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# A Closer Look At Supreme Court's Jesinoski Opinion

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On Jan. 13, 2015, the U.S. Supreme Court released its opinion in Jesinoski v. Countrywide Home Loans (No. 13-684) and resolved a circuit split on an important issue arising under the Truth in Lending Act, 15 U.S.C. §1601-1677 ("TILA"). Under TILA, a borrower has the right to rescind certain loans for up to three years after the loan is consummated. To exercise this right, borrowers must "notify the creditor" of their intention to rescind the loan within three years. The question in Jesinoski was whether a borrower satisfies this requirement by sending written notice to a lender of its intent to rescind or whether the borrower must file a lawsuit within the three-year statutory period. In recent years, a circuit split had developed over this issue. In Jesinoski, the Supreme Court resolved this split, holding that written notice is sufficient.

**TILA and the Right to Rescind**

Congress passed TILA in 1968 to help consumers "avoid the uninformed use of credit, and to protect the consumer against inaccurate and unfair credit billing." Among other things, TILA gives borrowers the right to rescind a loan "until midnight of the third business day following the consummation of the transaction or the delivery of the [disclosures required under TILA], whichever is later, by notifying the creditor ... of his intention to do so."

As the Supreme Court observed in Jesinoski, "[t]his regime grants borrowers an unconditional right to rescind for three days, after which they may rescind only if the lender failed to satisfy [TILA's] disclosure requirements." However, this conditional right to rescind "does not last forever." Rather, a provision added to TILA in 1980 mandates that it expires "three years after the date of consummation of the transaction or upon the sale of the property, whichever comes first." In other words, a borrower has three days to rescind a loan for any reason (or no reason), and three years to rescind a loan, but only if rescission is based on the lender's failure to provide the disclosure required under TILA.

**The Underlying Facts in Jesinoski**

In 2007, the Jesinoskis refinanced their mortgage and borrowed $611,000 from Countrywide Home Loans Inc. At the loan closing, they received a TILA disclosure and a notice of right to cancel. They signed

the disclosure acknowledging that they had received two copies of each document. When they did not exercise their unconditional right to rescind the loan within the first three days, the loan funded, and the Jesinoskis used the proceeds to pay off "multiple consumer debts."

Exactly three years later, the Jesinoskis mailed "all interested parties" a letter purporting to rescind the loan. Notwithstanding the acknowledgment that they signed at the loan closing, the Jesinoskis asserted that Countrywide violated TILA by failing to provide them with the required number of copies of the TILA notice and disclosure at the closing. Countrywide refused to acknowledge the validity of the rescission.

One year later, the Jesinoskis sued, seeking a declaration of rescission and damages. Defendants moved for judgment on the pleadings and the U.S. District Court for the District of Minnesota granted the motion. The district court acknowledged a circuit split on the issue, but relied upon a string of recent decisions in the district holding that a lawsuit for rescission was barred if not brought within three years of the closing on the loan sought to be rescinded.

The Jesinoskis appealed, arguing that the notice of rescission that they mailed to Countrywide was sufficient to exercise their right to rescind the loan under TILA, and that they were not also required to sue the lender within the three-year statutory period. A three-judge panel of the U.S. Court of Appeals for the Eighth Circuit rejected this argument and affirmed the district court's decision. In a per curiam opinion, the court held that the question presented by the Jesinoskis on appeal had already been resolved by a prior Eighth Circuit decision and that it was bound by that decision. However, two of the judges wrote separately, concurring in the judgment, but expressing their belief that the prior decision was wrongly decided and that, if the court were "writing on a clean slate," they would have reversed the district court.

**The Supreme Court's Decision**

With the luxury of being able to write on a clean slate, the Supreme Court reversed the Eighth Circuit. In a unanimous opinion authored by Justice Antonin Scalia, the Supreme Court held that the plain language of Section 1635(a) "leaves no doubt that rescission is effected when the borrower notifies the creditor of his intention to rescind." So long as this is done within three years of the loan closing, the rescission is timely.

The Supreme Court held that nothing in Section 1635(a) requires the borrower to sue in order to exercise its right of rescission, and that nothing in Section 1635(f) changed this conclusion, because that section tells borrowers "*when* the right to rescind must be exercised, [but] says nothing about *how* that right is exercised" (emphasis in original).

The Supreme Court noted that Countrywide did not dispute that Section 1635(a) only required written notice of rescission within the first three days after the loan closing. Countrywide further agreed that written notice was sufficient to rescind a loan within three years after the closing, but only if the parties agreed that the lender failed to make the required disclosures. In other words, Countrywide argued that if the parties disputed the adequacy of the lender's disclosures, then written notice would not suffice and a lawsuit was required.

The Supreme Court rejected this argument. Again, relying on the plain language of TILA, the Supreme Court held that "Section 1635(a) nowhere suggests a distinction between disputed and undisputed rescissions, much less that a lawsuit would be required for the latter."

Finally, the Supreme Court rejected Countrywide's efforts to "invoke the common law" to buttress their argument. "Rescission traditionally required either that the rescinding party return what he received before a rescission could be effected (rescission at law), or else that a court affirmatively decree rescission (rescission in equity)."

Countrywide argued that Congress could not have intended to eliminate both of these long-standing common-law requirements and allow a borrower to rescind a loan simply by writing to its lender. According to Countrywide, allowing rescission in this manner would simply encourage frivolous claims from borrowers. The Supreme Court was unpersuaded, holding: "The clear import of §1635(a) is that a borrower need only provide written notice to a lender in order to exercise his right to rescind. To the extent §1635(b) alters the traditional process for unwinding such a unilaterally rescinded transaction, this is simply a case in which statutory law modifies common-law practice."

**Conclusion**

The Supreme Court's holding in Jesinoski is an important one for both lenders and borrowers. It remains to be seen whether Countrywide's prediction that it will lead to frivolous claims of rescission will come to fruition, but that danger certainly exists. For lenders, the decision emphasizes the importance of complying with their disclosure requirements and, perhaps more importantly now, documenting that compliance.

—By Peter J. Gallagher, Porzio Bromberg & Newman PC

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