



High Court Rules that Borrowers May Exercise Right To Rescind Mortgage Loans By Providing Notice To Lender of Intent to Rescind Within Three Years of Loan Closing

On Jan. 13, 2015, the United States Supreme Court issued its long-awaited ruling in *Jesinoski v. Countrywide Home Loans, Inc.*, No. 13-684, 2015 WL 144681 (U.S. Jan. 13, 2015) resolving a circuit split over the notice requirements that must be complied with under the Truth In Lending Act (TILA), 15 U.S.C. § 1601 *et seq.*, for rescission of a home mortgage loan.

Justice Scalia, writing for a unanimous Court, overturned a September 2013 Eighth Circuit decision affirming a district court's dismissal of the Jesinoskis' (Petitioners) lawsuit to rescind their mortgage loan under TILA finding that notification – not the filing of a lawsuit – within three years of their loan's consummation was sufficient. The Petitioners mailed a notice of rescission to their lender, Countrywide Home Loans, Inc. (Countrywide), exactly three years after they obtained their mortgage loan. Countrywide did not acknowledge the rescission notice, and Petitioners filed suit a year later. The District Court granted Countrywide's motion for judgment on the pleadings and dismissed the case because the borrowers failed to file their lawsuit within three years of obtaining their loan. Aligning itself with the First, Sixth, Ninth and Tenth circuits, the Eighth Circuit affirmed the dismissal of the complaint. The Third, Fourth, and Eleventh circuits had held that notification alone, without the filing of a lawsuit, was sufficient to exercise the right of rescission. The Supreme Court accepted certiorari to resolve the split among the circuits.

Under TILA, a borrower has an absolute right to rescind a loan within three days of a loan closing or the date of receipt of the material required disclosures under TILA and TILA right to rescission forms, whichever comes later. But, even if a lender never provides the required notices, the right of rescission expires three years after the date the transaction consummates or upon sale of the property, whichever comes first. 15 U.S.C. § 16359 (f).

Petitioners maintained they had timely exercised their right to rescind by mailing Countrywide notice of their intent to do so within three years of the consummation of the transaction. Countrywide countered that the borrowers had not timely exercised their right because their lawsuit was not filed until four years after their loan had closed. Countrywide argued that because rescission is a judicial act, a lawsuit must be timely filed to exercise the right of rescission. As support, Countrywide pointed to Section 1635(g), which permits a court to “award relief...in addition to rescission.”

The Court, siding with the Petitioners, found that Section 1635(a) explains, in “unequivocal terms,” *how* the right to rescind is to be exercised. It provides that a borrower “shall have the right to rescind ... *by notifying the creditor, in accordance with regulations of the Bureau, of his intention to do so.*” (Emphasis added). According to the Court, 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. It follows that, so long as the borrower notifies within three years after the transaction is consummated, his rescission is timely. The statute does not also require him to sue within three years.” *Jesinoski*, 2015 WL 144681, at *3.

Certain Practical Implications: While it has been suggested that this decision allows borrowers to “walk-away” from underwater loans, that is not the case. First, borrowers are rarely able to tender back the funds received – a requirement that must be met before a mortgage can be rescinded. Second, while the decision states that a lawsuit is not required for the exercise of a right of rescission, the decision does not negate the lenders’ ability to defend against the rescission notice if the borrower received the required disclosures. A borrower still must exercise the right to rescind within three days of consummating the loan or receiving proper TILA notices, so long as that time period does not exceed three years. If the lender can show that the borrower received the proper notices, a notice of intent to rescind made more than three days after closing would be ineffective. Of course, litigation is generally required to adjudicate whether the borrower received proper TILA notices.

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