No. 11-2419

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

ELAYNE WOLF,

Plaintiff-Appellant,

v.

FEDERAL NATIONAL MORTGAGE ASSOCIATION, a/k/a FANNIE MAE, ET AL.,

Defendants-Appellees,

CONSUMER FINANCIAL PROTECTION BUREAU,

Amicus Curiae.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA

BRIEF OF THE CONSUMER FINANCIAL PROTECTION BUREAU AS *AMICUS CURIAE* IN SUPPORT OF PLAINTIFF-APPELLANT AND REVERSAL

Leonard J. Kennedy
General Counsel
To-Quyen Truong
Deputy General Counsel
David M. Gossett
Assistant General Counsel
Rachel Rodman
Senior Counsel
Peter G. Wilson
Kristin Bateman
Attorneys

CONSUMER FINANCIAL PROTECTION BUREAU
1700 G Street, NW
Washington, D.C. 20552
(202) 435-7964

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QUESTION PRESENTED

Section 125 of the Truth in Lending Act (TILA or Act), 15 U.S.C. § 1601 *et seq.*, provides consumers a statutory right to rescind certain types of mortgage loans. Consumers can rescind their loans for three days following consummation of the loan or delivery of the disclosures mandated by the Act, whichever occurs later. 15 U.S.C. § 1635(a). A consumer exercises his right to rescind "by notifying the creditor, in accordance with regulations of the [Consumer Financial Protection] Bureau, of his intention to do so." *Id.* The right to rescind expires three years after consummation of the loan or upon sale of the home, whichever occurs first. *Id.* § 1635(f).

This appeal presents a question concerning the timeliness of lawsuits arising out of a consumer's exercise of the right to rescind under the Act: When a consumer timely exercises an allegedly valid right of rescission by providing notice to the lender within three years, but the lender does not recognize the rescission, must the consumer also file a lawsuit against the lender within three years?

INTEREST OF THE *AMICUS CURIAE*

This case concerns what consumers must do to rescind their mortgage loans under TILA and its implementing regulation, Regulation Z, 12 C.F.R. § 1026 *et seq*., before their right to rescind expires three years after obtaining their loans. Most lower courts have concluded that consumers must both *exercise* their right of rescission—by providing notice to their lenders—and *sue* their lenders to resolve any disputes that arise regarding the rescission before the right to rescind expires. *See, e.g., Bradford v. HSBC Mortg. Corp*., 799 F. Supp. 2d 625 (E.D. Va. 2011). A minority of lower courts hold that consumers must exercise their right of rescission by notifying their lenders before the right to rescind expires, but that courts can determine in subsequent litigation whether the rescission was valid, even if that litigation begins after the three-year period has run. *See, e.g., In re Hunter*, 400 B.R. 651 (N.D. Ill. 2009).

Two appellate courts have addressed this question. The Ninth Circuit has adopted the majority view, and an unpublished opinion of the Third Circuit has taken the same position. *See McOmie-Gray v. Bank of Am. Home Loans*, 667 F.3d 1325 (9th Cir. 2012); *Williams v. Wells Fargo Home Mortg., Inc*., 410 Fed. App'x 495, No. 10-493, 2011 WL 395978 (3d Cir. Feb. 8, 2011). Other appellate courts are likely to reach the issue soon. *See* Bureau Mot. for Leave to File as *Amicus Curiae* (Mar. 1, 2012) at n.2.

The Consumer Financial Protection Bureau is "the primary source for interpretation and application of truth-in-lending law." *Household Credit Servs. v. Pfennig*, 541 U.S. 232, 238 (2004). The Dodd-Frank Wall Street Reform and Consumer

Protection Act transferred exclusive authority to interpret and promulgate rules regarding TILA from the Board of Governors of the Federal Reserve System to the Bureau on July 21, 2011. *See* 12 U.S.C. §§ 5581(b)(1), (d); *Designated Transfer Date*, 75 Fed. Reg. 57,252 (Sept. 20, 2010). The Bureau, exercising this authority, republished Regulation Z in December 2011. *See* 76 Fed. Reg. 79,768, 79,803 (Dec. 22, 2011) (codified at 12 C.F.R. § 1026 *et seq*.). The Bureau therefore has a substantial interest in ensuring the correct and consistent interpretation of TILA and Regulation Z.

In the view of the Bureau, the interpretation of TILA adopted by the majority of courts, including the court below, erroneously restricts consumers' rescission rights. Accordingly, the Bureau is filing *amicus* briefs in appeals pending in four circuits (including here) to explain the correct interpretation of the Act. To rescind a mortgage loan under TILA and Regulation Z, consumers must notify their lenders within three years of obtaining the loan, but are not also required to sue their lenders within that same timeframe if the lenders contest the rescission.

STATEMENT

A. Statutory and Regulatory Background

Congress enacted TILA in 1968 to establish a comprehensive scheme requiring lenders to disclose credit terms to consumers, with the aim of promoting the "informed use of credit." 15 U.S.C. § 1601(a). TILA requires lenders to provide "clear and accurate disclosures of terms dealing with things like finance charges, annual percentage rates of interest, and the borrower's rights." *Beach v. Ocwen Fed. Bank*, 523

U.S. 410, 412 (1998). TILA entitles consumers to statutory and actual damages to remedy violations of its disclosure and other provisions. 15 U.S.C. § 1640.

Section 125 of the Act, 15 U.S.C. § 1635, also provides consumers a statutory right to rescind certain types of mortgage loans by giving timely notice to their lenders. The right to rescind applies to open-end and closed-end loans secured by a lien on the consumer's principal dwelling (*e.g.*, home equity lines of credit, some second mortgages, and refinances). *See generally* 12 C.F.R. §§ 1026.15, 1026.23. It does not apply to purchase-money mortgages. 15 U.S.C. § 1635(e)(1).

Congress enacted § 1635 in response to fraudulent home-improvement schemes in which "homeowners, particularly the poor," were "trick[ed] * * * into signing contracts at exorbitant rates, which turn out to be liens on the family residences." 114 CONG. REC. H14388 (daily ed. May 22, 1968) (statement of Rep. Sullivan); *see id.* H14384 (statement of Rep. Patman). Section 1635 combats this unfairness by requiring lenders to disclose the material terms of transactions, providing consumers an opportunity to reflect on those terms, and granting consumers a statutory right to cancel transactions if they have a change of heart. Section 1635(a) provides:

> [T]he [consumer] shall have the right to rescind [qualifying mortgage loans] 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.

In operation, § 1635(a) provides consumers a three-day "cooling off" period to cancel their loans for any reason. But this period is meaningful only if consumers are aware of the material terms of their transactions and their right to cancel. Thus, § 1635(a) allows consumers to rescind until midnight of the third business day following the later of (1) loan consummation, (2) delivery of the notice of the right to cancel, or (3) delivery of the material disclosures.

In 1980, Congress amended § 1635 to limit the time period within which consumers must exercise their right to rescind. *See* Pub. L. No. 96-221, § 612 (1980). Under that new provision, § 1635(f), Congress provided:

> **(f) Time limit for exercise of right**
>
> [A consumer'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 consumer].

To rescind a loan, the consumer must "notify[ ] the creditor, in accordance with regulations of the Bureau, of his intention to do so" within the timeframe provided by § 1635(f). 15 U.S.C. § 1635(a). Regulation Z, in turn, specifies 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." 12 C.F.R. §§ 1026.15(a)(2),

1026.23(a)(2). The Bureau promulgated several model forms for this purpose. *See* 12 C.F.R. pt. 1026, App'x H. Model form H-8, for example, provides:

H-8—Rescission Model Form (General)

NOTICE OF RIGHT TO CANCEL

Your Right to Cancel

You are entering into a transaction that will result in a [mortgage/lien/ security interest] [on/in] your home. You have a legal right under federal law to cancel this transaction, without cost, within three business days from whichever of the following events occurs last:

(1) the date of the transaction, which is

__________________________; or

(2) the date you received your Truth in Lending disclosures; or

(3) the date you received this notice of your right to cancel.

If you cancel the transaction, the [mortgage/lien/security interest] is also cancelled. Within 20 calendar days after we receive your notice, we must take the steps necessary to reflect the fact that the [mortgage/lien/security interest] [on/in] your home has been cancelled, and we must return to you any money or property you have given to us or to anyone else in connection with this transaction.

You may keep any money or property we have given you until we have done the things mentioned above, but you must then offer to return the money or property. If it is impractical or unfair for you to return the property, you must offer its reasonable value. You may offer to return the property at your home or at the location of the property. Money must be returned to the address below. If we do not take possession of the money or property within 20 calendar days of your offer, you may keep it without further obligation.

How to Cancel

If you decide to cancel this transaction, you may do so by notifying us in writing, at

(creditor's name and business address).

You may use any written statement that is signed and dated by you and states your intention to cancel, or you may use this notice by dating and signing below. Keep one copy of this notice because it contains important information about your rights.

If you cancel by mail or telegram, you must send the notice no

later than midnight of (date)

(or midnight of the third business day following the latest of the three events listed above). If you send or deliver your written notice to cancel some other way, it must be delivered to the above address no later than that time.

I WISH TO CANCEL

____________________________ __________

Consumer's Signature Date

When a consumer exercises a valid right of rescission under § 1635(a), the transaction is cancelled. The effect of cancellation is governed by § 1635(b): The consumer "is not liable for any finance or other charge, and any security interest given

by the obligor * * * becomes void upon such a rescission." 15 U.S.C. § 1635(b); 12 C.F.R. §§ 1026.15(d)(1), 1026.23(d)(1). Section 1635(b) also governs the process of cancellation: Within 20 calendar days after receipt of a notice of rescission, the lender must return any money or property given in connection with the transaction and take all necessary action to reflect the termination of the security interest. 15 U.S.C. § 1635(b); 12 C.F.R. §§ 1026.15(d)(2), 1026.23(d)(2). When the lender has performed its obligations, the consumer must tender the money or property to the lender or, if that is impracticable or inequitable, must tender the property's reasonable value. 15 U.S.C. § 1635(b); 12 C.F.R. §§ 1026.15(d)(3), 1026.23(d)(3). This statutory procedure may be modified by court order.[1] 15 U.S.C. § 1635(b); 12 C.F.R. §§ 1026.15(d)(4), 1026.23(d)(4).

B. Facts[2]

This case concerns Elayne Wolf's alleged rescission of a mortgage loan under § 1635. On May 14, 2007, Wolf entered into a loan agreement with MetroCities Mortgage, LLC to refinance her mortgage. Dkt. 48 at 1. MetroCities secured the loan

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[1] For example, a court might modify these procedures if a consumer is in bankruptcy proceedings and prohibited from returning anything to the lender, or if the equities otherwise dictate that modification is appropriate. 12 C.F.R. pt. 1026, supp. I, subpt. B at 15(d)(4).

[2] Because this is an appeal from an order granting the appellees' motion to dismiss, the Court and the Bureau must accept Wolf's allegations as true. *Republican Party of N.C. v. Martin*, 980 F.2d 943, 952 (4th Cir. 1992). The Bureau takes no position on the merits of Wolf's claims.

with a deed of trust. Legal title to the rights conveyed by the deed of trust was assigned to BAC Home Loans Servicing LP. *Id.* 2.

Wolf alleged that MetroCities violated the Act's disclosure requirements by materially understating the finance charge and failing to provide proper notice of Wolf's right to rescind. *Id.* 3. Within three years of obtaining the loan, Wolf sent a notice of rescission to BAC. *Id.* 2. BAC subsequently sold the home to Fannie Mae in a foreclosure sale on July 20, 2010. *Id.*

Wolf remained in the home despite the foreclosure sale, and Fannie Mae obtained a judgment of possession in Virginia state court. *See id.* 2. Wolf timely appealed that judgment and also filed a state-court action on February 24, 2011—three years and nine months after obtaining her loan. *Id.* 2-3. Wolf's lawsuit was removed to federal district court on March 21, 2011. *Id.* 3. Wolf filed an amended complaint in the district court, seeking a declaratory judgment that her rescission was valid, an order returning the home's title to her, and damages. *Id.* 3. The defendants moved to dismiss. *Id.* 1.

The district court (Moon, J.) granted the defendants' motions, relying on several district court decisions from this Circuit, including *Yowell v. Residential Mortgage Solution, LLC*, No. 3:10-cv-00063, 2011 WL 3654388 (W.D. Va. Aug. 17, 2011) and *Bradford*, 799 F. Supp. 2d 625. *See* Dkt. 48 at 8. The court held that the "three-year limitations period" under § 1635(f) is "absolute" and "extinguishes the borrower's rescission right regardless of whether any notice of rescission was filed within three

years of closing." *Id.* (quoting *Bradford*, 799 F. Supp. 2d at 632) (internal quotation marks omitted). Accordingly, the court dismissed as untimely Wolf's request for a declaratory judgment that her rescission was valid, despite her allegation that she notified BAC of her rescission within three years of obtaining her loan. *Id.* 9.

SUMMARY OF ARGUMENT

Section 1635 grants consumers a unilateral right to rescind qualifying mortgage loans for up to three years after obtaining their loans. Under the plain terms of that provision, consumers are required to do only one thing before the three-year period expires—exercise their right to rescind by providing written notice to their lenders. Yet many courts, including the court below, have misread § 1635 to require something more. These courts hold that, if the rescission is contested, consumers also must sue their lenders within the same three-year timeframe. This interpretation of the Act is wrong, and it should be rejected.

Section 1635 establishes a private, non-judicial mechanism for consumers to rescind mortgage loans by providing notice to their lenders. Its requirements are uncomplicated. Section 1635(a) and Regulation Z specify that consumers exercise their right to rescind by providing written notice to their lenders. Section 1635(b) entitles consumers to relief when they exercise a valid rescission right. And § 1635(f) limits the period of time consumers have to notify their lenders in accordance with subsections (a) and (b) and Regulation Z. This statutory scheme is consistent with the

historical understanding that rescission may be achieved unilaterally upon notice to the counterparty to a contract. *See infra* Part A.

The district court erred in holding that the Act also requires consumers to file suit against their lenders within the time provided under § 1635(f). Subsection (f) provides that the rescission right "expire[s]" three years after loan consummation. It does not refer to consumers bringing lawsuits. The absence of such language is consistent with the statutory purpose of providing consumers a non-judicial mechanism to rescind their loans. Consequently, interpreting § 1635(f) as controlling the time to file lawsuits makes little sense. Although litigation may ensue after a consumer exercises a unilateral right to rescind a loan, rescission itself is achieved as of the date the consumer provides notice. The purpose of any subsequent litigation is to determine if the consumer in fact had a right to rescind—and if so, to require the lender to follow the procedures set out in § 1635(b) and Regulation Z. *See infra* Part B.

The Supreme Court's decision in *Beach v. Ocwen Federal Bank*, 523 U.S. 410 (1998), is not to the contrary. Although *Beach* did not resolve the question presented in this case, many courts, including the district court below, have invoked *Beach* to hold that § 1635(f) is a "statute of repose" that, *by definition*, requires consumers to file suit. These courts incorrectly assume that, because § 1635(f) has features of a statute of repose, it cannot define only the time to provide for providing notice. But statutes of repose are often satisfied by acts other than filing lawsuits. Thus, even accepting

that § 1635(f) is a "statute of repose," it does not require consumers to file suit within three years of obtaining their loans. *See infra* Part C.

The understanding that § 1635(f) is satisfied by notice is compelled by the plain language of the Act and the statutory purpose. Requiring consumers also to file suit within the time provided under subsection (f) disregards both. The holding below should be reversed.

ARGUMENT

Section 1635 Defines The Time For Consumers To Notify Their Lenders, Not The Time For Consumers To Sue Their Lenders.

A. Consumers exercise their right to rescind by notifying their lenders within the three-year period provided under § 1635(f).

Section 1635(f) defines the period of time during which consumers who do not receive the disclosures required under the Act are permitted to rescind their loans. It provides: the "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." This language specifies *when* consumers must rescind, but it is silent on *how* they must do so. The answer to that question is supplied by §§ 1635(a) and (b) and Regulation Z.

1. "[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." *Belini v. Washington Mut. Bank, FA*, 412 F.3d 17, 25 (1st Cir. 2005). Thus, when consumers have a right to rescind under § 1635 and "elect[ ] to rescind, the

mechanics of rescission are uncomplicated." *McKenna v. First Horizon Home Loan Corp.*, 475 F.3d 418, 422 (1st Cir. 2007). Section 1635(a) provides that the consumer "shall have the right to rescind" "by notifying the creditor" using "appropriate forms" provided "in accordance with regulations of the Bureau." Consistent with this section's unambiguous meaning, Regulation Z requires consumers to "exercise the right to rescind" by "notify[ing] the creditor of the rescission" in writing. 12 C.F.R. §§ 1026.15(a)(2), 1026.23(a)(2).

Section 1635(b) entitles consumers to relief when they exercise a valid rescission right: "When an obligor *exercises his right to rescind* * * * he is not liable for any finance or other change, and any security interest given by the obligor * * * becomes void upon such a rescission." (emphasis added). Thus, when a consumer has a right to rescind under the Act, "all that the consumer need do is notify the creditor of his intent to rescind. The agreement is then automatically rescinded." *Williams v. Homestake Mortg. Co.*, 968 F.2d 1137, 1140 (11th Cir. 1992).

The principle that consumers exercise the TILA right of rescission through notice is well established. As this Court has recognized, "[t]o exercise a right to rescind, a borrower must notify the creditor of the rescission by mail, telegram, or other means of written communication." *Jones v. Saxon Mortg., Inc.*, 537 F.3d 320, 325 (4th Cir. 1998). *See also McOmie-Gray v. Bank of Am. Home Loans*, 667 F.3d 1325, 1327 (9th Cir. 2012); *Taylor v. Domestic Remodeling, Inc.*, 97 F.3d 96, 98 (5th Cir. 1996) (*per*

curiam); *Williams*, 968 F.2d at 1139; *Rachbach v. Cogswell*, 547 F.2d 502, 505 (10th Cir. 1976). The Bureau is aware of no contrary authority.

Rescinding transactions through notice is not unique to TILA. In *Griggs v. E.I. DuPont de Nemours & Company*, 385 F.3d 440, 445-46 (4th Cir. 2004), this Court explained that since "the days of the divided bench," courts have recognized two types of rescission—rescission in equity and rescission at law. Rescission in equity is "'effected by the decree of the equity court which entertains the action for the express purpose of rescinding the contract and rendering a decree granting such relief.'" *Id.* 446 (quoting *Haumont v. Security State Bank*, 374 N.W.2d 2, 7 (Neb. 1985)). Rescission at law, by contrast, occurs when one party "has a right to unilaterally avoid a contract." *Id.* 445.

Rescission at law is achieved "when the plaintiff gives notice to the defendant that the transaction has been avoided and tenders to the defendant the benefits received by the plaintiff under the contract." *Id.* 445-46. This form of rescission is "a fact, the assertion by one party to [an] avoidable contract of his right (if such he had) to avoid it, and when the fact is made known to the other party, whether by a suit or in any other unequivocal way, the rescission is complete." *Cunningham v. Pettigrew*, 169 F. 335, 341 (8th Cir. 1909); *accord, e.g., Goess v. A.D.H. Holding Corp.*, 85 F.2d 72, 74 (2d Cir. 1936) (explaining that a party "may exercise the power to avoid the transaction by giving notice of rescission, demanding the return of the consideration given, and offering to restore what he received" and that the rescission "becomes fixed as of that

time"); *Johns v. Coffee*, 133 P. 4, 7 (Wash. 1913) (rejecting argument that "the mere giving notice of rescission to the corporate officers is not in itself sufficient to accomplish a rescission"); *see also* 2 Henry Black, *A Treatise On The Rescission Of Contracts And Cancellation Of Written Instruments*, § 577 (1916).

Under § 1635, consumers have a unilateral right to rescind upon notice to their lender. The right to rescind under § 1635 is therefore in the nature of a rescission at law.[3] Read together, subsections (a) and (b) and Regulation Z permit consumers to rescind qualifying mortgage loans by providing written notice to their lender. Subsection (f) then defines the maximum period of time consumers have to rescind by notifying their lender in accordance with subsections (a) and (b) and Regulation Z.

2. Although several district courts in this Circuit have held otherwise, this Court's decision in *American Mortgage Network v. Shelton*, 486 F.3d 815 (4th Cir. 2007) is consistent with the understanding that consumers exercise their rescission rights under TILA by notifying their lenders.

Shelton concerns the effect of the consumer's notice of rescission on the lender's security interest under § 1635(b). The Court held that the notice of rescission "does not automatically void the loan contract," and therefore it did not require the

[3] Section 1635(b) reflects "a reordering of common law rules governing rescission," in that it requires the lender to release the security interest before the consumer tenders. *Williams*, 968 F.2d at 1140. Section 1635(b) also allows a court to modify this default procedure as necessary. However, as discussed *infra* Part B, the purpose of litigation following a rescission under TILA remains consistent with the purpose of litigation following a rescission at law.

lender "to unconditionally release the security interest on the [consumer's] residence within 20 days of notification of cancellation." *Id.* 820-21.[4]

Shelton is not directly relevant to the question presented here—whether § 1635(f) is satisfied by timely notification of the lender. Nonetheless, district courts in this Circuit have erroneously read *Shelton* to hold that notice "is a necessary, but not a sufficient, step in exercising of one's rescission right." *Bradford*, 799 F. Supp. 2d at 631; *see also Yowell*, 2011 WL 3654388 at n.7; *Gilbert v. Deutsche Bank Trust Company Americas*, No. 4:09-cv-181, 2010 WL 2696763, *5 (E.D. N.C. July 7, 2010) (notice of rescission "merely requested rescission" but "[s]uch a request does not constitute the exercise of the right of rescission.").

That interpretation of § 1635 contravenes the Bureau's controlling interpretation in Regulation Z, which specifies that consumers "exercise the right to rescind" by "notify[ing] the creditor of the rescission" in writing. 12 C.F.R. §§ 1026.15, 1026.23. It should be rejected on that basis alone. *See Anderson Bros. Ford v. Valencia*, 452 U.S. 205, 219 (1981) ("[A]bsent some obvious repugnance to the statute, the * * * regulation implementing [TILA] should be accepted by the courts[.]"); *Ford Motor Credit Co. v. Milhollin*, 444 U.S. 555, 565 (1980) ("Unless demonstrably irrational," the Bureau's interpretation of TILA "should be dispositive.").

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[4] The Bureau takes no position on the issue determined in *Shelton*, which is not presented by this appeal.

Furthermore, these districts courts have misinterpreted *Shelton*. *Shelton* held that "the security interest becomes void" when the consumer "exercises a right to rescind that is available in the particular case, either because the creditor acknowledges that the right of rescission is available" or "the appropriate decision maker has so determined," and until that point, the consumer had "only advanced a claim seeking rescission." *Shelton*, 486 F.3d at 821 (internal quotation marks omitted). In the Court's view, the lender's security interest is not dissolved until it is clear by one of these means that the "right to rescind * * * *is available*." *Id.* (emphasis added).

Shelton thus addressed whether notice of rescission *dissolves* the lender's *security interest* under § 1635(b). It did not address or determine whether notice of rescission *exercises* the consumer's *rescission right* under § 1635(a). As a result, *Shelton* should not be read to reject *Jones* or the Bureau's controlling interpretation of § 1635(a), under which consumers exercise their rescission rights by providing written notice to their lenders.

District courts in this Circuit have also noted that *Shelton* disagreed with the Eleventh Circuit's conclusion in *Williams*, 968 F.2d at 1142, that "rescission is automatic upon notification." *Shelton*, 486 F.3d at 821. But the tension between these two decisions relates only to the effect of rescission under § 1635(b); it has nothing to do with how consumers exercise their right to rescind under § 1635(a). Indeed, the statement in *Williams* that rescission is "automatic" is akin to *Griggs*'s discussion of rescission at law, which—if available—is "effected when the plaintiff gives notice to the defendant that the transaction has been avoided." *Griggs*, 385 F.3d at 445.

* * *

The important point is that consumers do not go to court to exercise their right of rescission under TILA. Under §§ 1635(a) and (b) and Regulation Z, consumers exercise their rescission right by notifying their lenders. *Shelton* does not hold otherwise. Accordingly, the Act requires consumers to do only one thing before the right to rescind expires under § 1635(f): *exercise* their right to rescind by *notifying* their lenders of the rescission in writing.

B. Consumers are not required also to sue their lenders within the three-year period provided under § 1635(f).

Many courts, including the district court here, have erroneously required consumers to do more than exercise their right to rescind before the right expires under § 1635(f). When rescission is contested by the lender, these courts have held that the consumer also must sue the lender within § 1635(f)'s three-year timeframe. This interpretation of the Act is not supported by the plain language of § 1635 and misunderstands the role of litigation in a contested rescission.

Section 1635, like any statutory provision, must be interpreted in accordance with its "plain language." *Beach*, 523 U.S. at 416. Section 1635(f) simply states that the "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." There is no language anywhere in § 1635 that requires consumers to file suit before the right to rescind expires. Certainly, the district court did not identify any.

The absence of such language is consistent with the statutory scheme: Consumers achieve rescission under TILA by providing notice, not by winning a lawsuit. As a result, reading § 1635(f) to control the time for consumers to sue their lenders makes little sense.

Of course, litigation often ensues after consumers assert a unilateral right to rescind. If a lender disputes the rescission despite receiving timely notice, either party may file suit; and the consumer also may raise the rescission as a defense in foreclosure. *See* 15 U.S.C. § 1635(i). The issue in these cases is not whether the consumer *may* rescind, but whether he *did* rescind. Under TILA, the rescission is effective as of the notice date or not at all; the subsequent litigation is simply to determine whether the lender's refusal to honor the rescission was justified. If the court finds the consumer had the right to rescind and properly exercised it, the rescission was achieved as of the notice date, and the court should order the lender to follow the procedures specified by § 1635(b), or modify them as appropriate. And if the court finds the consumer did not have (or improperly exercised) a right to rescind, the rescission was not achieved, and the loan remains in place.

This understanding of the purpose of litigation under § 1635 is consistent with rescission at law in other contexts. "[W]here one contracting party * * * serve[s] notice of rescission on the [other], 'the rescission [is] complete and perfect'" as of the notice, not the litigation that may ensue. *Prewitt v. Sunnymead Orchard Co.*, 209 P. 995, 995 (Cal. 1922) (quoting *Am. Type Founders' Co. v. Packer*, 62 P. 744, 746 (Cal. 1900)). Thus, as

this Court recognized in *Griggs*, "the court in cases of rescission 'at law' does not effect the rescission and the court's only role is to get back the plaintiff's property or its value." 385 F.3d at 446 (quoting Dan B. Dobbs, *Handbook on the Law of Remedies* at § 4.8); *see also id.* 446 ("Rescission at law is accomplished without the aid of a court [and] * * * is completed when, having grounds justifying rescission, one party to a contract notifies the other party that he intends to rescind the contract and return that which he received under the contract.") (quoting *Acton v. Deliran*, 737 P.2d 996, 999 n.5 (Utah 1985)).[5]

The cases on which the district court relied characterize the consumers' notices of rescission as "merely request[ing] rescission." *See, e.g.*, *Gilbert*, 2010 WL 2696763 at *5. This interpretation misunderstands the effect of notice under § 1635(b). Notice does not "request" rescission; it *achieves* rescission, assuming the consumer properly exercised a valid right under the Act. *See, e.g.*, *Handbook on Remedies* § 4.8 ("[T]he plaintiff effects the rescission [in cases of rescission at law], and the court gives a judgment for restitution if that is needed."). If, on the other hand, the consumer did not have a valid rescission right or improperly exercised that right, the notice is without effect. But regardless of the notice's effect in a particular case, all that

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[5] *See also, e.g.*, *Peterson v. Highland Music, Inc.*, 140 F.3d 1313, 1322 (9th Cir. 1998); *Phelps v. U.S. Life Credit Ins. Co.*, 984 S.W.2d 425, 427 (Ark. 1999); *Omlid v. Sweeney*, 484 N.W.2d 486, 490 & n.3 (N.D. 1992); *Jones v. Bohn*, 311 N.W.2d 211, 213 (S.D. 1981); *Brown v. Techdata Corp., Inc.*, 234 S.E.2d 787, 792 (Ga. 1977); *E.T.C. Corp. v. Title Guarantee & Trust Co.*, 271 N.Y. 124, 128 (1936).

§ 1635(f) requires is that the consumer provides that notice within three years. Once the consumer provides timely notice to the lender, the right to rescind cannot "expire," because the consumer has already rescinded. The timeliness of the lawsuit to require the lender to honor the rescission is completely independent of the timeliness of the rescission itself under § 1635(f).

In addition to being textually unsupported, the district court's holding would vitiate the non-judicial rescission process established by Congress, with unintended and inefficient results. Requiring consumers not only to notify their lenders but also to bring suit within three years would incentivize consumers to file suit immediately, rather than working privately with their lenders to unwind the transaction. It would also encourage lenders to stonewall in response to a notice of rescission. Under the district court's holding, all a lender need do is refuse to rescind and wait. If the consumer does not file suit within three years, even a valid rescission becomes a nullity. These consequences are inefficient for lenders, consumers, and the courts and contravene the purpose of § 1635 to make "[t]he rescission process * * * private, with the creditor and debtor working out the logistics of a given rescission." *McKenna*, 475 F.3d at 421; *accord Belini*, 412 F.3d at 25.

C. *Beach* does not require consumers to file suit within the three-year period provided under § 1635(f).

Relying on the Supreme Court's decision in *Beach v. Ocwen Federal Bank*, the cases cited by the district court characterize § 1635(f) as a "statute of repose"

requiring that consumers both notify their lenders of their rescission and sue their lenders within three years. *See Yowell*, 2011 WL 3654388 at n.7; *Bradford*, 799 F. Supp. 2d at 630. These courts correctly recognize that § 1635(f) has features of a statute of repose, because the three-year period described in that section runs from a fixed date—loan consummation—that is independent of the actions or inaction of the litigants. But the courts err in assuming that a "statute of repose" also must establish the timeframe for initiating litigation. There is no rule that statutes of repose can be satisfied only by filing lawsuits, and *Beach* should not be read to require that result.

Beach involved a consumer who attempted to rescind a loan by raising rescission "as an affirmative defense in a collection action brought by the lender more than three years after the consummation of the transaction." 523 U.S. at 411-12. The Court concluded that the language of § 1635(f) "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." *Id.* 417. Because § 1635(f) "completely extinguishes the right of rescission at the end of the three-year period," the consumer in *Beach* was not entitled to assert it for the first time as a defense to a foreclosure action. *Id.* 411-12.

The holding in *Beach* clarifies *when* consumers must rescind their loans: "Section 1635 completely extinguishes the right of rescission at the end of the 3-year period." *Id.* 412. But it does not address *how* consumers must do so. Accordingly, the lower courts have recognized that *Beach* does not resolve the question presented here: whether § 1635(f) requires consumers to file suit before the right to rescind expires.

Dkt. 48 at 9-10; *Bradford*, 799 F. Supp. 2d at 630; *Rosenfield v. HSBC Bank, USA*, No. 10-cv-00058, 2010 WL 3489926 at *5 (D. Colo. Aug. 31, 2010), *appeal docketed*, No. 10-1442 (10th Cir. Sept. 27, 2010).

Many courts, including those cited by the district court below, nevertheless have relied on *Beach* to hold that § 1635(f) is a "statute of repose" that requires consumers to file suit within the three-year period. *Yowell*, 2011 WL 3654388 at n.7; *Bradford*, 799 F. Supp. 2d at 631. The first half of that analysis is unobjectionable, and flows from this Court's decision in *Jones*. In *Jones*, the Court relied on *Beach* to hold that "§ 1635(f) is a statute of repose." 537 F.3d at 326. The Court reasoned that § 1635(f) "mirrors a typical statute of repose in that it precludes a right of action after a specified period of time." *Id.* 327 (internal quotation marks omitted). Consistent with the Supreme Court's opinion in *Beach*, *Jones* concluded that "the time period stated" in § 1635(f) is "absolute" and "is typically not tolled for any reason." *Id.*; *accord Beach*, 523 U.S. at 419.

Like *Beach*, *Jones* involved a consumer who did not provide notice of rescission to the lender within three years of obtaining the loan, and thus did not resolve the question presented in this appeal. Nevertheless, *Jones* does recognize that § 1635(f) has features of a typical statute of repose, because it measures time from "a fixed date readily determinable by the [lender]"—the date of the relevant credit transaction—rather than "a date determined by the personal circumstances of the [consumer],"

such as the date the consumer learns he did not receive the required disclosures. *Caviness v. Derand Res. Corp.*, 983 F.2d 1295, 1300 at n.7 (4th Cir. 1993).

But the lower courts' conclusion that the label "statute of repose" implicitly requires *the filing of a lawsuit* before the three-year period expires under § 1635(f) mistakenly expands the holdings of *Beach* and *Jones*. There is no rule that statutes of repose can be satisfied only by filing lawsuits. On the contrary, statutes of repose are frequently used to limit the time for taking other types of actions, such as sending notices or submitting claims for benefits. The Uniform Commercial Code, for example, contains a "statute of repose" pursuant to which consumers must "notif[y] the bank of [their] objection" to an unauthorized wire transfer from their account "within one year of receiving notice of the account's debit." *Ma v. Merrill Lynch*, 597 F.3d 84, 88-89 (2d Cir. 2010) (discussing N.Y. UCC § 4-A-505). Other statutes that have been identified as "statutes of repose" require applicants for immigration relief or public benefits to submit applications within a defined period of time. *See, e.g.*, *Balam-Chuc v. Mukasey*, 547 F.3d 1044, 1048-50 (9th Cir. 2008); *Iacono v. Office of Persl. Mgmt.*, 974 F.2d 1326, 1328 (Fed. Cir. 1992). These statutes provide repose by establishing a date certain for applicants to obtain relief by taking the act specified in statute, but they do not require the filing of lawsuits.

Of course, applicants claiming relief under these statutes may resort to litigation: the government might reject a claim for benefits as untimely, or a bank might refuse to refund a wire transfer by claiming its customer failed to give proper

notice. *See, e.g.*, *Regatos v. N. Fork Bank*, 257 F. Supp. 2d 632, 642-45 (S.D.N.Y. 2003). But the statute of repose in such a case defines the time for taking the act specified in the statute, not the time for filing any ensuing litigation. *See Zengen, Inc. v. Comerica Bank*, 158 P.3d 800, 811 (Cal. 2007) (explaining that a statute regarding unauthorized wire transfers was "not a statute of limitation but merely a statute of repose. It requires the customer only to notify the bank of the claim, not actually to commence the action." (citation omitted)); *Grabowski v. Bank of Boston*, 997 F. Supp. 111, 119 (D. Mass. 1997) (explaining that a similar provision was "in the nature of a statute of repose" and "does not create a statute of limitations on the time allowed to bring suit under [the statute]. Instead, it creates a one year notice requirement." (citation omitted)).

When Congress intends to use a statute of repose to define the period of time for filing lawsuits, it does so unambiguously. The Securities Exchange Act of 1934, for example, refers expressly to litigation in providing a "3-year period of repose": "*No action shall be maintained* to enforce any liability created under this section, unless brought within one year after the discovery of the facts constituting the violation and within three years after such violation." *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350, 360 & n.6 (1991) (quoting 15 U.S.C. § 78i(e)) (emphasis added). The General Aviation Revitalization Act of 1994 similarly provides an "eighteen-year statute of repose" that forbids "*civil action[s] for damages* * * * after the applicable limitation period." *Blazevska v. Raytheon Aircraft Co.*, 522 F.3d 948, 950-51

(9th Cir. 2008) (quoting Pub. L. No. 103-298, 108 Stat. 1552) (emphasis added). Likewise, "[s]ection 413 of ERISA is a statute of repose" providing that "[*n*]*o action may be commenced*" six years from the date of an alleged breach of fiduciary duty. *Radford v. Gen. Dynamics Corp.*, 151 F.3d 396, 399-400 (5th Cir. 1998) (quoting 29 U.S.C. § 1113) (emphasis added). The lack of comparable language in § 1635(f) is further evidence that this section should not be interpreted to require the filing of a lawsuit. *See Atl. Sounding Co., Inc. v. Townsend*, 557 U.S. 404, 129 S. Ct. 2561, 2570 (2009); *Omni Capital Int'l, Ltd. v. Rudolf Wolff & Co.*, 484 U.S. 97, 106 (1987).

The understanding that § 1635(f) may be satisfied through notification rather than litigation does not "permit borrowers to invoke the very tolling doctrines" rejected in *Jones* or "cloud" the lender's title in foreclosure. *Bradford*, 799 F. Supp. 2d at 630-31. Even if it did, it would not be for the courts "to substitute [their] view of * * * policy for the legislation which has been passed by Congress." *Florida Dept. of Revenue v. Piccadilly Cafeterias, Inc.*, 554 U.S. 33, 53 (2008). But achieving rescission through notice does not allow tolling and in fact helps ensure certainty of title more promptly than *Bradford* assumed. TILA requires consumers to notify their lenders of their rescission within a specified, non-tollable time period. *See* 15 U.S.C. §§ 1635(a), (f). By definition, a lender must be placed on notice of a consumer's rescission within three years of loan consummation or the right is forever extinguished. *See Beach*, 523 U.S. at 412; *Jones*, 537 F.3d at 327.

A lender that disputes a consumer's right to rescind typically has two options: it can file suit to confirm the consumer does not have a right to rescind, or it can choose not to sue and risk that a court will resolve that issue in the consumer's favor in a later proceeding. But the promptness of litigation to determine the validity of the consumer's rescission is within the lender's control.[6]

If, as BAC did here, the lender chooses not to file suit, it assumes the risk of a later adverse determination and has little cause to complain about protracted uncertainty regarding the validity of its security interest. The Act protects lenders' interests by requiring consumers to provide notice of the rescission within three years of obtaining their loans. The Act should not be interpreted to penalize consumers for rescinding by providing notice in accordance with the plain language of the statute, particularly when § 1635 is designed to permit consumers to rescind without judicial intervention, and the Act as a whole is "remedial legislation, to be construed broadly in favor of consumers." *Rand Corp. v. Yer Song Moua*, 559 F.3d 842, 845 (8th Cir. 2009).

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[6] Consumers can also file suit to confirm that they previously rescinded and to compel the lender to comply with the procedures set forth in § 1635(b). *See supra* 17-20. The fact that § 1635 does not expressly limit the time period for litigation does not mean no limit exists. Some courts have concluded that TILA's general one-year statute of limitations, 15 U.S.C. § 1640, applies. *See, e.g.*, *Hunter*, 400 B.R. at 660-61. There is some support for this approach in the legislative history. *See* S. REP. NO. 96-368, at 32 (1979), *reprinted in* 1980 U.S.C.C.A.N. 236, 268. Other courts have criticized application of § 1640 to rescission under § 1635. *See, e.g.*, *McOmie*, 667 F.3d at 1327-28; *Bradford*, 799 F. Supp. 2d at 632-33. If § 1640 does not apply, courts may apply well-established borrowing doctrines to find an analogous statute of limitations. *See, e.g.*, *Graham Cnty. Soil & Water Conservation Dist. v. United States ex rel. Wilson*, 545 U.S. 409, 414-15 (2005).

CONCLUSION

The decision below should be reversed.

Respectfully submitted.

s/ Rachel Rodman
LEONARD J. KENNEDY
General Counsel
TO-QUYEN TRUONG
Deputy General Counsel
DAVID M. GOSSETT
Assistant General Counsel
RACHEL RODMAN
Senior Counsel
PETER G. WILSON
KRISTIN BATEMAN
Attorneys

CONSUMER FINANCIAL PROTECTION BUREAU
1700 G Street, NW
Washington, D.C. 20552
(202) 435-7964
rachel.rodman@cfpb.gov

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Counsel for *Amicus Curiae*

CERTIFICATE OF COMPLIANCE WITH RULE 32(A)(7)

I certify that this brief complies with the type-volume limitation set forth in FRAP 32(a)(7)(B). My word processing program, Microsoft Word, counted 6,814 words in the foregoing brief, exclusive of the portions excluded by Rule 32(a)(7)(B)(iii).

April 13, 2012

s/ Rachel Rodman

Rachel Rodman
Attorney for *Amicus Curiae*
Consumer Financial Protection Bureau
1700 G Street, NW
Washington, D.C. 20552
rachel.rodman@cfpb.gov
(202) 435-7964

CERTIFICATE OF SERVICE

I hereby certify that on April 13, 2012, I electronically filed the foregoing using the court's CM/ECF system, which will send notification of such filing to the following:

Henry Woods McLaughlin, III
LAW OFFICE OF HENRY MCLAUGHLIN, P.C.
707 East Main Street
Suite 1375
Richmond, VA 23219
henry@mclaughlinvalaw.com
Counsel for plaintiff-appellant

Seth Abram Schaeffer
MCGUIREWOODS LLP
1 James Center
901 East Cary Street
Richmond, VA 23219
sschaeffer@mcguirewoods.com
Counsel for defendant-appellees Fannie Mae and BAC Home Loans Servicing LP

Peter Grasis
RATHBUN & GOLDBERG, PC
10427 North Street
Suite 200
Fairfax, VA 22030
pgrasis@rathbun-goldberg.com
Counsel for defendant-appellee Professional Foreclosure Corporation of Virginia

s/ Rachel Rodman
Rachel Rodman
Attorney for *Amicus Curiae*
Consumer Financial Protection Bureau
1700 G Street, NW
Washington, D.C. 20552
rachel.rodman@cfpb.gov
(202) 435-7964