No. 12-1053

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

STEVEN J. SOBIENIAK and VICTORIA MCKINNEY,

Plaintiffs-Appellants,

v.

BAC HOME LOANS SERVICING, L.P., ET AL.,

Defendants-Appellees,

CONSUMER FINANCIAL PROTECTION BUREAU,

Amicus Curiae.

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

BRIEF OF THE CONSUMER FINANCIAL PROTECTION BUREAU AS *AMICUS CURIAE* IN SUPPORT OF PLAINTIFFS-APPELLANTS 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

April 13, 2012

TABLE OF CONTENTS

Page

TABLE OF CITATIONS

Pages

Statutes

Regulations

Cases

Other Authorities

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., Geraghty v. BAC Home Loans Servicing LP*, No. 11-336, 2011 WL 3920248 (D. Minn. Sept. 7, 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* at n.2 (Mar. 1, 2012) (listing ten appeals pending in four circuits presenting the same issue).

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* Pub. L. No. 111-243, §§ 1061(b)(1), (d) (2010), *codified at* 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. 79,768-01, 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' right of rescission. Accordingly, the Bureau is filing *amicus* briefs in appeals pending in four circuits (including this one). 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 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. 14,388 (1968) (statement of Rep. Sullivan); *see id.* at 14,384 (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). As amended, § 1635(f) provides:

> **(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).

[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).

B. Facts[2]

This case concerns Steven Sobieniak and Victoria McKinney's alleged rescission of a mortgage loan under § 1635 of the Act. On March 22, 2007, Sobieniak and McKinney entered into a loan agreement with Countrywide Home Loans, Inc. to refinance the mortgage on their Wayzata, Minnesota home. Dkt. 53 at 2. Sobieniak and McKinney allege that at the time of the transaction, Countrywide violated the Act's disclosure requirements by failing to deliver two copies of the Notice of the Right to Cancel and a signed copy of the Truth in Lending Disclosure Statement. *Id.* at 6-8. Countrywide subsequently assigned the loan to BAC Home Loans Servicing, LP (BAC). Dkt. 30 ¶ 30.

Within three years of obtaining the loan, Sobieniak and McKinney sent a notice of rescission to Countrywide and BAC. Dkt. 53 at 3. BAC refused to honor the rescission, relying on what it claimed were signed copies of the notice of right to cancel and TILA disclosures. *See id.*; Dkt. 30 Ex. 6. On January 14, 2011—three years and nine months after obtaining the loan—Sobieniak and McKinney filed suit *pro se* in federal district court. Dkt. 53 at 3. They later retained counsel and amended their

[2] Because this is an appeal from an order granting the appellees' motion for summary judgment, the Court and the Bureau must construe the record in the light most favorable to the appellants and draw all reasonable inferences in their favor. *BP Group, Inc. v. Kloeber*, 664 F.3d 1235, 1239-40 (8th Cir. 2012). The Bureau takes no position on the merits of the appellants' claims.

complaint, seeking an order enforcing the rescission, a declaratory judgment terminating the security interest in their home, and damages. *Id.*

BAC moved to dismiss. *Id.* The district court (Doty, J.)—treating the motion as requesting summary judgment—granted judgment in favor of BAC, concluding that the claims seeking enforcement of the rescission and dissolution of the security interest were untimely as a matter of law. *See id.* at 3, 9-11.

Invoking the Supreme Court's decision in *Beach v. Ocwen Federal Bank*, 523 U.S. 410 (1998), the court held that § 1635(f) is a "three-year statute of repose" that "operates as a statutory bar independent of the actions (or inaction) of the litigants." *Id.* at 9 (internal quotation marks omitted). The court acknowledged that *Beach* did not "specifically address" whether a timely "rescission request" could "survive[ ]" more than three years after consummation of a loan if the consumer "fails to file suit until the time allowed by the statute of repose expires." *Id.* at 9-10. To resolve that question, the court looked to a recent district court opinion. *See id.* at 10 (discussing *Geraghty v. BAC Home Loans Servicing LP*, No. 11-336, 2011 WL 3920248 (D. Minn. Sept. 7, 2011)). The court "agreed with the reasoning" of *Geraghty* and, characterizing Sobieniak and McKinney's notice of rescission as a "claim for rescission," held that "a suit for rescission filed more than three years after consummation of an eligible transaction is barred by the TILA's statute of repose." *Id.*

Geraghty had held that, "[b]ecause § 1635(f) is, after *Beach*, unquestionably a statute of repose, notification may be sufficient to invoke the right of rescission but a

lawsuit to enforce the right must still be filed prior to the end of the three-year period." 2011 WL 3920248 at *4. Under this interpretation of the Act, "[m]ere invocation" of the right to rescind—*i.e.*, by providing notice to the lender—"without more," "will not preserve the right beyond the three-year period." *Id.* (quoting *Williams*, 410 F. App'x at 499). Otherwise, "a borrower who sends a letter claiming some disclosure defect, but who does not file suit, has indefinitely tolled the rescission period." Order at 11. *Geraghty* concluded that such a result would not only "contradict[ ] Congress's intent to create repose from the threat of rescission after three years," but also "negatively affect[ ] the certainty of title in a foreclosure sale." 2011 WL 3920248, at *5; *see also* Dkt. 53 at 11 (citing the "strong public policy favoring certainty of title").

For these reasons, the district court granted summary judgment in favor of BAC, despite Sobieniak and McKinney's allegation that they provided notice of rescission to BAC within three years of obtaining their loan. *Id.* at 12.

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 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 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[.]" 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.

"[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. *See McOmie-Gray*, 667 F.3d at 1327 ("Regulation Z * * * confirms that notification is the means by which borrowers exercise their right to rescind."); *Jones v. Saxon Mortg., Inc.*, 537 F.3d 320, 325 (4th Cir. 1998) ("In order to exercise a right to rescind, a borrower must notify the creditor of the rescission by mail, telegram, or other means of written communication."); *Taylor v. Domestic Remodeling, Inc.*, 97 F.3d 96, 98 (5th Cir. 1996) (*per curiam*) ("In order to exercise the right to rescind, the consumer shall notify the creditor of the rescission by mail, telegram or other means of written communication."); *Williams*, 968 F.2d at 1139 ("Congress provided the consumer with the right to rescind a credit transaction under § 1635(a) solely by notifying the creditor within set time limits of his intent to rescind."); *Rachbach v. Cogswell*, 547 F.2d 502, 505 (10th Cir. 1976) ("Section 1635(a) requires only that the obligor exercise his right of rescission by notifying the creditor within the prescribed time limit of his intent to rescind."). The Bureau is not aware of any contrary appellate authority.

Rescinding transactions through notice is not unique to TILA. Since "the days of the divided bench," courts have recognized two types of rescission—rescission in equity and rescission at law. *Griggs v. E.I. DuPont de Nemours & Company*, 385 F.3d 440, 445-46 (4th Cir. 2004). 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.* at 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.*

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.* at 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) (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 the rescission "becomes fixed as of that time"); *Wilcox Trux v. Rosenberger*, 195 N.W. 489, 490-91 (Minn. 1923) (a rescission need not be awarded by the court, but rather "may be by the unaided act of the defrauded party"); *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"); 2 Henry Black, *A Treatise On The Rescission Of Contracts And Cancellation Of Written Instruments*, § 577 (1916).

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

[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.

"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 consumers 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)). The purpose of litigation following the unilateral rescission of a contract is not to ask the court to cancel the contract, because "[r]escission 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." *Griggs*, 385 F.3d at 446 (quoting *Acton v. Deliran*, 737 P.2d 996, 999 n.5 (Utah 1987) *v. Deliran*, 737 P.2d 996, 999 n.5 (Utah 1987)). Instead, "the court merely grants restitution after the party seeking it has achieved rescission by its own acts." *Phelps v. U.S. Life Credit Ins. Co.*, 984 S.W.2d 425, 427 (Ark. 1999).[4]

[4] *Accord Peterson v. Highland Music, Inc.*, 140 F.3d 1313, 1322 (9th Cir. 1998) (after a party "has effected the rescission" by notice, "subsequent judicial proceedings are for the purpose of confirming and enforcing that rescission"); *Omlid v. Sweeney*, 484 N.W.2d 486, 490 & n.3 (N.D. 1992) (a suit following rescission at law "is essentially an action for restitution"); *Jones v. Bohn*, 311 N.W.2d 211, 213 (S.D. 1981) (a party can "enforce his rights" arising from a unilateral rescission that "has already been accomplished"); *Brown v. Techdata Corp., Inc.*, 234 S.E.2d 787, 792 (Ga. 1977) (a party who "rescinds the contract himself" may "then bring an action at law for money damages (more accurately termed restitution) or for recovery of [his] property"); *E.T.C. Corp. v. Title Guarantee & Trust Co.*, 271 N.Y. 124, 128 (1936) (rescission at law "reinvests [a party] with the legal title to the thing for the possession of which he subsequently sues"); Dan B. Dobbs, *Handbook of Remedies* § 4.8 ("[T]he plaintiff effects the rescission and the court gives a judgment for restitution if that is needed.").

The district court's characterization of Sobieniak and McKinney's notice of rescission as a "letter claiming some disclosure defect" that "indefinitely tolled the rescission period," Dkt. 53 at 11, misunderstood the effect of the notice under § 1635(b). The notice does not "toll" the time period for rescission; it *achieves* rescission, if the consumer properly exercised a valid rescission right under the Act. 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 § 1635(f) requires is that the consumer provides notice within three years. Once the consumer provides timely notice to the lender, it is irrelevant when the right to rescind "expires," 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 district court characterized § 1635(f) as a "statute of repose" requiring that consumers both notify their lenders of their rescission and sue their lenders within three years. Dkt. 53 at 9-11. The court correctly recognized 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." *Id.* at 9. But the court erred in assuming that, because § 1635(f) is much like a statute of repose, its three-year period 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.* at 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 more than three years after loan consummation as a defense to a foreclosure action. *Id.* at 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.* at 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. 53 at 9-10; *Rosenfield v. HSBC Bank, USA*, No. 10-cv-00058, 2010 WL 3489926, *5 (D. Colo. Aug. 31, 2010) *appeal docketed*, No. 10-1442 (10th Cir. Sept. 27, 2010).

Many courts, including 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. Dkt. 53 at 9-11; *McOmie-Gray*, 667 F.3d at 1328-29; *Geraghty*, 2011 WL 3920248, at *4. The first half of that analysis is unobjectionable. These courts correctly perceive that § 1635(f) is much like a statute of repose, because it measures the time within which consumers must exercise their right to rescind from "a fixed date readily determinable by the [lender]," *Sterlin v. Biomune Sys.*, 154 F.3d 1191, 1196 n.9 (10th Cir. 1998)—the date of the relevant credit transaction—rather than from the (possibly indeterminate) date when consumers learn that they did not receive required disclosures. *Beach* thus acknowledges that TILA "permits no federal right to rescind, defensively or otherwise, after the 3-year period of § 1635(f) has run,"

even if consumers do not learn that their lender failed to provide the required disclosures until after the three-year period has passed. 523 U.S. at 419.

But concluding that the label "statute of repose" implicitly requires the filing of a lawsuit within three years, Dkt. 53 at 9-11; *McOmie-Gray*, 667 F.3d at 1326; *Williams*, 410 Fed. App'x at 499, mistakenly expands the holding in *Beach*. 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 thwart "the strong public policy favoring certainty of title" or permit "indefinite[ ] toll[ing]" of "the rescission period." Dkt. 53 at 11. Even if it did, it is not 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, 52 (2008). But achieving rescission through notice does not allow tolling and helps ensure certainty of title more promptly than many courts have 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.

If the lender disputes the consumer's right to rescind, it 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.[5]

Indeed, a similar sequence of events was alleged to have unfolded in this case. Sobieniak and McKinney received their loan from Countrywide in March 2007, and notified Countrywide and BAC of their rescission on January 15, 2010. Within two weeks of receiving the notice, BAC reviewed the loan file, determined that it did not agree that Countrywide had violated TILA, and mailed a letter declining to take the steps set forth in § 1635(b). Approximately one year later and before any sale of the home, Sobieniak and McKinney filed this lawsuit to compel BAC to honor their rescission.

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'

---

[5] 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* 16-19. 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. 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); *Aaron v. Brown Group, Inc.*, 80 F.3d 1220, 1223-26 (8th Cir. 1996).

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).

* * *

In sum, § 1635 is a straightforward provision that permits consumers who do not receive the necessary disclosures to rescind qualifying mortgage loans by notifying their lenders within three years of obtaining the loan. This Court should reject a construction of § 1635 that also would require consumers to file suit against their lenders within the same three-year timeframe: It is not supported by the plain language of the provision and contravenes the purpose of the statutory scheme to provide consumers a private, non-judicial mechanism to rescind mortgage loans.

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

Counsel for *Amicus Curiae*

April 13, 2012

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 6,783 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) 435-7237

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:

Jeffrey Vesel
920 Sunrise Avenue
Stillwater, MN 55082
Counsel for plaintiffs-appellants

Andrew B. Messite
REED SMITH LLP
599 Lexington Avenue
New York, NY 10022
Counsel for defendants-appellees

Andre Hanson
Ronn B. Kreps
FULBRIGHT & JAWORSKI LLP
80 S. Eighth Street
2100 IDS Center
Minneapolis, MN 55402-2112
Counsel for defendants-ppellees

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) 435-7237