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Striking a Balance: How Equitable Doctrine Restores the Purposes of TILA’s Rescission Right

Saif Alaqili†

INTRODUCTION

Imagine that you are interested in acquiring a loan. In order to obtain that loan, you offer a security interest in your home as collateral. At the time of filing, your lender fails to accurately and completely disclose the full credit terms or provide legally required forms. This omission could consist of anything from failure to fully disclose a variable interest rate to failure to inform you of your very right to rescind the loan. In either scenario, the lender’s error or omission would significantly disadvantage you. In some cases, the lender’s mistake might even place you in a position where you are unable to pay off your loan. Whether deliberately or due simply to ineptitude, the lender has pulled a veil over your eyes to convince you to create a security interest in your home under “favorable” terms in exchange for the loan. These lending practices expose borrowers to enormous liability and are particularly reprehensible when considering that the borrower’s principal dwelling secures the loan and, therefore, default on the loan risks foreclosure of the borrower’s home. This illustrates the basic inequity underlying deceptive lending practices.

To address unfair lending practices like these, Congress enacted a series of consumer protection laws that removed incentives to engage in such deceptions and provided remedies for victims. Specifically, Congress created the Truth in Lending Act (TILA) “to strengthen the national economy by enhancing the informed use of credit” and “requir[ing] creditors to

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Provisions within TILA require lending entities to make certain “material disclosures” to borrowers who offer a security interest in their principal dwelling. When lenders fail to make these disclosures accurately or provide certain forms, TILA provides borrowers a limited right to rescind the loan agreement.

The threat of rescission incentivizes lenders to comply with the consumer protections set forth in TILA. The consequences of rescission for a lender are often harsh. When a borrower rescinds the loan agreement, the borrower is no longer liable to the lender for any finance FEE or charge, and the security interest collateralizing the loan—in our example the borrower’s home—becomes void. Furthermore, “20 days after receipt of a notice of rescission,” the lender must return to the borrower “any money or property given as earnest money, down payment, or otherwise, and shall take any action necessary or appropriate to reflect the termination of any security interest created under the transaction.” Borrowers are permitted to retain property provided to them by lenders until their lenders perform the obligations under TILA. If a lender performs its obligations under TILA, then the borrower must return the property in kind or tender the reasonable value of the property where return would be impracticable or inequitable.

The process following rescission achieves the intended purpose of returning the borrower and lender to the positions they were in prior to entering the loan agreement, commonly known as a return to the status quo ante. At least one court has also suggested that the threat of this remedy achieves the purpose of placing borrowers in a stronger bargaining position.

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1 Riethman v Berry, 287 F3d 274, 279 (3d Cir 2002), citing 15 USC § 1601(a) (emphasis added). See also Cetto v LaSalle Bank National Association, 518 F3d 263, 265 n 1 (4th Cir 2008) (“The purpose for enacting TILA ... was to provide economic stabilization in consumer credit lending by assuring meaningful disclosure of credit terms and thus permitting consumers to make an informed use of credit.”).
2 See 15 USC §§ 1601–02, 1639.
4 See 15 USC § 1635(b).
5 15 USC § 1635(b).
6 See 15 USC § 1635(b).
7 See 15 USC § 1635(b).
8 See Ray v Citifinancial, Inc, 228 F Supp 2d 664, 667 (D Md 2002).
9 See Williams v Homestake Mortgage Co, 968 F2d 1137, 1140 (11th Cir 1992).
Nonetheless, the right to rescind under TILA is conditioned by a three-year constraint period that usually begins at the time of the consummation of the loan.\textsuperscript{10} Intuitively, this means that the more time that passes between consummation of the loan and rescission, the greater the difficulty in returning the parties to their original position. This period, therefore, seeks to ensure that if the borrower does rescind a loan, both parties can reach as close of a return to the status quo ante as is possible. However, the terms of this three-year constraint period are not entirely clear. They have since become a source of contention and litigation between borrowers and lenders.\textsuperscript{11}

Borrowers frequently provide timely notice of rescission within the three-year constraint period. However, lenders do not always comply with the rescission notice. Currently, the circuit courts are split on whether a timely written notice of rescission permits a borrower to sue the lender for rescission after three years from the consummation of the loan.\textsuperscript{12} In other words, it is not clear whether the three-year limit on the right to rescission in §1635(f) of TILA pertains to mere notice of rescission or the filing of a lawsuit.

Among the five circuits that have confronted this issue, a three-circuit majority held that mere notice does not permit litigation for rescission after the three-year period.\textsuperscript{13} Two other courts of appeals disagreed with the other circuits’ precedents and held that notice does preserve the right to sue beyond the

\textsuperscript{10} 15 USC §1635(f).

\textsuperscript{11} Compare McOmie-Gray v Bank of America Home Loans, 667 F3d 1325, 1328 (9th Cir 2012) (holding that notice is insufficient to permit borrower’s suit after three years from the consummation of the loan); Rosenfield v HSBC Bank, USA, 681 F3d 1172, 1188 (10th Cir 2012) (same) (collecting cases); Keiran v Home Capital, Inc, 2013 WL 3481366, *5 (8th Cir) (same), with Gilbert v Residential Funding LLC, 678 F3d 271, 278 (4th Cir 2012) (holding that notice is sufficient to permit borrower’s suit after three years from the consummation of the loan); Sherzer v Homestar Mortgage Services, 707 F3d 255, 267 (3d Cir 2013) (same). See also Williams v Wells Fargo Home Mortgage, Inc, 410 F Appx 495, 499 (3d Cir 2011) (holding that notice is insufficient).

\textsuperscript{12} See Gilbert, 678 F3d at 276. For the cases comprising the circuit split, see note 11.

\textsuperscript{13} See McOmie-Gray, 667 F3d at 1328; Rosenfield, 681 F3d at 1188; Keiran, 2013 WL 3481366 at *5. The Third Circuit previously held, in an unpublished opinion, that notice was insufficient. However, the Third Circuit has since joined the minority viewpoint. Compare Wells Fargo, 410 F Appx at 499 (holding that notice is insufficient to sue beyond the three-year time period), with Sherzer, 707 F3d at 267 (holding that notice is sufficient to sue beyond the three-year time period).
three-year period. Active in three of these disputes, the newly formed Consumer Financial Protection Bureau (CFPB) filed amicus briefs detailing its position that a borrower's notice should permit a lawsuit beyond the three-year period. The American Bankers Association, Consumer Bankers Association, and Consumer Mortgage Coalition collectively submitted briefs as amici curiae in support of the lender in the same cases, as well. This Comment will argue that the minority view that notice is sufficient to preserve the right to sue is the most compelling evaluation of the state of the law. This Comment will also argue that the minority viewpoint provides for more ideal incentives to change the behavior of financial institutions in the lending process.

Consumers who are uninformed of misrepresentations or deprived of mandatory disclosures by their lenders would otherwise have only three years to recognize and begin seeking remedies for the unfair practices arising within the transaction. While resolving this issue requires balancing the equitable interests of consumers with the financial interests of lenders, ultimately the fact that Congress enacted TILA to protect consumers means that adopting the majority interpretation would severely undercut and contravene the purposes of TILA.

Nonetheless, even if the minority viewpoint is correct that notice is sufficient to permit a lawsuit after three years from the consummation of the loan, TILA remains silent on how long a plaintiff has to sue should rescission not be granted through means other than the courts. Previously, some plaintiffs argued that courts should borrow the one-year statute of limitations within § 1640(e) of TILA, which details time limits for damages and civil liabilities for TILA violations. After the Beach v Ocwen Federal Bank decision, courts have generally refused to

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11 See Gilbert, 678 F3d at 278; Sherzer, 707 F3d at 267 (declining to discuss or cite to the Third Circuit's previous ruling in Williams v Wells Fargo Home Mortgage, Inc, 410 F Appx 495, 499 (3d Cir 2011)).

12 See, for example, Brief of the Consumer Financial Protection Bureau as Amicus Curiae in Support of Plaintiff-Appellant and Reversal, Rosenfield v HSBC Bank, USA, No 10-1442 (9th Cir filed Mar 26, 2012) ("CFPB Brief").

13 See, for example, Brief of Amici Curiae American Bankers Association, Consumer Bankers Association, and Consumer Mortgage Coalition Supporting Appellees and Affirmance, Sherzer v Homestar Mortgage Services, No 11-4254 (3rd Cir filed June 1, 2012) ("Bankers' Association Brief").


15 See 15 USC § 1640(e).
carry over the § 1640(e) restraint. This Comment argues that equitable doctrines, specifically laches, waiver, and estoppel, are superior alternatives in determining prejudicial or untimely delays in a lawsuit after a borrower delivers notice.

This Comment will begin by explaining the current state of the law on TILA’s rescission right in Part I. This Comment will detail how borrowers utilize the rescission right and where the ambiguity lies within the statutory and regulatory language. After exploring an influential Supreme Court precedent on the TILA rescission right, this Comment will provide background on the majority and minority viewpoints. It will discuss the holdings of the courts of appeals and provide information submitted to the courts in amicus briefs by lenders and the CFPB. Afterwards, in Part II this Comment will apply the CFPB’s amicus brief and supporting case law to demonstrate that the minority viewpoint is legally superior. Finally, this Comment will argue that the equitable doctrine of laches adequately fills in the time gap created by the minority viewpoint.

I. CURRENT STATE OF THE LAW ON THE TILA RESCISSION RIGHT

The majority of the circuit courts apply the Supreme Court’s decision in Beach v Ocwen Federal Bank\(^ {19} \) to resolve this legal issue. Emphasizing the Beach Court’s language rather than language of the statute or regulation, the Eighth, Ninth, and Tenth Circuits held that mere notice of rescission is not enough to preserve the statutory right to rescission beyond three years.\(^ {20} \) Conversely, the Fourth Circuit, citing the plain meaning of the statute and the Federal Reserve and CFPB’s directive, held that written notice of rescission preserves the right to litigate rescission beyond three years.\(^ {21} \) The Third Circuit later joined the Fourth Circuit’s minority viewpoint in a recent case that disagrees with its previously unpublished opinion.\(^ {22} \)

\(^{19}\) 523 US 410 (1998).


\(^{21}\) Gilbert v Residential Funding LLC, 678 F3d 271, 278 (4th Cir 2012).

\(^{22}\) Compare Sherzer v Homestar Mortgage Services, 707 F3d 255, 267 (3d Cir 2013), with Williams v Wells Fargo Home Mortgage, Inc, 410 F Appx 495, 498 (3d Cir 2011).
CFPB and various lenders also joined the argument through amicus briefs. Prior to delving into the decisions of the courts, it is useful to understand how a right to rescind is exercised.

A. Asserting the Right to Rescind

The cases comprising the circuit split have similar facts: (1) a borrower secures a loan from a lender by using the borrower's principal place of dwelling as the security interest; (2) the lender fails to deliver or distorts TILA's required terms or documentation; (3) within three years of creating the security interest, the borrower sends a notice of rescission to the lender; and (4) the borrower files a lawsuit after the three-year period ends.

The Federal Reserve initially maintained the right to issue regulatory directives under TILA, but the CFPB now issues those directives. Under the relevant directive, Regulation Z, notice is required but does not automatically rescind the loan alone. Instead, the lender is given an opportunity to comply with or negotiate the rescission request. The problem with this private remedy methodology is that § 1635—the timing provision of TILA—fails to "explicitly establish a time limit in which borrowers must bring suit for rescission if a lender does not comply with [or acknowledge] the rescission request." The statute's silence on this issue resulted in the courts' current struggle with the issue of permitting a rescission after three years.

B. The Statutory and Regulatory Language Governing TILA Rescissions

The ambiguity in the statute stems from the following language in 15 USC § 1635(f): "Time limit for exercise of right: An obligor's right of rescission shall expire three years after the date of consummation of the transaction or upon the sale of the

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23 See CFPB Brief at *10–11.
24 See, for example, Rosenfield, 681 F3d at 11–1177; McOmie-Gray, 667 F3d at 1326–27; Sherzer, 707 F3d at 256; Gilbert, 678 F3d at 274.
26 See 12 CFR § 1026.23.
27 See 12 CFR § 1026.23.
28 McOmie-Gray, 667 F3d at 1327.
property, whichever occurs first." The Federal Reserve issued a regulation—Regulation Z—to clarify that instruction. After Congress shifted the responsibility to regulate TILA from the Federal Reserve to the CFPB, the CFPB reaffirmed the Federal Reserve's previous regulation by republishing Regulation Z and explicitly clarifying that the CFPB did not intend to change the substance of the regulation:

Historically, Regulation Z of the Board of Governors of the Federal Reserve System has implemented TILA. The Dodd-Frank Wall Street Reform and Consumer Protection Act amended a number of consumer financial protection laws, including TILA. In addition to various substantive amendments, the Dodd-Frank Act transferred rulemaking authority for TILA to the Bureau of Consumer Financial Protection effective July 21, 2011. See sections 1061 and 1100A of the Dodd-Frank Act. Pursuant to the Dodd-Frank Act and TILA, as amended, the Bureau is publishing for public comment an interim final rule establishing a new Regulation Z (Truth in Lending), 12 CFR Part 1026, implementing TILA (except with respect to persons excluded from the Bureau's rulemaking authority by section 1029 of the Dodd-Frank Act). The interim final rule substantially duplicates the Board's Regulation Z as the Bureau's new Regulation Z, 12 CFR part 1026, making only certain non-substantive, technical, formatting, and stylistic changes. To minimize any potential confusion, the Bureau is preserving the numbering system of the Board's Regulation Z, other than the new part number. While this interim final rule generally incorporates the Board's existing regulatory text, appendices (including model forms and clauses), and supplements, the rule has been edited as necessary to reflect nomenclature and other technical amendments required by the Dodd-Frank

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29 15 USC § 1635(f).
Act. Notably, this interim final rule does not impose any new substantive obligations on regulated entities.\textsuperscript{31}

Importantly, Regulation Z instructs that, "[t]o exercise the right to rescind, the consumer shall \textit{notify} the creditor of the rescission."\textsuperscript{32} Courts have treated Regulation Z with differing levels of attention in deciding whether notification is sufficient to preserve the right beyond three years after the loan's consummation, with the minority viewpoint placing much greater emphasis on the persuasiveness of the plain language of the statute and regulation.\textsuperscript{33}

C. The Supreme Court's Interpretation of § 1635(f)

The Supreme Court dealt with the same statutory provision—§ 1635(f)—in \textit{Beach}.\textsuperscript{34} In that case, the question before the court was whether the right to rescind could be used "as an affirmative defense in a collection action brought by the lender more than three years after the consummation of the transaction."\textsuperscript{35} When Ocwen Federal Bank began foreclosure proceedings against the borrower David Beach, the borrower attempted to raise the defense of rescission over three years after they consummated the secured loan.\textsuperscript{36} Each of the lower courts held that the plain meaning of § 1635 indicated that the right to rescind terminated after three years.\textsuperscript{37} The Supreme Court affirmed, holding that "§ 1635(f) completely extinguishes the right of rescission at the end of the 3-year period."\textsuperscript{38} The Court held:

\begin{itemize}
  \item \textsuperscript{31} 76 Fed Reg 79768 (cited note 30).
  \item \textsuperscript{32} 12 CFR § 226.23(a)(2) (emphasis added):

  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.

  Id.

  \item \textsuperscript{33} Compare \textit{Keiran}, 720 F3d at 728; \textit{McOmie-Gray}, 667 F3d at 1328; \textit{Rosenfield}, 681 F3d at 1188 (collecting cases), with \textit{Gilbert}, 678 F3d at 278; \textit{Sherzer}, 707 F3d at 258–59.

  \item \textsuperscript{34} See \textit{Beach}, 523 US at 411.

  \item Id at 411–12.

  \item See id at 413.

  \item See id at 414.

  \item \textsuperscript{38} \textit{Beach}, 523 US at 412 (emphasis added).
\end{itemize}
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.\footnote{Id at 417 (alteration in original), citing to 15 USC § 1635.}

The Court further narrowed the holding when it noted that the "‘ultimate question’ is whether Congress intended that ‘the right shall be enforceable in any event after the prescribed time.’"\footnote{Id at 416 (emphasis added), quoting Midstate Horticultural Co v Pennsylvania Railroad Co, 320 US 356, 360 (1943).} The language the Court used seems to characterize the right to rescind as something that dies exactly three years after it is first born. In light of this understanding, three of the circuit courts have looked to this language in determining that, similarly, a right to rescind through a later lawsuit cannot be preserved merely by a timely notice of rescission.\footnote{See text accompanying note 20.} The opposing viewpoint, however, disagreed with this portrayal and instead created a distinction between the exercise of the right and performance of the lender.\footnote{See Part I.E.}

The Court also foreclosed the argument of borrowing the one-year statute of limitations within § 1640(e) of TILA,\footnote{See Beach, 523 US at 417–19.} which details time limits for civil damages in TILA violations.\footnote{See 15 USC § 1640(e).} After the Beach decision, courts have generally refused to carry over the § 1640(e) restraint.
D. In Defense of the Insufficiency of Notice: the Circuits Relying on Beach

Thus far, a three-circuit majority has held that the statutory right to rescind cannot be preserved by a consumer’s notification of rescission, with an additional circuit supporting this view in an unpublished opinion. Either wholly or in part, these courts rely on the language of the Beach decision.

The courts of appeal comprising the majority viewpoint often rely on the distinction between statutes of repose and statutes of limitation as an important basis in their holdings. The following excerpt succinctly illustrates the distinction between statutes of repose and statutes of limitations:

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. It extinguishes the action, or terminates any right to action, after a fixed period of time has elapsed. An action may be barred by a statute of repose before there has been an injury, or before there has been discovery of an injury, or before a cause of action arises or accrues. A statute of repose sets an outer boundary in time beyond which no cause of action may arise for conduct that otherwise would have been actionable. It imposes an absolute time limit within which an action must be brought, limiting the liability of those within the statute’s protection.45

Statutes of repose differ from statutes of limitation in that a statute of limitation restrains actions that occur after the cause of action has accrued.46 Conversely, a statute of repose would cut off the possibility of advancing an action before injury occurs.47 Thus in the TILA scenario, if the statute were understood as a statute of limitation, then borrowers would have three years from the discovery of the misrepresentation or absent documentation to exercise their right. If the statute were understood as a statute of repose, then borrowers would have to

47 See id.
exercise the right within three years of the consummation of the loan. As stated in Part I.C, the Supreme Court used the term “extinguished” to describe the underlying right in § 1635(f). Because of this characterization, it is not difficult to see why many courts concluded that the statute is a statute of repose. The minority viewpoint does not contest the character of the statute, but instead advances on determining what the “exercise of the right” constitutes.


The Ninth Circuit was the first court of appeal to hold against the sufficiency of notice to preserve a rescission lawsuit. In McOmie-Gray v Bank of America Home Loans, the borrower, Kathryn McOmie-Gray, attempted to invoke lower court rulings that applied the statute of limitations in 15 USC § 1640(e) that would require a rescission within one-year from the date of notification.48 In this case, Bank of America failed to notify McOmie-Gray of the expiration date of her right to rescind and thus sufficiently opened itself to liability under TILA.49 After discovering this omission within two years after the consummation of the loan, McOmie-Gray notified Bank of America of her decision to rescind. The Bank initiated negotiations after receiving her notification. These negotiations later spilled over the three-year time limit for rescission. As a consequence of exceeding the three-year period, when the negotiations failed and McOmie-Gray sued, the lower court held that the right to rescind was time-barred and the Ninth Circuit later affirmed.50

The Ninth Circuit first noted its previous decision that found that the right to rescission is bound by a statute of repose that extinguishes the rescission right rather than a statute of limitations.51 But the Ninth Circuit foreclosed the right to rescind by relying primarily on the decision in Beach.52 Keeping

48 See McOmie-Gray v Bank of America Home Loans, 667 F3d 1325, 1326 (9th Cir 2012).
49 See id.
50 See id at 1325.
51 See id, citing Miguel v Country Funding Corp, 309 F3d 1161 (9th Cir 2002).
52 See McOmie-Gray, 667 F3d at 1328 (“[U]nder the case law of this court and the
in mind that the statute of repose begins to run from the date of the loan's consummation, the court focused on the specific language from *Beach* that there is "no federal right to rescind, defensively or otherwise, after the 3-year period of § 1635(f) has run." The court interpreted this to mean that the borrower "could not raise the right to rescind as a defense to the mortgagee's foreclosure action after the three-year period has run," and that the language of the *Beach* case is sufficiently broad to reach McOmie-Gray's case. Finally, noting that § 1635 is a statute of repose, the court further held that any attempt to create a new limitation period via § 1640 would contradict the language of the statute.

2. The Tenth Circuit: *Rosenfield v HSBC Bank, USA.*

After the Ninth Circuit's decision in *McOmie-Gray*, the Tenth Circuit agreed that timely notice was insufficient to prolong the right to sue for rescission. In *Rosenfield v HSBC Bank, USA*, the plaintiff Jean Rosenfield sought declaratory judgment that her notification rescinded the loan and also sought injunctive relief to prevent HSBC Bank from foreclosing on her home. The suit arose soon after Rosenfield refinanced her home. Rosenfield's first lender "sold or assigned" the loan to HSBC Bank. Approximately two years after the refinancing, Rosenfield discerned that the original lender omitted loan details that are required disclosures under TILA and other federal statutes. It is particularly notable that among the absent details was any information at all on Rosenfield's right to rescind the loan. Rosenfield timely notified HSBC Bank of her

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53 See id, quoting *Beach*, 523 US at 419 (emphasis in original).
54 *McOmie-Gray*, 667 F3d at 1328.
55 See id at 1329.
56 See *Rosenfield v HSBC Bank, USA*, 681 F3d 1172, 1176 (10th Cir 2012)("Ms. Rosenfield first sought a declaratory judgment that the mortgage on her home has been rescinded and HSBC [Bank] is not entitled to proceed with any foreclosure.") (quotation marks omitted).
57 See id.
58 See id ("[S]he claimed that required disclosures attendant to the transaction were omitted, including, inter alia, information on rescission rights, adjustable rates, and finance charges.").
59 See id at 1176.
decision to rescind, but did not receive any response. Ten months later—and outside the three-year window—the Bank initiated a foreclosure action that Rosenfield failed to prevent through raising a “defense of rescission” in her suit.

In holding that Rosenfield was unable to preserve her right to rescind the loan, the court focused on the same “or otherwise” language in Beach that the Ninth Circuit emphasized in McOmie-Gray. In light of the broad implications of the “or otherwise” language, the court held that Beach is dispositive on this issue and that Rosenfield’s argument is inconsistent with a statute of repose.

Important, the Rosenfield decision adds an extra avenue of analysis for discussing the underlying basis of the conferred right of rescission. Specifically, because “[t]he effect of a rescission [on] an agreement is to put the parties back in the same position they were in prior to the making of the contract,” the later someone rescinds a loan after consummation the less likely that a rescission is able to put the parties back into the status quo ante. The unique facts of the case illustrate how title in the home may transfer across entities that create a clouded title. The court shared the Supreme Court’s concern of clouded titles, which the Court expressed in Beach. Because new actors may take an interest in the property in the time between consummation and rescission, the title to the property may become obscured with each assignment of the loan. This unfairly disadvantages banks by requiring “costly and difficult” loan management throughout the lifetime of the loans the banks oversee.

60 See Rosenfield, 681 F3d at 1176.
61 Id.
62 See Part I.D.2 and text accompanying note 53.
63 See Rosenfield, 681 F3d at 1182.
64 See id. See also Jones v Thomas, 491 US 376, 392 (1989) (Scalia dissenting) (“[T]he Double Jeopardy Clause is a statute of repose for sentences as well as for proceedings. Done is done.”); McCann v Hy-Vee, Inc, 663 F3d 926, 930 (7th Cir 2011) (stating that statutes of repose “serve[] as an unyielding and absolute barrier to a cause of action, regardless of whether that cause has accrued”).
66 See Rosenfield, 681 F3d at 1182 (“New actors may have come onto the field post-transaction and obtained some interest in the loan or the underlying property.”).
67 See id. See also Beach, 523 US at 418–19 (“Since a statutory right of rescission
The court found that, through notification, the "borrower may properly alert the creditor of her intent to rescind the underlying transaction," but notification alone does not automatically rescind the loan. Rosenfield attempted to persuade the court by using the language of Regulation Z and the statute alone. Rosenfield submitted that because TILA requires notification of the intention to rescind and because Regulation Z only defines notice as a written communication, she fulfilled all her duties under the TILA regime. The court held that "these provisions suggest only that the giving of notice is a necessary predicate act to the ultimate exercise of the right." Finally, the court appealed to the majority approach in noting that most of the courts to reach the issue had already ruled against Rosenfield's attempted explanation of the statute. The court listed the Wells Fargo decision as part of its reasoning but, as discussed in Part I.C.4 below, that decision no longer has significant precedential value.

3. The Eighth Circuit: Keiran v Home Capital, Inc.

Keiran v Home Capital, Inc is a pair of consolidated cases with similar facts where both the Keirans and the Sobeniaks sought rescission and monetary damages. Both plaintiffs sued their respective mortgage servicers for rescission after claiming that copies of material disclosures were not provided to them at the consummation of the loan. The mortgage servicers could cloud a bank's title on foreclosure, Congress may well have chosen to circumscribe that risk.".

Rosenfield, 681 F3d at 1185.

Id ("Ms. Rosenfield responds that the plain text of TILA and Regulation Z provides all that is necessary for her in this case.").

Id ("[A]s she points out, TILA provides that the borrower must 'notify[ ] the creditor, in accordance with regulations of the Bureau, of [her] intention to [rescind] . . . Regulation Z states, in pertinent part, that "[t]o exercise the right to rescind, the consumer shall notify the creditor of the rescission by mail, telegram or other means of written communication."') (emphasis and alterations in the original).

Id ("According to Ms. Rosenfield, neither TILA nor Regulation Z appears to explicitly require the consumer to take any other action to exercise the right to rescind.") It is unclear, however, that the court's interpretation of the TILA regime is the correct or complete one from the face of the regulatory language (presented in Part II.B).

See Rosenfield, 681 F3d at 1187–88 (collecting cases).

Id.

720 F3d 721, 724 (8th Cir 2013).

Id at 724–25.
responded to the rescission notices and indicated that rescission was not proper. Nonetheless, the plaintiffs brought suits after three years from the consummation of the loan.

The court approached the analysis of the issue by first contrasting the Tenth and Fourth Circuits approaches. The court then outlined some of the key considerations from the *Beach* decision, including the "or otherwise" language influential in the Tenth Circuit's decision. The court further noted that statutes of repose are intended to provide the defendant's peace, not the plaintiff's vindication. The court stated that it found the Tenth Circuit's (and now majority) opinion to be more persuasive than the Fourth Circuit's. While the CFPB proposed that the bank should instead have to file the suit, the court refused to put the burden on banks since it worried that this would create automatic rescissions outside the meaning of the statutory language. Finally, the court stopped short of stating that lawsuits are mandatory for rescission, since it agreed that lenders who consented privately would not need judicial interference.

4. The Third Circuit: *Williams v Wells Fargo Home Mortgage, Inc.*

*Williams v Wells Fargo Home Mortgage, Inc.* is a non-precedential, unpublished opinion by the Third Circuit. Nonetheless, it was the Third Circuit's first foray into resolving the sufficiency of notice issue. The court disagreed that timely notice could permit a lawsuit after three years. In the dispute, Paula Williams consummated a loan in November of 2002 and

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76 Id.
77 Id.
78 *Keiran*, 720 F3d at 726-27.
79 Id at 727.
80 See Part I.D.3.
81 See *Keiran*, 720 F3d at 727.
82 Id at 728.
83 Id at 728-29.
84 Id at 728 n 4 ("We agree that nothing in TILA or Beach would seem to foreclose the parties completing the rescission process privately, in the event that the lender agrees to rescission upon notice from the obligor.").
86 See Part I.E.2 (analyzing Sherzer).
then—after realizing the lender's failure to comply with TILA— notified the lender of her intent to rescind the loan in November of 2004 (well within the three-year limit in § 1635(f)). The civil action to enforce the rescission, however, was not filed until August of 2006, over three years after the consummation of the loan.

The court rejected the idea that notice suffices to exercise the right and prevent expiration of the right to rescind. The court noted that "[i]t may be that an obligor may invoke the right to rescission by mere notice. Mere invocation without more, however, will not preserve the right beyond the three-year period." However, the court failed to thoroughly develop this line of reasoning any further and additionally failed to analyze the reasonability of the rule it eventually created by exploring its ex ante effects.

In the alternative, Williams argued that the three-year period is subject to equitable tolling. The court, however, was bound to its own precedent identifying the statute as a statute of repose and not of limitation, a correction the Third Circuit made after the Beach decision. Therefore, the court concluded that "the right ceases to exist once a statute of repose has run . . . equitable tolling cannot resurrect Williams' right to rescind the credit transaction."

5. Brief of Amici Curiae American Bankers Association, Consumer Bankers Association, and Consumer Mortgage Coalition, as filed in Rosenfield.

The American Bankers Association, Consumer Bankers Association, and Consumer Mortgage Coalition (collectively "Bankers Associations") filed joint amicus briefs in the Rosenfield, Gilbert, and Keiran cases, arguing in support of lenders. Because the substance of the amicus briefs are largely

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87 See Wells Fargo, 410 F Appx at 498.
88 See id.
89 See id at 499.
90 Id at 499.
91 See Wells Fargo, 410 Fed Appx at 499.
92 See In re Community Bank of Northern Virginia, 622 F3d 275, 301 (3d Cir 2010), citing Beach, 523 US at 410 (noting that the court previously ruled incorrectly that the statute was one of limitations subject to equitable tolling).
93 Wells Fargo, 410 Fed Appx at 499.
the same, this discussion will focus only on the amicus brief filed in *Rosenfield*. However, the arguments are applicable across all the cases.

The Bankers Associations argued that the *Beach* case has already characterized the §1635(f) as a statute of repose and that ruling against banks would force the courts to enforce expired rights. This argument is consistent with the court decisions already discussed. Additionally, the Bankers’ Associations argued that substantial harm to lenders would result from a rule permitting notice to preserve the action. First, the Bankers’ Associations alleged that ruling for the plaintiff’s would result in a flood of meritless litigation in the form of last-ditch efforts by borrowers to save homes and preemptive notices of rescission (within the three-year period) for the sake of holding onto the right to litigate later. Secondly, the Bankers’ Associations argued that notice alone would create a unilateral rescission right that would result in inequitable consequences for lenders. The Bankers’ Associations also argued that Congress balanced the interests of borrowers and lenders in crafting the rescission remedy, and the borrowers’ suggested interpretations would result in draconian results. Additionally, the Bankers’ Association claimed that the borrowers’ “interpretation would increase uncertainty, litigation costs, and risk, resulting in higher costs for borrowers.” Because lenders must be sure of the enforceability of loans and because costs to the lender would end up passed on to future borrowers, these increased costs to lenders tie up the availability of credit and increase costs to future borrowers.

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94 Bankers’ Association Brief at *4–8.
95 Id at *8–10.
96 Id at *10–13.
97 Id at *13, quoting Daniel Rothstein, *Truth in Lending: The Right to Rescind and the Statute of Limitations*, 14 Pace L Rev 633, 657 (1994) (“Plaintiffs’ interpretation would push this ‘draconian remedy’ well beyond the balance of interests carefully struck by Congress. Because rescission is effectively an ‘interest-free loan[,] . . . the longer one allows the right of rescission to be exercised, the greater the benefit to the consumer, and the greater the penalty to the creditor.’”).
98 Bankers’ Association Brief at *14–15.

Litigation would increase not just between lenders and borrowers, but also between (a) lenders themselves; (b) secondary market participants and lenders;
E. In Support of Upholding the Right to Rescind

The alternative viewpoint on survival of the rescission right tends to concentrate on the distinction between exercising the right of rescission and litigating the right of rescission. Exercising the rescission right allows for the private actors who are party to the agreement to resolve the issue among themselves. The Fourth and Third Circuits and the CFPB provide key analyses on how rescission can then be litigated after three years from the consummation of the loan.

1. The Fourth Circuit: Gilbert v Residential Funding LLC.

The Fourth Circuit deviated from the majority viewpoint with its decision in Gilbert v Residential Funding LLC when it became the first court of appeals to hold in favor of the borrower. Plaintiff-Appellants Rex and Daniela Gilbert attempted to rescind an adjustable rate note after defaulting on the loan within the three-year period under § 1635(f). The Gilberts properly notified the mortgage company requesting a cancellation of the security interest and reimbursement of all consideration. The mortgage company promptly responded within ten days notifying the Gilberts' attorney that there were no absent material disclosures that would permit a right to rescind. Just as in the previously-mentioned cases, the borrowers did not file the lawsuit seeking enforcement of rescission until after the three-year period had passed.

Rather than beginning with Beach as the previously-mentioned courts did, the Gilbert court began by looking to the

and (c) home buyers and home sellers. TILA rescission also serves an "insurance function for consumers" that "increase[s] the seller's marginal costs," which will "tend to raise the price" for the loan.

100 See Barnes v Chase Home Financial, LLC, 825 F Supp 2d 1057, 1064 (D Or 2011); In re Hunter, 400 Bankr 651, 659 (ND Ill 2009) ("Significantly, TILA does not require the consumer to file a lawsuit to exercise the right to rescind. Both the statute and the regulation require only notification to the creditor.").

101 See Gilbert, 678 F3d at 277.
102 See Gilbert v Residential Funding LLC, 678 F3d 271, 278 (4th Cir 2012).
103 See id at 274.
104 See id.
105 See id.
106 See Gilbert, 678 F3d at 276.
plain meaning of the statute in evaluating timeliness.\textsuperscript{107} The court observed that "neither 15 USC § 1635(f) nor Regulation Z says anything about the filing of a lawsuit" and, therefore, the court "refuse[d] to graft such a requirement upon them."\textsuperscript{108} The court differentiated between the two stages of rescission, which it implied that the other courts had conflated.\textsuperscript{109} Namely, there is (1) the exercise of the right to rescind, and (2) voiding of the contract.\textsuperscript{110} Regulation Z and § 1635(f) are only concerned with the former of the two.\textsuperscript{111} The two provisions both delineate that a "borrower exercises [the] right of rescission by merely communicating in writing to [the] creditor [the] intention to rescind."\textsuperscript{112} Conversely, to complete and void a contract one of two things must occur: (1) the lender may agree that the right to rescind is available and unwind the contract with the borrower independently and outside of the courts;\textsuperscript{113} or (2) absent this acknowledgement by the lender, a borrower must pursue legal enforcement of rescission through filing a lawsuit.\textsuperscript{114}

By narrowly construing the issue, the court found that the issue before it was not whether the contract has been voided, but only whether the right had been exercised.\textsuperscript{115} Accordingly, the court addressed the lender's argument relying on Beach by noting that:

The Beach Court did not address the proper method of exercising a right to rescind or the timely exercise of that

\textsuperscript{107} See id at 276–77 (noting that the Supreme Court has repeatedly stated that the plain meaning of the statute is usually dispositive).

\textsuperscript{108} Id at 277.

\textsuperscript{109} See id.

\textsuperscript{110} See Gilbert, 678 F3d at 277.

\textsuperscript{111} Id ("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.").

\textsuperscript{112} Id.

\textsuperscript{113} See id.

\textsuperscript{114} See Gilbert, 678 F3d at 277, quoting Large v Conseco Financial Servicing Corp, 292 F3d 49, 54–55 (1st Cir 2002) ("Either the creditor must 'acknowledge[ ] that the right of rescission is available' and the 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).

\textsuperscript{115} See Gilbert, 678 F3d at 277 ("At this stage of the litigation, we are not concerned with whether the contract has been effectively voided. A court must make a determination on the merits as to whether that should occur.").
right. Instead, in *Beach*, the Court looked at whether § 1635(f) is a statute of limitation, that is, whether [it] operates, with the lapse of time, to extinguish the right which is the foundation for the claim or merely to bar the remedy for its enforcement.\(^{11}\)

The court specifically identified the language from *Beach* that noted § 1635 is not about commencement of an action.\(^{11}\) The court further interpreted *Beach* to mean that the three-year restriction in § 1635 “concerns the extinguishment of the right of rescission and does not require borrowers to file a claim for the invocation [commencement] of that right.”\(^{11}\)

2. The Third Circuit (again), *Sherzer v Homestar Mortgage Services*.

In *Sherzer v Homestar Mortgage Services*, the court characterized the question before it as “what action [a borrower] must take to exercise the right of rescission before that three-year period expires” within § 1635(f).\(^{11}\) Plaintiffs Daniel and Geraldine Sherzer provided timely notice of rescission of two loans secured by their principal dwelling.\(^{12}\) The Sherzers argued that the lender failed to provide multiple disclosures required by TILA.\(^{12}\) The lender agreed to rescind the smaller loan, but denied that the larger loan contained any material violations of TILA.\(^{12}\) The Sherzers filed suit against the lender almost three years and three months after the consummation of the loan.\(^{12}\)

The court ultimately held in favor of the Sherzers because of the statutory language.\(^{12}\) The court noted that “the language of

\(^{11}\) Id at 278 (quotation marks omitted) (alteration in original).

\(^{11}\) Id at 278 ("[T]hat the Gilberts failed to seek enforcement of their right to rescind within the three years does nothing to take away from the fact that they exercised their right of rescission within that time period.").

\(^{12}\) *Sherzer v Homestar Mortgage Services*, 707 F3d 255, 256 (3d Cir 2013).

\(^{12}\) Id.

\(^{12}\) See id.

\(^{12}\) Id.

\(^{12}\) See *Sherzer*, 707 F3d at 256.

\(^{12}\) See id at 258 ("Although the Lenders' amici have raised practical concerns that may arise if obligors are permitted to rescind their loans through written notice alone, we find ourselves constrained by the text of § 1635 in spite of those concerns.").
the statute provides that [a borrower] exercises his right of rescission when he sends notice to the creditor; it says nothing about a court filing."125 Next, the court considered § 1635(a)—which states that the right is exercised "by notifying the creditor, in accordance with regulations of the Bureau, of his intention to do so"126—and observed that neither the statute nor the regulation discuss lawsuits. Furthermore, § 1635(b) requires lenders to comply with the rescission within 20 days of notice,127 and fails to mention that the judiciary must sanction such rescission.128 The court further noted that Beach simply did not answer the question of how a borrower rescinds a loan.129

3. The Consumer Financial Protection Bureau's Fourth Circuit Amicus Brief.

As litigation on this statutory right to rescission proceeded, the CFPB contributed to consumers' cases by filing amicus briefs on their behalf.130 Because the versions of its briefs are very similar, this section will focus on the amicus brief submitted in Gilbert. The CFPB advocated for the minority viewpoint: a legal interpretation in which notification of rescission is all that would be required within the three-year period under § 1635 to permit litigation after three years. While the Board of Governors of the Federal Reserve used to be the primary authority on the administration of the TILA,131 Congress recently transferred those powers to the CFPB via the Dodd-Frank Wall Street

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125 Id.
126 15 USC § 1635(a) (emphasis added).
127 Sherzer, 707 F3d at 258–259, quoting 15 USC § 1635(b) ("Within 20 days after receipt of a notice of rescission, the creditor shall return . . . any money or property . . . shall take any action necessary or appropriate to reflect the termination of any security interest.") (emphasis in original).
128 Id at 259 ("§ 1635(b) states that the creditor must return money or property ['within 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."") (emphasis in original).
129 Id at 262 ("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. This omission is unsurprising since the obligors in Beach did not claim to have taken any action to rescind their loan before the bank initiated foreclosure proceedings.") (emphasis in original).
131 See 12 USC §§ 5481(12)(O), 5512(b)(1), 5581(b)(1)).
Reform and Consumer Protection Act.\textsuperscript{132} The CFPB subsequently republished Regulation Z and is therefore a stakeholder in how courts interpret it.\textsuperscript{133} Since the Federal Reserve’s TILA enforcement powers were transferred to the CFPB, it follows that the CFPB is now “the primary source for interpretation and application of truth-in-lending law.”\textsuperscript{134} Thus, not only does the CFPB have a substantial interest in the outcome of the litigation, it also has an important voice that ought to be acknowledged as litigation proceeds.\textsuperscript{135}

In constructing its argument in favor of the sufficiency of notification to preserve rescission, the CFPB began by presenting the legislative history. The CFPB noted that Congress enacted § 1635 because of the prevalence of home improvement schemes targeted towards “‘homeowners, particularly the poor,’ [who] were ‘trick[ed] into signing contracts at exorbitant rates, which turn[ed] out to be liens on the family residences.’”\textsuperscript{136} The CFPB further stated that § 1635 addresses this problem by mandating that lenders disclose the material terms of transactions.\textsuperscript{137} This would therefore provide consumers with an opportunity to make informed decisions on those terms while creating a statutory right to rescind those noncompliant loans.\textsuperscript{138}

In developing the argument in favor of the sufficiency of notice, the CFPB argued in the \textit{Rosenfield} amicus brief that the

\textsuperscript{132} Dodd-Frank Wall Street Reform and Consumer Protection Act § 1061(b)(1), (d), Pub L No 111-203, 124 Stat 1376, 2036–39 (2010), codified at 12 USC § 5581(b)(1), (d). See also Bureau of Consumer Financial Protection, Designated Transfer Date, 75 Fed Reg 57252 (2010).
\textsuperscript{133} See CFPB Brief at *2.
\textsuperscript{134} \textit{Household Credit Services v Pfennig}, 541 US 232, 238 (2004).
\textsuperscript{135} CFPB Brief at *3 (“The Bureau has a substantial interest in ensuring the correct and consistent interpretation of \textit{TILA} and Regulation Z on this important issue.”). It should be noted here that it is not clear that the CFPB should be afforded a high level of deference on the issue. The issue of the timeliness of lawsuits on rescission arises from the ambiguous statutory and regulatory language. The CFPB supplied its interpretation of the two through amicus briefs discussed in Part I.E.3. Judicial deference to an amicus brief interpretation is unlikely in light of recent Supreme Court case law. See generally \textit{Christopher v SmithKline Beecham Corp}, 132 S Ct 2156 (2012) (declining to adopt the interpretation of the Department of Labor that was first set out in an amicus brief).
\textsuperscript{136} CFPB Brief at *4, quoting 90th Cong, 2d Sess, in 114 Cong Rec H 14388 (May 22, 1968) (statement of Rep Sullivan). See also 114 Cong Rec H 14384 (statement of Rep Patman).
\textsuperscript{137} CFPB Brief at *4.
\textsuperscript{138} Id.
interpretation begins not with Beach, but with the plain meaning of the statute, specifically stating:

The language of § 1635 is plain: Within three years of loan consummation, consumers must exercise their right of rescission by notifying their lender that they are doing so. If there were any ambiguity in that mandate, Regulation Z resolves it by also specifying that consumers exercise the right to rescind by providing written notice to the lender. Section 1635 and Regulation Z require no more.139

The CFPB criticized the argument for reading a filing requirement into the language, finding no basis whatsoever in the language of the statute to confirm this idea.140 The CFPB noted that this right of rescission is no different than in other contexts: “Rescission under TILA . . . is a non-judicial mechanism, and is accomplished by notice, not a lawsuit.”141 Just as the Fourth Circuit eventually noted,

[I]t is the consumer’s exercise of the right to rescind (by providing written notice to the lender) that must occur within the threeyear [sic] period—not the filing of suit to confirm the validity of the rescission.142

The CFPB further commented on how failing to preserve the right to sue after three years would push incentives in the incorrect direction and also commented on how the idea of notice being sufficient is not a new concept to statutes of repose.143 But ultimately, the CFPB focused on a strong distinction between the private remedy of rescission and asking the courts for a legal remedy of rescission, noting that:

139 Id at *10 (emphasis in original).
140 See id at *11.
141 CFPB Brief at *11.
142 Id. See also id at *14 (“These courts fail to understand that the statutory right of rescission under TILA—consistent with rescission under the common law and many other statutes—is accomplished privately by notice.”) (emphasis added).
143 See id at *18.
This logic assumes that, in a contested case, the consumer sues to obtain the remedy of rescission. That is incorrect. Even in a contested case, TILA rescission is accomplished by notice; it is not awarded by the court as a remedy. Thus, when consumers sue under § 1635, they are not asking the court to grant rescission, but rather to confirm that rescission has been accomplished and to compel the lender to act accordingly by, e.g., releasing the security interest. The timeliness of the consumer's lawsuit is entirely independent of the timeliness of the consumer's exercise of the right to rescind. Accordingly, if the court finds the consumer rescinded the transaction (because she properly exercised a valid right under § 1635), the lender must be ordered to honor the rescission, even if the underlying right to rescind has expired.144

Thus, under the CFPB's interpretation of the law, the court's role in TILA rescissions is to look back at the notification and determine if, indeed, the facts indicated exercising rescission was proper. The court's role is not to grant the right itself.

Perhaps more deliberately, the CFPB expressed some frustration at the courts comprising the majority viewpoint that had failed to defer to the CFPB's directives on the issue. The CFPB submitted that:

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[.]” Because the “complexity and variety” of credit transactions “defy exhaustive regulation by a single statute,” Congress “delegated expansive authority” to the agency charged with implementing TILA “to elaborate and expand the legal framework governing commerce in credit.” Accordingly, “[u]nless demonstrably irrational,” the Bureau’s constructions of TILA “should be dispositive.”145

144 Id at *18–19 (emphasis added).

Therefore, the CFPB appealed to the notion that the complexity underlying loan transactions should make its position more persuasive in its capacity as arbiter of TILA regulations. It should be noted, however, that majority viewpoint of dismissing "late" lawsuits avoids a situation in which an unfamiliar judge would have to delve into the facts unique to each transaction. This argument may then work against the CFPB.

II. THE RIGHT OF RESCISSION SHOULD BE PRESERVED BY NOTICE

The above discussion outlines the bases for both majority and minority viewpoints. This section argues that the Gilbert and Sherzer decisions and the CFPB arguments outline a more persuasive approach to interpreting TILA and Regulation Z. In order to address the problems that may arise under the minority viewpoint, this section proposes that courts could apply the equitable doctrine of laches to resolve timeliness disputes.

A. The Sufficiency of Notice Viewpoint is Most Consistent with the Statutory Language

The plain meaning of the statute should control, and the requirement that a lawsuit commence within the statutory timeframe is a judicially-created impediment to rescission. As the Fourth Circuit pointed out in Gilbert,\(^\text{146}\) the plain meaning of the statute is often dispositive.\(^\text{147}\) The language of § 1635 does not discuss lawsuits as requirements for rescission, since both parties could privately agree to rescind the loan without court interference.\(^\text{148}\) Thus, the idea that a suit must be brought within three years is a judicially-created requirement to the statute that is erroneously required by the majority of courts. According to the plain language of the statute, all that is required is the "exercise" of the right to rescind within the three-year period.\(^\text{149}\) In using identical language in the regulation, the

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\(^{146}\) Gilbert v Residential Funding LLC, 678 F3d 271 (4th Cir 2012).

\(^{147}\) See United States v Ron Pair Enterprises, Inc, 489 US 235, 241 (1989), quoting Caminetti v United States, 242 US 470, 485 (1917) ("[W]hen the statute's language is plain, 'the sole function of the courts is to enforce it according to its terms."").

\(^{148}\) See note 84.

\(^{149}\) See 15 USC § 1635(f).
CFPB and the Federal Reserve each left little to the imagination as what could be considered an exercise of the right. Regulation Z has always stated that “exercise” means “notification.” If rescission were indeed proper, then the courts’ role would only be enforcing, not granting, the equitable remedy. Additionally, the court’s reading of the statute in Sherzer is persuasive. Section 1635(b) requires response from the lender on mere notice. Perhaps, suit by the lender would be more fitting if rescission were not immediate.

Furthermore, this minority viewpoint lends itself to the most internally consistent statutory interpretation. Specifically, the statute allows for twenty days after the delivery of notification for the lender to respond to the borrower’s request for rescission. The inclusion of this period of time indicates that the statute’s drafters supported a private remedy for this issue by creating standards that a borrower and lender could follow in order to resolve disputes related to their transactions. Additionally, this twenty-day period creates obstacles for those advocating for the majority viewpoint. For example, if the absent documents are not discovered until a week before the three-year period is up and the borrower immediately sends notification to the lender, then under the majority viewpoint the borrower would have to simultaneously file a lawsuit to preserve the right to rescind. By interpreting § 1635 under the minority viewpoint, the right to rescind is preserved at the moment of notification, and the borrower can wait twenty days for the lender to respond and attempt to resolve the dispute privately. Should the lender refuse rescission, the borrower can then pursue legal enforcement of rescission. When the private action fails, only then is it permissive to seek legal remedies in the courtroom. The main problem that courts would then struggle with is identifying how long after rescission to allow for filing of a legal claim should the private remedies fail. Creating a limitation would be difficult since the Supreme Court has already closed off one potential solution via § 1640.152

150 See 12 CFR § 226.23(a)(2).
151 See 15 USC § 1635(b) (“Within 20 days after receipt of a notice of rescission, the creditor shall return to the obligor any money or property . . . and shall take any action necessary . . . to reflect the termination of any security interest.”).
152 See Beach v Ocwen Fed Bank, 523 US 410, 417–18 (1998) ("[T]he effect of the 1-year limitation provision on damages actions is expressly deflected from recoupment claims.").
Because neither statute nor regulation requires or even speaks of a necessity to file suit, a requirement that borrowers file a lawsuit cannot be persuasively defended. As the CFPB noted in its amicus brief, reading into the provisions a requirement of filing a lawsuit would project the TILA rescission remedy out of private negotiations and into the public courts, contrary to the plain meaning of the statute and the statutory scheme's implications.\textsuperscript{153} This private-public distinction is important in justifying the reading of the statute.

The policy implications also undermine the requirement of a lawsuit. For example, the CFPB observed that

[r]equiring 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. It would also encourage lenders to stonewall in response to a notice of rescission, because if the consumer failed to file suit before the right expired, even a valid rescission would become a nullity.\textsuperscript{154}

The response of borrowers and lenders to this legal regime may, therefore, directly contravene the purposes of the TILA. The insufficiency of notice rule would result in a worse impact for low-income communities where there might be a greater likelihood of an asymmetry of information between lenders and unsophisticated borrowers. This population would, therefore, be more susceptible to predatory lending. Thus, lenders who stonewall—by delayed responses, privately refusing rescission, or negotiating up to the three-year period—would be more likely to outlast a rescission claim and reap the rewards of their own errors (deliberate or otherwise). Also, the lawsuit requirement rule would moot some valid rescissions, mandate an opening of the floodgates to litigation by compelling litigation for every transaction and, therefore, waste judicial resources on

\textsuperscript{153} CFPB Brief at *14, quoting Belini v Washington Mutual Bank, FA, 412 F3d 17, 25 (1st Cir 2005) ("Section 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.").

\textsuperscript{154} CFPB Brief at *18–19.
transactions that could easily have been negotiated to completion outside the courtroom.155

Additionally, the CFPB properly noted that "[w]hen Congress intends to use a statute of repose to define the period of time for filing lawsuits, it does so unambiguously."156 Here, the statute remains ambiguous and, thus, the spirit of the TILA suggests that courts should err in favor of the borrower who is typically in a weaker bargaining position.157

Furthermore, the Fourth Circuit was astute in observing that the lawsuit requirement viewpoint is confounding the exercise with the enforcement of rescission.158 Distinguishing between these two steps offers a strong reason to push back on the Beach precedent while also offering an explanation as to why courts often overlook this argument by collapsing the two. While this line of argument would need further expansion, one method to do so would be through analogizing to similar statutes.159 The CFPB has already located some statutes that are similarly structured, but the Tenth Circuit still found them unconvincing.160 Finally, this is all contingent on the understanding that Beach did not concern how the right was exercised, but only its duration.161

To address the counterarguments to the CFPB's recommendation, the Tenth Circuit's Rosenfield opinion provides

155 But see Beach, 523 US at 418–19 (noting that "[s]ince a statutory right of rescission could cloud a bank's title on foreclosure, Congress may well have chosen to circumscribe that risk, while permitting recoupment damages regardless of the date a collection action may be brought"). See also Jones v Saxon Mortgage, 537 F3d 320, 327 (4th Cir 1998) (noting that it is "easy to understand why a statute of repose is typically an absolute time limit beyond which liability no longer exists and is not tolled for any reason. To permit tolling of a statute of repose would upset the economic best interests of the public as a whole") (citation omitted).


157 See text accompanying note 9.

158 See Part I.E.1.

159 See note 156.

160 See Rosenfield, 681 F3d at 1186 n 10. See also CFPB Brief at *21–22 (noting NY UCC Law § 4-A-505 and immigration relief and public benefits statutes establish a date for invoking rights by performing the statutorily required act).

161 See Briosos v Wells Fargo Bank, 737 F Supp 2d 1018, 1024–26 (ND Cal 2010) (observing that the decision in Beach depended on the duration of the right and not the duration for filing a lawsuit and holding in favor of the minority viewpoint).
a strong basis for comparing viewpoints. Notably, while the Tenth Circuit Court of Appeals was receptive to the arguments of the CFPB in *Rosenfield v HSBC Bank, USA*, the court found the arguments to be largely the same as the plaintiff's and, ultimately, was rather brief in addressing the arguments of the CFPB. In responding to the CFPB's argument, the Tenth Circuit focused on the idea promulgated by *Beach* that the "Supreme Court conceived of repose under TILA as working to prevent the rescission right from acting to unduly cloud a bank's title on foreclosure." While the TILA is meant to be construed liberally and in favor of the consumer, the Tenth Circuit focused in particular on the negative impact that the CFPB's proposed legal rule would have on commercial transactions and lending entities. This concern is not entirely grounded in reality, however. The underlying issue here is that lenders would be required to enforce stricter loan management practices in processing and policing all of their loans. It does not logically follow that permitting notice to preserve the right to rescind would result in imposing universal costs on lenders. In fact, quite the contrary should occur. By providing timely notice, the borrower alerts the lender to the possibility of rescission and the subsequent costs and risks that arise from rescission of that specific loan. At that point, a responsible lender would have to begin collecting information and documentation related to proper title of the particular loan in question. A lender on notice of rescission ought to exercise proper diligence and care in preparing for the rescission. Because this process begins well within the three-year restraint period, it is neither unreasonable nor burdensome to require lenders to continue policing title after three years should that be necessary. Lenders would not need to continue this process much longer beyond the three-year period.

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162 681 F3d 1172 (10th Cir 2012).
163 See id at 1186 n 10 ("These arguments have some superficial appeal, but we are constrained by the *Beach* Court's defining of the parameters of rescission under TILA.") (emphasis added).
164 Id (quotation marks omitted).
165 Id at 1179–80 (collecting cases).
166 See *Rosenfield*, 681 F3d at 1186 n 10 (stating that the CFPB's idea would "create commercial uncertainty and enlarge the period before the relationship between borrowers and lenders is solidified"). See also Part I.D.4.
should the equitable doctrine of laches\textsuperscript{167} apply, so again, it is not an unduly burdensome requirement. Furthermore, any frivolous suits could already be handled by Rule 11 sanctions, for instance.

Furthermore, the Tenth Circuit found the CFPB’s reliance on state law cases entirely unpersuasive.\textsuperscript{168} The court noted that “the fact that rescission may be exercised under other state-law statutes of repose within their specified time periods without use of the courts is irrelevant to the question of what is required to exercise the rescission right within the repose period of TILA.”\textsuperscript{169}

B. Applying the Equitable Doctrine of Laches Resolves Concerns Resulting from the Minority View

The problem with resolving this dispute in favor of the minority viewpoint is an issue that would arise regarding the time limit after rescission to validate the rescission and require the lender’s performance. In other words, if notice is proper, then how much time must pass after the borrower provides notice before a disagreeing lender can foreclose on the principal dwelling because the borrower has slept on her rights? The equitable doctrine of laches,\textsuperscript{170} would provide an appropriate defense to defendants that would heavily, yet justly, restrict the amount of time borrowers have to litigate through a standard of prejudice.

First, it should be noted that the concept of laches is not a new concept to the TILA or even to § 1635. In fact, “under the original version of TILA, borrowers theoretically possessed an indefinite period of time to elect rescission (although the length of time could render it difficult for the borrower to comply with his obligations to the lender upon rescission).”\textsuperscript{171} Members of Congress viewed this indefinite period as problematic because they later “added the three-year statute of repose now found in

\textsuperscript{167} See note 170.

\textsuperscript{168} Rosenfield, 681 F3d at 1186 n 10.

\textsuperscript{169} Id.

\textsuperscript{170} See Black’s Law Dictionary 630 (West 9th ed 2009) (“An equitable doctrine by which some courts deny relief to a claimant who has unreasonably delayed or been negligent in asserting a claim.”).

\textsuperscript{171} In re DeShields, 2005 WL 6522765, *7 (ED Pa 2005).
[S]ection 1635(f) in 1974."172 Nonetheless, before Congress enacted the restriction period, "courts assumed that enforcement of a right of rescission, traditionally a remedy in equity, could be barred by laches in appropriate circumstances."173 And as the argument advanced in Part II.A indicates, Congress has not adequately addressed the question of how to limit the apparently indefinite right.

While one may argue that the entire purpose of Congress's action was to create a bright-line limit, the amendment's drafters either did not address or did not consider the difference between exercising the right and litigating the performance of the already completed rescission. The proposed solution of using equitable remedies only revives a previously utilized remedy by applying it to the unique subset of circumstances that Congress failed to consider. The DeShields court succinctly addresses this:

If Congress, in 1974 or thereafter, intended to require that any borrower, seeking to enforce his prior exercise of a right of rescission, bring any enforcement action within a three-year period, it could have easily so stated in section 1635(f), using language similar to that enacted elsewhere in TILA... Moreover, if the FRB [Federal Reserve Board] believed that the proper enforcement of TILA required a three-year statute of limitations on rescission lawsuits, it could have provided one in Regulation Z (to the extent that doing so would be consistent with the language of the statute). Apparently, both Congress and the FRB believed that the terms of the statute of repose now found in section 1635(f), coupled with the ability of a lender to seek declaratory relief and the constraints imposed by laches and by future sales of the realty, were sufficient to balance the respective interests protected by TILA.174

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172 Id at *8.

173 Id (emphasis added). See also Wachtel v West, 476 F2d 1062, 1065 (6th Cir 1973) ("[S]ince rescission is an equitable remedy, presumably the defenses of laches or estoppel could be interposed to prevent a borrower from enjoying the benefit of the credit for a long period of time and then succeeding in having the transaction avoided to the detriment of the lender.").

The *DeShields* court looked to 15 USC § 1640(e) for a parallel TILA provision that would require a court action. In its analysis, the court found that the language of § 1635 had no parallel to § 1640's language describing “any action under this section may be brought in any United States district court, or in any other court of competent jurisdiction, within one year from the date of the occurrence of the violation.” Thus, since nothing requires litigation for rescission or provides a timeline for timely litigation, then the natural conclusion should be that previously used equitable principles fill in this blank. Since Congress did not foreclose equitable remedies, it may have tacitly approved of this solution. Additionally, this would resolve the Bankers Associations' concern over the consequences of an indefinite period for rescission. Not only would greater certainty be imparted by the fact that equitable remedies would close off certain actions, but this would further incentivize borrowers not to frivolously notify of rescission without planning to act on it.

Furthermore, it is not unexpected that Congress, the Federal Reserve, or the CFPB would be silent on this issue. First, because § 1635 does not speak to judicial intervention in the exercise of rescission, it seems that Congress crafted rescission to be a private remedy. As a private remedy, borrowers and lenders could attempt to negotiate more favorable conditions to update their loan agreements. For instance, a borrower may want to keep the property but renegotiate the loan agreement privately. Because rescission is such a drastic move, a borrower would now be placed in a stronger position of power than a lender who would be incentivized to make concessions in a new agreement. A borrower could then constructively return value of the property to the lender by immediately signing a new agreement. Secondly, as a result of the inherent complexity of such negotiations, no institution previously mentioned, including Congress, would be able to adequately gauge or estimate when each individual private negotiation would fail. It is likely impossible to guess in advance how the process would play out. Thus, it seems fair that a

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175 Id (comparing 15 USC § 1640(e) with 15 USC § 1635(f)).
176 See Part I.D.5.
177 For ways in which the remedy seems to be constructed as a private one, see notes 151–152 and accompanying text.
proposed solution to the silence of § 1635 must be reasonably flexible to allow the private parties to resolve their dispute amongst themselves first. The equitable doctrine of laches provides this exact level of flexibility required, precisely because "[t]he applicability of the doctrine of laches is generally a question of fact which depends on the [specific] facts and circumstances of each case." Laches are malleable because they operate on a case-by-case basis.

The fact-based inquiry into the application of laches traditionally requires two elements. First, it must be proven that there was a delay. Secondly, a delay is not sufficient to claim laches unless there has been prejudice to a particular party. The requirement for prejudice is fairly loose and allows lenders significant flexibility to meet their burden of proof.

The following discussion describes three methods of how lenders may prove prejudice. First, "[p]rejudice may result from a party's change of position." In other words, the lender's position must change to its detriment as a result of the borrower's delay. Obscuring title as a result of the delay would likely fall under this category. Second, "[p]rejudice to a party's ability to defend claims may sustain a laches defense." Evidentiary issues such as death of a material witness would fall into this category. In a TILA scenario, this might be manifested through destruction of agreement documentations or other similar evidence. And finally, "[p]rejudice may be shown through a plaintiff's tardy opportunism, e.g., challenging a transaction after enjoying its benefits." This form of prejudice most lends itself to application under TILA. Where a borrower continues to reap the benefits of a loan provided to the lender, the borrower does so to the lender's detriment. By not receiving

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180 See id at 19.
181 Id.
183 Buckley and Smith, 16:6 ALI-ABA Estate Planning Course Materials J at 21.
184 Carlson v Carlson, 98 NE 2d 779, 783 (Ill 1951).
185 Buckley and Smith, 16:6 ALI-ABA Estate Planning Course Materials J at 23.
payments on a loan, the lender's ability to loan money is tied up in the pending action. A liability is imposed on the lender that a borrower does not otherwise have to confront. The other two forms of prejudice allow lenders additional tools to advance a laches claim, but are not likely required. If a court is entirely unconvinced that prejudice exists, arguments for estoppel or waiver might still be viable defenses—particularly against those borrowers who act inconsistently with their request for rescission.

In exploring whether the facts or circumstances sufficiently meet the standard for laches, a court would need to investigate the specifics of each case. For instance, a borrower who receives no response after the lender's twenty-day response period should show some evidence of diligence after this fact to confirm receipt of notice. Conversely, a pattern of negotiations between the two parties would not allow laches to apply, since this risks incentivizing the lender to deceive the borrower into "sleeping" on the case or engage in perpetual stonewalling. Overall, laches permit the individual tailoring that cases such as these ought to require, while preventing the abuse that bright-line rules would invite.

C. A Final Consideration

One final effect of drawing a distinction between the exercise of a right and seeking judicially enforced performance is that a borrower may still be able to seek damages from the completed rescission under § 1640. Some courts suggest that if the borrower completes a proper rescission and the lender does not recognize it, this would be a separate TILA violation. Therefore, a borrower could potentially sue for damages resulting from a lender's untimely acknowledgement of rescission. This may be better characterized as fraud or bad faith. This type of claim may sufficiently differ from the restricting language of § 1635(g) to permit the borrower an alternative means of vindication.

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186 See Keiran, 720 F3d at n 2 ("Their claims for money damages for the banks' failures to rescind are, however, timely. See 15 USC §§ 1635(b), 1640(e).") .
III. Conclusion

The minority viewpoint ultimately forms the best legal rule for evaluating the sufficiency of rescission. The minority viewpoint is more amenable to resolving rescission claims outside of courts, which would ease the burden on judicial resources. Otherwise, courts would be flooded with rescission complaints that may potentially be resolved privately anyway. The minority viewpoint is also most consistent with the plain language of the statute and applicable regulation. Since no lawsuit requirement is detailed within either, it is unclear how one could persuasively graft a litigation requirement into the language. Analogous statutes of repose tend to be clear on when a lawsuit is required, and TILA provides no similar mention of a requirement. Furthermore, Beach only applied to the duration of the right to rescind, not the distinct exercise of that right.

Congress’s silence on the subject justifies using the equitable doctrines that applied to TILA prior to the congressional statute of repose amendment. Because a lender would have notice prior to the time expiration of § 1635(f), it would not be burdensome to require lenders to police individual loans from the moment of notification. In the case of frivolous notification, no rescission would occur because a material error from the lender is required. If notification is not frivolous but the borrower intends to “save” the opportunity to rescind in the future while exploiting the lender, laches or other equitable doctrines would protect the lender from obligations based on undue prejudice.

By enforcing the minority viewpoint, TILA’s § 1635 consumer protection statute would live up to its identity as a protection for consumers.