No. 12-1053

IN THE

United States Court of Appeals

FOR THE EIGHTH CIRCUIT

STEVEN J. SOBIENIAK, *et al.*,

Plaintiffs-Appellants,

— v. —

BAC HOME LOANS SERVICING, L.P., *et al.*,

Defendants-Appellees.

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

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

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CORPORATE DISCLOSURE STATEMENT

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

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INTRODUCTION

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

Despite Congress' "manifest intent" to put rescission under TILA to rest after three years, *id.* at 410, Plaintiffs and the Consumer Financial Protection Bureau ("CFPB") (as *amicus curiae*) now propose a new way to evade the three-year bar. They believe the period becomes irrelevant whenever a borrower files a notice of rescission with the lender within three years.

This Court has already said that "[S]ection 1635(f) provides a three-year period of limitations for actions," that is, *all* actions in court, "alleging a violation of the right-of-rescission." *Felt v. Fed. Land Bank Ass'n of Belle Fourche*, 760 F.2d 209, 210 (8th Cir. 1985). The majority of courts agree that such suits must be brought within three years, regardless of whether the borrower filed a notice with the lender. *See Sobieniak v. BAC Home Loans Servicing, LP*, No. 11-110, 2011

WL 6122318, at *4 (D. Minn. Dec. 8, 2011) (listing cases). *Amici*—the American Bankers Association ("ABA"), the Consumer Bankers Association ("CBA"), and the Consumer Mortgage Coalition ("CMC")—believe that these courts are right. Actions for rescission must be brought within three years.[1]

Plaintiffs' contrary approach would fundamentally undermine a statute of repose meant to promote finality and clarity. It would upset the careful balance of remedies found in TILA. It would do so for the sake of a remedy that borrowers may invoke—and often do invoke—when they are in default, when they have no genuine basis to rescind, and when they have no ability to tender the loan proceeds as required. And it would allow a borrower to strip a lender who complied with TILA of its security interest instantaneously and unilaterally. But most importantly, it would cast a shadow of uncertainty over the housing finance market, resulting in additional costs for the very borrowers that TILA was meant to benefit. The district court's decision should be affirmed.

INTEREST OF THE *AMICI CURIAE*

Amici are three of the largest financial services trade associations in the United States. They recognize that Plaintiffs' approach to Section 1635(f) would

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

upset the housing finance market just as it is recovering from one of the worst economic shocks in history.

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

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

CMC is a trade association of national mortgage lenders, mortgage servicers, and mortgage origination-service providers, committed to the nationwide rationalization of consumer mortgage laws and regulations. The CMC regularly appears as *amicus curiae* in litigation with implications for the national mortgage lending marketplace.

ARGUMENT

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

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

Section 1635(f) "completely extinguishes" the right to rescind after a given time. *Beach*, 523 U.S. at 411; *see* 15 U.S.C. § 1635(f) ("[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[.]"). The Supreme Court has read this provision to "govern[] the life of the underlying right," not just the time for bringing a suit to enforce it. *Beach*, 523 U.S. at 417. Because it limits the underlying right, Section 1635(f) is a statute of repose. *See Nesladek v. Ford Motor Co.*, 46 F.3d 734, 737 (8th Cir. 1995) (defining statute of repose); *Specialty Rests. Corp. v. Bucher*, 967 F.2d 1179, 1182 (8th Cir. 1992) (same).[2] Such statutes are "less susceptible to judicial exception," *Amoco Prod. Co. v. Newton Sheep Co.*, 85 F.3d 1464, 1472 (10th Cir. 1996), because the right that would otherwise sustain the action no longer exists.

Statutes of repose serve a number of useful purposes. For example, such statutes require suits to be filed in a timely fashion, before the difficulties of

[2] The CFPB concedes that it is "unobjectionable" that Section 1635(f) is a statute of repose. CFPB's Br. 21, ECF No. 39002090738.

proving a complex case may be "compound[ed] with the passage of time." *Integrity Floorcovering, Inc. v. Broan-Nutone, LLC*, 521 F.3d 914, 919 (8th Cir. 2008). They also relieve parties of a never-ending fear of indefinite liability by providing some degree of "certainty" as to the end point of liability. *Simmons v. United States*, 421 F.3d 1199, 1201 (11th Cir. 2005).

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

Plaintiffs and the CFPB argue that a court may enforce a right extinguished by Section 1635(f). But in *Felt v. Federal Land Bank Association of Belle Fouche*, 760 F.2d 209, 210 (8th Cir. 1985), this Court explained that Section 1635(f) grants plaintiffs only three years to bring "actions alleging a violation of the right-of-rescission." *Id.* at 210. Although *Felt* did not consider the impact of notice, the Court's reference to "actions"—without any qualification—reflects its agreement that Section 1635(f) closes the door to *all* rescissions suits after three years.

Were *Felt* interpreted to allow for Plaintiffs' reading, Section 1635(f) would no longer achieve the purposes of a statute of repose. Stale cases would become common unless lenders simply caved to pressure to settle. And as the CFPB concedes in a footnote to its brief, the section would no longer provide the

certainty of a repose period.[3] *See* CFPB's Br. 25 n.5. If courts determined to "borrow" limitations periods from other statutes, as the CFPB suggests, lenders would be forced to guess at the applicable limitations period. Courts could borrow from *state* limitation periods, destroying the uniform application of this statute of national reach. Lenders would then be forced to wrestle with perhaps 50 different standards in 50 different states. This patchwork of periods would be detrimental to housing finance and the cost and flow of mortgage credit to consumers.

Perhaps more fundamentally, courts have never assumed the role of enforcing a right that has already been extinguished. "A cause of action is generally defined as the fact or facts which establish or give rise to a right of action, the existence of which affords a party a right to judicial relief." *Stewart v. Shanahan*, 277 F.2d 233, 236 (8th Cir. 1960). By virtue of Section 1635(f), a plaintiff suing after the critical three-year mark lacks the "right of action" necessary to support the suit—whether the borrower sought to privately assert that remedy before bringing suit or not. *See McOmie-Gray v. Bank of Am. Home Loans*, 667 F.3d 1325, 1329 (9th Cir. 2012).

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[3] Plaintiffs try to resolve this self-created problem by looking to the one-year statute of limitations found in 15 U.S.C. § 1640. *See, e.g.*, Pls.' Br. 6, ECF No. 388907341. But Section 1640 applies only to claims for *damages*, not claims for rescission. *See* 15 U.S.C. § 1640(a). Nor does it apply if the claim is raised as a defense by recoupment or set-off. *Id.* § 1640(e).

The CFPB attempts to recharacterize Plaintiffs' suit as a quasi-declaratory judgment action concerning a borrower's unilateral act.[4] *See* CFPB's Br. 11-12. That is not the law. Absent mutual assent of the parties, "[r]escission involves a judicial termination of a party's contractual obligations; it is a court-ordered 'unwinding' of a contract." *Jones v. InfoCure Corp.*, 310 F.3d 529, 535 (7th Cir. 2002). Several courts have applied this principle in the TILA context, holding that a unilateral notice of rescission does not automatically rescind a mortgage. *See, e.g.*, *Am. Mortg. Network, Inc. v. Shelton*, 486 F.3d 815, 821 (4th Cir. 2007); *Yamamoto v. Bank of New York*, 329 F.3d 1167, 1172 (9th Cir. 2003); *Large v. Conseco Fin. Servicing Corp.*, 292 F.3d 49, 55 (1st Cir. 2002). These courts agree that, where a lender disagrees with a borrower's purported rescission, a borrower has only advanced a *claim* for rescission until the relevant decisionmaker decides whether the conditions for rescission have been met. *Large*, 292 F.3d at 55.

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

A. Plaintiffs' interpretation would open the floodgates to meritless litigation.

Plaintiffs' approach would further ensure that courts would be forced to grapple with largely groundless rescission suits for years to come. Indeed, the

[4] Plaintiffs characterize their suit as a claim under Section 1640(a). *E.g.*, Pls.' Br. 18-19. Rescission is not a remedy that can be awarded under Section 1640(a).

enormous body of recent rescission-related case law cited by the parties and the CFPB reflects the substantial growth in rescission litigation in the wake of the financial crisis. Plaintiffs' interpretation would ensure that courts remain overwhelmed.

Furthermore, in the experience of *amici* and their members, TILA rescission claims frequently lack merit. Borrowers often raise such claims on the eve of bankruptcy or in the midst of a foreclosure proceeding in a last ditch effort to avoid enforcement of their obligations.[5] These borrowers rarely have the ability to "return the loan principal" as TILA requires. *Marr v. Bank of Am.*, 662 F.3d 963, 966 (7th Cir. 2011) ("[T]his requirement often has the practical effect of ruling out rescission[.]").[6] Often there is no TILA violation at all. In the context of litigation, these defects may be quickly identified and non-meritorious claims may be dispensed with efficiently. What is more, the requirement of litigation imposes

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

[6] "[A]s a result of recent dramatic decreases in home values in certain areas of the country, many borrowers' net tender obligations are still likely to exceed the value of their homes. Thus, an underwater TILA plaintiff typically cannot refinance her mortgage, and the sale of her home usually cannot generate sufficient proceeds to fully finance the borrower's tender obligation." Lee Krivinskas Shepard, *It's All About the Principal: Preserving Consumers' Right of Rescission Under the Truth in Lending Act*, 89 N.C. L. Rev. 171, 181 (2010).

some discipline on potential plaintiffs, requiring them to consider whether it is worth investing time and money in futile claims.

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

Allowing a rescission action to proceed at any juncture without limitation, so long as a notice was filed within three years, creates a perverse incentive for borrowers to "pre-file" a notice of rescission before the three-year period expires. The borrower could then hold that right of rescission indefinitely, until it becomes useful. If, for instance, the lender later chose to foreclose, the borrower might try to assert a tardy recoupment claim (while avoiding the decision in *Beach* by invoking the notice). The lender could not even borrow statutes of limitations from elsewhere to defeat the recoupment claim, as it has long been understood that statutes of limitation generally do not bar the use of stale claims brought defensively. *See, e.g.*, *Williams v. Neely*, 134 F. 1, 2 (8th Cir. 1904). The lender's only option to avoid this problem would be to litigate the matter itself, immediately upon receiving the rescission notice, by bringing its own costly action every time a rescission notice is filed—even if the notice is facially without merit.

B. Plaintiffs' interpretation would transform rescission into an equitable remedy that produces fundamentally inequitable results.

Rescission is an equitable remedy guided by equitable principles. *See, e.g.*, *Soc'y Nat'l Bank v. Parsow P'ship, Ltd.*, 122 F.3d 574, 576 (8th Cir. 1997).[7] In fact, Congress underscored the equitable nature of TILA's rescission provision by empowering courts to develop their own procedures for administering the remedy. *FDIC v. Hughes Dev. Co., Inc.*, 938 F.2d 889, 890 (8th Cir. 1991). Courts have also read requirements into TILA rescission that are supported primarily by equitable (rather than textual) considerations. *See, e.g., Shelton*, 486 F.3d at 821 (relying on equitable considerations to hold that courts may condition rescission on demonstration of ability to tender); *Yamamoto*, 329 F.3d at 1171-73 (same).

Congress could not have intended an equitable remedy to create substantial inequities, but that is exactly what Plaintiffs' reading threatens to do here. A fundamental premise of the Plaintiffs' argument is that the rescission is complete upon notice from a borrower. Were this true, the lender's security interest would become instantly void by law, 15 U.S.C. § 1635(b), even if the notice were not valid, *Yamamoto*, 329 F.3d at 1172.[8] This result makes sense in the context of

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[7] Although TILA rescission is "statutorily granted[,] … [it] remains an equitable doctrine subject to equitable considerations." *Brown v .Nat'l Permanent Fed. Sav. & Loan Ass'n*, 683 F.2d 444, 447 (D.C. Cir. 1982).

[8] This would cause significant complications for a lender. For instance, a lender facing a rescission notice might be forced to reduce its regulatory capital, as

rescission within the three-day "cooling-off period," where the right is unconditional, funds have not been disbursed, and the security interest has not been recorded. But such a result is not equitable after those first three days, when the right becomes conditional, funds have been disbursed, and the security interest recorded. "Clearly it was not the intent of Congress to reduce the mortgage company to an unsecured creditor or to simply permit the debtor to indefinitely extend the loan without interest." *Shelton*, 486 F.3d at 820-21.

This is not to suggest that Congress left borrowers without *any* remedy after the three years pass; to the contrary: Section 1640(a) specifically contemplates a damage award for a violation of the TILA rescission provision.[9] *See* 15 U.S.C. § 1640(a) (permitting damages for a failure to comply with "any requirement under Section 1635"). Consequently, if a borrower could establish that a creditor wrongfully refused to rescind, the borrower could still receive both actual and statutory damages. But that relief, unlike the rescission right, would not present a potential cloud over a property's title for years to come. Congress anticipated that borrowers would receive a measure of relief, but not by warping the rescission

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secured debt is treated differently from unsecured debt in calculating required capital levels. *See* 12 C.F.R. pt. 3, appendix A § 3 & table 1.

[9] A borrower would be entitled to damages, for instance, if he were able to establish that (a) the lender failed to make a material disclosure, (b) the borrower filed a rescission notice within three years, (c) the borrower had an ability to tender, and (d) the lender did not comply with the rescission requirements.

right into a never-ending cause of action that imposes significant expense on the creditor and the marketplace.

Plaintiffs ask this Court to rely on a highly technical reading of Section 1635(f) that is divorced from the broader statutory context.[10] Yet TILA is an interconnected and comprehensive scheme. *See, e.g.*, *Christ v. Beneficial Corp.*, 547 F.3d 1292, 1297-98 (11th Cir. 2008). Its remedial provisions must be read together. When they are, Congress' intent becomes clear: rescission should be treated as a limited and controlled remedy, while ample other remedies remain available to the borrower. That Plaintiffs' view of this equitable remedy would create gross inequities further evidences that Plaintiffs' approach could not have been what Congress intended. Plaintiffs' approach should therefore be rejected.

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

Plaintiffs' misguided approach also upsets the delicate balance that Congress struck in the statute. Legislatures often use statutes of repose to strike a "legislative balance" to service the "economic best interest" of the public. *Jones v. Saxon Mortg., Inc.*, 537 F.3d 320, 327 (4th Cir. 1998). That balance should not be lightly upset. This is especially so in the TILA context, where Congress has taken

[10] Certain other courts have taken such an approach. *See, e.g.*, *Gilbert v. Residential Funding LLC*, No. 10-2295, 2012 WL 1548580, at *5 (4th Cir. May 3, 2012), *petition for reh'g filed* No. 10-2295 (May 17, 2012).

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

Congress crafted the right of rescission to give borrowers a limited chance to reconsider their decision to enter into certain credit transactions involving their homes. Rescission, however, is a "restorative rather than compensatory remedy," *Andrews v. Chevy Chase Bank*, 545 F.3d 570, 575 (7th Cir. 2008), and was not designed for recurrent use. In fact, Congress enacted higher "tolerance" levels for TILA disclosure violations in 1995 partly because it was concerned that rescission, the "most draconian remedy available under [TILA]," had become too common and threatened too much liability on the lenders. *McKenna v. First Horizon Home Loan Corp.*, 475 F.3d 418, 424 (1st Cir. 2007) (quotation marks omitted).

By extending indefinitely the length of time during which a borrower could rescind, Plaintiffs' interpretation would push this "draconian remedy" well beyond the balance of interests carefully struck by Congress. Because rescission is effectively an "interest-free loan[,] … the longer one allows the right of rescission to be exercised, the greater the benefit to the consumer, and the greater the penalty to the creditor." Daniel Rothstein, *Truth in Lending: The Right to Rescind and the Statute of Limitations*, 14 Pace L. Rev. 633, 657 (1994). By permitting a borrower

to rescind upon notice, the borrower could pre-file a notice and then—years later—seek the return of all their payments and interest, having lived rent-free at the expense of the lender. This would disrupt both the equipoise Congress intended and the long-established expectations of the participants in our nation's housing finance market.

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

Plaintiffs' interpretation would increase uncertainty and risk in the marketplace. Even the logistics of effecting a rescission by notice creates uncertainty; unlike a lawsuit, a borrower's notice might be lost or misdirected and a lender might never become aware of the purported rescission. Merely by alleging to have mailed a rescission notice within three years from closing, the borrower may indefinitely extend the right of rescission. A lender or subsequent holder could never be confident that its security interest was clear and might always face the prospect of being reduced to unsecured status.

Uncertainty has real consequences for the lending market. The secondary mortgage market can only deliver a steady supply of reasonably-priced loans if securitizers and investors can be certain that loans are valid and enforceable. [11]

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[11] "Commentators have estimated that the existence of an efficiently operating secondary mortgage market may reduce the cost of home mortgage credit by up to two percent." Franklin D. Cordell, *The Private Mortgage Insurer's Action for Rescission for Misrepresentation: Limiting a Potential Threat to Private Sector*

Likewise, buyers will only be willing to purchase homes coming out of foreclosure if they can be confident that they are taking clear title. But Plaintiffs' approach to rescission would "cloud the bank's title on foreclosure." *Beach*, 523 U.S. at 418.

Adopting Plaintiffs' approach would increase the costs to lenders and their assignees on every loan in other ways. Ultimately, these costs would be borne by borrowers at the closing table. Lenders would be expected to incur additional litigation expenses. Litigation would increase not just between lenders and borrowers, but also between (a) lenders themselves; (b) secondary market participants and lenders; and (c) home buyers and home sellers. TILA rescission also serves an "insurance function for consumers" that "increase[s] the seller's marginal costs," which will "tend to raise the price" for the loan. Michael Aikens, *Off-Contract Harms: The Real Effect of Liberal Rescission Rights on Contract Price*, 121 Yale L.J. Online 69, 79 (2011). Plaintiffs' approach would expand both the reach and the potential payout of the insurance, further increasing costs.

CONCLUSION

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

Participation in the Secondary Mortgage Market, 47 Wash. & Lee L. Rev. 587, 593 (1990) (footnote omitted).

Respectfully Submitted,

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REVISED CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing document was served on June 11, 2012 via first-class mail on the following counsel:

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