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Avoiding the Nuclear Option: Balancing Borrower and Lender Rights Under the Truth in Lending Act's Right of Rescission

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I. Introduction

Two different borrowers, the Sherzers and Ms. McOmie-Gray, took nearly identical actions to rescind their refinanced loans.[1] However, because federal circuits have split regarding *how* a borrower can exercise rescission, the Sherzers' actions validly rescinded their loan while McOmie-Gray's actions were deemed untimely.[2]

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1. *Compare* Sherzer v. Homestar Mortg. Servs., 707 F.3d 255, 256 (3d Cir. 2013) (stating that the Sherzers sent notice to and filed suit against the lender to exercise rescission), *with* McOmie-Gray v. Bank of Am. Home Loans, 667 F.3d 1325, 1326–27 (9th Cir. 2012) (stating that McOmie-Gray sent notice to and filed suit against the lender to exercise rescission).

2. *See Sherzer*, 707 F.3d at 261 (holding that a borrower "exercises his right of rescission by sending the creditor valid written notice of rescission, and need not also file suit within the three-year period"); *McOmie-Gray*, 667 F.3d at 1326 (stating TILA "requir[es] dismissal of a claim for rescission brought more

The Truth in Lending Act (TILA)[3] represents landmark legislation passed by Congress to regulate the lending market.[4] Under certain conditions, a borrower can rescind a qualifying loan within three years of loan consummation.[5] McOmie-Gray qualified for TILA's right of rescission.[6] Accordingly, she felt the need to exercise her rescission right and gave her lender notice within three years of loan consummation.[7] However, McOmie-Gray filed suit three years and four months after loan consummation.[8] Because McOmie-Gray filed suit *after* TILA's three-year period, the Court of Appeals for the Ninth Circuit affirmed the dismissal of her case as untimely.[9]

The Sherzers were given more time to file suit than McOmie-Gray.[10] The Sherzers also qualified for TILA's right of rescission and they provided their lender with notice of rescission within three years of loan consummation.[11] The Sherzers filed suit three years and three months after loan consummation.[12] However, the Court of Appeals for the Third Circuit held that the Sherzers

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than three years after the consummation of the loan . . . regardless of when the borrower sends notice of rescission"). Both cases will be discussed in further detail. *See infra* notes 115–33 and accompanying text (discussing both cases in the context of the circuit split).

3. Truth in Lending Act, Pub. L. No. 90-321, 82 Stat. 146 (1968) (codified as amended at 15 U.S.C. §§ 1601–65 (2012)).

4. *See infra* notes 37–39 and accompanying text (describing Congress's stated purposes for passing TILA).

5. *See infra* notes 49–54 and accompanying text (discussing the three conditions that must be met under TILA for a borrower to have a rescission right).

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

7. *Id*. at 1326.

8. *See id*. at 1326–27 (listing McOmie-Gray's loan-consummation date as April 14, 2006, and McOmie-Gray's lawsuit filing date as August 28, 2009).

9. *See id*. at 1329 (stating that "the district court properly dismissed this case as untimely").

10. *Compare* Sherzer v. Homestar Mortg. Servs., 707 F.3d 255, 267 (3d Cir. 2013) (permitting the Sherzers' rescission suit three years and three months after loan consummation), *with* McOmie-Gray v. Bank of Am. Home Loans, 667 F.3d 1325, 1329 (9th Cir. 2012) (refusing McOmie-Gray's rescission suit three years and four months after loan consummation).

11. *Sherzer*, 707 F.3d at 256.

12. *See id*. (listing the Sherzers' loan-consummation date as August 26, 2004 and the Sherzers' lawsuit filing date as November 30, 2007).

validly exercised rescission via notice within TILA's three-year period and therefore could file suit after that time.[13]

McOmie-Gray and the Sherzers took similar rescission steps—both sent notice *before* but filed suit *after* TILA's three-year period.[14] Yet because of opposing decisions supplied by the Ninth and Third Circuits, the rescission suits resulted in dramatically different results.[15] This Note reviews these two opposing approaches to how a borrower exercises TILA's right of rescission. This Note argues that courts should not permit rescinding borrowers to file suit after TILA's three-year period because doing so would upset the balance between each party's rights in the borrower–lender relationship.[16] Stated differently, permitting a rescinding borrower to file suit after TILA's three-year period becomes the nuclear option—borrowers would have a disproportionate amount of power in the borrower–lender relationship, thus upsetting the balance.[17] Choosing this nuclear option results in severe consequences for *all* parties involved in the lending market.[18]

Part II examines the history of TILA, with an emphasis on the statute's right of rescission.[19] Part III reviews the two

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13. *See id*. at 267 (holding that "the District Court erred as a matter of law when it dismissed the Sherzers' complaint as untimely").

14. *See supra* notes 7–8, 11–12 and accompanying text (providing the nearly identical actions taken by the Sherzers and McOmie-Gray).

15. *See supra* note 10 and accompanying text (comparing the Third Circuit's decision that allowed a borrower to file a rescission suit three years after loan consummation with the Ninth Circuit's decision that refused to allow a borrower to file a rescission suit three years after loan consummation).

16. *See infra* notes 291–95 and accompanying text (accepting the Notice-and-Filing Approach because it maintains the balance in the borrower–lender relationship). Note that I have labeled the two approaches adopted by federal circuits as the "Notice-Only Approach" and the "Notice-and-Filing Approach." Both approaches will be defined and discussed in further detail. *See infra* notes 109–12 and accompanying text (discussing both approaches and providing a representative case for each).

17. *See infra* notes 172–77 and accompanying text (rejecting the Notice-Only Approach because it upsets the balance in the borrower–lender relationship).

18. *See infra* notes 262–65 and accompanying text (describing how the Notice-Only Approach increases costs for lenders, who will pass on those costs to borrowers by increasing the prices associated with lending transactions).

19. *See infra* notes 23–93 and accompanying text (discussing TILA's history and the right of rescission).

approaches that have emerged from the circuit split concerning *how* borrowers validly exercise TILA's right of rescission.[20] Finally, Part IV examines the arguments surrounding the two approaches[21] and recommends that courts adopt the approach that limits a borrower's ability to file suit to TILA's prescribed three-year period.[22]

II. A Brief History of TILA's Right of Rescission

Congress sought to address consumer rights by enacting TILA—a "corner stone of consumer credit legislation."[23] This Part first describes, in general terms, the lending market before TILA's implementation.[24] Second, this Part provides an overview of the purpose and legislative history of TILA.[25] Third, this Part explains the context in which TILA's right of rescission can be exercised.[26] Fourth, this Part reviews Regulation Z, a regulation promulgated by the Federal Reserve Board that interprets TILA's rescission provision.[27] Finally, this Part discusses *Beach v. Ocwen Federal Bank*,[28] the only Supreme Court case addressing TILA's right of rescission.[29]

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20. *See infra* notes 94–139 and accompanying text (discussing the circuit split).

21. *See infra* notes 145–279 and accompanying text (analyzing the arguments and counterarguments for both approaches).

22. *See infra* Part IV.C (rejecting the Notice-Only Approach and recommending the Notice-and-Filing Approach).

23. ELIZABETH RENUART & KATHLEEN KEEST, NAT'L CONSUMER LAW CTR., TRUTH IN LENDING § 1.1.1 (5th ed. 2003).

24. *See infra* notes 30–36 and accompanying text (discussing the pre-TILA lending market).

25. *See infra* notes 37–47 and accompanying text (discussing TILA generally).

26. *See infra* notes 48–63 and accompanying text (discussing TILA's right of rescission).

27. *See infra* notes 64–75 and accompanying text (discussing Regulation Z).

28. 523 U.S. 410 (1998).

29. *See infra* notes 76–93 and accompanying text (discussing *Beach*).

A. The Pre-TILA Lending Market

Before TILA, state laws governed consumer credit and lending markets.[30] These assorted state laws lacked uniformity and were poorly enforced, rendering them largely ineffective.[31] Another problem concerned the effect of the state laws: they were reactive, rather than proactive, in providing borrowers with some relief.[32] Further complicating matters, creditors used a variety of methods to calculate interest rates and to decide which additional charges, such as credit-investigation and loan-processing fees,[33] were incorporated into those rates.[34] Due to this lack of uniformity, consumers could not effectively "comparison shop for credit."[35] In essence, the pre-TILA lending market created a "buyer beware" relationship between the borrower and lender because the borrower lacked meaningful protection measures.[36]

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30. *See* David Smith & Gregg Stevens, *The Impact of TILA on the Debtor–Creditor Relationship*, 61 CONSUMER FIN. L. Q. REP. 296, 297 (2007) ("Prior to the TILA, the laws governing consumer credit varied greatly from state to state . . . .").

31. *See id.* (stating the state laws "varied greatly" and were "ineffective due to being poorly enforced, cumbersome, or unrealistic in light of America's increasing reliance on credit" (footnote omitted)).

32. *See id.* ("[W]hile an overburdened debtor could avail himself of bankruptcy, that form of debtor relief itself did nothing to address problems that might exist on the front-end of the purchase or in the decision to use credit.").

33. *See* RENUART & KEEST, *supra* note 23, § 1.1.2 (referencing Senator Paul Douglas's concern over "camouflaging of credit by loading . . . exorbitant fees for credit life insurance, excessive fees for credit investigation, and all sorts of loan processing fees").

34. *See id.* § 1.1.1 ("[C]onsumers had no easy way to determine how much credit would really cost, or how to compare among various creditors. Creditors did not use a uniform way of calculating interest, or a single system for defining what additional charges would be included in the interest rate . . . .").

35. *See* 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, 184–85 (2010) ("Before TILA, consumers found it difficult or impossible to comparison shop for credit . . . .").

36. *See* Smith & Stevens, *supra* note 30, at 296 (describing the borrower–lender relationship before TILA as "buyer beware" because of a "variety of historically-failed or at best costly and partially-effective debtor protection measures" (footnotes omitted)).

B. The Truth in Lending Act

In response, Congress passed TILA in 1968.[37] TILA broadly applies to most consumer-credit transactions.[38] TILA's stated purpose is to promote credit comparison shopping for consumers, to avoid the "uninformed use of credit," and to prevent inaccurate and unfair credit practices.[39] To achieve this purpose, TILA standardizes credit measurements[40] and requires lenders to make specified disclosures to borrowers.[41] Specifically, lenders must provide certain material disclosures, including the terms of the loan, finance charges, and the borrower's rights.[42] Noncompliant

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37. *See* Jonathan M. Landers & Ralph J. Rohner, *A Functional Analysis of Truth in Lending*, 26 UCLA L. REV. 711, 713 (1979) ("The basic premises of TIL[A] were that consumers needed certain information to make essential decisions in consumer credit transactions and that the information then available . . . was inadequate."); RENUART & KEEST, *supra* note 23, § 1.2.1 (describing TILA as "landmark legislation" that "marked the birth of modern consumer legislative activism").

38. *See* RALPH J. ROHNER & FRED H. MILLER, TRUTH IN LENDING ¶ 1.01, at 2 (Alvin C. Harrell ed., Supp. 2009) ("Applicable to virtually every form of consumer credit transaction—from home mortgages to small loans to credit card plans to even pawn transactions—the TIL Act commands nationwide uniformity of disclosure . . . ."); Shepard, *supra* note 35, at 185 ("TILA's application is broad—ranging from open-end credit transactions like credit card and home equity loans to closed-end transactions like car loans and mortgages." (footnotes omitted)).

39. 15 U.S.C. § 1601(a) (2012).

40. *See id.* § 1605(a) (defining the "finance charge" as "the sum of all charges, payable directly or indirectly by the person to whom the credit is extended, and imposed directly or indirectly by the creditor as an incident to the extension of credit"); *id.* § 1606 (providing definitions of the "annual percentage rate" depending on the type of credit plan used); RENUART & KEEST, *supra* note 23, § 1.1.1 (stating that TILA "prescribe[s] a uniform definition of what kinds of credit-related charges should be included when calculating the annual percentage rate, and requiring that the total cost of these charges be disclosed by dollar amount as the 'finance charge'"); Shepard, *supra* note 35, at 185 ("TILA provides a standardized definition of two key measurements of the cost of credit: the finance charge and the APR." (footnotes omitted)).

41. *See* 15 U.S.C. § 1635(a) ("The creditor shall clearly and conspicuously disclose . . . the rights of the obligor . . . [and] appropriate forms for the obligor to exercise his right to rescind any transaction subject to this section."); Shepard, *supra* note 35, at 185 ("TILA requires lenders to disclose to prospective consumer borrowers specific, standardized information about . . . credit transactions . . . .").

42. *See, e.g.*, 15 U.S.C. § 1638 (listing required disclosures, such as the "finance charge" and the "identity of the creditor"); *see also* Beach v. Ocwen Fed.

lenders face both criminal[43] and civil liability.[44] Congress amended TILA in 1980,[45] 1995,[46] and 2008[47] to make changes to the timing and substance of required disclosures, such as allowing more tolerance for minor errors made by the lender.

C. TILA's Right of Rescission

In addition to damages, TILA provides some borrowers with another remedy: a right of rescission.[48] Borrowers have a right of

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Bank, 523 U.S. 410, 412 (1998) ("[T]he Act requires creditors to provide borrowers with clear and accurate disclosures of terms dealing with things like finance charges, annual percentage rates of interest, and the borrower's rights.").

43. *See* 15 U.S.C. § 1611 (stating lenders who "willfully and knowingly" violate TILA are criminally liable and "shall be fined not more than $5,000 or imprisoned not more than one year, or both").

44. *See id.* § 1640 ("[A]ny creditor who fails to comply . . . is liable to such person in an amount equal to . . . any actual damage sustained by such person as a result of the failure . . . ."); RENUART & KEEST, *supra* note 23, § 1.2.1 ("Violations of these disclosure provisions subjected the creditor to civil suit for actual damages, statutory damages, and attorney fees, and could even cause criminal liability.").

45. *See* Truth in Lending Simplification and Reform Act, Pub. L. No. 96-221, 94 Stat. 168 (1980) (reducing the amount of TILA's required disclosures and relaxing the strict liability standard for lender violations); Shepard, *supra* note 35, at 187 (stating that Congress amended TILA by passing the Truth in Lending Simplification and Reform Act of 1980 because lender "compliance with the earliest version of the statute had become too difficult").

46. *See* Truth in Lending Act Amendments of 1995, Pub. L. No. 104-29, 109 Stat. 271 (codified as amended in scattered sections of 15 U.S.C.) (clarifying the content of TILA's "finance charge" requirement and expanding the meaning of what constitutes an "accurate" finance charge); RENUART & KEEST, *supra* note 23, § 6.1 (stating Congress amended TILA in 1995 to "reduc[e] the exposure of the mortgage lending industry to liability for extended rescission" by "provid[ing] greater tolerance for errors in certain disclosures").

47. *See* Mortgage Disclosure Improvement Act of 2008, Pub. L. No. 110-289, 122 Stat. 2855 (expanding the types of mortgage loans that lenders must provide TILA disclosures for and implementing waiting periods between the TILA disclosures and loan consummation); Jeff Sovern, *Preventing Future Economic Crises Through Consumer Protection Law or How the Truth in Lending Act Failed the Subprime Borrowers*, 71 OHIO ST. L.J. 761, 816 (2010) ("In 2008, Congress amended TILA . . . . These amendments changed both the content and the timing of the disclosures; as for the timing . . . now lenders are obliged to let borrowers know of changes in key loan terms at least three days before the closing." (footnote omitted)).

48. *See* 15 U.S.C. § 1635(a) (2012) (providing the borrower with a "right to

rescission under three conditions. First, the loan must be a "consumer credit transaction," meaning the borrower is a natural person and the loan is for personal, household, or family purposes.[49] TILA does not provide a right of rescission for corporate entities[50] or for a loan used for business purposes.[51] Second, the loan must be secured with the borrower's "principal dwelling."[52] Third, the loan cannot be a residential mortgage transaction.[53] Accordingly, consumers cannot exercise a right of rescission for a first mortgage but can for nonpurchase transactions, such as home-equity loans, home-improvement credit sales, and refinancing.[54] A borrower whose loan meets the statutory requirements has a right of rescission.[55]

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rescind the transaction" if certain conditions apply); Beach v. Ocwen Fed. Bank, 523 U.S. 410, 412 (1998) ("Going beyond these rights to damages, the Act also authorizes a borrower . . . to rescind the loan transaction entirely . . . .").

49. *See* 15 U.S.C. § 1635(a) (requiring a "consumer credit transaction"); *id.* § 1602(i) (defining a "consumer credit transaction" as "one in which the party to whom credit is offered or extended is a natural person, and the money, property, or services which are the subject of the transaction are primarily for personal, family, or household purposes").

50. *See id.* § 1602(i) (implying that a corporation does not qualify for a right of rescission under TILA because the statute defines a "consumer" as a natural person).

51. *See id.* ("'[C]onsumer,' used with reference to a credit transaction, characterizes the transaction as one in which . . . the money, property, or services which are the subject of the transaction are primarily for personal, family, or household purposes."); RENUART & KEEST, *supra* note 23, § 6.2.2 ("[N]ot every transaction in which a lien is placed on a person's home is covered. For example, a second mortgage placed on a home to obtain money to expand a business or for agricultural purposes will not be eligible for rescission." (footnote omitted)).

52. 15 U.S.C. § 1635(a); RENUART & KEEST, *supra* note 23, § 6.2.3 ("The second basic requirement for rescission rights to arise is that the transaction must involve a security interest in the consumer's principal dwelling.").

53. *See* 15 U.S.C. § 1635(e)(1) (listing a "residential mortgage transaction" as an "exempted transaction" that does not include a right of rescission).

54. *See* Shepard, *supra* note 35, at 179 ("[A] consumer who has taken out a nonpurchase-money mortgage—through a home refinancing, home equity loan, or home improvement credit sale—has an absolute right to rescind the loan within three business days following the loan closing." (footnotes omitted)); RENUART & KEEST, *supra* note 23, § 6.1 ("Home equity loans and home improvement credit sales are common examples of rescindable transactions.").

55. *See supra* notes 49–54 and accompanying text (providing three conditions for rescission).

The consumer has an absolute right of rescission within three business days of the latest of the following: (1) consummation of the transaction,[56] (2) delivery of the right to rescind notice, or (3) delivery of all required material disclosures.[57] Congress believed this "cooling-off period"[58] would provide the consumer with "the opportunity to reconsider any transaction which would have the serious consequence of encumbering the title" to their principal dwelling.[59] If the lender fails to deliver one copy of the required material disclosures[60] or two copies of the right to rescind notice,[61] then § 1635(f) applies:

> 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 . . . .[62]

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56. *See* RENUART & KEEST, *supra* note 23, § 6.3.1 (stating consummation of the transaction occurs when "the consumer becomes contractually obligated on a credit transaction, which is determined by reference to state law" (footnote omitted)). Although the three-day rescission can be exercised after the latest of the three events listed, for simplistic purposes of this Note, I use "loan consummation" as the event that triggers the three-day rescission.

57. *See* 15 U.S.C. § 1635(a) (2012)

> [T]he obligor shall have the right to rescind the transaction until midnight of the third business day following the consummation of the transaction or the delivery of the information and rescission forms required under this section together with a statement containing the material disclosures required under this subchapter, whichever is later, by notifying the creditor, in accordance with regulations of the Bureau, of his intention to do so.

58. RENUART & KEEST, *supra* note 23, § 6.3.1.

59. S. REP. NO. 96-368, at 29 (1980); *see also* ROHNER & MILLER, *supra* note 38, ¶ 8.01[1], at 598 ("Theoretically, during the three-day delay the consumer is to reflect on the wisdom and desirability of the contract and on the risk of possible loss of the home.").

60. *See supra* note 42 and accompanying text (describing TILA's required material disclosures); Beach v. Ocwen Fed. Bank, 523 U.S. 410, 411 (1998) ("[T]he borrower may rescind the loan agreement if the lender fails to deliver certain forms or to disclose important terms accurately." (citation omitted)).

61. *See* RENUART & KEEST, *supra* note 23, § 6.4.1 ("*All* persons entitled to rescind . . . must receive two copies of the rescission notice and one copy of the material disclosures." (footnote omitted)).

62. 15 U.S.C. § 1635(f).

Accordingly, the consumer's right of rescission extends for three years after the loan's consummation date.[63] This extended right of rescission is the focus of this Note.

D. Regulation Z

Congress gave the Federal Reserve Board (Board) regulatory authority to implement TILA.[64] Accordingly, the Board issued Regulation Z[65] along with official staff interpretations.[66] Regulation Z is so named because the Board alphabetizes (rather than numberings) its regulations, and this particular regulation represents the twenty-sixth regulation implemented by the Board.[67] Regulation Z has complex provisions that address topics such as computation of credit costs, disclosure of credit terms, and methods to resolve errors on credit accounts.[68] Furthermore, Regulation Z's stated purpose is "to promote the informed use of

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63. *See* RENUART & KEEST, *supra* note 23, § 6.1 ("The rescission right is absolute for three days, but it may also last up to three years . . . if important TIL[A] disclosures were not provided correctly at the time of the original credit transaction." (footnotes omitted)); *supra* note 56 and accompanying text (stating that the loan's consummation date is determined under state law). Although the three-year rescission can be exercised after the latest of the two events listed, for simplistic purposes of this Note, I use "loan consummation" as the event that triggers the three-year rescission.

64. *See* Truth in Lending Act, Pub. L. No. 90-321, 82 Stat. 146, 148 (1968) (codified as amended at 15 U.S.C. § 1604(a) (2012)) (providing the Federal Reserve Board with the power to "prescribe regulations to carry out" TILA); Ford Motor Credit Co. v. Milhollin, 444 U.S. 555, 566 (1980) ("Congress delegated broad administrative lawmaking power to the Federal Reserve Board when it framed TILA.").

65. *See* 12 C.F.R. § 226.1(a) (2010) ("This regulation, known as Regulation Z, is issued by the Board of Governors of the Federal Reserve System to implement the federal Truth in Lending Act . . . .").

66. *See id.* § 226, supp. I (2010) ("This commentary is the vehicle by which the staff of the Division of Consumer and Community Affairs of the Federal Reserve Board issues official staff interpretations of Regulation Z.").

67. *See FRB: All Regulations*, BD. OF GOVERNORS OF THE FED. RESERVE SYS., http://www.federalreserve.gov/bankinforeg/reglisting.htm#Z (last updated June 30, 2014) (last visited Sept. 24, 2014) (providing an alphabetized list of the Board's regulations, which includes Regulation A–Regulation YY) (on file with the Washington and Lee Law Review).

68. *See id.* (stating that Regulation Z "[p]rescribes uniform methods for computing the cost of credit, for disclosing credit terms, and for resolving errors on certain types of credit accounts").

consumer credit by requiring disclosures about its terms and cost."[69] Despite Regulation Z's complexity, only the section concerning notice of TILA's extended right to rescind pertains to this Note:

> To exercise the right to rescind, the consumer shall notify the creditor of the rescission by mail, telegram or other means of written communication. Notice is considered given when mailed, when filed for telegraphic transmission or, if sent by other means, when delivered to the creditor's designated place of business.[70]

Courts give deference to the Board's interpretations of TILA and Regulation Z.[71]

In response to the financial crisis that caused the Great Recession of 2007–2008, Congress created the Consumer Financial Protection Bureau (CFPB) in 2010.[72] The CFPB is an independent agency tasked with regulating consumer financial services and products.[73] Congress transferred authority from seven federal agencies to the CFPB, including the Board's previous authority to interpret and regulate under TILA.[74] The

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69. 12 C.F.R. § 226.1(b).

70. *Id.* § 226.23(a)(2).

71. *See, e.g.*, Ford Motor Credit Co. v. Milhollin, 444 U.S. 555, 565 (1980) ("[D]eference is especially appropriate in the process of interpreting the Truth in Lending Act and Regulation Z. Unless demonstrably irrational, Federal Reserve Board staff opinions construing the Act or Regulation should be dispositive . . . .").

72. *See* 12 U.S.C. § 5491(a) (2012) (stating that Congress created the CFPB to "regulate the offering and provision of consumer financial products or services under the Federal consumer financial laws"); Leonard J. Kennedy et al., *The Consumer Financial Protection Bureau: Financial Regulation for the Twenty-First Century*, 97 CORNELL L. REV. 1141, 1142 (2012) (stating that Congress responded to the recent financial crisis by passing the Dodd–Frank Wall Street Reform and Consumer Protection Act (Dodd–Frank), which included the creation of the CFPB); Ronald J. Mann, *After the Great Recession: Regulating Financial Services for Low- and Middle-Income Communities*, 69 WASH. & LEE L. REV. 729, 732 (2012) (describing the new CFPB as a "breath of fresh air").

73. *See* 12 U.S.C. § 5511 (stating that the CFPB will "implement" and "enforce Federal consumer financial law consistently" so that lending markets are "fair, transparent, and competitive"); Kennedy et al., *supra* note 72, at 1146 (stating that Congress formed the CFPB "to regulate consumer financial products and services" as an independent federal agency).

74. *See* 12 U.S.C. § 5581(b)(1)(B) ("The [Consumer Financial Protection] Bureau shall have all powers and duties that were vested in the Board of Governors, relating to consumer financial protection functions, on the day before

CFPB reaffirmed Regulation Z by republishing it and expressing the intent to not change its substance.[75]

E. Beach v. Ocwen Federal Bank

The Supreme Court addressed TILA's right of rescission in *Beach v. Ocwen Federal Bank*.[76] In 1986, David and Linda Beach secured a construction loan to build a house.[77] In the same year, the Beaches refinanced the loan.[78] Five years later, the Beaches stopped making loan payments, and the bank foreclosed on the house.[79] The Beaches argued that the bank failed to make required disclosures under TILA, and therefore, they could exercise the right of rescission.[80] Although the Beaches conceded that the three-year period had already expired in 1989, they argued that the right of rescission could still be exercised as an affirmative "'defense in recoupment' to a collection action."[81] A recoupment defense allows a defendant to reduce, mitigate, or abate the damages claimed by the plaintiff if the defense and the

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the designated transfer date."); Kennedy et al., *supra* note 72, at 1146 (stating that Congress consolidated the authority of seven federal agencies and transferred that authority the CFPB).

75. *See* Truth in Lending (Regulation Z), 76 Fed. Reg. 79768-01 (Dec. 22, 2011) (to be codified at 12 C.F.R. pt. 1026) ("In light of the transfer of the Board['s] . . . rulemaking authority . . . to the Bureau, the Bureau is publishing for public comment an interim final rule . . . . This interim final rule does not impose any new substantive obligations on persons subject to the existing Regulation Z, previously published by the Board.").

76. 523 U.S. 410, 411–12 (1998).

77. *Id.* at 413.

78. *Id.* The Beaches' construction loan was a residential mortgage transaction that would not provide them with a right of rescission. *See supra* note 53 and accompanying text (stating a residential mortgage transaction is exempted from TILA). However, the Beaches refinanced this construction loan with another bank. *Beach*, 523 U.S. at 413. Because nonpurchase mortgages include home refinancing, the Beaches had a right of rescission under TILA. *See supra* note 54 and accompanying text (stating that a nonpurchase mortgage, such as home refinancing, gives the borrower a right of rescission).

79. *Beach,* 523 U.S. at 413.

80. *See id.* at 413–14 ("The Beaches . . . alleg[e] that the bank's failure to make disclosures required by the Act gave them rights under §§ 1635 and 1640 to rescind the mortgage agreement . . . ." (footnote omitted)).

81. *Id.* at 415.

plaintiff's claim arise out of the same transaction.[82] Furthermore, a recoupment defense can be asserted after the statute of limitations expires.[83]

The Court considered whether the Beaches could exercise TILA's extended right of rescission after the three-year period.[84] First, the Court acknowledged that generally a defendant could plead recoupment of damages as an affirmative defense even if the statute of limitations expired for an independent cause of action.[85] The Court, however, concluded that the plain meaning of § 1635(f), TILA's rescission provision, indicates that it is not a statute of limitations:

> Section 1635(f), however, takes us beyond any question whether it limits more than the time for bringing a suit, by governing the life of the underlying right as well. The subsection says nothing in terms of bringing an action but instead provides that the "right of rescission [under the Act] 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. There is no reason, then, even to resort to the canons of construction that we use to resolve doubtful cases . . . .[86]

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82. *See* 20 AM. JUR. 2D *Counterclaim, Recoupment, and Setoff* § 5 (1995) ("[R]ecoupment allows a defendant to defend against a claim by asserting, up to the amount of the claim, the defendant's own claim against the plaintiff growing out of the same transaction . . . . [R]ecoupment applies only by way of reduction, mitigation, or abatement of damages claimed by the plaintiff . . . ." (footnotes omitted)).

83. *See id.* ("The defense of recoupment is not a counterclaim or setoff and therefore is not affected by a statute of limitations. Thus, a party may assert a claim for equitable recoupment, even though a timely counterclaim has not or cannot be filed." (footnotes omitted)).

84. *See* Beach v. Ocwen Fed. Bank, 523 U.S. 410, 415 (1998) ("[W]e granted certiorari to determine whether under federal law the statutory right of rescission provided by § 1635 may be revived as an affirmative defense after its expiration under § 1635(f)." (citation omitted)).

85. *See id.* ("[A] defendant's right to plead 'recoupment,' a 'defense arising out of some feature of the transaction upon which the plaintiff's action is grounded,' survives the expiration of the period provided by a statute of limitation that would otherwise bar the recoupment claim as an independent cause of action." (citation omitted) (internal quotation marks omitted)).

86. *Id.* at 417.

Second, the Court noted that TILA expressly allows for recoupment of damages after the statute of limitations period has expired,[87] yet is silent for the right of rescission.[88] Third, the Court stated that, after TILA was amended, Congress ensured "any such liberality was 'subject to the [three-year] time period provided in subsection (f).'"[89] Therefore, Congress deliberately intended to treat damages and the right of rescission differently under TILA.[90] Fourth, the Court recognized this distinction "makes perfectly good sense" because "a statutory right of rescission could cloud a bank's title on foreclosure."[91] Respecting Congress's intent,[92] the Court rejected the Beaches' argument and held that the right of rescission "completely extinguishes" after three years.[93]

III. The Circuit Split & the Two Approaches

In the aftermath of *Beach*, circuits have disagreed over *how* a consumer exercises TILA's right of rescission.[94] As a result, two approaches have emerged.[95] This Part discusses the emergence

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87. *See id.* at 418 ("[T]he effect of the 1-year limitation provision on damages actions is expressly deflected from recoupment claims.").

88. *See id.* ("[H]owever, there [is] no provision for rescission as a defense that would mitigate the uncompromising provision of § 1635(f) that the borrower's right 'shall expire' with the running of the time.").

89. *Id.*

90. *See id.* ("Thus, recoupment of damages and rescission in the nature of recoupment receive unmistakably different treatments, which under the normal rule of construction are understood to reflect a deliberate intent on the part of Congress.").

91. *Id.*

92. *See id.* at 419 ("We respect Congress's manifest intent by concluding that the Act permits no federal right to rescind, defensively or otherwise, after the 3-yeard period of § 1635(f) has run.").

93. *See id.* at 412 ("We . . . hold that § 1635(f) completely extinguishes the right of rescission at the end of the 3-year period.").

94. *See* Sherzer v. Homestar Mortg. Servs., 707 F.3d 255, 258 (3d Cir. 2013) ("Beach . . . does not address how an obligor must exercise his right of rescission within the three-year period."); Gilbert v. Residential Funding LLC, 678 F.3d 271, 278 (4th Cir. 2012) ("The Beach Court did not address the proper method of exercising a right to rescind or the timely exercise of that right.").

95. *See* Keiran v. Home Capital, Inc., 720 F.3d 721, 726–27 (8th Cir. 2013)

> [T]he Fourth Circuit came to the conclusion that giving the creditor written notice, in any form, was enough to satisfy the statute of repose. . . . On the other hand, the Tenth Circuit . . . could not accept

and development of the circuit split.[96] This Part then provides a representative case for each of the two approaches.[97] Finally, this Part identifies the importance of the circuit split and discusses why it should be resolved quickly.[98]

A. The Circuit Split

After the Supreme Court decided *Beach*, the Court of Appeals for the Ninth Circuit considered the issue of how a borrower exercises TILA's right of rescission.[99] The Ninth Circuit determined that a borrower must provide notice *and* file suit against the lender within three years of loan consummation to properly exercise rescission.[100] Shortly thereafter, the Court of Appeals for the Fourth Circuit considered the same issue.[101] Disagreeing with the Ninth Circuit,[102] the Fourth Circuit decided that a borrower does not have to file suit.[103] Instead, the borrower only has to provide the lender with written notice within three years of loan consummation to properly exercise rescission.[104]

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the view that notice without suit was enough, and instead, held that commencement of suit was required.

96. *See infra* notes 99–112 and accompanying text (discussing generally the circuit split).

97. *See infra* notes 114–33 and accompanying text (discussing each approach).

98. *See infra* notes 134–39 and accompanying text (discussing the significance of the circuit split).

99. *See* McOmie-Gray v. Bank of Am. Home Loans, 667 F.3d 1325, 1326 (9th Cir. 2012) ("McOmie-Gray argues that because she gave the Bank timely notice of rescission, she was not required to bring suit within the three-year period . . . . [T]he question presented is a matter of first impression.").

100. *See id.* (stating that TILA "requir[es] dismissal of a claim for rescission brought more than three years after the consummation of the loan . . . regardless of when the borrower sends notice of rescission").

101. *See* Gilbert v. Residential Funding LLC, 678 F.3d 271, 275 (4th Cir. 2012) ("The Gilberts first argue that the district court erred in dismissing their TILA claim on the basis that they had failed to exercise their extended right to rescind in a timely manner.").

102. *See id.* at 276 ("[W]e disagree with the Ninth Circuit that a borrower must file a lawsuit within the three-year time period to exercise her right to rescind . . . .").

103. *See id.* at 278 (stating that TILA's right of rescission "does not require borrowers to file a claim").

104. *See id.* at 277 ("[T]he Gilberts exercised their right to rescind with the

Because the Ninth and Fourth Circuits reached different conclusions concerning TILA's rescission, a circuit split emerged.[105]

B. The Two Approaches

Other courts of appeals have further deepened the circuit split. The Tenth[106] and Eighth[107] Circuits have joined the Ninth Circuit by also requiring borrowers to provide notice and file suit against the lender within three years of loan consummation to properly exercise rescission[108]—the "Notice-and-Filing Approach."[109] However, the Third Circuit sided with the Fourth Circuit,[110] deciding that mere notice to the lender is sufficient for a borrower to exercise rescission[111]—the "Notice-Only

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April 5, 2009, letter. Simply stated, neither 15 U.S.C. § 1635(f) nor Regulation Z says anything about the filing of a lawsuit, and we refuse to graft such a requirement upon them.").

105. *See id.* at 276

> There is a split of authority as to whether the borrower must file a lawsuit within three years after the consummation of a loan transaction to exercise her right to rescind, or whether the borrower need only assert the right to rescind through a written notice within the three-year period.

106. *See* Rosenfield v. HSBC Bank, USA, 681 F.3d 1172, 1187 (10th Cir. 2012) (stating that "we are not alone in our holding" and citing the Ninth Circuit's decision).

107. *See* Keiran v. Home Capital, Inc., 720 F.3d 721, 728 (8th Cir. 2013) ("[W]e agree with the Tenth Circuit's thorough and well-reasoned opinion in *Rosenfield* . . . .").

108. *See id.* (holding that a borrower "must file suit, as opposed to merely giving the bank notice, within three years"); *Rosenfield*, 681 F.3d at 1182 (deciding "a written letter, without more, is not enough").

109. I created the phrase "Notice-and-Filing Approach" because it coordinates with the other approach, which the Third Circuit referred to as the "notice-only" approach. Sherzer v. Homestar Mortg. Servs., 707 F.3d 255, 265 (3d Cir. 2013). *See also infra* note 112 and accompanying text (using the Notice-Only Approach).

110. *See Sherzer*, 707 F.3d at 261 ("We thus join the Fourth Circuit . . . .").

111. *See id.* (holding that a borrower "exercises his right of rescission by sending the creditor valid written notice of rescission, and need not also file suit within the three-year period").

Approach."[112] The remaining courts of appeals have yet to address the issue.[113]

1. The Notice-and-Filing Approach

Circuits adopting the Notice-and-Filing Approach require borrowers to provide written notice *and* file suit within three years of the loan's consummation date to exercise TILA's right of rescission.[114] For example, in *McOmie-Gray v. Bank of America Home Loans,*[115] the borrower refinanced a loan through a lender.[116] At the closing, the lender provided the borrower with disclosures.[117] Less than two years after receiving the loan, the borrower alleged that the disclosures violated TILA and sent the lender written notice to rescind the loan.[118] The lender refused to rescind, claiming the borrower received the required disclosures under TILA.[119] Three years and four months after receiving the loan, the borrower filed suit in federal district court for a declaration of rescission.[120]

The district court dismissed the borrower's complaint as untimely because it was brought after the three-year period.[121]

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112. I adopted the phrase "Notice-Only Approach" from the Third Circuit. *See id.* at 265 (coining the term "notice-only" to describe its approach).

113. *See supra* notes 99, 101, 106–07, 110 and accompanying text (identifying the only five circuit cases that have decided how a borrower exercises TILA's right of rescission).

114. *See supra* note 108 and accompanying text (describing the Notice-and-Filing Approach).

115. 667 F.3d 1325 (9th Cir. 2012).

116. *Id.* at 1326. The borrower refinanced the mortgage loan with the lender. Complaint at 4, McOmie-Gray v. Bank of Am. Home Loans, No. 2:09-cv-02422, 2010 WL 2546090 (E.D. Cal. June 23, 2010). Because nonpurchase mortgages include home refinancing, the borrower had a right of rescission under TILA. *See supra* note 54 and accompanying text (stating a nonpurchase mortgage, such as home refinancing, gives the borrower a right of rescission).

117. *McOmie-Gray*, 667 F.3d at 1326.

118. *See id. ("*On January 18, 2008, McOmie-Gray, through her attorney, sent the bank notice of her intent to rescind the loan, citing the Bank's failure to advise McOmie-Gray of the final date to cancel the transaction.").

119. *See id.* at 1327 ("The Bank refused rescission, asserting that McOmie-Gray had received proper notice of her right to rescind.").

120. *Id.*

121. *Id.*

On appeal, the borrower argued that she was not required to bring suit because she provided the lender with a timely notice of rescission.[122] The Ninth Circuit determined that the district court properly dismissed the case as untimely because the borrower filed the rescission suit more than three years after the loan's consummation date.[123]

2. The Notice-Only Approach

Circuits adopting the Notice-Only Approach require borrowers to provide lenders with a written notice within three years of the loan's consummation date to exercise TILA's right of rescission.[124] For example, in *Sherzer v. Homestar Mortgage Services,*[125] the borrowers acquired two refinanced loans on their home.[126] Less than three years after closing, the borrowers sent written notice to the lenders, rescinding the loans because the lenders allegedly failed to make certain TILA disclosures.[127] The lenders agreed to rescind the smaller loan but refused to rescind the larger loan, claiming there were no material TILA disclosure violations.[128] Three years and three months after the loan closing,

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122. *See id.* at 1326 ("McOmie-Gray argues that because she gave the Bank timely notice of rescission, she was not required to bring suit within the three-year period, and the district court erred in dismissing this case.").

123. *See id.* at 1329 ("Because § 1635(f) is a statute of repose, it extinguished McOmie-Gray's right to rescission on April 14, 2009, three years after the consummation of the loan. McOmie-Gray did not file her rescission suit until August 28, 2009. Therefore, the district court properly dismissed this case as untimely . . . .").

124. *See supra* note 111 and accompanying text (describing the Notice-Only Approach).

125. 707 F.3d 255 (3d Cir. 2013).

126. *Id.* at 256. The borrowers refinanced their mortgage loans with the lender. Brief for Appellants at 9, Sherzer v. Homestar Mortg. Servs., 707 F.3d 255 (3d Cir. 2013) (No. 11-4254). Because nonpurchase mortgages include home refinancing, the borrowers had a right of rescission under TILA. *See supra* note 54 and accompanying text (stating that a nonpurchase mortgage, such as home refinancing, gives the borrower a right of rescission).

127. *Sherzer*, 707 F.3d at 256.

128. *See id.* ("As for the much larger loan, however, HSBC denied that rescission was appropriate, claiming that Homestar had not materially violated TILA.").

the borrowers filed suit in federal district court for a declaration of rescission, among other remedies.[129]

The district court granted the lenders' motion for judgment on the pleadings, deciding that the borrowers' rescission suit was time-barred because they filed it more than three years after the loan's closing date.[130] On appeal, the borrowers argued that sending the lenders a written notice within the three-year period represents a valid exercise of their TILA rescission rights.[131] The Third Circuit reversed the district court's judgment,[132] holding that a borrower exercises her right of rescission by sending the lender a "valid written notice of rescission, and need not also file suit within the three-year period."[133]

C. Importance of Resolving the Circuit Split

According to the Supreme Court's Rules, the Court will consider granting a writ of certiorari when the courts of appeals decide cases in a conflicting manner, thus resulting in a circuit split.[134] Furthermore, the Court typically will wait until at least three circuits have decided the issue.[135] The issue of how a

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129. *Id.*

130. *See id.*

> The Lenders filed a motion for judgment on the pleadings, arguing that suits for rescission filed more than three years after a loan's closing date are time-barred under 15 U.S.C. § 1635(f), even when the obligor mailed a notice of rescission within the three-year period. . . . The District Court agreed with the Lenders, granted the motion for judgment on the pleadings, and dismissed the case.

131. *See id.* at 257 (stating that the Sherzers argue that "an obligor who has not received material disclosures can exercise his right to rescission and rescind his loan agreement simply by sending written notice to the lender within the three-year period").

132. *Id.* at 267.

133. *Id.* at 261.

134. *See* SUP. CT. R. 10 (listing a circuit split as a "compelling reason" for the Supreme Court to consider granting a writ of certiorari).

135. *See* Nicholas J. Wagoner, *D.C. Circuit Creates Circuit Split Over Graphic Cigarette Warning Labels*, CIRCUIT SPLITS (Aug. 27, 2012, 05:38 AM), http://www.circuitsplits.com/2012/08/dc-circuit-creates-circuit-split-over-graphic-cigarrette-warning-labels.html (last visited Sept. 24, 2014) ("As a rule of thumb, the Supreme Court will typically let an issue on which the circuits are split 'percolate' until at least three circuit courts have squarely addressed the issue.")

borrower exercises TILA's right of rescission within the statute's three-year period satisfies these requirements: five circuits are split between two competing approaches.[136]

As a general matter, TILA tends to be "over-litigated" as issues frequently arise concerning TILA's impact on the lending market.[137] Cases involving TILA's rescission rights are not immune from this trend, as they are also frequently litigated.[138] Finally, major players in the lending market have recognized the need for a "correct and consistent" interpretation of TILA's rescission,[139] indicating the importance of resolving this issue quickly to promote uniformity.

IV. Analyzing the Two Approaches

Courts of appeals, scholars, and major players in the lending markets have endorsed both the Notice-Only and the Notice-and-Filing Approach. This Part investigates the arguments and counterarguments of each approach, as stated by their respective supporters.[140] Then, this Part argues that the Notice-and-Filing Approach is the better option and encourages courts to adopt it.[141]

(on file with the Washington and Lee Law Review).

136. *See supra* Part III.B (identifying and categorizing the five circuit court decisions).

137. *See* Smith & Stevens, *supra* note 30, at 306 ("In this case the result is a TILA that is over-litigated, with more issues to come as Congress continues to expand into the substantive regulation of contract terms. The TILA has been a boon to consumer financial services lawyers on both sides of the issues . . . .").

138. *See* Brief for Consumer Financial Protection Bureau as Amicus Curiae Supporting Plaintiff-Appellant at *2, Rosenfield v. HSBC Bank, USA, 681 F.3d 1172 (10th Cir. 2012) (No. 10-1442) [hereinafter CFPB Brief] ("This case presents a *frequently* litigated question regarding the interpretation of TILA and its implementing regulation, Regulation Z, as they apply to the rescission of certain mortgage loans." (emphasis added)).

139. *See id.* at *3 (stating that the CFPB has "a substantial interest in ensuring the correct and consistent interpretation of TILA and Regulation Z" in regards to rescission).

140. *See infra* notes 146–279 and accompanying text (discussing the arguments and counterarguments of both approaches).

141. *See infra* notes 280–303 and accompanying text (recommending the Notice-and-Filing Approach).

A. The Notice-Only Approach: Arguments & Counterarguments

Supporters of the Notice-Only Approach justify its adoption using a series of arguments. First, the circuit courts make textual, structural, and precedential arguments.[142] Second, supporters argue that agency deference and statutory purpose support the Notice-Only Approach.[143] Third, supporters make pragmatic arguments to justify their approach.[144] This section explores and challenges these arguments below.

1. The Text of TILA & Regulation Z

The Courts of Appeals for the Third and Fourth Circuits have justified their adoption of the Notice-Only Approach by using textual arguments. These circuits have pointed out that courts always start with the text in a statutory-interpretation analysis.[145] Accordingly, these circuits determined that neither the plain meaning of TILA nor Regulation Z requires the filing of a suit.[146] Indeed, both texts "refer exclusively" to written notice as the means to exercise a right of rescission.[147] Therefore, the absence of references to filing suit indicates rescission can be exercised without a court filing.[148] Finally, the legislative history shows that Congress intended for the borrower to exercise her right of rescission "without judicial intervention."[149] Accordingly,

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142. *Infra* Part IV.A.1–3.

143. *Infra* Part IV.A.4–5.

144. *Infra* Part IV.A.6–8.

145. *See* Sherzer v. Homestar Mortg. Servs., 707 F.3d 255, 258 (3d Cir. 2013) (stating "we begin with the statutory text"); Gilbert v. Residential Funding LLC, 678 F.3d 271, 276 (4th Cir. 2012) (same).

146. *See Sherzer*, 707 F.3d at 267 ("According to the most natural reading of the statutory language, an obligor must send valid written notice of rescission before the three years expire. . . . [T]he statute says nothing about filing a suit within that three-year period . . . ."); *Gilbert*, 678 F.3d at 277 ("[N]either 15 U.S.C. § 1635(f) nor Regulation Z says anything about the filing of a lawsuit, and we refuse to graft such a requirement upon them.").

147. *Sherzer*, 707 F.3d at 258.

148. *See id.* at 260 ("Thus, the absence of any reference to causes of action or the commencement of suits in § 1635 also suggests that rescission may be accomplished without a formal court filing.").

149. Keiran v. Home Capital, Inc., 720 F.3d 721, 734 (8th Cir. 2013)

the text only requires a borrower to provide written notice to exercise her right of rescission, consistent with the Notice-Only Approach.

2. The Structure of TILA

The Third and Fourth Circuits have also used structural arguments to support the Notice-Only Approach. First, these circuits point out that other sections of TILA suggest that the right of rescission "occurs automatically."[150] For example, one section requires lenders to return money or property to borrowers within a set number of days after receipt of written notice *rather than* after a court order.[151] Second, the courts reason that, because the borrower does not have to file suit within three days of loan consummation to exercise the three-day right of rescission, she should not have to file suit within three years of loan consummation to exercise the three-year right of rescission.[152] Third, when TILA does mention the judiciary's involvement, the statute does not say whether that involvement is *necessary* for rescission.[153] Overall, the Notice-Only Approach remains consistent with the structure of TILA.

(Murphy, J., concurring and dissenting).

150. *Sherzer*, 707 F.3d at 258–59.

151. *See id.* at 259 ("[Section] 1635(b) states that the creditor must return money or property '[w]ithin 20 days after *receipt of a notice of rescission*'—not within twenty days of a court order stating that the obligor is entitled to rescind.").

152. *See id.* at 264

> If an obligor . . . exercise[s] his three-day right to rescission . . . . [t]he obligor is not required to file suit against the creditor during the three-day period . . . . After the three-day period has expired, the obligor no longer has a "right of rescission"—but because he exercised that right in a timely manner, he now has a statutory right to his property and to clear title. The three-year right of rescission should be understood to work in the same way: it expires if it is not exercised in three years, but borrowers who have exercised the right can file suit after the three-year period has passed. (citation omitted) (footnote omitted).

153. *See id.* at 260 ("Only two provisions in § 1635 make any mention of courts, and both are silent as to whether court involvement is necessary to effect rescission.").

One response to these structural arguments involves distinguishing TILA's three-day right of rescission from its three-year right of rescission. As previously stated, supporters argue that because a borrower does not have to file suit to exercise the three-day rescission, she should not have to do so to exercise the three-year rescission.[154] However, a borrower exercising three-day rescission cannot file suit due to a justiciability problem: the borrower lacks standing because TILA gives the lender twenty days to terminate his security interest in the borrower's principal residence.[155] Stated differently, a borrower's three-day rescission will expire before the lender's twenty-day period to terminate his security interest, thereby preventing a borrower from filing suit for lack of standing. This justiciability problem disappears for three-year rescission, conceivably, because a borrower can have standing to file suit *after* the lender's twenty-day period expires yet *before* the borrower's three-year rescission also expires. Therefore, opponents of the Notice-Only Approach can argue that justiciability concerns permit treating TILA's three-day rescission and three-year rescission differently without offending the statute's structure.

3. The Supreme Court's Beach *Decision*

Circuits have used precedential arguments to support the Notice-Only Approach. Many of these courts determined that *Beach* is not controlling because the Supreme Court never addressed *how* a borrower must exercise her right of rescission.[156]

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154. *See supra* note 152 and accompanying text (comparing TILA's three-day and three-year right of rescission).

155. *See* Keiran v. Home Capital, Inc., 720 F.3d 721, 733 (8th Cir. 2013) (Murphy, J., concurring and dissenting) (stating that TILA does not require a borrower to file suit to exercise the three-day right of rescission "for good reason" because "[d]uring those three days the obligor would still likely lack the grounds for filing because § 1635(b) gives the lender twenty days to terminate his security interest").

156. *See* Sherzer v. Homestar Mortg. Servs., 707 F.3d 255, 262 (3d Cir. 2013) ("Critical to this appeal, nowhere in *Beach* does the Court address *how* an obligor must exercise his right of rescission within that three-year period."); Gilbert v. Residential Funding LLC, 678 F.3d 271, 278 (4th Cir. 2012) ("The *Beach* Court did not address the proper method of exercising a right to rescind or the timely exercise of that right.").

Accordingly, the courts characterized *Beach*'s language concerning TILA's right of rescission as dicta.[157] Even as dicta, however, the courts claim that *Beach* remains consistent with the Notice-Only Approach because *Beach* merely requires that the borrower exercise the right of rescission within three years.[158]

4. The Consumer Financial Protection Bureau's Endorsement

In addition to the Third and Fourth Circuits, the CFPB endorses the Notice-Only Approach[159] as a "private, non-judicial mechanism" to exercise TILA's right of rescission.[160] The CFPB is now "the primary source for interpretation and application of truth-in-lending law."[161] Accordingly, courts grant deference to the CFPB's interpretations of TILA and Regulation Z.[162] Therefore, the CFPB's support of the Notice-Only Approach carries significant weight.[163]

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157. *See Sherzer*, 707 F.3d at 263 ("In resolving the question at issue here, we rely on the statutory language, not on the debatable implications of dicta.").

158. *See id.*

> [*Beach*] is also consistent with our view that they need only send notice of rescission to the lenders during that period, if that is how the right of rescission is exercised. The most that can be gleaned . . . is that, however the right of rescission is to be exercised, it must be done within three years.

159. *See* CFPB Brief, *supra* note 138, at *14 ("Under the plain terms of § 1635—and the Bureau's controlling interpretation of that provision—consumers exercise their rescission right by *providing notice* to their lender within three years of obtaining the loan." (emphasis added)).

160. *Id.* at *25.

161. Household Credit Servs., Inc. v. Pfennig, 541 U.S. 232, 238 (2004) (citation omitted). Although the Supreme Court made this statement in regards to the Federal Reserve's Board of Governors, Congress transferred the Board's power to the CFPB in 2010, thereby allowing the Court's quote to apply to the CFPB as well. *See* 12 U.S.C. § 5581(b)(1)(B) (2012) (transferring the Board's "powers and duties" that "relat[ed] to consumer financial protection functions" to the CFPB).

162. *See, e.g.*, Ford Motor Credit Co. v. Milhollin, 444 U.S. 555, 565 (1980) ("[D]eference is especially appropriate in the process of interpreting the Truth in Lending Act and Regulation Z. Unless demonstrably irrational . . . [the CFPB's] staff opinions construing the Act or Regulation should be dispositive . . . .").

163. *See, e.g.*, Keiran v. Home Capital, Inc., 720 F.3d 721, 731 (8th Cir. 2013) (Murphy, J., concurring and dissenting) ("The majority decision is contrary to . . . the position of the agency responsible for enforcing it."); Rosenfield v. HSBC Bank, USA, 681 F.3d 1172, 1178 n.4 (10th Cir. 2012) (acknowledging

Although the CFPB endorses the Notice-Only Approach, some circuits have refused to be persuaded by the CFPB's amici briefs. For example, because the Eighth Circuit determined that the text of TILA and the Beach decision plainly require a borrower to file suit, it refused to give deference to the CFPB's interpretations.[164] The Tenth Circuit has made a similar determination.[165] Furthermore, the Court of Appeals for the Sixth Circuit, in a different TILA context, has refused to give *Chevron* deference[166] to Regulation Z's interpretation of TILA because it conflicted with TILA's text.[167] In sum, the Eighth and Tenth Circuits' actions, coupled with another circuit's refusal to grant *Chevron* deference, indicate that TILA's text and the *Beach* decision justify rejecting the Notice-Only Approach, even when endorsed by the CFPB.

5. TILA as a Remedial Statute

Most courts agree that TILA exists as a remedial statute that must be construed to favor borrowers.[168] Prior to TILA,

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receipt of an amicus curiae from the CFPB and finding it "helpful"); CFPB Brief, *supra* note 138, at *12 ("Even if § 1635 were silent or ambiguous on this issue, 'absent some obvious repugnance to the statute, the * * * regulation implementing [TILA] should be accepted by the courts[.]'" (alteration in original) (citation omitted)).

164. *See Keiran*, 720 F.3d at 728 (stating "we are not unmindful of" CFPB's regulations but "the text of the statute, as explicated in *Beach,* establishes that filing suit is required").

165. *See Rosenfield*, 681 F.3d at 1186 n.10 (stating that the CFPB's "arguments have some superficial appeal, but we are constrained by the *Beach* Court's defining of the parameters of rescission under TILA").

166. *See* Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842–43 (1984) ("When a court reviews an agency's construction of the statute which it administers . . . . [i]f the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." (footnote omitted)).

167. *See Conference Honors Chairman Emeritus Lawrence X. Pusateri*, 55 CONSUMER FIN. L.Q. REP. 290, 294 (2001)

> The Sixth Circuit reversed, refusing to give *Chevron* deference to the Federal Reserve Board interpretation of the Truth in Lending Act in Regulation Z. The Sixth Circuit found that: "Regulation Z's exclusion of over-limit fees, such as those imposed in this case, from the 'finance charge' conflicts with the express language [of] TILA."

168. *See, e.g.*, *Rosenfield*, 681 F.3d at 1179–80 ("In light of its remedial

"unsophisticated" borrowers had little leverage in loan negotiations with lenders.[169] To address this problem, Congress designed TILA to shift bargaining power from lenders to borrowers via the right of rescission.[170] Therefore, supporters of the Notice-Only Approach argue that requiring unsophisticated borrowers to file suit in addition to sending notice to the lender violates TILA's purpose as a remedial statute favoring borrowers.[171]

Those opposing the Notice-Only Approach recognize TILA's remedial nature, but argue that this approach disproportionately favors borrowers.[172] Many borrowers make rescission claims just before bankruptcy or during foreclosure in an attempt to prevent enforcement of their obligations.[173] Opponents argue that the Notice-Only Approach allows a borrower merely to provide written notice to rescind the loan *even if* the lender complied with

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nature, we liberally construe TILA's language in favor of the consumer."); Bragg v. Bill Heard Chevrolet, Inc., 374 F.3d 1060, 1065 (11th Cir. 2004) (same); Begala v. PNC Bank, Ohio, Nat'l Ass'n, 163 F.3d 948, 950 (6th Cir. 1998) (same); Smith v. Fid. Consumer Disc. Co., 898 F.2d 896, 898 (3d Cir. 1990) (same).

169. *See* Shepard, *supra* note 35, at 192 ("TILA is designed to protect borrowers who, relative to lenders, are unsophisticated actors who possess less leverage in loan negotiations." (footnote omitted)).

170. *See id.* (stating that Congress shifted "significant leverage from lenders to borrowers in setting forth a strict liability remedy that substantially liberalizes the steps needed to unwind a mortgage transaction under the common law").

171. *See* 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) ("Requiring these already overwhelmed borrowers to file suit cannot be reconciled with the statute's consumer-protection purpose nor with the idea that TILA is a remedial statute . . . ." (footnote omitted)).

172. *See* Brief for Amici Curiae American Bankers Ass'n, Consumer Bankers Ass'n, and Consumer Mortg. Coalition Supporting Appellees at *10, Wolf v. Fed. Nat'l Mortg. Ass'n, 512 F. App'x 336 (4th Cir. 2013) (No. 11-2419) [hereinafter ABA Brief] ("Congress could not have intended an equitable remedy to create substantial inequities, but that is what *Gilbert* threatens to do. . . . '[I]t 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.'" (citation omitted)).

173. *See id.* at *8 ("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.").

TILA's requirements.[174] This *unilateral* power to rescind without cause could unfairly result in the cancellation of a TILA-compliant lender's security interest in the collateral.[175] Moreover, the Notice-Only Approach's disproportionate favoritism does not stop at the borrowers facing bankruptcy or foreclosure proceedings. Opponents argue that *all* borrowers can "pre-file" their notice of rescission with lenders.[176] In other words, as long as a borrower sends the lender a notice of rescission before the three-year period, then the borrower can wait indefinitely to use it.[177] By disproportionately favoring borrowers, the Notice-Only Approach detrimentally impacts lenders and extends TILA's remedial nature too far.

As a practical matter, supporters of the Notice-Only Approach argue that the Notice-and-Filing Approach offends TILA's remedial nature due to its expensive filing requirement. The Notice-Only Approach merely requires a borrower to send written notice, a cheap endeavor that most likely will involve only the cost of paper and postage.[178] In comparison, the Notice-and-Filing Approach requires a borrower to file a lawsuit, an act involving expensive court and attorneys' fees.[179] These litigation expenses, Notice-Only supporters argue, offend TILA's remedial nature that favors borrowers, especially those borrowers facing financial problems.[180]

Three counterarguments undermine the notion that the litigation expenses associated with Notice-and-Filing Approach

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174. *See* Sherzer v. Homestar Mortg. Servs., 707 F.3d 255, 264 (3d Cir. 2013) (stating a borrower could transmit "notice of rescission when he has no cause to do so").

175. *See id.* (noting this argument).

176. *See* ABA Brief, *supra* note 172, at *9 ("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.").

177. *See id.* ("The borrower can now hold that right of rescission indefinitely, until it becomes useful.").

178. *See Sherzer*, 707 F.3d at 267 (stating that "it costs little for an obligor to send a letter to the lender" under the Notice-Only Approach).

179. *Id.* (stating that, under the Notice-and-Filing Approach, "the lender would incur some cost to sue to determine title").

180. *See* Godrey, *supra* note 171, at 565 (stating that the Notice-and-Filing Approach will "[d]iscourag[e] communication between borrowers and lenders" and can lead to "costly litigation").

upset TILA's remedial nature. First, parties rarely resolve rescission disputes without court involvement.[181] Accordingly, a borrower will likely face litigation expenses under either approach. Second, the borrower does not have to pursue the lawsuit to completion: lenders have an incentive to settle strong rescission claims to also avoid litigation costs.[182] During these settlements, borrowers can negotiate to reduce the loan amount,[183] a step that may actually offset any initial legal fees to file suit. Third, a borrower with financial problems can seek assistance with legal fees. For example, the borrower can request that a federal court waive any filing fees based on demonstrated financial need.[184] Overall, under the Notice-and-Filing Approach, a borrower's litigation expenses can be mitigated or eliminated in the settlement context or by a request for a court waiver.

6. State Statutes of Limitations Apply

Supporting the Notice-Only Approach, the Third Circuit stated that the borrower cannot wait indefinitely to file suit after sending the lender a written notice because of state statutes of limitations.[185] As a general practice, if a federal law creates a cause of action but does not provide a statute of limitations, then courts will borrow an analogous state statute of limitations.[186]

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181. *See* Shepard, *supra* note 35, at 193 (stating that courts "frequently are forced" to determine whether a TILA violation occurred).

182. *See id.* at 180 (stating that, after the borrower files a rescission suit, "lenders have been known to settle with borrowers who bring strong rescission claims").

183. *See id.* (speculating that "lenders might agree to modify a borrower's mortgage loan by reducing the current balance by roughly the same amount the lender would have to return to the borrower in a rescission" and estimating that amount to be "ten to twenty percent" of the original loan).

184. *See* 28 U.S.C. § 1915(a)(1) (2012) (permitting a federal court to waive filing fees for civil and criminal actions where the party submits an affidavit disclosing all assets and stating that she "is unable to pay such fees or give security therefor").

185. *See* Sherzer v. Homestar Mortg. Servs., 707 F.3d 255, 265 (3d Cir. 2013) ("An obligor who has sent a written notice of rescission to his lender but received no response will not be able to wait indefinitely before filing a lawsuit to enforce the rescission . . . because statutes of limitation will constrain his ability to file suit.").

186. *See* Graham Cnty. Soil & Water Conservation Dist. v. U.S. ex rel.

Therefore, because TILA does not provide a statute of limitations for rescission claims, a state statute of limitations will prevent a borrower from waiting indefinitely to file suit after providing written notice.[187]

Conceivably, a state statute of limitations will curtail a borrower's ability to wait indefinitely.[188] However, this argument remains incompatible with the reason Congress passed TILA in the first place: to bring uniformity to the lending market that was previously governed by a patchwork of state laws.[189] The Third Circuit's proposal to apply different states' varied statutes of limitations will return the lending market to disorder as lenders and borrowers struggle to apply various state statutes of limitations with different time lengths to TILA's right of rescission.

7. Conservation of Judicial Resources

Comparing the two approaches, supporters argue that the Notice-Only Approach saves judicial resources.[190] Specifically, the Notice-and-Filing Approach encourages borrowers to involve courts immediately instead of trying first to enter into private negotiations with the lender, thereby avoiding courts altogether.[191] Accordingly, the Notice-Only Approach conserves

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Wilson, 545 U.S. 409, 414 (2005) (stating that when a federal statute lacks an expressed limitations period, courts "generally 'borrow' the most closely analogous state limitations period").

187. *See Sherzer*, 707 F.3d at 266 ("Thus, if 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.").

188. *See supra* notes 185–87 and accompanying text (describing the effect of state statutes of limitations on TILA rescission suits filed by borrowers).

189. *See supra* notes 30–36 and accompanying text (describing the pre-TILA lending market's lack of uniformity).

190. *See* CFPB Brief, *supra* note 138, at *10 ("Requiring consumers to file suit within the three-year timeframe . . . wastes valuable judicial resources . . . .").

191. *See id.* at *18–19 ("Requiring consumers not only to notify their lender but also to file a lawsuit within three years would incentivize consumers to file suit immediately, rather than working privately with the lender to unwind the transaction.").

judicial resources by giving borrowers the option to enter into private negotiations with the lenders.

Critics respond by arguing that, in practice, the Notice-Only Approach will not conserve judicial resources. Specifically, the Notice-Only Approach will increase litigation among *all* participants in the lending markets as sellers struggle to clear title and lenders respond to "pre-filing" attempts by borrowers.[192] In addition to its failure to conserve judicial resources, the Notice-Only Approach will also increase costs for borrowers as lenders pass these costs on to future borrowers.[193]

8. Exercising Rescission Versus Confirming Rescission

Notice-Only Approach supporters distinguish between a borrower exercising the right of rescission and confirming the rescission's validity.[194] A borrower exercises rescission by written notice.[195] A borrower then confirms the rescission in one of two ways: (1) an agreement from the lender that the rescission is valid; *or* (2) a decree from the court that the rescission is valid.[196]

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192. *See* Rosenfield v. HSBC Bank, USA, 681 F.3d 1172, 1185 (10th Cir. 2012) ("[E]nforcement would likely be costly and difficult."); ABA Brief, *supra* note 172, at *15 ("Litigation will increase 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."); *cf.* Sherzer v. Homestar Mortg. Servs., 707 F.3d 255, 267 (3d Cir. 2013) ("[P]ermitting obligors to rescind by written notice could potentially impose additional costs on banks, as it costs little for an obligor to send a letter to the lender while, on the other hand, the lender would incur some cost to sue to determine title.").

193. *See* ABA Brief, *supra* note 172, at *14 (stating that the Notice-Only Approach "will increase the costs to lenders and their assignees on every loan in other ways; these costs will be borne by borrowers at the closing table"); *cf. Sherzer*, 707 F.3d at 267 ("This may, in turn, be more costly for borrowers insofar as lenders—like all businesses—pass along costs occasioned by regulation or taxation to their customers.").

194. *See* Gilbert v. Residential Funding LLC, 678 F.3d 271, 277 (4th Cir. 2012) ("We must not conflate the issue of whether a borrower has exercised her right to rescind with the issue of whether the rescission has, in fact, been completed and the contract voided.").

195. *See id.* ("The former is the concern of § 1635(f) and Regulation Z, and a borrower exercises her right of rescission by merely communicating in writing to her creditor her intention to rescind.").

196. *See id.* ("To complete the rescission and void the contract . . . the creditor must 'acknowledge[] that the right of rescission is available' and the

Accordingly, borrowers can exercise and confirm rescission privately with the lender or request the judiciary to confirm the rescission.[197]

For the sake of argument, assume a borrower has exercised rescission by providing the lender with notice. Three possible scenarios can then occur. First, the borrower and lender, through private agreement, can confirm that a valid rescission occurred.[198] Second, if the lender refuses to confirm rescission, the borrower can sue, asking a court to confirm and enforce the rescission.[199] Third, if the lender believes the borrower improperly exercised rescission, the lender can sue, asking a court to enforce the loan agreement.[200]

In practice, this complicated structure requires the "unsophisticated borrower"[201] to determine *if* a lawsuit should be filed and *who* should be filing it. Furthermore, the vast majority of borrowers attempting to exercise rescission will find themselves in litigation as compared to a private agreement with

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parties must unwind the transaction amongst themselves, or the borrower must file a lawsuit so that the court may enforce the right to rescind." (alteration in original)).

197. *See Sherzer*, 707 F.3d at 257

> Under this view, rescission of the loan agreement occurs when a valid notice of rescission is sent, not when a court enters an order enforcing the obligor's rights. The subsequent legal action would simply determine whether a valid rescission had occurred, and, if so, the court would enforce the respective obligations of the parties.

198. *See* CFPB Brief, *supra* note 138, at *14 (stating that "[S]ection 1635 is written with the goal of making the rescission process a private one, worked out between creditor and debtor without the intervention of the courts").

199. *See* Sherzer v. Homestar Mortg. Servs., 707 F.3d 255, 257 (3d Cir. 2013) ("If the lender does not comply with § 1635(b)—because, for example, it contends that all relevant disclosures have been made such that the obligor had no right to rescind the agreement—the obligor may file an action to recover the money and property owed and to quiet title.").

200. *See id.* at 265 ("If the borrower fails to exercise a *valid* right to rescission, the lender maintains its security interest in the property and does not incur any obligations toward the borrower. A lender who believes an obligor's notice of rescission is invalid may choose to file suit to resolve any uncertainty."); CFPB Brief, *supra* note 138, at *18 ("When disputes arise, either the lender or the consumer may initiate litigation. . . . If the court finds the consumer was not entitled to rescind, the loan remains in place.").

201. *See* Godfrey, *supra* note 171, at 552 (using the adjective "unsophisticated" to describe the type of borrower that TILA is designed to protect).

the lender.[202] Accordingly, by requiring the borrower to file suit in *every* scenario,[203] the Notice-and-Filing Approach simplifies rescission and maintains TILA's purpose of protecting borrowers by avoiding the "uninformed use of credit."[204]

B. The Notice-and-Filing Approach: Arguments & Counterarguments

Supporters of the Notice-and-Filing Approach justify its adoption using a series of arguments. First, the circuit courts make textual and precedential arguments.[205] Second, supporters argue that TILA's right of rescission functions as both a statute of repose and an equitable remedy.[206] Third, supporters make pragmatic arguments to justify the Notice-and-Filing Approach.[207]

1. The Text of TILA & Regulation Z

The Courts of Appeals for the Eighth, Ninth, and Tenth Circuits have used textual arguments to support the Notice-and-Filing Approach. These circuits claim the texts of TILA and Regulation Z do not provide an exhaustive list of actions necessary to exercise rescission.[208] Therefore, the textual requirement of written notice is necessary but *not sufficient* to

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202. *See* Keiran v. Home Capital, Inc., 720 F.3d 721, 728 (8th Cir. 2013) ("[F]iling suit will certainly be necessary to actually accomplish rescission in *most* cases where rescission under TILA is sought." (emphasis added)).

203. *Cf. Sherzer*, 707 F.3d at 258 ("The Lenders argue that when there is a dispute regarding the propriety of rescission, the obligor must file suit within three years of the closing date to exercise his right of rescission or he will be forever time-barred. This view has been adopted by the Ninth and Tenth Circuits.").

204. 15 U.S.C. § 1601(a) (2012).

205. *Infra* Part IV.B.1–2.

206. *Infra* Part IV.A.3–4.

207. *Infra* Part IV.A.5–7.

208. *See* Keiran v. Home Capital, Inc., 720 F.3d 721, 728 (8th Cir. 2013) ("[W]hile Regulation Z sets forth one of the things an obligor must do to rescind the loan—give written notice to the bank—it does not set forth the entirety of things necessary to accomplish rescission.").

exercise the right of rescission.[209] Then what is the purpose of the written notice? The circuits reason that the written notice shows *intent* to rescind, and a lawsuit *exercises* the right of rescission.[210] Accordingly, a borrower must provide written notice *and* file suit before the three-year expiration date.[211]

2. The Supreme Court's Beach *Decision*

Circuits have used *Beach* to justify adoption of the Notice-and-Filing Approach. These courts consider *Beach* to be dispositive on the issue of how a borrower exercises TILA's right of rescission.[212] Specifically, the courts read *Beach* to classify TILA's right of rescission as a statute of repose.[213]

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209. *See* Rosenfield v. HSBC Bank, USA, 681 F.3d 1172, 1185 (10th Cir. 2012) ("We do not, however, read [TILA and Regulation Z] as establishing that notice is a *sufficient* condition for the exercise of the TILA rescission right. Read plainly, these provisions suggest only that the giving of notice is a *necessary* predicate act to the ultimate exercise of the right . . . ." (citations omitted)).

210. *See Keiran*, 720 F.3d at 728 ("Our interpretation of § 1635(f) creates no dissonance between the regulation and the statute. The regulation requires notice to the lender of an intent to rescind, and the statute requires that rescission be accomplished within three years or the right expires."); *Rosenfield*, 681 F.3d at 1185 ("'[B]y notifying the creditor . . . a borrower may properly alert the creditor of her *intent to rescind* the underlying transaction."); McOmie-Gray v. Bank of Am. Home Loans, 667 F.3d 1325, 1327 (9th Cir. 2012) ("[T]he statute and regulations contemplate that a borrower, who by sending notice of rescission has 'advanced a claim seeking rescission,' will seek a determination that rescission is proper." (citation omitted)).

211. *See Rosenfield*, 681 F.3d at 1186 ("[W]e cannot ignore the mandatory language of § 1635(f), which pertinently provides that the 'obligor's right of rescission *shall expire* three years after the date of consummation of the transaction or upon . . . sale of the property.'" (citation omitted)).

212. *See McOmie-Gray*, 667 F.3d at 1328 ("[U]nder the case law of this court and the Supreme Court, rescission suits must be brought within three years from the consummation of the loan . . . ."); *Rosenfield*, 681 F.3d at 1182 ("*Beach* is dispositive of the instant question . . . . [W]e must hold that the mere invocation of the right to rescission via a written letter, without more, is not enough to preserve a court's ability to effectuate (or recognize) a rescission claim after the three-year period has run.").

213. *See Rosenfield*, 681 F.3d at 1182 ("Ms. Rosenfield's position is not consistent with the effect of a strict repose period—which *Beach* held that § 1635(f) establishes *in this context*—one that operates to *completely* extinguish the right being claimed *after it lapses*."); *McOmie-Gray*, 667 F.3d at 1326 ("15 U.S.C. § 1635(f) is a three-year statute of repose, requiring dismissal of a claim for rescission brought more than three years after the consummation of the

A statute of repose bars legal action after a set period of time triggered by an event.[214] Furthermore, a statute of repose "terminates *any* right" to action or recovery after the expiration date by imposing an "*absolute* time limit."[215] Stated differently, a statute of repose prevents a party from bringing an action *or* raising a defense after the time period expires. In contrast, a statute of limitations is not absolute because it does not terminate the substantive right *or* the right to recover.[216] Instead, a statute of limitations only "makes the remedy unavailable" to the party.[217] In other words, a statute of limitations prevents a party from bringing an action *but* allows raising a defense after the time period expires.[218]

Perhaps the best way to understand the difference between a statute of repose and a statute of limitations is through the *Beach* decision. The Beaches stopped making payments on their refinanced loan five years after the loan's consummation.[219] Because five years exceeds the three-year time period for TILA's rescission, the Beaches admitted they could not bring a rescission action against the lender.[220] However, believing TILA's rescission to act as a statute of limitations, the Beaches argued they could use rescission as an affirmative defense in the lender's collection

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loan . . . .").

214. *See* 51 AM. JUR. 2D *Limitation of Actions* § 24 (2013) ("A statute of repose is designed to bar actions after a specified period of time has run from the occurrence of some event other than the injury which gave rise to the claim." (footnote omitted)).

215. *Id.* (emphasis added).

216. *See id.* § 20 ("A statute of limitations . . . does not extinguish the substantive or underlying right, or affect the right to recover." (footnotes omitted)).

217. *See id.* ("When the statute of limitations expires, it does not extinguish the cause of action, but instead, makes the remedy unavailable." (footnote omitted)).

218. *See id.* ("A statute of limitations does not take away rights, as such, but merely precludes the plaintiff from proceeding . . . although the plaintiff was not diligent enough, the right goes on, but the plaintiff simply cannot go to court in order to enforce it." (footnote omitted)).

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

220. *See id.* at 415 ("The Beaches concede that any right they may have had to institute an independent proceeding for rescission under § 1635 lapsed in 1989, three years after they closed the loan with the bank . . . .").

action brought after the three-year period expired.[221] The Supreme Court disagreed with the Beaches and determined that TILA's rescission functions instead as a statute of repose.[222] Therefore, the Beaches could not bring a rescission action *or* raise a defense after TILA's three-year period ended.[223] By reading *Beach* as deciding that TILA's rescission provision is a statute of repose, some circuits conclude that the borrower must file suit before the end of TILA rescission's three-year expiration period.[224]

3. TILA's Right of Rescission is a Statute of Repose Requiring Suit

Extending the precedential argument concerning *Beach*, supporters of the Notice-and-Filing Approach argue that TILA's rescission provision, as a statute of repose, requires a borrower to file suit.[225]

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221. *See id.* ("The Beaches . . . argue that the restriction to three years in § 1635(f) is a statute of limitation governing only the institution of suit and accordingly has no effect when a borrower claims a § 1635 right of rescission as a 'defense in recoupment' to a collection action.").

222. *See id.* at 417

> Section 1635(f), however, takes us beyond any question whether it limits more than the time for bringing a suit, by governing the life of the underlying right as well. The subsection says nothing in terms of bringing an action but instead provides that the "right of rescission [under the Act] 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.

223. *See id.* at 412 ("We . . . hold that § 1635(f) completely extinguishes the right of rescission at the end of the 3-year period.").

224. *See* McOmie-Gray v. Bank of Am. Home Loans, 667 F.3d 1325, 1329 (9th Cir. 2012) ("Section 1635(f) is therefore not merely a statute of limitations—it *completely extinguishes* the underlying right itself." (emphasis added)); Rosenfield v. HSBC Bank, USA, 681 F.3d 1172, 1183 (10th Cir. 2012)

> Indeed, we believe that it is the filing of an action in a court (or perhaps a defensive assertion of the rescission right in a court) that is required to invoke the right limited by the TILA statute of repose; the concept of repose itself (especially in the context here) fundamentally *limits* the ability to file an action.

225. *See McOmie-Gray*, 667 F.3d at 1326 ("[Section] 1635(f) is a three-year statute of repose, requiring dismissal of a claim for rescission brought more than three years after the consummation of the loan secured by the first trust deed, regardless of when the borrower sends notice of rescission.").

In response, supporters of the Notice-Only Approach claim that, even if TILA's rescission provision operates as a statute of repose, it does not require filing suit.[226] Specifically, a statute of repose requires a person to act but does not necessarily require that action to be a lawsuit.[227] For example, a New York law containing a statute of repose gives a bank customer one year to object to an unauthorized payment for a wire transfer after receiving notice of the transaction.[228] In this example, a customer has one year to *notify* the bank of her objection to the transfer,[229] an action that does not require filing suit. Accordingly, Notice-Only supporters argue that the relevant statute will dictate the action required before the statute of repose's expiration.[230]

In the context of TILA, supporters of the Notice-Only Approach argue that the statute only requires notice of rescission.[231] To bolster the notice-only claim, supporters argue that Congress explicitly states when filing suit is required:

> Congress may choose to use a statute of repose to make the filing of a lawsuit necessary in order to exercise a statutory

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226. *See* Keiran v. Home Capital, Inc., 720 F.3d 721, 732 (8th Cir. 2013) (Murphy, J., concurring and dissenting) ("It also cannot be inferred from the fact that § 1635 is a statute of repose that homeowners must sue to exercise their right of rescission."); CFPB Brief, *supra* note 138, at *11

> Even though *Beach* is not directly on point, courts have interpreted that decision to hold that § 1635(f) is a "statute of repose." That, they reason, *by definition* requires the filing of a lawsuit. But statutes of repose often are satisfied by acts other than initiating litigation. Thus, even assuming § 1635(f) is a "statute of repose," it may be satisfied by providing notice to the lender.

227. *See Keiran*, 720 F.3d at 732 (Murphy, J., concurring and dissenting) ("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."); CFPB Brief, *supra* note 138, at *19 ("While § 1635(f) has features of a statute of repose, there is no general rule that a statute of repose can be satisfied only by filing a lawsuit, and *Beach* should not be read to require that result.").

228. N.Y. U.C.C. LAW § 4-A-505 (McKinney 2012).

229. *See id.* (finding the statute of repose barred the customer's claim because "he failed to notify Merrill Lynch of his objections within one year").

230. *See Keiran*, 720 F.3d at 732 (Murphy, J., concurring and dissenting) ("The nature of the required action depends on what the statute provides.").

231. *See id.* ("TILA unambiguously provides that the right of rescission is exercised 'by notifying the creditor, in accordance with the regulations of the [Consumer Financial Protection] Bureau, of his intention to do so.'" (alteration in original) (citation omitted)).

> right, but when it has chosen to do so, it has done it explicitly. Section 413 of ERISA provides an example of a statute of repose in connection with breaches of fiduciary duties: "No action may be commenced" more than six years after the alleged breach of fiduciary duty occurred.[232]

Because Congress did not explicitly refer to a lawsuit in TILA's rescission provision,[233] and because the only action mentioned involves notice,[234] a borrower's notice to a lender satisfies the action required under TILA rescission as a statute of repose.

Although the Notice-Only Approach may appear convincing, in practice it destroys the overall purpose of a statute of repose. A statute of repose prevents a party from bringing an action *or* raising a defense after a set time period expires, thereby imposing an absolute time limit.[235] Applied to the TILA context, as clarified by the Supreme Court's *Beach* decision, the three-year time limit on the borrower's right of rescission functions as an absolute bar.[236] Stated differently, a borrower's rescission rights *completely* expire three years after loan consummation.[237] Yet under the Notice-Only Approach, as long as the borrower provides the lender with notice *before* TILA's three-year period, the borrower can file a rescission claim *after* that three-year period.[238] By extending the borrower's ability to bring actions after the three-year period, the Notice-Only Approach

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232. *Id.* (citation omitted).

233. *See id.* at 733 ("TILA contains no language even hinting that a lawsuit is required to exercise the right of rescission. Neither TILA nor Regulation Z mention at any point the need for a court filing.").

234. *See id.* (referring to TILA and Regulation Z and stating that "[t]he plain language of the statute and the regulation both unambiguously require *only* written notice to effectuate rescission" (emphasis added)).

235. *See supra* notes 214–15 and accompanying text (describing the effect of a statute of repose).

236. *See* Beach v. Ocwen Fed. Bank, 523 U.S. 410, 417 (1998) (stating that TILA's rescission provision "govern[s] the life of the underlying right" and talks "of a right's duration" in "straightforward" terms).

237. *See id.* at 419 ("We respect Congress's manifest intent by concluding that the Act permits no federal right to rescind, *defensively or otherwise*, after the 3-year period of § 1635(f) has run." (emphasis added)).

238. *See* Gilbert v. Residential Funding LLC, 678 F.3d 271, 276 (4th Cir. 2012) (recognizing that the borrowers exercised their right of rescission by providing notice to the creditor *before* TILA's three-year period and therefore the borrowers could file suit *after* TILA's three-year period expired).

undermines the Court's classification of TILA's rescission provision as a statute of repose *and* violates the purpose of a statute of repose to function as an absolute time limit. Unlike the Notice-Only Approach, the Notice-and-Filing Approach harmonizes the Court's *Beach* decision and the purpose of a statute of repose by requiring borrowers to provide notice and file suit *before* the three-year period expires.

4. The Equitable Remedy of Rescission

Advocates of the Notice-and-Filing Approach compare TILA's right of rescission to common-law rescission because, in both contexts, rescission functions as an equitable remedy that restores the parties to the status quo ante.[239] Stated differently, rescission restores the parties to their precontractual positions by requiring each party to return what she received from the other party.[240] In TILA's rescission context, restoring the parties to the status quo ante involves the borrower returning the lender's loan proceeds and the lender releasing its security interest in the borrower's principal dwelling.[241]

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239. *See* Rosenfield v. HSBC Bank, USA, 681 F.3d 1172, 1183 (10th Cir. 2012) ("Rescission in its most basic form is an equitable remedy designed to return the parties to the status quo prevailing before the existence of an underlying contract."); Shepard, *supra* note 35, at 222 ("[C]ourts have concluded that, in one respect, TILA rescission and common law rescission are coterminous: both attempt to return the parties to the *status quo ante*."). Note that "status quo ante" is defined as "[t]he situation that existed before something else (being discussed) occurred." BLACK'S LAW DICTIONARY 1448 (8th ed. 2004).

240. *See* Sherzer v. Homestar Mortg. Servs., 707 F.3d 255, 265 (3d Cir. 2013) ("One of the goals of § 1635 is 'to return the parties most nearly to the position they held prior to entering into the transaction.'" (citation omitted)); *Rosenfield*, 681 F.3d at 1184 ("And to effectuate a rescission in the general remedial sense means that 'each party [must] return to the other what he has received from the other by way of contractual performance.'" (alteration in original) (citation omitted)).

241. *See* Shepard, *supra* note 35, at 189 ("TILA, moreover, allows borrowers who have suffered a material disclosure violation to unwind the loan transaction up to three years following the loan closing."); *id.* at 190

> Under TILA, after the borrower notifies the lender or its assignee of her intent to rescind, section 1635(b) and its implementing regulation require the lender to cancel its security interest in the borrower's home. Only after the creditor complies with its obligations under the

Because rescission's equitable goal involves restoring the parties to the status quo ante, Notice-and-Filing Approach supporters argue that rescission is not appropriate when achieving the status quo ante becomes too difficult.[242] However, the Notice-Only Approach allows the borrower to provide the lender with notice then file suit after TILA's three-year period.[243] Allowing the borrower to file a rescission suit after the three-year period allows more time to pass, thereby increasing the likelihood that the underlying circumstances of both parties will have substantially changed.[244] For example, a new creditor may have obtained a security interest in the principal dwelling.[245] The increased likelihood of changes in the underlying circumstances complicates restoring the status quo ante, thereby frustrating the goal of rescission as an equitable remedy.[246] In contrast, the Notice-and-Filing Approach recognizes that TILA provides the borrower with a "generous three-year repose period"[247] during which the borrower and lender can, with relative ease, achieve the status quo ante *before* the underlying circumstances change too much.

> statute must the consumer return the net loan proceeds (the loan principal minus all costs and finance charges paid by the consumer over the loan term) to the creditor. (footnotes omitted).

242. *See Rosenfield*, 681 F.3d at 1184 ("The primary justification of rescission, however, is 'remedial economy' . . . . Consequently, it is not an appropriate remedy in circumstances where its application would lead to prohibitively difficult (or impossible) enforcement.").

243. *See id.* at 1185 (stating that under the Notice-Only Approach, a borrower can provide written notice to a lender then "decide[] later—at some unknown, and perhaps distant, point in the future—to effectuate the rescission right through judicial process").

244. *See id.* ("[I]t is self-evident that when a borrower who has provided notice to a creditor decides later—at some unknown, and perhaps distant, point in the future—to effectuate the rescission right through judicial process, the underlying circumstances in no small number of cases are likely to have changed significantly.").

245. *See id.* ("Just to provide one example: new actors may have come onto the field post-transaction and obtained some interest in the loan or the underlying property.").

246. *See id.* ("And, as a consequence of this reality, enforcement would likely be costly and difficult. In short, such an outcome is not consistent with the general goal and application of a rescission remedy." (footnote omitted)).

247. *Id.* at 1187.

One scholar suggests that TILA and common-law rescission are different because TILA liberalizes many of the common-law rescission requirements.[248] For example, because TILA imposes strict liability on lenders for disclosure violations, borrowers do not have to plead their TILA rescission claims with particularity.[249] Furthermore, a borrower using the common law's right of rescission could not likely rescind a loan transaction years after the closing.[250] Therefore, distinctions exist between rescission in the TILA versus the common law context.

While undoubtedly these differences exist, they strengthen the argument for the Notice-and-Filing Approach. By relaxing the pleading standard for rescission claims, TILA makes it easier for borrowers to validly exercise rescission in qualifying transactions. Furthermore, by giving the borrower a longer length of time to exercise rescission than would be allowed in the common-law context, TILA increases a borrower's bargaining power with the lender. Accordingly, both changes from the common law's rescission favor borrowers. Therefore, the Notice-and-Filing Approach's requirement that borrowers provide notice and file suit within three years merely maintains the balance in the borrower–lender relationship by not allowing borrowers to retain indefinitely the right to enjoy these relaxed provisions.

5. The Notice-Only Approach Clouds Title

The Notice-and-Filing Approach limits the uncertainty of title in the context of TILA's rescission. As a general matter, rescission can negatively affect, or cloud, title to the principal dwelling—it remains unclear who has title and whether the title is still encumbered by the security interest.[251] However, as the

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248. *See* Shepard, *supra* note 35, at 189 ("TILA substantially liberalizes these [common-law] requirements.").

249. *See id.* ("TILA substantially liberalizes these [common-law] requirements. TILA rescission claims need not be pleaded with particularity. TILA violations are measured by a strict liability standard. Consequently, creditors will be liable even for 'technical or minor' violations.").

250. *Id.* ("It is unlikely that a borrower seeking to rescind under the common law could bring a rescission action one, two, or three years following the loan transaction, as TILA's rescission provisions permit." (footnotes omitted)).

251. *See* Rosenfield v. HSBC Bank, USA, 681 F.3d 1172, 1186–87 (10th Cir.

Beach Court indicated, Congress chose to limit the potential duration of clouded title by imposing a three-year time limit for exercising rescission in TILA.[252] By requiring borrowers to provide notice and file suit within TILA's three-year period, the Notice-and-Filing Approach respects the limit on clouded title that Congress prescribed in TILA.

Supporters of the Notice-and-Filing Approach criticize the Notice-Only Approach because it creates *further* uncertainty regarding title to the principal dwelling.[253] By giving a borrower the unilateral power of rescission through notice and by allowing a borrower to wait indefinitely to file suit,[254] the Notice-Only Approach extends the amount of time a borrower can exercise rescission, thereby furthering uncertainty in regards to title.[255]

Two responses exist to support the Notice-Only Approach in regards to the clouded title problem. First, a state statute of limitations will impose a time limit on when a borrower can file suit,[256] thereby preventing the borrower from waiting indefinitely. Second, lenders can clear a clouded title by filing

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2012) (stating that "rescission has the capacity to negatively affect the certainty of title in a foreclosure sale—and potentially thereafter").

252. *See* Beach v. Ocwen Fed. Bank, 523 U.S. 410, 418–19 (1998) ("Since a statutory rescission right could cloud a bank's title on foreclosure, Congress may well have chosen to circumscribe that risk . . . .").

253. *See Rosenfield*, 681 F.3d at 1186 ("Contrary to the statute's concerns, as expressed in its language, Ms. Rosenfield's reading would allow the right of rescission to operate broadly to 'cloud a bank's title on foreclosure' . . . ." (citation omitted)).

254. *See supra* note 243 and accompanying text (describing how, under the Notice-Only Approach, a borrower can wait indefinitely to file suit as long as she provided the lender with notice within TILA's three-year period).

255. *See Rosenfield*, 681 F.3d at 1186 (stating that the Notice-Only Approach "would permit the time period for solidifying the legal relationship between lenders and borrowers to be effectively enlarged . . . ."); *id.* at 1187

> [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, would indirectly enlarge the congressionally established three-year time period under TILA, and it could work to cloud the title of the property for an indefinite period of time. (footnote omitted).

256. *See supra* notes 185–87 and accompanying text (describing how courts can apply a state statute of limitations where a federal statute does not provide one, thereby preventing a borrower from waiting indefinitely to file suit under TILA).

suit.[257] For example, a lender who believes the borrower has invalidly exercised rescission can sue to confirm the invalidity rather than wait and see if the borrower will file suit first.[258] In sum, the Notice-Only Approach prevents an indefinite period of clouded title because state statutes of limitations will apply and lenders have the option to file suit.

The Notice-Only Approach's state-statutes-of-limitations argument, however, fails to solve the clouded-title problem. Although a state statute of limitations would admittedly prevent a borrower from waiting indefinitely to file suit, the state statute could potentially extend the borrower's ability to file suit past TILA's three-year period. For example, assume an applicable state statute-of-limitations period is five years. Under the Notice-Only Approach, the borrower in this state could provide the lender with notice *then* wait two years *after* TILA's three-year period and still file a valid claim. The potential for a state statute of limitations to extend TILA's three-year period can lead to further clouding of title.

The Notice-Only Approach's argument that the lender can clear a clouded title by filing suit undermines the argument that the Notice-Only Approach conserves judicial resources. Supporters of the Notice-Only Approach argue that the Notice-and-Filing Approach incentivizes borrowers to involve courts in rescission immediately rather than trying to engage in private negotiations with lenders.[259] To clear title, however, Notice-Only

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257. *See* Sherzer v. Homestar Mortg. Servs., 707 F.3d 255, 265 (3d Cir. 2013) ("A lender who believes an obligor's notice of rescission is invalid may choose to file suit to resolve any uncertainty."); *id.* at 266–67 ("Once alerted to the cloud on its title, a lender could sue to confirm that the obligor's rescission was invalid or do nothing and assume the risk that a court might later rule that the rescission was valid."); Keiran v. Home Capital, Inc., 720 F.3d 721, 734 (8th Cir. 2013) (Murphy, J., concurring and dissenting) ("[L]enders are free to file a declaratory or quiet title action at any time to establish conclusively whether a homeowner's exercise of his right of rescission is valid. In other words, the 'cloud' on title lasts precisely so long as the lender wishes it to last.").

258. *See Sherzer*, 707 F.3d at 266–67 ("[L]enders in these circumstances have options to resolve that uncertainty. Once alerted to the cloud on its title, a lender could sue to confirm that the obligor's rescission was invalid or do nothing and assume the risk that a court might later rule that the rescission was valid.").

259. *See supra* note 194 and accompanying text (criticizing the Notice-and-Filing Approach because it encourages consumers to involve courts immediately instead of trying to first enter into private negotiations with the lender to avoid

supporters suggest the lender should file suit.[260] Does this argument not incentivize lenders to involve courts in rescission immediately? It seems this argument discourages lenders from entering into private negotiations with borrowers, thereby undermining the conservation of judicial resources argument.

6. The Notice-Only Approach Increases Costs for All Parties

Supporters of the Notice-and-Filing Approach argue that the Notice-Only Approach disproportionately favors borrowers.[261] By disproportionately favoring borrowers, the Notice-Only Approach detrimentally affects lenders in two ways. First, lenders will likely file suit to resolve clouded title problems[262] or to prevent a borrower from "pre-filing" their rescission claim,[263] thereby imposing litigation costs on lenders as well as borrowers. Second, lenders will incur the cost of providing an interest-free, fee-free mortgage to a borrower who validly rescinds a loan.[264] Lenders will then pass these costs on to future borrowers, thus increasing costs for all parties involved in loan transactions.[265]

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courts altogether).

260. *See supra* note 258 and accompanying text (stating that a lender who believes a borrower has invalidly exercised rescission has the option to file suit to clear title).

261. *See supra* notes 174–86 (stating that the Notice-Only Approach provides a borrower with a unilateral power to rescind and allows them to file suit after TILA's three-year period).

262. *See supra* note 258 and accompanying text (providing the Notice-Only supporters' argument that lenders can file suit to clear title rather than wait for the borrower to act).

263. *See* ABA Brief, *supra* note 172, at *9 ("The lender's only option to avoid this problem will be to litigate the matter itself, immediately upon receiving the rescission notice, by bringing its own costly action every time a rescission notice is filed—even if the notice is facially without merit.").

264. *See id.* at *14 ("By permitting a borrower to rescind upon notice, the borrower can pre-file a notice and then—years later—seek the return of all of their payments and interest, having lived rent-free at the expense of the lender.").

265. *See id.* at *15 (stating that the Notice-Only Approach "will increase the costs to lenders . . . these costs will be borne by borrowers at the closing table. . . . And TILA rescission serves an 'insurance function for consumers' that 'increase[s] the seller's marginal costs,' which will 'tend to raise the price' for the loan." (alteration in original) (citation omitted)); Sherzer v. Homestar Mortg. Servs., 707 F.3d 255, 267 (3d Cir. 2013) ("[P]ermitting obligors to rescind by

Supporters of the Notice-Only Approach recognize the potential for increased costs.[266] However, they argue that an increase in costs does not justify disregarding TILA's text.[267] In fact, many of TILA's regulations increase costs, not just the right of rescission.[268] Finally, Congress—not the courts—determines these costs.[269]

7. The Judiciary's Involvement Benefits All Parties

The Notice-and-Filing Approach requires the judiciary's involvement, which benefits *all* parties involved in the loan transaction. First, all parties can benefit from a court's equitable powers under TILA to modify the borrower's repayment obligations.[270] Because TILA requires the borrower to return the loan proceeds to the lender during rescission,[271] financially burdened borrowers may not have the means to fulfill this obligation.[272] However, requiring the borrower to file suit means a court can provide the borrower with the option to set up installment payments with reasonable interest rates over several

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written notice could potentially impose additional costs on banks . . . . This may, in turn, be more costly for borrowers insofar as lenders—like all businesses—pass along costs occasioned by regulation or taxation to their customers.").

266. *See Sherzer*, 707 F.3d at 264 (stating that supporters of the Notice-and-Filing Approach "argue that this interpretation may create increased uncertainty with respect to title, and could increase costs for both lenders and consumers. We find . . . [this] concern, while likely valid, does not permit us to disregard the text of § 1635").

267. *See id.* at 267 ("[T]he fact that this approach may be more costly is not, in and of itself, a reason to disregard the text of the statute.").

268. *See id.* ("Many TILA regulations increase costs for lenders (and, in turn, consumers) . . . .").

269. *See id.* ("[I]t is for Congress—not the courts—to determine whether those increases are warranted.").

270. *See* Shepard, *supra* note 35, at 182 ("There are significant benefits for all stakeholders—borrowers, lenders, and communities alike—associated with modifying repayment obligations.").

271. *See supra* note 241 and accompanying text (stating that, under TILA, a borrower provides the lender with rescission notice, the lender cancels the security interest in the principal dwelling, and then the borrower must return the net loan proceeds).

272. *See* Shepard, *supra* note 35, at 222 ("When borrowers are underwater and unable to tender either through a refinancing or a sale of the home, they are incapable of restoring the lender to its pre-mortgage loan transaction position.").

years.[273] These installment payments benefit all parties by reducing harmful foreclosures.[274]

Second, a court following the Notice-and-Filing Approach can mediate the "hostage exchange" relationship between a borrower and lender during rescission.[275] In a rescission scenario, the borrower will be reluctant to return the loan proceeds to the lender because the borrower will lose her bargaining power.[276] Similarly, a lender will be reluctant to release its security interest in the borrower's property because the lender will become an unsecured creditor and lien creditors can attach to the collateral.[277] Because both parties have strong incentives to keep their leverage or "hostage,"[278] a court can step in to referee the rescission.[279]

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273. *See id.* at 182 ("Non-bankruptcy courts, which handle the vast majority of TILA rescission actions, should use their equitable authority under TILA to modify borrowers' repayment obligations by allowing borrowers to tender in installments, over a period of years, and at reasonable interest rates." (footnote omitted)).

274. *See id.* at 182–83 ("[M]odify[ing] borrowers' repayment obligations . . . reduces foreclosures that harm borrowers, lenders, and communities and ensures that TILA's consumer-protective mandate will remain viable even in a depressed housing market.").

275. *See id.* at 190 ("The rescission process set forth in the statute in many ways resembles a hostage exchange . . . .").

276. *See id.* ("If the borrower tenders to a creditor who refuses to release its security interest in the borrower's home, the borrower . . . [has] relinquished a large lump sum of cash and all of her bargaining power . . . ." (footnote omitted)).

277. *See id.* at 190–91 ("[I]f the lender releases its security interest before the borrower tenders, the lender is rendered a vulnerable, unsecured creditor, whose collateral is subject to attachment by lien creditors." (footnotes omitted)).

278. *See id.* at 190 ("[E]ach captor (the borrower or creditor) is reluctant to give up her hostage (the tender obligation or security interest, respectively) before the other party complies, since unrequited release risks a near-complete loss of leverage.").

279. *See* Daniel Rothstein, Comment, *Truth in Lending: The Right to Rescind and the Statute of Limitations*, 14 PACE L. REV. 633, 636 (1994) (stating that TILA provides "specific procedures that the creditor must follow if the consumer rescinds" but recognizes that "[c]ourts are specifically authorized to modify the procedure in equity").

C. Recommending the Notice-and-Filing Approach

The post-*Beach* TILA rescission landscape contains two important elements. First, under certain conditions, TILA's rescission statute gives a borrower an extended right of rescission for three years.[280] Second, under the Supreme Court's *Beach* decision, TILA's rescission statute functions as a statute of repose, which *completely* terminates a borrower's ability to exercise rescission after the three-year period.[281] When choosing between the Notice-Only and the Notice-and-Filing Approach, courts should consider which approach remains compatible with this landscape.

The Notice-Only Approach remains incompatible with the *Beach* Court's characterization of TILA's rescission as a statute of repose. Notice-Only supporters admit that, if the borrower provides the lender with notice within TILA's three-year period, then the borrower can file suit after the three-year period, subject to applicable state statutes of limitations.[282] Notice-Only supporters justify this conclusion by drawing a distinction between exercising and confirming rescission, where filing suit after the three-year period merely confirms that a valid rescission occurred.[283] Remember that a statute of repose "terminates *any* right" to action or recovery after the time period expires.[284] But how can a borrower file suit after TILA's three-year time period expires if all of her rights under the statute of repose have already terminated? Logic dictates that a borrower cannot retain

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280. *See supra* notes 60–63 and accompanying text (stating that borrowers have an extended right of rescission that lasts for three years after loan consummation if the lender fails to take certain actions).

281. *See* Beach v. Ocwen Fed. Bank, 523 U.S. 410, 417 (1998) (stating that TILA's rescission provision "govern[s] the life of the underlying right" to bring suit and talks of "a right's duration"); Rosenfield v. HSBC Bank, USA, 681 F.3d 1172, 1182 (10th Cir. 2012) (stating that *Beach* categorized TILA's rescission provision as a strict repose period "that operates to *completely* extinguish the right being claimed *after it lapses*"*).*

282. *See supra* notes 185–87 and accompanying text (stating that courts have a policy of applying a state statute of limitations to a federal law lacking a limitations period and this practice will prevent borrowers from waiting indefinitely to file suit).

283. *See supra* Part IV.A.8 (arguing that a barrower can to provide notice before yet file suit after TILA's three-year rescission period).

284. 51 AM. JUR. 2D *Limitation of Actions* § 24 (2013).

a right to file suit after the statute of repose's three-year period expires under TILA rescission. By contradicting the statute of repose articulated in *Beach*, the Notice-Only Approach fails to adhere to the post-*Beach* TILA rescission landscape.

In addition to theoretical concerns, extending a borrower's ability to file suit after TILA's three-year period, *for any reason*, leads to grave practical consequences. First, a borrower's extended time makes it much more difficult to restore the parties to the status quo ante, thus frustrating the equitable nature of rescission.[285] Second, TILA's three-year period already clouds the principal dwelling's title[286] and extending a borrower's time to file suit exacerbates this problem. Third, increased costs will result for all parties as lenders pass on the expenses they incur by providing interest-free, fee-free mortgages and filing suit to address clouded title problems as well as pre-filed rescission attempts.[287] Because of theoretical and practical concerns, courts should *not* adopt the Notice-Only Approach.

In contrast, the Notice-and-Filing Approach respects the post-*Beach* TILA rescission landscape. Under this approach, if a borrower does not provide notice and file suit within TILA's three-year period, then the borrower's rescissions rights expire.[288] This notion adheres to the Supreme Court's statute-of-repose classification because the borrower's rights expire when TILA's three-year time period ends, rather than extending beyond. By aligning with the statute of repose articulated in *Beach*, the Notice-and-Filing Approach fits neatly into the post-*Beach* TILA rescission landscape.

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285. *See supra* Part IV.B.4 (stating that restoring the parties to the status quo ante—one of the goals of equitable rescission—becomes more difficult to achieve as time passes).

286. *See supra* note 251 and accompanying text (describing the ability of rescission to cause uncertainty on title).

287. *See supra* notes 262–65 and accompanying text (stating that the Notice-Only Approach will increase lenders' costs and that lenders will pass along these costs to borrowers); ABA Brief, *supra* note 172, at *9 (stating that "borrowers will have no disincentive to attempt a meritless rescission; they will be free to file their notice and wait").

288. *See supra* note 100 and accompanying text (providing a court's determination that a borrower must file suit for rescission before TILA's three-year period expires).

As a practical matter, the Notice-and-Filing Approach maintains the balance in the borrower–lender relationship. Although TILA exists as a remedial statute favoring borrowers,[289] rescission *within* TILA stands as an equitable remedy designed to balance the interests of *both* parties.[290] TILA's rescission, in conjunction with the Notice-and-Filing Approach, adheres to rescission's equitable nature. Under TILA rescission, the borrower benefits from relaxed rescission standards (as compared to the common law) [291] and a generous three-year rescission period.[292] By providing the borrower with these benefits, TILA gives the borrower bargaining power over the lender.[293] Under the Notice-and-Filing Approach, the borrower's benefits are limited by the three-year statute of repose, which extinguishes the borrower's rescission rights while limiting the potential for clouded title.[294] By limiting the borrower's benefits, the Notice-and-Filing Approach prevents the borrower from abusing her bargaining power to the detriment of the lender and ultimately, the lending market. Without the Notice-and-Filing Approach's limits on the borrower's benefits, the borrower would have a disproportionate amount of power over the lender,[295] resulting in

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289. *See supra* Part IV.A.5 (identifying the Notice-Only Approach argument that TILA must be construed to favor borrowers because it is a remedial statute).

290. *See supra* Part IV.B.4 (describing the Notice-and-Filing Approach argument that rescission is an equitable remedy designed to return both parties to the status quo ante).

291. *See* Shepard, *supra* note 35, at 223 ("TILA substantially relaxes the requirements for seeking relief under the common law and imposes liability on lenders on a strict liability basis in order to encourage lenders to disclose the key terms of mortgage loan transactions clearly, consistently, and completely." (footnotes omitted)).

292. *See supra* note 250 and accompanying text (describing the borrower's right to bring a TILA rescission claim up to three years after loan consummation and how that ability is not likely under the common law).

293. *See* Shepard, *supra* note 35, at 223 (stating that TILA rescission represents "a private right of action with a severe remedy" and encourages consumers to "police the marketplace").

294. *See supra* note 252 and accompanying text (stating that the *Beach* Court recognized Congress's concern of limiting TILA's rescission because of the potential to cloud title).

295. *See* ABA Brief *supra* note 172, at *12 ("Congress anticipated that borrowers would receive a measure of relief, but not by warping the rescission rights into a never-ending cause of action."); *id.* at *9 (stating that the Notice-

increased costs that will ultimately affect all parties, including the borrower.[296] Therefore, TILA, coupled with the Notice-and-Filing Approach, maintain the balance mandated by equitable rescission.

Although strong theoretical and practical arguments justify the Notice-and-Filing Approach, Notice-Only supporters do raise three concerns that merit attention. First, and perhaps the strongest, involves the concern that TILA's text and structure never reference filing a lawsuit in regards to exercising rescission.[297] However, this structural argument fails when comparing TILA's three-day and three-year rescission. Specifically, a justiciability concern explains the exercise of three-day rescission without filing suit but this same concern is absent in the three-year rescission context.[298] Accordingly, the structure of TILA remains unhelpful in justifying the Notice-Only Approach.

Furthermore, the Supreme Court has made it clear that the text of a statute should not be interpreted in a vacuum, but instead should be considered based on the entire law's policy and objective.[299] Accordingly, the post-*Beach* TILA rescission landscape justifies adopting the Notice-and-Filing Approach because it prevents the borrower from circumventing TILA's three-year statute of repose. Furthermore, rescission's equitable nature also supports the Notice-and-Filing Approach by balancing both parties' interests.[300]

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and-Filing Approach's "requirement of litigation imposes some discipline on potential plaintiffs, requiring them to consider whether it is worth investing time and money in futile claims").

296. *See supra* note 265 and accompanying text (stating that the increased cost to lenders will be passed on to borrowers in future loan transactions).

297. *See supra* Part IV.A.1–2 (recognizing that TILA's text explicitly requires written notice, the text makes no reference to filing suit in the rescission context, and the statute's structure suggests that lawsuits are not necessary to exercise rescission).

298. *See supra* notes 154–55 and accompanying text (noting that a lawsuit requirement for TILA's three-day rescission would create standing problems that are not present in TILA's three-year rescission context).

299. *See* U.S. Nat'l Bank of Or. v. Indep. Ins. Agents of Am., Inc., 508 U.S. 439, 455 (1993) (stating that the Supreme Court, when "expounding a statute . . . must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy").

300. *See supra* Part IV.B.4 (stating that one of rescission's equitable goals

Second, although the CFPB, a major player in the lending industry, interprets TILA as supporting the Notice-Only Approach,[301] courts are not required to give a federal agency's interpretation *Chevron* deference when the statute is unambiguous.[302] Furthermore, one circuit court has refused to give CFPB's Regulation Z *Chevron* deference before,[303] suggesting the CFPB's interpretations have been previously unpersuasive. Accordingly, the CFPB's support of the Notice-Only Approach is not dispositive on the issue of how the Supreme Court should resolve the circuit split.

Third, the Notice-Only Approach conserves judicial resources by encouraging borrowers to enter into private negotiations with lenders, as opposed to immediately seeking judicial intervention.[304] However, TILA's litigation history indicates that lenders "routinely" ignore borrower's notice or deny they have violated TILA.[305] Therefore, regardless of the approach chosen, the parties will frequently involve courts to determine the rescission's validity.[306] Furthermore, the borrower's principal dwelling represents the security interest at stake in TILA's

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involves restoring both parties to the status quo ante).

301. *See supra* Part IV.A.4 (arguing that the CFPB's endorsement strengthens support for adoption of the Notice-Only Approach).

302. *See supra* note 166 and accompanying text (explaining *Chevron* deference).

303. *See supra* note 167 and accompanying text (describing a case where a circuit court of appeals refused to give *Chevron* deference to a CFPB interpretation because it conflicted with TILA's text).

304. *See supra* Part IV.A.7 (implying that the Notice-Only Approach saves judicial resources because it does not incentivize borrowers to involve courts in rescission immediately).

305. *See* Shepard, *supra* note 35, at 193 ("Although TILA allows consumers to initiate the rescission process without a court's intervention merely by sending a cancellation notice to the holder of the note, creditors routinely ignore the rescission notice or respond by denying that they have violated the statute." (footnotes omitted)); Keiran v. Home Capital, Inc., 720 F.3d 721, 734 (8th Cir. 2013) (Murphy, J., concurring and dissenting) ("No doubt borrowers may sometimes make rescission claims without any valid basis, but lenders may also deny them without legal right or might take advantage of uninformed consumers.").

306. *See* Shepard, *supra* note 35, at 193 ("[E]ven though rescission under TILA is a 'non-judicial' remedy, courts frequently are forced to decide whether or not the lender has committed a violation triggering a borrower's right of rescission." (footnotes omitted)).

rescission context.[307] For public policy reasons, would it not be wiser to involve courts, as a mediator, when a borrower risks losing her principal dwelling? Due to the likelihood of court involvement for either approach and the presence of the borrower's principal dwelling, it appears the wiser approach may be to involve the courts in *every* exercise of rescission to protect the borrower.

V. Conclusion

As the economy recovers from the Great Recession, nonpurchase transactions, such as home-equity loans, are on the rise.[308] Many borrowers will meet the requisite conditions and qualify for TILA's three-day right of rescission.[309] Furthermore, if lenders are not providing these borrowers with a right-to-rescind notice along with TILA's required material disclosures, then TILA extends the borrower's right of rescission to three years.[310]

Until the Supreme Court resolves the circuit split, lenders should proceed with caution—especially if they operate in a jurisdiction that follows the Notice-Only Approach. Borrowers in notice-only jurisdictions can employ the nuclear option: send the lender a notice of rescission before TILA's three-year period then wait and file suit afterwards.[311] In response, lenders should pay

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307. *See supra* note 52 and accompanying text (identifying conditions for TILA's rescission right, including that the borrower's principal dwelling secures the loan).

308. *See* Christine Layton, *As Homeowner Equity Rebounds, Home Equity Loans Return*, U.S. FINANCE POST (Jan. 21, 2014), http://usfinancepost.com/as-homeowner-equity-rebounds-home-equity-loans-return-12487.html#CrVSGTL46HeQx2gQ.99 (last visited Sept. 24, 2014) (stating home equity loan activity "increased 30.8% during the first nine months of 2013" as compared to 2012 and that new home equity lending is expected to reach $60 billion in 2013) (on file with the Washington and Lee Law Review).

309. *See supra* notes 49–54 and accompanying text (providing the three conditions that must be met for borrowers to qualify for TILA's right of rescission).

310. *See supra* notes 60–62 and accompanying text (stating that a borrower's rescission extends to three years under TILA if the lender fails to deliver required material disclosures or the right to rescind notice).

311. *See supra* notes 125–33 and accompanying text (providing a representative case where a rescinding borrower provided the lender with notice before and filed suit after TILA's three-year period, yet the court held that the

careful attention to communications sent by borrowers, as they may be exercising rescission. Furthermore, lenders may want to consider filing suit to seek to clear problems associated with clouded title on the security interest. Hopefully, courts will join the Courts of Appeals for the Eighth, Ninth, and Tenth Circuits in adopting the Notice-and-Filing Approach so the borrower–lender relationship will remain balanced, in accordance with rescission's equitable nature.

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borrower validly exercised rescission).