIRCUIT

JEAN C. ROSENFIELD,

Plaintiff-Appellant,

— v. —

HSBC BANK, USA, *et al*.,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

BRIEF OF *AMICI CURIAE* AMERICAN BANKERS ASSOCIATION, CONSUMER BANKERS ASSOCIATION, AND CONSUMER MORTGAGE COALITION SUPPORTING APPELLEES AND AFFIRMANCE

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May 3, 2012

CORPORATE DISCLOSURE STATEMENT

Amici curiae are all non-profit corporations headquartered in Washington, D.C. Pursuant to Fed. R. App. P. 26.1 and 29(c), none of the *amici curiae* has a parent corporation or publicly held corporation that owns 10% or more of its stock.

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INTRODUCTION

This appeal presents a straightforward question: whether a borrower may file a suit to enforce a right that has already expired. The Truth in Lending Act ("TILA"), 15 U.S.C. § 1601, *et seq.*, gives certain borrowers a right to rescind their mortgage loans. Although that right typically lasts for three days from the time the loan is made, 15 U.S.C. § 1635(a), it can extend to three years if the lender fails to make certain disclosures required by TILA, 15 U.S.C. § 1635(f). But Congress was unequivocal in saying that, once those three years pass, the rescission right "shall expire." *Id.* The Supreme Court later found these terms "so straightforward as to render any limitation on the time for seeking a remedy superfluous." *Beach v. Ocwen Fed. Bank*, 523 U.S. 410, 417 (1998).

Despite Congress' "manifest intent" to put rescission to rest after three years, *id.* at 410, Plaintiff and the Consumer Financial Protection Bureau ("CFPB") (as *amicus curiae*) seek to create confusion over the very issue deemed "superfluous" by the Court. They suggest that the three-year period of repose may be avoided, so long as a borrower files a notice of rescission with the lender.

Perhaps unsurprisingly, the majority of courts to address this issue disagree with Plaintiff's view. *See Sobienak v. BAC Home Loans Servicing, LP*, No. 11-110, 2011 WL 6122318, at *4 (D. Minn. Dec. 8, 2011) (listing cases). *Amici*—the American Bankers Association ("ABA"), the Consumer Bankers Association

("CBA"), and the Consumer Mortgage Coalition ("CMC")—believe that these courts are right, and urge this Court to hold similarly that the time bar found in Section 1635(f) may not be evaded with a simple notice from the borrower. [1]

Plaintiff's approach would fundamentally undermine a statute of repose meant to promote finality and clarity—and nothing good would come of it. Instead, Plaintiff's view would upset the careful balance of remedies found in TILA. It would do so for the sake of a remedy that borrowers may invoke—and often do invoke—when they are in default, when they have no genuine basis to rescind, and when they have no ability to tender the loan proceeds (as the statute requires). Plaintiff's approach further would allow a borrower to strip a lender who complied with TILA of its security interest instantaneously and unilaterally. And most importantly, it would cast a long shadow of uncertainty over the housing finance market, a market that depends on certainty and predictability. The price for that uncertainty would fall squarely on the very individuals that TILA was meant to benefit—borrowers. Accordingly, the district court's decision should be affirmed.

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[1] No counsel for a party authored this brief in whole or in part. No party or counsel for a party contributed money intended to fund the brief's preparation or submission to the Court. No person other than the *amici curiae*, their members, or their counsel contributed money to fund preparing or submitting it.

INTEREST OF THE *AMICI CURIAE*

Amici are three of the largest financial services trade associations in the United States. They stand together because they recognize the troubling consequences of applying a new approach to Section 1635(f), as Plaintiff proposes here. Plaintiff's interpretation threatens to upset the housing finance market just as it is recovering from one of the most significant economic shocks in history.

The ABA is the principal national trade association of the financial services industry in the United States. Founded in 1875, the ABA is the voice for the nation's $13 trillion banking industry and its million employees. ABA members are located in each of the fifty States and the District of Columbia, and include financial institutions of all sizes and types, both large and small.

The CBA is the only national financial trade group focused exclusively on retail banking and personal financial services—banking services geared toward consumers and small businesses. As the recognized voice on retail banking issues, CBA provides leadership, education, research, and federal representation for its members. CBA members include the nation's largest bank holding companies as well as regional and super-community banks that collectively hold two-thirds of the total assets of depository institutions.

CMC is a trade association of national mortgage lenders, mortgage servicers, and mortgage origination-service providers, committed to the nationwide

rationalization of consumer mortgage laws and regulations. The CMC regularly appears as *amicus curiae* in litigation with implications for the national mortgage lending marketplace.

ARGUMENT

I. Section 1635(f) Is a Statute of Repose That Extinguishes the Right to Rescind After Three Years, Barring Any Suit Premised on that Right.

A. The Supreme Court has already determined that Section 1635(f) is a statute of repose.

Section 1635(f) is more than a statute of limitations; it "completely extinguishes" the right to rescind after a given time. *Beach*, 523 U.S. at 411; *see* 12 U.S.C. § 1635(f) (providing that a borrower's right "*shall expire* three years after the date of consummation of the transaction or upon the sale of the property, whichever occurs first" (emphasis added)). The Supreme Court has read this provision to "govern[] the life of the underlying right," not just the time for bringing a suit to enforce it. *Beach*, 523 U.S. at 417. Because it defines the limits of the underlying right, Section 1635(f) is a statute of repose. "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." *Joseph v. Wiles*, 223 F.3d 1155, 1168 (10th Cir. 2000). Such statutes are "less susceptible to judicial exception," *Amoco Prod. Co. v. Newton Sheep Co.*, 85 F.3d 1464, 1472 (10th Cir. 1996), as the right that would otherwise sustain the action no longer exists.

These statutes serve a number of useful purposes. For one, they require "litigation to be commenced within a prescribed period of time [when] the reliability and availability of evidence is assured." *Hartford v. Gibbons & Reed Co.*, 617 F.2d 567, 569 (10th Cir. 1980). They consequently "insulate the judicial process against actions which, once crystallized, have then grown old and stale through the passage of time." *Maughan v. SW Servicing, Inc.*, 758 F.2d 1381, 1387 (10th Cir. 1985). For another, they protect parties from the burdens "necessarily entailed in protracted controversies of unknown potential liability," *Hartford*, 617 F.2d at 569, while satisfying "the need for finality," *Sterlin v. Biomune Sys.*, 154 F.3d 1191, 1196 n.9 (10th Cir. 1996).

B. Plaintiff's interpretation would strip Section 1635(f) of its force as a statute of repose while compelling the Court to enforce an expired right.

Plaintiff and the CFPB wrongly argue that a court may enforce a right extinguished by Section 1635(f). But under Plaintiff's reading, Section 1635(f) would no longer achieve any of the purposes of a statute of repose. As the CFPB concedes in a footnote to its brief, the section would no longer prescribe a clear time limit for bringing TILA litigation. *See* CFPB's Br. 24 n.4, ECF No. 01018818929. Even if courts then determined to "borrow" limitations periods from other statutes, as the CFPB suggests, lenders would be forced to guess at the applicable limitations period. And as the CFPB's own authorities indicate, courts

would likely borrow from *state* limitation periods, destroying the uniform application of this comprehensive statute of national reach. Lenders would then be forced to wrestle with perhaps 50 different standards in 50 different states. Such a patchwork of limitations periods would be detrimental to housing finance and the cost and flow of mortgage credit to consumers. Furthermore, "protracted controversies" would logically become the norm (unless lenders simply gave into settlements), as suits would often not even begin until after the three-year period contemplated by Congress.

Perhaps more fundamentally, courts have never assumed the role of enforcing a right that has already been extinguished. "Every judicial action" must include "a remedial right in favor of the plaintiff, and a remedial duty resting on the defendant springing from this delict, and finally the remedy or relief itself." *Vinson v. Graham*, 44 F.2d 772, 777 (10th Cir. 1930) (quotation marks omitted). By virtue of Section 1635(f), a plaintiff suing after the critical three-year mark lacks the remedial rights necessary to support the suit—whether the borrower sought to privately assert that remedy before bringing suit or not. *See McOmie-Gray v. Bank of Am. Home Loans*, 667 F.3d 1325, 1329 (9th Cir. 2012).

Seeking to avoid this reality, the CFPB attempts to recharacterize Plaintiff's suit as a quasi-declaratory judgment action concerning a borrower's unilateral act. *See* CFPB's Br. 18. But that is not the law. Absent mutual assent of the parties,

"[r]escission involves a judicial termination of a party's contractual obligations; it is a court-ordered 'unwinding' of a contract." *Jones v. InfoCure Corp.*, 310 F.3d 529, 535 (7th Cir. 2002). For example, in *Huffman v. Saul Holdings Ltd. Partnership*, 194 F.3d 1072, 1081 (10th Cir. 1999), this Court recognized that plaintiffs bringing a rescission claim could void their contracts, but only after "ultimately obtain[ing] a recovery on their rescission claim." Several courts have applied the same principle in the TILA context, holding that a unilateral notice of rescission does not automatically rescind a mortgage. *See, e.g.*, *Am. Mortg. Network, Inc. v. Shelton*, 486 F.3d 815, 821 (4th Cir. 2007); *Yamamoto v. Bank of New York*, 329 F.3d 1167, 1172 (9th Cir. 2003); *Large v. Conseco Fin. Servicing Corp.*, 292 F.3d 49, 55 (1st Cir. 2002). These courts all agree that, at least where a lender disagrees with a borrower's purported rescission, a borrower has only advanced a *claim* for rescission until the relevant decisionmaker decides whether the required conditions for rescission have been met. *Large*, 292 F.3d at 55. There is no reason for this Court to embrace the CFPB's erroneous arguments to the contrary—particularly since doing so would only undermine the certainty that is critical to a smoothly functioning mortgage market.

II. Plaintiff's Interpretation of Section 1635(f) Would Cause Substantial Harm to Lenders, Borrowers, and Courts.

A. Plaintiff's interpretation would open the floodgates to meritless litigation.

Plaintiff's approach would further ensure that courts would be forced to grapple with largely groundless rescission suits for years to come. Indeed, the enormous body of recent rescission-related case law cited by the parties and the CFPB reflects the substantial growth in rescission litigation in the wake of the financial crisis. *See, e.g.*, CFPB's Br. 8-9. Plaintiff's interpretation would ensure that courts remain overwhelmed. "[P]ractical considerations of judicial economy" therefore support a narrower reading of the statute than Plaintiff's. *United States ex rel. Precision Co. v. Koch Indus., Inc.*, 971 F.2d 548, 553 (10th Cir. 1992).

Furthermore, in the experience of *amici* and their members, TILA rescission claims frequently lack merit. Borrowers often raise such claims on the eve of bankruptcy or in the midst of a foreclosure proceeding in a last ditch effort to avoid enforcement of their obligations.[2] These borrowers rarely have the ability to "return the loan principal" as TILA requires. *Marr v. Bank of Am.*, 662 F.3d 963, 966 (7th Cir. 2011) ("[T]his requirement often has the practical effect of ruling out

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[2] Consumer lawyers see these claims as so common that "[a]dvocates representing clients in [foreclosures] who do not evaluate the case for the possibility of Truth in Lending rescission are flirting with malpractice." National Consumer Law Center, *Truth in Lending* § 1.1.2 (3d ed. 1995 & Supp. 1996).

rescission, if the borrower has already used the money to cover urgent financial obligations.").[3] Often there is no TILA violation at all. In the context of litigation, these defects may be quickly identified and non-meritorious claims may be dispensed with efficiently. What is more, the requirement of litigation imposes some discipline on potential plaintiffs, requiring them to consider whether it is worth investing time and money in futile claims.

Of course, not every rescission claim is unsupported. But if Plaintiff and the CFPB have their way, borrowers will have no disincentive to attempt a meritless rescission; they would be free to file their notice and wait.

Allowing a rescission action to proceed at any juncture without limitation, so long as a notice was filed within three years, creates a perverse incentive for borrowers to "pre-file" a notice of rescission before the three-year period expires. The borrower could then hold that right of rescission indefinitely, until it becomes useful.[4] If, for instance, the lender later chose to foreclose, the borrower might try

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[3] *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, 181 (2010) ("[A]s a result of recent dramatic decreases in home values in certain areas of the country, many borrowers' net tender obligations are still likely to exceed the value of their homes. Thus, an underwater TILA plaintiff typically cannot refinance her mortgage, and the sale of her home usually cannot generate sufficient proceeds to fully finance the borrower's tender obligation.").

[4] In *Nix v. Option One Mortgage Corp.*, No. Civ. 05-03685 (RBK), 2006 WL 166451, *1-2 (D.N.J. Jan. 16, 2006), for instance, the borrower filed a notice of rescission on July 31, 1998, and later filed suit for rescission on July 22, 2005.

to assert a tardy recoupment claim (while avoiding the decision in *Beach* by invoking the notice). And contrary to the CFPB's argument, the lender could not even borrow statutes of limitations from elsewhere to defeat the recoupment claim, as statutes of limitation generally do not bar the use of stale claims brought defensively. *See, e.g.*, *Atl. Richfield Co. v. Farm Credit Bank of Wichita*, 226 F.3d 1138, 1168 (10th Cir. 2000). The lender's only option to avoid this problem would be to litigate the matter itself, immediately upon receiving the rescission notice, by bringing its own action. Either way, as the CFPB acknowledges, "litigation will ensue." CFPB's Br. 23.

B. Plaintiff's interpretation would jeopardize housing finance by instantaneously reducing lenders to unsecured creditor status upon notice from a borrower—even if the lender did nothing wrong.

Plaintiff's approach would also result in the widespread destruction of the security interests that support mortgage loans. A fundamental premise of the Plaintiff's argument is that the rescission is entirely complete upon unilateral notice from a borrower. Were this true, the lender's security interest would become instantly void by law, 15 U.S.C. § 1635(b), even if the notice were not valid, *Yamamoto*, 329 F.3d at 1172.[5] As noted above, the lender's only recourse

[5] This voiding would cause significant complications for a lender. For instance, a lender facing a rescission notice might be forced to reduce its regulatory capital, as secured debt is treated differently from unsecured debt in calculating required capital levels. *See* 12 C.F.R. pt. 3, appendix A § 3 & table 1.

would be to file an immediate lawsuit requesting that the court reinstate the security interest (on the basis that the purported rescission was not valid, or that the borrower failed to tender, or both).

"Clearly it was not the intent of Congress to reduce the mortgage company to an unsecured creditor or to simply permit the debtor to indefinitely extend the loan without interest." *Shelton*, 486 F.3d at 820-21. Plaintiff's intended result does "considerably more than placing the consumer in a stronger bargaining position." *In re Lynch*, 170 B.R. 26, 31 (Bankr. D.N.H. 1994). It would leave the borrower with a house (because tender only comes later) and all the money returned by the lender, without having to do anything more than file a single, conclusory notice with the lender.[6]

C. Plaintiff's interpretation would upset the careful balance of remedies found in TILA.

Plaintiff's misguided approach also upsets the delicate balance that Congress struck in the statute. As this Court has acknowledged, legislatures often use statutes of respose to strike a careful "economic balance" that should not be lightly upset. *Amoco Prod.*, 85 F.3d at 1742. That is especially true in the TILA context, where Congress has taken special care to balance competing purposes and

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[6] One group of consumer lawyers even argues there is no need to tender back the loan proceeds if the lender does not respond to a rescission notice fast enough. *See* National Consumer Law Center, *Truth in Lending* § 10.9.5.2 (7th ed. 2010).

deliberately limited certain remedies to achieve that balance. *See, e.g.*, *Turner v. Beneficial Corp.*, 242 F.3d 1023, 1025 (11th Cir. 2001) ("Congress has amended TILA to ensure that it provides for a fair balance of remedies.").

Congress crafted the right of rescission to give borrowers a limited chance to reconsider their decision to enter into certain credit transactions involving their homes. In contrast to TILA's civil damages provision, 15 U.S.C. § 1640(a), rescission was not designed to compensate borrowers, *Andrews v. Chevy Chase Bank*, 545 F.3d 570, 575 (7th Cir. 2008) (explaining that rescission is an "individualized, restorative rather than compensatory remedy"). In fact, Congress enacted higher "tolerance" levels for TILA disclosure violations in 1995 partly because it was concerned rescission had become too common. One senator, for instance, observed that the "threat of wholesale rescissions presents a real danger to our modern system of home financing." *McKenna v. First Horizon Home Loan Corp.*, 475 F.3d 418, 424 (1st Cir. 2007) (quoting 141 Cong. Rec. S14566, 14567 (1995) (statement of Sen. Alfonse D'Amato)). To him, the 1995 amendments were "intended to curtail the devastating liability that threatens our housing finance system": suits demanding "the most draconian remedy available under Truth in Lending—rescission." *Id.*

By extending indefinitely the length of time during which a borrower could rescind, Plaintiff's interpretation would push this "draconian remedy" well beyond

the balance of interests carefully struck by Congress. "The essential effect of the [rescission] remedy is to afford the consumer an interest-free loan from the date of the transaction to the exchange of money after rescission. Therefore, the longer one allows the right of rescission to be exercised, the greater the benefit to the consumer, and the greater the penalty to the creditor." Daniel Rothstein, *Truth in Lending: The Right to Rescind and the Statute of Limitations*, 14 Pace L. Rev. 633, 657 (1994). By permitting a borrower to rescind upon notice, the borrower could pre-file a notice and then—years later—seek the return of all their payments and interest, having lived rent-free at the expense of the lender. This would disrupt both the equipoise Congress intended and the long-established expectations of the participants in our nation's housing finance market.

D. Plaintiff's interpretation would increase uncertainty, litigation costs, and risk, resulting in higher costs for borrowers.

In the end, Plaintiff's interpretation of the right to rescind would be certain to do only one thing: raise borrowing costs to the very consumers that TILA was meant to protect.

The new interpretation would significantly increase uncertainty and risk in the marketplace. As the district court recognized in this case, even the simple logistics of effecting a rescission by notice creates uncertainty; unlike a lawsuit, a borrower's notice might be lost or misdirected, "introduc[ing] a lacuna between the expiration of the right to rescind and the time in which the lender might learn of a

purportedly timely [r]escission." *Rosenfield v. HSBC Bank, USA*, No. 10-cv-00058-MSK-MEH, 2010 WL 3489926, at *5 (D. Colo. Aug. 31, 2010). So long as the borrower was willing to allege that he or she had noticed an intent to rescind within three years from closing, the borrower would enjoy an indefinite right to rescind. A lender or subsequent holder could never be confident that its security interest was clear (and might always face the prospect of being reduced to unsecured status).

Such uncertainty has real consequences for the lending market. The secondary mortgage market, for instance, can only deliver a steady supply of loans that are reasonably priced if securitizers and investors can be certain that loans are valid and enforceable.[7] Likewise, buyers will only be willing to purchase homes coming out of foreclosure if they can be confident that they are taking title free and clear. But the extended right supported by Plaintiff and the CFPB would very likely "cloud the bank's title on foreclosure." *Beach*, 523 U.S. at 418. In short, the uncertainty and risk stemming from a rescission claim with an unknown expiration date imposes a cost on market participants that will be passed on to consumers.

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[7] "Commentators have estimated that the existence of an efficiently operating secondary mortgage market may reduce the cost of home mortgage credit by up to two percent." Franklin D. Cordell, *The Private Mortgage Insurer's Action for Rescission for Misrepresentation: Limiting a Potential Threat to Private Sector Participation in the Secondary Mortgage Market*, 47 Wash. & Lee L. Rev. 587, 593 (1990) (footnote omitted).

Moreover, adopting Plaintiffs' approach would increase the hard costs to lenders and their assignees on every loan in other ways. Most obviously, lenders would be expected to incur additional litigation expenses across their entire lending portfolio.[8] But TILA rescission also serves an "insurance function for consumers" that "increase[s] the seller's marginal costs," which will "tend to raise the price" for the loan. Michael Aikens, *Off-Contract Harms: The Real Effect of Liberal Rescission Rights on Contract Price*, 121 Yale L.J. Online 69, 79 (2011). Plaintiff's approach would expand both the reach and the potential payout of that insurance. But this additional insurance is not costless, so Plaintiff's approach would compel lenders to cover the expense by increasing charges to borrowers at the closing table. Those homeowners struggling to afford a house at all will be hardest hit, all for the sake of an "expanded" remedy most often invoked in groundless cases.

CONCLUSION

The law is clear as to how the statute of repose limiting the rescission remedy should operate; practical considerations counsel the same result. Both law and policy indicate that the district court should be affirmed.

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[8] New uncertainty would cause increased litigation not just between lenders and borrowers, but also between (a) lenders themselves; (b) secondary market participants and lenders; and (c) home buyers and home sellers.

Respectfully Submitted,

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ECF CERTIFICATION

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