

CHALLENGES UNDER TRUTH IN LENDING: SUING FOR RESCISSION, GIVING CLEAR AND CONSPICUOUS NOTICE, AND ELECTING NOT TO RESCIND

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I.	Introduction	163
II.	The Right of Rescission.....	170
	A. A Question of Timing	170
	B. The Basis for Disagreement.....	180
	C. Impact of <i>Beach v. Ocwen Federal Bank</i>	184
III.	Enforcing the Right of Rescission	189
	A. The Requirement of Tender	189
	B. The Argument Against Tender	191
IV.	Notice about the Right to Rescind.....	197
	A. Identifying the Right Date	197
	B. The Problem of Competing Dates.....	199
V.	Premature Election Not to Rescind	205
	A. Conflicting Statements.....	205
	B. Acknowledgment and Confirmation.....	207
	C. Postdating and Waiver	208
VI.	Conclusion	210

I. INTRODUCTION

When Congress passed the Truth in Lending Act (TILA)¹ in 1968, it paved the way for lenders to make certain uniform disclosures in

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1. Truth in Lending Act, Pub. L. No. 90-321, 82 Stat. 146 (1968) (codified as amended at 15 U.S.C. §§ 1601-1667f (2012)).

consumer credit transactions.² It was a step in the right direction because until then lenders could decide on their own disclosures, and there was no consensus about the kind of information they should give to consumers.³ Both TILA and Regulation Z, which implements it, require creditors to follow a standard format, so that consumers will have the opportunity to compare the cost of credit and make intelligent decisions about the offers they receive in the marketplace.⁴ No longer can a post-TILA creditor gain a competitive advantage by formulating its offer of credit to make it seem more attractive than it really is, because all creditors are bound by the same rules. For example, a creditor has to express a loan's finance charge as an annual percentage rate rather than merely disclosing the loan's interest rate.⁵ This approach takes into account any charge that the lender imposes incident to, or as a condition of, the extension of credit.⁶

2. The purpose of TILA is "to assure a meaningful disclosure of credit terms so that the consumer will be able to compare more readily the various credit terms available to him and avoid the uninformed use of credit, and to protect the consumer against inaccurate and unfair credit billing and credit card practices." 15 U.S.C. § 1601(a) (2012). A creditor must disclose information to the consumer in a particular transaction in accordance with regulations promulgated by the Bureau of Consumer Financial Protection, which took over jurisdiction from the Federal Reserve Board after Congress passed the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 1061(b), 124 Stat. 1376, 2036 (2010). Regulation Z prescribes the disclosures that a creditor must make and even requires certain disclosures to be more conspicuous than others. *See* 12 C.F.R. § 1026.17(a)(2) (2014).

3. The legislative history of TILA gave some indication of the problems as follows:

With respect to rate, some creditors employ an "add on" rate, which is based on the original balance of the obligation as opposed to the declining balance. This has the effect of understating the simple annual rate by approximately 50 percent.

Other segments of the credit industry, such as credit unions and small loan companies employ monthly rates. Although for some it is a simple matter to multiply the monthly rate by 12, the evidence before the committee indicates that many people are not aware of the true cost of credit when it is expressed on a monthly basis.

Other creditors add a number of additional fees or charges to the basic finance charge, such as credit investigation fees, credit life insurance, and various "service" charges. This permits a creditor to quote a low rate while actually earning a higher yield through the additional fees and charges.

H.R. REP. NO. 90-1040, at 13 (1967), *as reprinted in* 1968 U.S.C.C.A.N. 1962, 1970.

4. Congress believed that uniform disclosures would allow consumers to compare the cost of credit and make informed decisions. *See id.* TILA's purpose was "to assure a meaningful disclosure of credit terms so that the consumer [would] be able to compare more readily the various credit terms available to him and avoid the uninformed use of credit." 15 U.S.C. § 1601(a) (2012).

5. Regulation Z indicates that the finance charge includes "any charge payable directly or indirectly by the consumer and imposed directly by the creditor as an incident to or a condition of the extension of credit." 12 C.F.R. § 1026.4(a) (2014). Congress authorized the Bureau of Consumer Financial Protection to issue regulations to carry out the purposes of TILA. 15 U.S.C. § 1604(a) (2012).

6. *See* 15 U.S.C. § 1605(a) (2012); 12 C.F.R. § 1026.4(a) (2014). The right of rescission does not, however, apply to a mortgage obtained to finance acquisition of the consumer's principal dwelling. 12 C.F.R. §§ 1026.23(f)(1), 1026.2(a)(24) (2014).

A creditor's disclosure obligation relates not only to the cost of credit, but also to the consumer's right to rescind a transaction in which the consumer gives the creditor a security interest in his principal dwelling.⁷ Even if a creditor makes no disclosure mistakes in such a transaction, a consumer has a right to rescind the transaction within three business days, and the creditor must advise the consumer of that right.⁸ If a creditor does not meet its disclosure obligations in a rescindable transaction, a consumer's right to rescind may last as long as three years.⁹ There is, however, some disagreement about what a consumer must do within that three-year period in order to rescind. Some courts take the position that a consumer need only give the creditor written notice of his rescission within that period;¹⁰ others go further and require the consumer to sue within the three-year period if the creditor refuses to cooperate with the consumer.¹¹ It is not surprising that courts disagree about what a consumer must do to rescind a transaction because TILA provides that a consumer's right to rescind shall "expire" three years after consummation of the transaction.¹² Those courts that require a consumer to sue within that period rely on the United States Supreme Court's characterization of the statute, in *Beach v. Ocwen Federal Bank*,¹³ as a limitation on the right itself, thus not allowing a consumer to use the right to rescind as a defense in recoupment after the expiration of the three-year period.¹⁴ This Article will consider the different judicial approaches to the three-year limitation that have arisen in this area.

The right of rescission has produced disagreement in other ways. Although Regulation Z lays out the procedure for implementing a

7. 15 U.S.C. § 1635(a) (2012); 12 C.F.R. § 1026.23(a)(1) (2014).

8. Regulation Z provides that "[t]he consumer may exercise the right to rescind until midnight of the third business day following consummation, delivery of the notice [of the right to rescind], or delivery of all material disclosures, whichever occurs last." 12 C.F.R. § 1026.23(a)(3)(i) (2014).

9. Regulation Z provides that "[i]f the required notice or material disclosures are not delivered, the right to rescind shall expire 3 years after consummation, upon transfer of all the consumer's interest in the property, or upon sale of property, whichever occurs first." *Id.*

10. *See, e.g.*, *Gilbert v. Residential Funding LLC*, 678 F.3d 271 (4th Cir. 2012); *Leonard v. Bank of Am. NA*, No. 10-C-0814, 2012 WL 3001266 (E.D. Wis. July 23, 2012); *Briosos v. Wells Fargo Bank*, 737 F. Supp. 2d 1018 (N.D. Cal. 2010); *Herzog v. Countrywide Home Loans (In re Hunter)*, 400 B.R. 651 (Bankr. N.D. Ill. 2009).

11. *See Rosenfield v. HSBC Bank, USA*, 681 F.3d 1172 (10th Cir. 2012); *McOmie-Gray v. Bank of Am. Home Loans*, 667 F.3d 1325 (9th Cir. 2012); *Phillippi v. Beneficial Loan & Thrift Co.*, No. 10-4281 (SRN/JJG), 2012 WL 684873 (D. Minn. Mar. 2, 2012).

12. 15 U.S.C. § 1635(f).

13. *Beach v. Ocwen Fed. Bank*, 523 U.S. 410 (1998).

14. In *Beach*, the Supreme Court made the point that TILA "permits no federal right to rescind, defensively or otherwise, after the 3-year period of § 1635(f) has run." *Id.* at 419.

consumer's rescission,¹⁵ some creditors become uneasy about following that procedure when they are not sure a consumer will be able to return the money or property that is the subject of the transaction.¹⁶ One can readily understand a creditor's concern in this context because Regulation Z dictates that the creditor's security interest becomes void when a consumer rescinds a transaction.¹⁷ Taken literally, this suggests that a consumer's rescission terminates the lien that protects the creditor, and the creditor may then be left unsecured without any assurance that the consumer is willing or able to tender the amount due the creditor. Some courts react to this problem by requiring a consumer to plead in his complaint that he has the ability to tender, failing which a creditor will prevail on a motion to dismiss.¹⁸ Those courts see it as pointless to proceed with a consumer's rescission if the consumer cannot return the creditor's money or property. Other courts seek a solution by conditioning the removal of the creditor's lien on the consumer's performance.¹⁹ They justify conditional rescission on the basis of their

15. See 12 C.F.R. § 1026.23(d) (2014).

16. Regulation Z allows a consumer to keep the creditor's money or property until the creditor returns "any money or property that has been given to anyone in connection with the transaction." *Id.* § 1026.23(d)(2)-(3). Furthermore, the creditor must take any action necessary to terminate its security interest. *Id.* § 1026.23(d)(2).

17. Regulation Z provides that "[w]hen a consumer rescinds a transaction, the security interest giving rise to the right of rescission becomes void and the consumer shall not be liable for any amount, including any finance charge." *Id.* § 1026.23(d)(1).

18. See *Yamamoto v. Bank of N.Y.*, 329 F.3d 1167, 1173 (9th Cir. 2003) (stating that a court may alter the rescission procedures before trial when it finds that consumer has no ability to pay back the proceeds); *Abdel-Malak v. JP Morgan Chase Bank, N.A.*, 748 F. Supp. 2d 505, 512 (D. Md. 2010) (failing to halt foreclosure sale on the basis of rescission because consumer did not assert ability to tender); *Briosos v. Wells Fargo Bank*, 737 F. Supp. 2d 1018, 1029 (N.D. Cal. 2010) (stating that "Plaintiff must set forth factual allegations demonstrating that he has the resources (or may readily obtain them) to be in a position to tender the loan proceeds"); *Cheche v. Wittstat Title & Escrow Co., LLC*, 723 F. Supp. 2d 851, 858 (E.D. Va. 2010) (finding that consumer must provide "sufficient factual allegations demonstrating a 'plausible' ability to tender" in order to survive motion to dismiss); *Webb v. SunTrust Mortg., Inc.*, No. 1:10-CV-0307-TWT-CCH, 2010 WL 2950353, at *4 (N.D. Ga. July 1, 2010) (finding that plaintiffs' claim should be dismissed because they did not plead facts showing that they had the ability to repay loan); *ING Bank v. Korn*, No. C09-124Z, 2009 WL 1455488, at *1 (W.D. Wash. May 22, 2009) (requiring consumer to plead ability to tender).

19. See *Am. Mortg. Network, Inc. v. Shelton*, 486 F.3d 815, 821 (4th Cir. 2007) (finding that unconditional rescission was not appropriate where plaintiffs were unable to tender loan proceeds); *Williams v. Homestake Mortg. Co.*, 968 F.2d 1137, 1142 (11th Cir. 1992) (holding that "a court may impose conditions that run with the voiding of a creditor's security interest upon terms that would be equitable and just to the parties in view of all surrounding circumstances"); *Ayon v. JP Morgan Chase Bank, N.A.*, No. CV F 12-0355 LJO SKO, 2012 WL 1189455, at *12 (E.D. Cal. April 9, 2012) (conditioning consumer's rescission on meaningful tender); *Dawson v. Thomas* (*In re Dawson*), 411 B.R. 1, 43 (Bankr. D.D.C. 2008) (conditioning rescission on payment of proceeds), *aff'd*, 437 B.R. 15 (Bankr. D.D.C. 2010); *Robertson v. Strickland* (*In re Robertson*), 333 B.R. 894, 904 (Bankr. M.D. Fla. 2005) (holding consumer's rescission conditional on tender); *US Bank Nat'l*

equitable jurisdiction, supported by regulatory language that allows a court to modify the rescission procedures relating to the parties' performance.²⁰ Although Regulation Z clearly sets out this judicial power, it says nothing about affecting the voidness of the creditor's security interest when a consumer rescinds, and courts have had to grapple with this omission in trying to fashion a remedy for a rescinding consumer.²¹ This Article will discuss the various approaches that courts have taken in restoring the parties to the *status quo ante*.

A creditor can also run into difficulty by not giving the consumer a clear and conspicuous notice of the consumer's right to rescind a transaction.²² The clarity of the creditor's notice is sometimes called into question when the creditor gives a specific date for rescission that conflicts with the provision that allows the consumer to rescind until three days after consummation, delivery of all material disclosures, or delivery of the notice of the right to rescind, whichever happens last.²³

Ass'n v. Guillaume, 38 A.3d 570, 589 (N.J. 2012) (holding that foreclosure court could deny rescission if consumer could not tender balance of loan).

20. See *Am. Mortg. Network*, 486 F.3d at 820 (finding that "[t]he trial court in exercising its powers of equity, could have either denied rescission or based the unwinding of the transaction on the borrowers' reasonable tender of the loan proceeds"); *Yamamoto*, 329 F.3d at 1173 (holding that "court may impose conditions on rescission that assure that the borrower meets her obligations once the creditor has performed its obligations"); *Brown v. Nat'l Permanent Fed. Sav. & Loan Ass'n*, 683 F.2d 444, 448 (D.C. Cir. 1982) (finding that court had equitable power to condition rescission on consumer's return of loan proceeds); *Bradford v. HSBC Mortg. Corp.*, 838 F. Supp. 2d 424, 433 (E.D. Va. 2012) (finding that § 1635(b) vests equitable jurisdiction in courts to decide "whether and how to effect rescission"); *Abdel-Malak*, 748 F. Supp. 2d at 512 (denying equitable rescission remedy because consumers were unable to repay their loan and their future ability to do so was speculative); *AFS Fin., Inc. v. Burdette*, 105 F. Supp. 2d 881, 882 (N.D. Ill. 2000) (holding rescission and removal of security interest conditioned on consumer's repayment of loan).

21. TILA provides that "[t]he procedures prescribed by [§ 1635(b)] shall apply except when otherwise ordered by a court." 15 U.S.C. § 1635(b) (2012). Regulation Z provides similarly that "[t]he procedures outlined in paragraphs (d)(2) and (3) of [§ 1026.23] may be modified by court order." 12 C.F.R. § 226.23(d)(4) (2014).

22. A creditor must give two copies of the notice of the right to rescind to each consumer who has the right to rescind. The notice must clearly and conspicuously declare the details about the consumer's right to rescind. See 12 C.F.R. § 226.23(b)(1).

23. The Rescission Model Form published by the Bureau of Consumer Financial Protection reads in pertinent part:

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.

12 C.F.R. pt. 226, app. H-8 (2014). In the last paragraph of the model notice, the language reads:

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.

The disclosure of a specific rescission date is not problematic if the creditor makes all the required disclosures and accurately states the date of consummation.

Confusion can occur, however, if the creditor fails to meet its responsibilities and leaves the consumer in a quandary about the deadline for rescinding. Occasionally, the creditor will omit the specific deadline for rescission and leave it to the consumer to work out the date, doing his own computations about when the three business days will expire.²⁴ It is arguable that a consumer should be able to rely on the specific date for rescission designated by the creditor and that the creditor's failure to provide accurate information leaves the consumer unsure about his time for rescinding. If the rescission notice contains a deadline that has already passed, the consumer will be even more confused about his right to rescind.²⁵ In that event, a court has to decide what to do about the conflict between the stated rescission deadline and the narrative in the rescission notice relating to the consumer's right to

Id. A consumer will frequently allege a violation when the creditor gives a specific date for the consumer to send a rescission notice that conflicts with the date representing the third business day following the latest of the three events mentioned in the first paragraph. When this happens, a court must decide whether the creditor has made a clear and conspicuous disclosure of the consumer's right to rescind.

24. See *Semar v. Platte Valley Fed. Sav. & Loan Ass'n*, 791 F.2d 699, 704 (9th Cir. 1986) (holding that failure to fill in expiration date constituted violation); *Little v. Bank of Am., N.A.*, 769 F. Supp. 2d 954, 962 (E.D. Va. 2011) (holding that consumer stated claim for rescission where creditor's notice of right to cancel failed to state deadline for rescission); *Reynolds v. D & N Bank*, 792 F. Supp. 1035, 1038 (E.D. Mich. 1992) (creditor committed violation by failing to fill in date when right of rescission expired); *New Maine Nat'l Bank v. Gendron*, 780 F. Supp. 52, 57 (D. Me. 1991) (holding that creditor's failure to fill in expiration date extended consumer's right to rescind). But see *Melfi v. WMC Mortg. Corp.*, 568 F.3d 309, 313 (1st Cir. 2009) (holding that consumer received adequate notice about the right to rescind even though creditor did not state deadline for rescission); *Kelly v. Performance Credit Corp.*, No. 08-40159, 2009 WL 3300030, at *5 (D. Mass. April 14, 2009) (holding that the creditor's omission of the deadline for rescission did not violate statute).

25. In *Palmer v. Champion Mortgage*, the consumer argued that the creditor's notice about the right to rescind was confusing because it stated a deadline for rescission that had already passed when the consumer received the notice. *Palmer v. Champion Mortg.*, 465 F.3d 24, 27 (1st Cir. 2006). Despite this, the court found in the creditor's favor because the consumer could have determined the actual deadline by calculating when midnight of the third business day would arrive following the latest of the three events listed in the notice. See *id.* at 29. The court could not see how "any reasonable alert person—that is, the average consumer—reading the Notice would be drawn to the April 1 deadline without also grasping the twice-repeated alternative deadlines." *Id.* The court's position was that even if the specified deadline (April 1) was wrong, the consumer still could arrive at the correct deadline by referring to midnight of the third business day following the last of three events (consummation, date the disclosures were received, date the notice of the right to rescind was received). The basic question is whether the phrase "or midnight of the third business day following the latest of the three events listed above" is intended as an alternative guide for arriving at the correct rescission deadline or whether it is merely descriptive of the deadline date. See NAT'L CONSUMER LAW CTR., TRUTH IN LENDING § 10.4.4.7.3 (8th ed. 2012).

rescind within three business days. The courts have had a hard time resolving this conflict, and this Article will discuss their response to this challenge.²⁶

The courts have also been concerned with problems that arise when a creditor tries to induce the consumer into making a premature election not to rescind a transaction.²⁷ In many cases, a creditor is simply trying to add finality to the transaction so that the three-day rescission period disappears, but it is not easy to reconcile the rescission language with an election not to cancel. It is confusing when the premature election indicates on the transaction date that the consumer's right to rescind has already expired.²⁸ The courts have been vigilant in preventing creditors from avoiding the stated procedure for a consumer to waive his right to rescind, and that is essentially what the premature election seeks to achieve.²⁹

This Article reveals that the uniformity sought by Congress through TILA has challenged the courts to clarify the relationship between a

26. See *Fuller v. Deutsche Bank Nat'l Trust Co. (In re Fuller)*, 642 F.3d 240, 243 (1st Cir. 2011) (holding that creditor's omission of specific deadline for rescission in creditor's notice was not a violation even though coupled with wrong consummation date); *Carye v. Long Beach Mortg. Co.*, 470 F.2d 3, 9 (D. Mass. 2007) (holding that the creditor's notice about right to rescind was clear and conspicuous even though lacking transaction date and actual deadline for rescission); *Barnes v. Chase Home Fin., LLC*, 825 F. Supp. 2d 1057, 1071 (D. Or. 2011) (denying motion to dismiss when creditor gave wrong date for expiration of consumer's right to rescind); *Aubin v. Residential Funding Co., LLC*, 565 F. Supp. 2d 392, 399 (D. Conn. 2008) (denying creditor's motion to dismiss when creditor misstated the transaction date, and the rescission deadline and the notice of the right to rescind did not define the term "business day"); *Ware v. Indymac Bank, FSB*, 534 F. Supp. 2d 835, 844 (N.D. Ill. 2008) (granting creditor's motion to dismiss consumer's claim even though the rescission deadline in the creditor's notice had already passed).

27. See *Rand Corp. v. Yer Song Moua*, 559 F.3d 842, 847 (8th Cir. 2009) (holding that creditor violated statute by requiring consumers to sign statement that three business days had elapsed and consumers had not rescinded); *Rodash v. AIB Mortg. Co.*, 16 F.3d 1142, 1146 (11th Cir. 1994) (holding that providing on the same day the notice of the right to cancel and the election not to cancel prevented the creditor's clear disclosure of the consumer's right to rescind); *Conrad v. Farmers & Merchants Bank*, 762 F. Supp. 2d 843, 847 (W.D. Va. 2011) (denying creditor's motion to dismiss consumer's claim of a violation relating to postdated confirmation that consumer had not rescinded); *Wiggins v. Avco Fin. Servs.*, 62 F. Supp. 2d 90, 96 (D.D.C. 1999) (holding that election not to cancel constituted an impermissible waiver).

28. See *Rand Corp.*, 559 F.3d at 847 (observing that "[t]he [consumers] signed a statement on April 22, 2005, certifying it was April 26, 2005").

29. See *Tenney v. Deutsche Bank Trust Corp.*, No. 08-40041-FDS, 2009 WL 415510, at *4-5 (D. Mass. Jan. 6, 2009) (denying creditor's motion to dismiss claim when creditor required consumer to sign confirmation at closing that three days had elapsed and that consumer had not rescinded transaction); *Adams v. Nationscredit Fin. Servs. Corp.*, 351 F. Supp. 2d 829, 834 (N.D. Ill. 2004) (denying creditor's claim for summary judgment when consumer had to sign confirmation at closing that he had elected not to rescind transaction and that three business days had elapsed since he received the notice of the right to cancel); *Apaydin v. CitiBank Fed. Sav. Bank (In re Apaydin)*, 201 B.R. 716, 719 (Bankr. E.D. Pa. 1996) (stating that use of waiver form had the effect of making disclosure less than clear and conspicuous).

notice of rescission and a suit for rescission, the relevance of the consumer's ability to tender the loan principal, and the difficulty of recognizing a creditor's attempt to accommodate a consumer's premature election not to cancel a transaction.

II. THE RIGHT OF RESCISSION

A. A Question of Timing

Nothing in the Truth in Lending scheme provokes as much discussion as the right of rescission.³⁰ When a consumer grants a lender a security interest in his principal dwelling,³¹ the consumer has an absolute right to rescind the transaction within three business days after consummation of the transaction, delivery of all material disclosures, or delivery of the notice of the right to rescind, whichever happens last.³² If the creditor fails to make the proper disclosures, the right to rescind can last as long as three years.³³ When the consumer in *Beach v. Ocwen Federal Bank*³⁴ tried to use the right to rescind as a defense in recoupment against a collector after the three-year period had run, the United States Supreme Court left no doubt that the statute did not merely limit the time in which a consumer could bring an action, but governed the duration of the right itself.³⁵ The consumer therefore had no right to rescind, defensively or otherwise, once the three-year period had expired.³⁶ It is fair to say, therefore, that § 1635(f) of TILA is a statute of repose that imposes a three-year deadline on rescission actions.³⁷ After

30. With certain limited exceptions, a consumer has the right to rescind a credit transaction where a creditor has a security interest in the consumer's principal dwelling. 15 U.S.C. § 1635(a) (2012); 12 C.F.R. § 1026.23(a)(1) (2014).

31. Regulation Z defines "dwelling" as "a residential structure that contains one to four units, whether or not that structure is attached to real property." 12 C.F.R. § 1026.2(a)(19) (2014).

32. 12 C.F.R. § 1026.23(a)(3).

33. See *id.* § 1026.23(a)(3)(i); 15 U.S.C. § 1635(a).

34. *Beach v. Ocwen Fed. Bank*, 523 U.S. 410 (1998).

35. *Id.* at 417. The Court explained that § 1635(f) "talks not of a suit's commencement but of a right's duration, which it addresses in terms so straightforward as to render any limitation on the time for seeking a remedy superfluous." *Id.*

36. *Id.* at 419.

37. See *Rosenfield v. HSBC Bank, USA*, 681 F.3d 1172, 1187 (10th Cir. 2012) (stating that "[a]llowing uncertainty of title to drag on past the already-generous three-year repose period would run counter to the commercial-certainty concerns of Congress (recognized in *Beach*) that led Congress to establish the fixed and limited repose period of § 1635(f) in the first place"); *Jones v. Saxon Mortg., Inc.*, 537 F.3d 320, 327 (4th Cir. 1998) (noting that "[b]ecause § 1635(f) is a statute of repose, the time period stated therein is not tolled for any reason"); *Miguel v. Country Funding Corp.*, 309 F.3d 1161, 1164 (9th Cir. 2002) (holding that § 1635 is a statute of repose, depriving the courts of subject matter jurisdiction when a § 1635 claim is brought outside the three-year limitation period"); *Harris v. OSI Fin. Servs., Inc.*, 595 F. Supp. 2d 885, 898 (N.D. Ill. 2009) (finding that §

Beach, the question still remained, however, about how a consumer could rescind a transaction. There is a difference between rescinding through notice alone and rescinding through judicial action.

The consumer in *Beach* understandably tried to preserve his position by using his right of rescission defensively because it was too late for him to sue the lender.³⁸ Section 1635(f) says nothing about bringing an action, and thus its language is not consistent with that usually found in a statute of limitations.³⁹ The term “expire” makes its impact by extinguishing the underlying right to rescind once the three-year period has expired.

Regulation Z seems to make it quite easy for a consumer to rescind. All the consumer needs to do is “notify the creditor of the rescission by mail, telegram or other written means of communication.”⁴⁰ It is the effect of the consumer’s notification that matters. There is no problem if the consumer rescinds within three business days because a consumer has a right to do so without giving any reason for his decision.⁴¹ If a consumer wants to rescind thereafter, he may find that the creditor is not impressed with his claim that the creditor has omitted some material disclosure⁴² or that it has not given the consumer a notice of the right to rescind.⁴³ If the creditor disagrees with the consumer, there is a question

1635(f) is a statute of repose and not subject to equitable extensions); *Sobieniak v. BAC Home Loans Servicing, LP*, 835 F. Supp. 2d 705, 710 (D. Minn. 2011) (stating that “TILA imposes a three-year statute of repose on claims for rescission”); *Meyer v. Argent Mortg. Co. (In re Meyer)*, 379 B.R. 529, 540 (Bankr. E.D. Pa. 2007) (recognizing § 1635 as a statute of repose).

38. The consumers in *Beach* conceded that they could not bring an independent action for rescission because the three-year period had run. However, they urged the Court to recognize their right of rescission as a defense in recoupment to the creditor’s collection action. *See Beach*, 523 U.S. at 415.

39. The *Beach* Court observed that “[t]he terms of a typical statute of limitation provide that a cause of action may or must be brought within a certain period of time.” *Id.* One must contrast this with the word “expire” used in § 1635(f). This was a signal to the Court that the statute deals with “duration” of a right rather than commencement of an action. *See id.* at 417.

40. 12 C.F.R. § 1026.23(a)(3)(i) (2014).

41. *See id.*

42. *See Little v. Bank of Am.*, 769 F. Supp. 2d 954, 963 (E.D. Va. 2011) (holding that creditor complied with the material disclosure requirement of the payment schedule); *Hubbard v. Ameriquist Mortg. Co.*, 624 F. Supp. 2d 913, 919 (N.D. Ill. 2008) (stating that creditor’s failure to disclose proper payment periods violated material disclosure provision); *Hager v. Am. Gen. Fin., Inc.*, 37 F. Supp. 2d 778, 784-85 (S.D. W.Va. 1999) (denying summary judgment to creditor where consumer alleged creditor’s failure to include credit insurance premium in finance charge); *Hopkins v. First NLC Fin. Servs., LLC (In re Hopkins)*, 372 B.R. 734, 743 (Bankr. E.D. Pa. 2007) (stating that creditor’s failure to inform consumer that loan has variable interest is material and extends rescission period). Regulation Z defines “material disclosure” as “the required disclosures of the annual percentage rate, the finance charge, the amount financed, the total of payments, the payment schedule, and the disclosures and limitations referred to in §§ 1026.32(c) and (d) and 1026.43(g).” 12 C.F.R. § 1026.23(a)(3)(ii).

43. *See Rand Corp. v. Yer Song Moua*, 559 F.3d 842, 848 (8th Cir. 2009) (holding that

whether the consumer's mere notice to the creditor is enough to rescind the transaction, or whether the consumer must also sue for rescission within the statutory period.

The conflict arises when a consumer gives a rescission notice to the creditor within the extended three-year period, but does not sue until after that period has passed. The courts have not agreed about whether a consumer must also sue within the three-year period, even if he has already given notice to the creditor.⁴⁴ Some courts take the view that a consumer's mere notice of rescission does not constitute a consumer's exercise of the right to rescind. Under this theory, once the three-year period expires, a notice previously sent cannot extend the consumer's time for actually bringing suit.⁴⁵ Other courts make it possible for a consumer to extend the time for suit beyond three years because a consumer's timely notice within the three-year period accomplishes

creditor violated TILA by requiring consumer to sign statement indicating consumer's election not to rescind transaction); *Rodash v. AIB Mortg. Co.*, 16 F.3d 1142, 1146-47 (11th Cir. 1994) (finding that creditor violated statute by requiring consumer to sign form on the transaction date indicating election not to cancel); *White v. Homefield Fin., Inc.*, 545 F. Supp. 2d 1159, 1168 (W.D. Wash. 2008) (denying assignee's motion to strike where consumer argued that document had incorrect transaction date and did not contain expiration date); *Adams v. Nationscredit Fin. Servs. Corp.*, 351 F. Supp. 2d 829, 833-34 (N.D. Ill. 2004) (stating that creditor violated statute by requiring consumer to confirm at closing an election not to rescind transaction).

44. See *Rosenfield v. HSBC Bank, USA*, 681 F.3d 1172, 1185 (10th Cir. 2012) (stating that giving notice is a necessary act for the ultimate exercise of rescission, but that it is not sufficient); *McOmie-Gray v. Bank of Am. Home Loans*, 667 F.3d 1325, 1328 (9th Cir. 2012) (holding that rescission suit must be brought within three years regardless of when consumer gives notice); *Jones v. Saxon Mortg., Inc.*, 537 F.3d 320, 327 (4th Cir. 1998) (holding that "§ 1635(f) is an absolute time limit and cannot be tolled to allow a party to rescind after a foreclosure sale"); *Sobieniak v. BAC Home Loan Servicing, LP*, 835 F. Supp. 2d 705, 711 (D. Minn. 2011) (finding that allowing borrower's rescission letter to toll the rescission period "contradicts Congress's intent to create repose from the threat of rescission after three years"); *Bradford v. HSBC Mortg. Corp.*, 799 F. Supp. 2d 625, 632 (E.D. Va. 2011) (holding that "the three-year time limit on TILA rescission is absolute, the expiration of which extinguishes the borrower's rescission right regardless of whether any notice of rescission was filed within three years of closing"). But see *Gilbert v. Residential Funding LLC*, 678 F.3d 271, 278 (4th Cir. 2012) (stating that "the three-year limitation . . . concerns the extinguishment of the right of rescission and does not require borrowers to file a claim for the invocation of that right"); *Leonard v. Bank of Am. NA*, No. 10-C-0814, 2012 WL 3001266, at *16 (E.D. Wis. July 23, 2012) (finding that consumer exercised his right of rescission by sending written notice to creditor before the three year period expired); *Herzog v. Countrywide Home Loans (In re Hunter)*, 400 B.R. 651, 662 (Bankr. N.D. Ill. 2009) (concluding that "where the consumer timely elected to rescind the loan, § 1635(f) is not a limitation on the filing of suit to enforce that right").

45. See *Rosenfield*, 681 F.3d at 1188 (holding that "notice, by itself, is not sufficient to exercise (or preserve) a consumer's right of rescission under TILA"); *McOmie-Gray*, 667 F.3d at 1328 (holding that "rescission suits must be brought within three years from the consummation of the loan, regardless of whether notice of rescission is delivered within that three-year period"); *Sobieniak*, 835 F. Supp. 2d at 710 (noting that a majority of courts hold that a claim for rescission does not survive the three-year period if a consumer sends a rescission request to the creditor but does not file suit until the period expires).

rescission.⁴⁶

In *McOmie-Gray v. Bank of America Home Loans*,⁴⁷ the Ninth Circuit took the position that a consumer must file a lawsuit within three years after consummation of the loan.⁴⁸ The court in *McOmie-Gray* did not treat the consumer's notice as accomplishing the rescission that the consumer intended, but recognized it instead as merely advancing "a claim seeking rescission."⁴⁹ If the lender did not cooperate, then the consumer had to seek a judicial determination that his rescission was justified, and for that he had to act within three years.⁵⁰

The *McOmie-Gray* court relied on the Supreme Court's statement in *Beach v. Ocwen Federal Bank* that § 1635(f) "permits no federal right to rescind, defensively or otherwise, after the 3-year period of §1635(f) has run."⁵¹ The Ninth Circuit in *McOmie-Gray* read *Beach* as governing cases where a consumer seeks rescission of a mortgage transaction.⁵² But the court did not rest on *Beach* alone; it relied on the approach that it had previously taken in *Miguel v. Country Funding Corporation*⁵³ when the consumers did not notify the mortgagee of their rescission within three years.⁵⁴ Unfortunately, they had sent a timely notice to the wrong party.

The consumer in *McOmie-Gray* had given the lender timely notice of rescission, and the only question was whether she also had to bring suit within three years. On the other hand, the question in *Miguel* was whether the consumer had to give notice within three years, and not whether she had to sue.⁵⁵ It was, therefore, a little surprising that the

46. See *Sherzer v. Homestar Mortg. Servs.*, 707 F.3d 255, 258 (3d Cir. 2013); *Gilbert*, 678 F.3d at 277; *Herzog* 400 B.R. at 662.

47. *McOmie-Gray*, 667 F.3d at 1325.

48. *Id.* at 1329.

49. *Id.* at 1327 (quoting *Large v. Conseco Fin. Servicing Corp.*, 292 F.3d 49, 55 (1st Cir. 2002)).

50. *Id.*

51. *Id.* at 1328 (quoting *Beach v. Ocwen Fed. Bank*, 523 U.S. 410, 419 (1998)).

52. The *Beach* Court recognized that § 1635(f) dealt with "a right's duration" rather than "a suit's commencement." *Beach*, 523 U.S. at 417. The *McOmie-Gray* court interpreted the *Beach* language broadly to include the consumer's suit for rescission. See *McOmie-Gray*, 667 F.3d at 1328.

53. *Miguel v. Country Funding Corp.*, 309 F.3d 1161 (9th Cir. 2002).

54. *Id.* at 1162. The borrowers sent their notice of rescission to the mortgage servicer on November 7, 1997, and then filed suit against the servicer on December 1, 1997, exactly three years from the closing date. When the borrowers realized that they had the wrong defendant, they amended their complaint after the three-year period had run to include the creditor. By then, it was too late. See *id.* at 1162-63.

55. See *id.* at 1165 (questioning whether the cancellation was effective even though the creditor did not receive it within the three-year period of repose); see also *Phillippi v. Beneficial Loan & Thrift Co.*, No. 10-4281 (SRN/JJG), 2012 WL 684873, at *4 (D. Minn. March 2, 2012).

court in *McOmie-Gray* reminded the parties of the *Miguel* language stating that § 1635(f) barred any rescission claims brought more than three years after consummation.⁵⁶ That language was mere *dictum* because a decision on the need for notice within three years did not require the court to answer the question whether the consumer had to sue within the same period. Nevertheless, the court in *McOmie* relied essentially on the *dictum* in *Miguel* that § 1635(f) represents an absolute bar on rescission actions that are filed more than three years after consummation.⁵⁷

The court in *McOmie-Gray* could have been more forthright in its opinion that the consumer had to file her suit within three years after consummation or be forever barred. The original version of the statute did not contain any time limit on rescission, so that a consumer who gave a notice of rescission that the creditor did not accept would be able to file suit in his own good time. It was not until 1974 that Congress amended the statute to set the three-year limit on the period for rescinding.⁵⁸ That amendment seemed to send a message that left no doubt that the right to rescind would cease to exist after three years.

In *Rosenfield v. HSBC Bank, USA*,⁵⁹ the Tenth Circuit allied itself with *McOmie-Gray*, emphasizing that “the mere invocation of the right to rescission via a written letter, without more is not enough to preserve a court’s ability to effectuate (or recognize) a rescission claim after the three-year period has run.”⁶⁰ The court reminded the parties that rescission in its most basic form was an equitable remedy designed to restore the parties to the *status quo ante*.⁶¹ The court saw no material difference between the rescission remedy in Truth in Lending and that in the contractual context,⁶² contending that it is no more costly for the parties to rescind an agreement than to try to enforce it.⁶³ But the court was concerned that a consumer’s mere notice of intent to rescind would

56. The Court in *McOmie-Gray* recognized the *Miguel* holding that “the borrower’s right to rescission had expired because the bank did not receive a notice of rescission within three years from the consummation of the transaction.” *McOmie-Gray*, 667 F.3d at 1329 (citing *Miguel*, 309 F.3d at 1165). The notice issue is different from that of the filing requirement. See *Suits to Compel Rescission Brought More Than Three Years After Consummation*, 43 CONSUMER CREDIT & TRUTH-IN-LENDING COMPLIANCE REP., April 2012, at 3.

57. *McOmie-Gray*, 667 F.3d at 1329 (citing *Miguel*, 309 F.3d at 1165).

58. See Act of Oct. 28, 1974, Pub. L. No. 93-495, 88 Stat. 1500, 1517 (codified as amended at 15 U.S.C. § 1635(f) (2012)).

59. *Rosenfield v. HSBC Bank, USA*, 681 F.3d 1172 (10th Cir. 2012).

60. *Id.* at 1182.

61. *Id.* at 1183-84.

62. *Id.* at 1183.

63. See *id.* at 1184 (citing Andrew Kull, *Rescission and Restitution*, 61 BUS. LAW. 569, 577 (2006)).

not preserve that balance if the consumer decided much later to enforce rescission judicially in the face of an unresponsive creditor. After all, there could be a significant gap between the time the consumer notifies the creditor of rescission and the time the consumer seeks a judicial remedy, when enforcement suddenly becomes more complicated and costly.⁶⁴

In *Rosenfield*, the consumer took refuge in the language of Regulation Z that directed her how to exercise her right to rescind. She suggested that mere notice to the creditor was all that the regulation required. The court agreed that notice was required, but concluded it was not sufficient.⁶⁵ This seemed an adequate response to the consumer's contention that neither TILA nor Regulation Z prescribed any requirement for rescission other than notice to the creditor. The court preferred to read the Truth in Lending language against the background of the statutory objective, thus putting some limitation on the right of rescission.⁶⁶ The *Rosenfield* court went beyond *McOmie-Gray* to emphasize the Supreme Court's acknowledgment in *Beach* that enlargement of the rescission period would effectively create commercial uncertainty.⁶⁷ After all, it is in the best interests of creditors and consumers alike to have their transactions settled in some reasonable period of time, and categorizing the statute as one of repose furthers that objective. The Supreme Court recognized the different treatment given to recovery of damages and rescission in this context, especially since Congress allowed a consumer to assert a TILA violation as a matter of defense by recoupment in a creditor's action to recover its debt even

64. The Consumer Financial Protection Bureau urged the Tenth Circuit in *Rosenfield* to recognize the application of the one-year statute of limitations in § 1640 to the time period for bringing suit, relying on *Herzog v. Countrywide Home Loans (In re Hunter)*, 400 B.R. 651, 660-61 (Bankr. N.D. Ill. 2009) and *Barnes v. Chase Home Fin., LLC*, 825 F. Supp. 2d 1057, 1066 (D. Or. 2011). Brief for Consumer Financial Protection Bureau as Amicus Curiae Supporting Plaintiff-Appellant, *Rosenfield v. HSBC Bank, USA*, 681 F.3d 1172 (10th Cir. 2012) (No. 3:10-CV-00063), 2012 WL 1074082. But it must be noted that § 1640 only gives costs and an attorney's fee to a consumer who brings a successful action confirming the consumer's right of rescission under § 1635. See 15 U.S.C. § 1640(a)(3) (2012). It does not cover the period for bringing suit.

65. See *Rosenfield*, 681 F.3d at 1185 (relying on the *Beach* concept of repose under TILA that would avoid commercial uncertainty and the extension of the period before the parties' relationship is solidified).

66. The *Rosenfield* court explained as follows:

Accepting a consumer's *unilateral* notice of an intent to rescind as a legally effective exercise of rescission, where the creditor has not in any sense *actually* acted on the consumer's wishes, would indirectly enlarge the congressionally established three-year time period under TILA, and it could work to cloud the title of the property for an indefinite period of time.

Id. at 1187.

67. See *id.* at 1185.

though the one-year period had passed.⁶⁸ As a result, the Court in *Beach* would not recognize a consumer's right to rescind, "defensively or otherwise, after the 3-year period of § 1635(f) has run."⁶⁹

It is understandable that the *Rosenfield* court was concerned about a possible extension beyond the statutory three-year period. The mere notification to a creditor would allow a consumer to sue later at his leisure without having to worry about the expiration of time, and this could create an uncertainty that might linger indefinitely.⁷⁰ But this is certainly not a situation that is beyond a creditor's control. If a creditor is skeptical about a consumer's rescission claim, it can seek a judicial determination to resolve the matter.⁷¹ It is not as if the creditor is helpless in the face of the consumer's action. Even if the creditor is not inclined to sue immediately, it may still raise questions with the consumer about the rescission claim and avoid any lingering uncertainty about the transaction. If the courts are concerned that a rescission dispute might last well beyond the three-year period if a rescission notice within that period is enough to preserve the consumer's claim, it is enough to say that the creditor has an incentive to act promptly itself if it senses that it is being disadvantaged by the consumer's lethargic approach to judicial action. Any uncertainty about the transaction or any perceived cloud on title can last only as long as a lender is willing to remain silent in the face of the consumer's rescission notice.⁷²

When the Fourth Circuit in *Gilbert v. Residential Funding LLC*⁷³ expressed the contrary view, that a borrower need only express his rescission through a written notice within the three-year period, it relied essentially on the plain meaning rule of statutory construction to conclude that both the statute and the regulation deal only with the

68. *Beach v. Ocwen Fed. Bank*, 523 U.S. 410, 419 (1998).

69. *Id.*

70. *See Rosenfield*, 681 F.3d at 1187 n.11 (recognizing that if a consumer's notice to the creditor is sufficient to preserve the right of rescission, a consumer can sit on her rights and seek enforcement some years into the future).

71. *See Keiran v. Home Capital, Inc.*, 720 F.3d 721, 734 (8th Cir. 2013) (Murphy J., concurring in part and dissenting in part) (stating that a lender may choose to negotiate or litigate when the consumer notifies it of rescission, but there can be no indefinite cloud on title without the lender's tacit consent); *Sherzer v. Homestar Mortg. Servs.*, 707 F.3d 255, 266-67 (3d Cir. 2013) (stating that a lender can resolve any uncertainty by suing to confirm the invalidity of the consumer's rescission, or in the alternative the lender can do nothing and assume that a court will recognize the rescission as valid).

72. *See* NAT'L CONSUMER LAW CTR., TRUTH IN LENDING, *supra* note 25, § 10.6.3.1.3 (stating that creditor can file suit challenging validity of rescission). Regulation Z contemplates that the creditor has twenty days to act on the consumer's notice of rescission. 12 C.F.R. § 1026.23(d)(2) (2014). By the same token, a creditor can use that same time to let the consumer know that it questions the consumer's right to rescind.

73. *Gilbert v. Residential Funding LLC*, 678 F.3d 271 (4th Cir. 2012).

consumer's right to rescind.⁷⁴ The borrower exercised that right by letter well within the three-year period, and neither the statute nor the regulation said anything about filing a lawsuit.⁷⁵ The court differentiated between exercising a right to rescind and completing the rescission.⁷⁶ The Fourth Circuit in *Gilbert* suggested that once borrowers give notice of rescission, they are protected even if the lender resists the rescission and forces the borrowers to take further enforcement steps. As far as the Fourth Circuit was concerned, the basic issue was whether the borrowers had exercised their right of rescission in time, and the lender's lack of cooperation did not affect that determination.⁷⁷

Like other courts, the *Gilbert* court took its turn at explaining *Beach*, emphasizing that the Supreme Court did not deal with the timely exercise of the borrower's right to rescind, but rather with the question whether § 1635(f) was a statute of limitation or a statute of repose.⁷⁸ The Court in *Beach* did not allow the defendant to assert rescission as an affirmative defense beyond the three-year period because there was then no existing right—it had vanished, it had expired.⁷⁹ It is true that in *Beach* there was no rescission letter, but the basic question remained

74. *Id.* at 276-77 (citing *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 242 (1989)). One authority has explained the plain meaning rule this way: "In the absence of a specific indication to the contrary, words used in the statute will be given their common, ordinary and accepted meaning, and the plain language of the statute should be afforded its plain meaning." 2A NORMAN J. SINGER & J.D. SHAMBLE SINGER, *STATUTES AND STATUTORY CONSTRUCTION* § 46:1 (7th ed. 2012).

75. According to the *Gilbert* court, all that a consumer has to do in order to exercise his right to rescind is to give the creditor the proper notice prescribed by Regulation Z. *Gilbert*, 678 F.3d at 277 (citing 12 C.F.R. § 1026.23(a)(2)).

76. *Id.* Under this interpretation, the exercise of the right of rescission is a preliminary act that merely gives the creditor notice about the consumer's intentions. *See Bradford v. HSBC Mortg. Corp.*, 838 F. Supp. 2d 424, 434 (E.D. Va. 2012) (finding that consumer does not exercise right to rescind merely by giving notice of intent to rescind). If the creditor does not respond to the consumer's initiative, the question still remains whether the consumer can then wait until he decides to press a rescission claim in court, however long that decision takes.

77. *See Gilbert*, 678 F.3d at 277.

78. *See id.* at 278.

79. *See Beach v. Ocwen Fed. Bank*, 523 U.S. 410, 417 (1988). It seems that the Court wanted to avoid the expansion of time that might affect the uncertainty of title. If the consumer's unilateral notice to the creditor accomplishes rescission, but the creditor does not respond, it means therefore that the consumer may take his time in seeking judicial enforcement of the rescission remedy. This is not what the *Beach* Court had in mind. *See id.* at 415-16. If the consumer's unilateral notice had this effect, then this would suggest that such notice would automatically void a loan contract; most courts do not support that proposition because a consumer could avoid his obligations simply by sending notices of rescission to the creditor. *See Am. Mortg. Network, Inc. v. Shelton*, 486 F.3d 815, 821 (4th Cir. 2007) (adopting majority view that "unilateral notification of cancellation does not automatically void the loan contract"); *Yamamoto v. Bank of N.Y.*, 329 F.3d 1167, 1172 (9th Cir. 2003) (finding that in contested case, rescission is accomplished when a court finds in the consumer's favor); *Large v. Conseco Fin. Servicing Corp.*, 292 F.3d 49, 54-55 (1st Cir. 2002) (observing that mere assertion of right to rescind does not automatically void the contract).

whether the defendant had acted in time, and the conclusion was that he was too late.

When the Third Circuit in *Sherzer v. Homestar Mortgage Services*⁸⁰ joined the Fourth Circuit in *Gilbert* in holding that a consumer's valid rescission notice was enough to rescind a transaction under TILA, a clear split emerged between those courts and the Ninth and Tenth Circuits on the other side. The *Sherzer* court viewed *Beach* simply as requiring a consumer to exercise his right of rescission within three years, but not indicating how a consumer should exercise that right.⁸¹ This was consistent with the approach in *Beach* because the consumers in that case did not indicate any interest in rescinding until the three-year period had expired. Therefore, there was no problem in trying to interpret any action that the consumer may have taken before that expiration.

When the Eighth Circuit joined the fray in *Keiran v. Home Capital, Inc.*,⁸² it cast its lot with the Ninth Circuit in *McOmie-Gray* and the Tenth Circuit in *Rosenfield*. The *Keiran* court seemed convinced that a statute of repose is always associated with filing a lawsuit.⁸³ Nevertheless, there is nothing in the nature of a statute of repose that always requires a consumer to seek a judicial remedy. It depends on the context.⁸⁴ A statute of repose can force a person to act before a certain deadline, but the particular context may dictate something short of judicial action.⁸⁵ In the TILA context, a consumer must take some action to rescind within a certain period, lest the statutory right be extinguished. Both TILA and Regulation Z confirm that the consumer takes the necessary action by notifying the creditor of his decision to rescind.⁸⁶ It is not as if Congress does not know how to make a lawsuit a requirement

80. *Sherzer v. Homestar Mortg. Servs.*, 707 F.3d 255 (3d Cir. 2013).

81. *See id.* at 258.

82. *Keiran v. Home Capital Inc.*, 720 F.3d 721 (8th Cir. 2013).

83. The Eighth Circuit agreed with the *Rosenfield* court that a consumer seeking rescission must file suit, instead of merely giving notice, within three years in order to prevail under § 1635(f). *See id.* at 728.

84. *See McOmie-Gray v. Bank of Am. Home Loans*, 667 F.3d 1325, 1327 (9th Cir. 2012) (finding that § 1635 does not explicitly establish a time limit in which a consumer must file suit to rescind). Statutes of repose that require that an action be filed typically refer to the commencement of a civil action. *Sherzer*, 707 F.3d at 259. A statute of repose does not always set a time limit for a lawsuit because it all depends on how a consumer may exercise his rights under a particular statute. *See Keiran*, 720 F.3d at 732 (Murphy, J., concurring in part and dissenting in part).

85. *See Ma v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 597 F.3d 84, 88 (2d Cir. 2010) (finding that under a statute of repose the bank did not have to reimburse its customer for an unauthorized transfer if the customer did not object within one year); *Balam-Chuc v. Mukasey*, 547 F.3d 1044, 1051 (9th Cir. 2008) (finding 8 U.S.C. § 245(i) to be a statute of repose which required aliens to file a visa petition on or before April 30, 2001, in order to qualify for adjustment of status).

86. *See* 15 U.S.C. § 1635(a) (2012); 12 C.F.R. § 1026.23(a)(2) (2014).

for a consumer to exercise a statutory right under a statute of repose. Congress has certainly risen to the challenge in other contexts where it prohibited judicial action after a certain time.⁸⁷ The majority in *Keiran* recognized a consumer's written notice to the creditor as one of the requirements for rescinding, but not the only one.⁸⁸ In the majority's view, a consumer has to follow up with a lawsuit within three years if he wants to complete the process.⁸⁹ But if neither TILA nor Regulation Z says anything about a lawsuit, it is not clear why the majority thought it necessary to make this a requirement even if litigation might ensue from the creditor's failure to accept the consumer's rescission. If the consumer rescinds and the cooperative creditor fulfills its responsibilities by returning the consumer's property and taking any necessary action to terminate its security interest, there would be no place for a lawsuit in the scheme of things.⁹⁰ Where the parties have acted in furtherance of the consumer's rescission, it can hardly be said, therefore, that they must nevertheless conjure up some kind of judicial action to put the final seal of approval on the parties' implementation of that rescission.⁹¹ Even if a suit is sometimes necessary because the creditor does not agree that the consumer has a right to rescind, that does not mean the consumer has not rescinded. In that event, the creditor will seek judicial intervention to settle the matter one way or the other, but that does not affect the reality that the consumer has complied with the requirements for rescission.

87. See *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350, 363 (1991) (recognizing statute of repose which provided that no action could be maintained under the Securities Act of 1933 to enforce liability unless brought within three years after the violation); *Radford v. Gen. Dynamics Corp.*, 151 F.3d 396, 400 (5th Cir. 1998) (per curiam) (recognizing 29 U.S.C. § 1113 as statute of repose which foreclosed any action brought more than six years after the breach of a fiduciary duty).

88. See *Keiran*, 720 F.3d at 728; see also *Rosenfield v. HSBC Bank, USA*, 681 F.3d 1172, 1185 (10th Cir. 2012) (stating that "the giving of notice is a necessary predicate to the ultimate exercise of the [rescission] right"). The *Rosenfield* court interpreted 12 C.F.R. § 1026.23(a)(2) as imposing a duty on the consumer to notify the creditor of his rescission in order to exercise the right to rescind later. See *id.* at 1185.

89. *Keiran*, 720 F.3d at 728.

90. See 12 C.F.R. § 1026.23(d) (effects of rescission).

91. Regulation Z does allow for judicial intervention relating to the parties' return of money or property involved in the transaction. See *id.* § 1026.23(d)(4). But this is a far cry from requiring judicial action for rescission to occur. See *Sherzer v. v. Homestar Mortg. Servs.*, 707 F.3d 255, 260 (3d Cir. 2013). Although the Act provides for a statute of limitations governing damages, 15 U.S.C. § 1640(e), there is no similar provision relating to rescission. Instead, the Act provides that "the obligor shall have the right to rescind the transaction . . . by notifying the creditor, in accordance with the regulations of the Bureau, of his intention to do so." 15 U.S.C. § 1635(a). There is nothing in the statute about filing a lawsuit. This raises a question about the requirement for court action if Congress did not deem it necessary to include appropriate language in the statute. See *Hartman v. Smith*, 734 F.3d 752, 762 (8th Cir. 2013) (Melloy, J., concurring); *Gilbert v. Residential Funding LLC*, 678 F.3d 271, 277 (4th Cir. 2012).

B. The Basis for Disagreement

The framework for exploring this judicial split lies in § 1635.⁹² Subsection (a) allows a consumer to exercise the right of rescission by notifying the creditor of his intention to do so in accordance with Regulation Z.⁹³ Subsection (f) then provides that the consumer's right of rescission "shall expire three years after the date of consummation of the transaction or upon the sale of the property"⁹⁴ Regulation Z provides that the consumer may exercise the right of rescission by notifying the creditor by "mail, telegram or other means of written communication."⁹⁵

If a court recognizes a consumer's timely notice as the time of rescission, then it should not matter what happens after the expiration of the three-year period. A consumer would not sue later to exercise his right of rescission, but rather to confirm the rescission if the creditor is uncooperative.⁹⁶ The plain language approach to the statute and the regulation suggests that it is the consumer's notice that produces the rescission.⁹⁷ If the creditor has no problems with the consumer's rescission notice, then the creditor and the consumer should follow the procedures outlined in the regulation.⁹⁸ The parties' obligations ensue from the consumer's rescission, and that rescission occurs when the consumer sends the appropriate notice to the creditor.⁹⁹ There is nothing

92. 15 U.S.C. § 1635.

93. *Id.* § 1635(a).

94. *Id.* § 1635(f).

95. 12 C.F.R. § 1026.23(a)(2).

96. The Fourth Circuit pointed out the difference between exercising a right to rescind and completing the rescission. The parties must either "unwind the transaction among themselves, or the borrower must file a lawsuit so that the court may enforce the right to rescind." *Gilbert*, 678 F.3d at 277. The Third Circuit found that rescission occurs when the consumer sends a valid notice of rescission. *Sherzer*, 707 F.3d at 261 n.5. Both courts agreed, however, that a consumer could still sue after the three-year period has expired. *See id.* at 267; *Gilbert*, 678 F.3d at 278.

97. The *Gilbert* court refused to impose a filing requirement on the provision for rescission. *See Gilbert*, 678 F.3d at 277. Neither the statute nor the regulation says anything about filing a lawsuit. *See id.* In plain terms Regulation Z requires a consumer to notify the creditor if he wants to exercise the right to rescind. 12 C.F.R. § 1026.23(a)(2). The consumer's notice informs the creditor that the consumer is rescinding. *Id.* There is no prediction at that point about how the creditor will react to the consumer's notice, and the consumer may have to bring a lawsuit to accomplish this objective. But the regulation addresses the consumer's exercise of the right to rescind, and the regulatory language should be given its plain meaning. *See SINGER & SHAMBIE, supra* note 74, at §46:1.

98. *See* 12 C.F.R. § 1026.23(d)(2)-(3). The creditor must return the consumer's money within twenty days, and then the consumer must return the creditor's money.

99. If the consumer exercises his right to rescind according to § 1026.23(a), then § 1026.23(d) outlines the effects of that rescission. There can be no effect of rescission if no rescission has occurred. Subsection (d) begins with "[w]hen a consumer rescinds," a sure clue that rescission has taken place. *See* 12 C.F.R. § 1026.23(d)(1). This reference to a consumer's act of

in the statute or the regulation suggesting that a court must intervene for rescission to occur. For all intents and purposes, rescission is a private affair that the parties can work out between themselves. A consumer has the unfettered right to rescind within three days, and no judicial intervention is necessary for the consumer to exercise that right. Congress must have been confident about the parties' ability to accomplish rescission on their own because it even expanded the time for a creditor to return a consumer's money.¹⁰⁰ This accommodation is consistent with the idea that a creditor should have enough time to react to the consumer's rescission and to decide on its own course of action once the consumer has shown his hand. If the parties disagree, litigation may ensue, but by then rescission would have already occurred. If a court finds that the consumer's rescission is valid, then it will follow the procedures outlined in the regulation and confirm the rescission.

It is not necessary to tie the time for rescinding a transaction to the time for enforcing rescission. The statute provides a three-year limit on the right of rescission. If the consumer's notice is not enough by itself to bring about rescission, a consumer will have to give notice with enough time to spare, so that he will be able to file suit against the lender if the lender does not respond to the consumer's notice within twenty days.¹⁰¹ This means, therefore, that a consumer will not have a full three years to rescind through notice. The consumer may run out of time to work out the rescission details with the lender if the only thing that counts is the lawsuit.¹⁰² One can only imagine that a lender will not have much

rescinding is far different from a court's intervention to accomplish rescission and gives additional weight to the idea that the consumer's valid notice is the defining moment. *See Sherzer*, 707 F.3d at 259 n.2. When this regulatory reference is considered with § 1635, it confirms that the consumer's written notice brings about rescission, because it is the consumer's right of rescission that expires in § 1635(f) and there is nothing there that implicates the commencement of a lawsuit. *See id.* at 259-60; *Gilbert*, 678 F.3d at 278.

100. In 1980 Congress increased the creditor's time for returning the consumer's money or property from ten days to twenty days thus, in effect, giving the creditor even more time to determine the validity of the consumer's rescission. *See S. REP. NO. 96-368*, at 29 (1980), *as reprinted in* 1980 U.S.C.A.N. 234, 264.

101. A consumer must be wary of sending his rescission notice too close to the expiration of the three-year period if that notice is not enough to accomplish rescission. The creditor has twenty days to respond by returning the consumer's money or property and taking any action to terminate the security interest. *See* 12 C.F.R. § 1026.23(d)(2). If the notice is not enough for rescission to occur, then a creditor has a strategic advantage if the consumer gives notice within twenty days of the expiration of the three-year period. All the creditor has to do is bide its time, wait for the twenty days to expire, and then it will be too late for the consumer to sue. The drafters could hardly have intended that result.

102. As a matter of principle, the consumer should have a full three years to exercise his right to rescind. The right mentioned in § 1635(f) of TILA (dealing with expiration) is the same right covered in § 1026.23(a)(2) (dealing with the exercise of the right to rescind). Nowhere does the statute or regulation suggest that the consumer must remember to provide for the creditor's twenty

incentive to cooperate with a consumer if the latter gives his rescission notice near the end of the three-year period, for then the lender may just wait for the time to expire without reacting to the consumer's notice.¹⁰³ A consumer's bona fide rescission may be rendered ineffective because the consumer did not rush to litigation in time. This seems counter to the proposition that rescission is a private process that allows the parties to return to the *status quo ante*. Any ensuing litigation that arises because of the parties' disagreement is intended to address the creditor's concern about the validity of the consumer's rescission.¹⁰⁴ However, if notice is not sufficient, one wonders whether this gives a creditor a strategic advantage in delaying its response when the consumer gives notice shortly before the three-year period expires.¹⁰⁵ It may also give a creditor the incentive to prolong negotiations even when a consumer gives early notice. It is conceivable that such a strategy can take the parties to the brink of the rescission period, leaving the consumer little time to file suit.

In *McOmie-Gray*, the consumer saw what can happen when negotiations over rescission continue for over a year and then the consumer files her lawsuit.¹⁰⁶ Even in the face of the consumer's allegation that the bank had decided to toll the statute of limitations, the Ninth Circuit still found that the consumer had failed to meet her deadline for filing suit.¹⁰⁷ The delay in *McOmie-Gray* certainly inured to the lender's benefit, and it was in the lender's interest to extend the time

days to respond, thus cutting down on what seems to be an absolute period of three years for the consumer to rescind. If the consumer rescinds within three days instead of during the extended three-year period, there is no doubt that the consumer can enforce a valid rescission notice even after the three days have expired. See *Sherzer*, 707 F.3d at 264.

103. It is understood that "section 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). Allowing a creditor to plan strategically to wait out the rescission period when the consumer gives notice near the end of the three years would interrupt the smooth working of the rescission process and provide an incentive for a consumer to sue sooner rather than later. See Brief for Consumer Financial Protection Bureau as Amicus Curiae Supporting Plaintiffs-Appellants, *Sherzer v. Homestar Mortg. Servs.*, 707 F.3d 255 (3d Cir. 2013) (No. 11-4254), 2012 WL 1408760, at *20.

104. See *Sherzer*, 707 F.3d at 261 n.4; *Peterson v. Highland Music Inc.*, 140 F.3d 1313, 1322 (9th Cir. 1998).

105. In *McOmie-Gray*, the transaction closed on April 14, 2006, but the consumer did not send her rescission letter until January 18, 2008. *McOmie-Gray v. Bank of Am. Home Loans*, 667 F.3d 1325 (9th Cir. 2012). The lender initially refused to accept her notice of rescission, but then negotiated with her about the rescission for more than a year, while supposedly agreeing to toll the statute of limitations relating to her rescission until August 30, 2009. *Id.* at 1327. The court held that the consumer's right to rescind expired on April 14, 2009, and that the parties' tolling agreement was irrelevant. *Id.* at 1329-30. The lender had everything to gain by negotiating as long as possible.

106. See *id.* at 1327.

107. *Id.* at 1329-30.

as much as possible. Setting the time of notice as the proper limit for rescission removes any incentive for a creditor to use dilatory tactics in the rescission process.

In light of the possible disagreement about the consumer's right to rescind, one would expect a consumer to be circumspect about his rescission message. When the consumers in *U.S. Bank National Ass'n v. Manzo* tried to use their right of rescission as a bargaining chip, they found out they had missed the three-year deadline by one day after sending four letters to the lender in an attempt to negotiate a settlement to a foreclosure action.¹⁰⁸ The consumers wanted to entice the lender into a loan modification but were keen to point out that if litigation ensued, they could assert certain defenses and counterclaims arising out of Truth in Lending violations.¹⁰⁹ The consumers' last letter to the lender included with it a proposed counterclaim for rescission and damages.¹¹⁰ The consumers left no doubt about what they had in mind. The proposed counterclaim contained the following language: "[t]he borrowers, by the filing of this action, elect to rescind the subject transaction."¹¹¹ Although a court granted the consumers permission to file their counterclaim on March 11, 2008, the consumers did not file it until November 19, 2008, more than three years after consummation of the loan transaction.¹¹²

The consumers certainly made a valiant effort to impress the lender with the possibility of rescinding the transaction if they could not reach a modification agreement, but the four letters to the lender were simply a part of the settlement negotiations between the parties. The letters were certainly conditional in nature and assured the lender that the consumers *could* assert certain defenses if they had to litigate.¹¹³ Even the proposed counterclaim that the consumers sent to the lender for review did not indicate any present intention to rescind, because it was only a proposal. The proposed counterclaim therefore sent a message that the consumers intended to rescind the transaction by filing their counterclaim and not by any other method.¹¹⁴ But the court made so much of the consumers'

108. *U.S. Bank Nat'l Ass'n v. Manzo*, 960 N.E. 2d 1238 (Ill. App. Ct. 2011).

109. *See id.* at 1241.

110. *Id.* at 1242.

111. *Id.*

112. *Id.* at 1243.

113. *Id.* at 1241 (emphasis added).

114. The consumers had included the proposed counterclaim with their fourth letter to the lender on December 14, 2007. On March 11, 2008, they filed a motion for leave to file their counterclaim. *Id.* at 1242-43. The consumers did not actually file the counterclaim until November 19, 2008, exactly three years and one day after the loan transaction was consummated. They were one day too late. *See id.* at 1248-49.

lack of intent to rescind, that it seemed willing to concede that the consumers could have achieved their objective by timely notice.¹¹⁵ This approach seemed consistent with cases where the mere rescission notice was sufficient to vindicate the consumer's claim.¹¹⁶ It only goes to show that a consumer must leave no doubt about his rescission, and conduct that can be interpreted as a declaration of intent will do the consumer no good in the face of an uncooperative creditor. The consumer's notice to the creditor must be unequivocal.

C. Impact of Beach v. Ocwen Federal Bank

The disagreement among the courts about the effect of the time limit on the consumer's right to rescind rests essentially on the courts' interpretation of *Beach v. Ocwen Federal Bank*. In *Beach*, the consumers did not assert their right of rescission within three years, but tried to do so thereafter as an affirmative defense in foreclosure.¹¹⁷ The consumers were confident about their position because they viewed § 1635(f) as a statute of limitations that governed the filing of a lawsuit rather than the use of rescission as a defense.¹¹⁸ The Supreme Court did not side with the consumers because it held that the right of rescission itself lasts only three years.¹¹⁹ Once that period passed, the consumers in *Beach* had nothing to assert: the right to rescind had expired.

It is noteworthy, however, that the Supreme Court did not say anything about how a consumer could exercise his right to rescind, and that is the question that has divided the courts in the post-*Beach* era.¹²⁰ It

115. The court acknowledged Regulation Z's flexibility about the type of written communication that a consumer can use to rescind a transaction. *Id.* at 1247. But the court looked for evidence that the consumers had communicated their present intent to rescind. *See id.*

116. *See* Gilbert v. Residential Funding LLC, 678 F.3d 271, 277 (4th Cir. 2012) (stating that consumer exercised right of rescission in timely fashion by sending notice to lender within three-year period); Jackson v. CIT Grp./Consumer Fin., Inc., No. 2:06-CV 543, 2006 WL 3098767, at *2 (W.D. Pa. Oct. 30, 2006) (holding that consumer's rescission notice was timely when sent within three years); Herzog v. Countrywide Home Loans (*In re* Hunter), 400 B.R. 651, 662 (Bankr. N.D. Ill. 2009) (denying lender's motion to dismiss since consumer gave timely notice within three-year period).

117. *See* Beach v. Ocwen Fed. Bank, 523 U.S. 410, 411-12 (1998).

118. *See id.* at 415.

119. The Court stated the general rule: "[A] defendant's right to plead 'recoupment' . . . survives the expiration of the period provided by a statute of limitation that would otherwise bar the recoupment claim as an independent cause of action." *Id.* The only problem was that § 1635(f) was not a statute of limitation and therefore did not fall within the general rule. *See id.* at 417.

120. *Compare* Sherzer v. Homestar Mortg. Servs., 707 F.3d 255, 258 (3d Cir. 2013) ("Neither § 1635(a) nor Regulation Z states that the obligor must also file suit; both refer exclusively to written notification as the means by which an obligor exercises his right of rescission."), *with* Rosenfield v. HSBC Bank, USA, 681 F.3d 1172, 1183 (10th Cir. 2012) (holding that "the mere invocation of the right to rescission via a written letter, without more is not enough to preserve a court's ability to

is understandable that the Court was silent on that issue because the consumers in *Beach* did not take any steps to rescind their loan before the lender began foreclosure proceedings following the three-year period.¹²¹ It did not matter, therefore, how the consumers exercised their right to rescind, whether through suit or by asserting it as a defense. The three-year period had already expired and the consumers could not do anything thereafter to resurrect that right. If the notice is the thing that matters as far as rescission goes, any suit after the three-year period expires would be for vindication of the consumers' rights to recover their money and to settle any questions about liens on their property.¹²²

In *Beach*, the Supreme Court viewed § 1635(f) as a statute that extinguished the consumers' right of rescission after three years.¹²³ That time period runs from the date of the transaction's consummation, rather than from the time of the consumers' awareness that the lender did not give the proper disclosures, a factor unique to a statute of limitations.¹²⁴

This does not mean, however, that a consumer must file a lawsuit within three years simply because § 1635(f) is a statute of repose. Such a statute extinguishes a statutory right unless the consumer acts within a certain period to exercise that right. But it is not always necessary for a right to be exercised through litigation. It all depends on the type of statute involved, and there is nothing unusual about exercising a statutory right short of litigation. Of course, litigation is usually available to vindicate a consumer's rights when the parties disagree. However, in the Truth in Lending context, it is the consumer's notice to the creditor that carries the rescission message.¹²⁵ There is little evidence that

effectuate or recognize a rescission claim after the three-year period has run").

121. The loan transaction closed in 1986, and the consumers tried to rescind in 1991, more than three years later. *See Beach*, 523 U.S. at 415. The *Beach* Court therefore did not have to say anything about how the consumers could rescind because there was no existing right to do so. *See id.* at 417.

122. Section 1635(a) is in the nature of rescission at law, and any subsequent action is for enforcement of the consumer's rights. *See Sherzer*, 707 F.3d at 261 n.4.; *Gilbert v. Residential Funding L.L.C.*, 678 F.3d at 271, 277 (4th Cir. 2012); NAT'L CONSUMER LAW CTR., TRUTH IN LENDING, *supra* note 25, § 12.2.2.4.2.

123. Although the Court in *Beach* did not mention the term "repose," the courts nevertheless have generally treated the decision as recognizing § 1635(f) as a statute of repose. *See Rosenfield*, 681 F.3d at 1182; *McOmie-Gray v. Bank of Am. Home Loans*, 667 F.3d 1325, 1329 (9th Cir. 2012); *Jones v. Saxon Mortg., Inc.*, 537 F.3d 320, 327 (4th Cir. 1998); *Phillippi v. Beneficial Loan & Thrift Co.*, No. 10-4281 (SRN/JJG), 2012 U.S. Dist. LEXIS 27799, at *11 (D. Minn. March 2, 2012); *Dixon v. Countrywide Home Loans, Inc.*, 710 F. Supp. 2d 1325, 1334 (S.D. Fla. 2010).

124. *See Beach*, 523 U.S. at 417 (explaining that § 1635(f) deals with the duration of the rescission right itself, instead of merely barring the remedy).

125. *See* 15 U.S.C. § 1635(a) (2012) (indicating that "the obligor shall have the right to rescind the transaction . . . by notifying the creditor, in accordance with regulations of the Bureau, of his intention to do so"); 12 C.F.R. § 1026.23(a)(2) (2014) (indicating that the obligor must notify

Congress intended that such notice should be ignored in favor of a later exercise of the rescission right through litigation.¹²⁶ The language seems clear enough that a consumer's notice has a certain effect, and it leaves one wondering why some courts ignore the plain language about how a consumer may rescind. The limitation period addresses a consumer's right to rescind, but if a consumer has already exercised that right when the three-year period expires, a subsequent lawsuit to enforce a consumer's rights will ensue only if the creditor ignores the consumer's notice or otherwise fails to honor its statutory obligations. It is then up to the consumer to enforce the rescission, and this does not leave the lender in a conundrum if the consumer fails to act promptly in vindicating his statutory rights.

Although § 1635 does not specifically set a time limit for litigation, at least § 1640 should be recognized as requiring a consumer to sue within one year after the creditor fails to respond to the consumer's notice.¹²⁷ After all, § 1640(e) does cover any action brought under § 1640, and § 1640(a)(3) makes specific reference to a consumer's right to recover costs and a reasonable attorney's fee in a successful action for rescission.¹²⁸ Section 1640(a)(3) seems to refer to two possible actions: one possibility being a lawsuit to enforce a creditor's liability for failing to comply with any requirement relating to credit transactions, and the other relating to a determination that the consumer has a right to rescind. When § 1640(e) refers to "any action under this section," it is possible to include within that terminology not only an action for damages, but also one in which a court upholds a consumer's right to rescind.¹²⁹ It is true

his lender "by mail, telegram, or other means of written communication").

126. See *McOmie-Gray*, 667 F.3d at 1327 ("Section 1635 does not explicitly establish a time limit in which borrowers must bring suit for rescission if a lender does not comply with the rescission request."); *Sherzer*, 707 F.3d at 259 (finding that § 1635(b) requires a creditor to return the consumer's money or property within twenty days after receipt of a notice of rescission, not within twenty days of a court order).

127. See *Barnes v. Chase Home Fin., LLC*, 825 F. Supp. 2d 1057, 1065 (D. Or. 2011) (stating that § 1635(f) should be interpreted to limit the consumer's exercise of the right to rescind rather than the time in which the consumer can sue to enforce that right); *Herzog v. Countrywide Home Loans (In re Hunter)*, 400 B.R. 651, 662 (Bankr. N.D. Ill. 2009) (stating that if a creditor fails to respond to the consumer's timely rescission, the consumer should have a year to sue). In *Miguel*, the court denied relief to a consumer because her cancellation notice did not reach the creditor within the three-year period. *Miguel v. Country Funding Corp.*, 309 F.3d 1161, 1165 (9th Cir. 2002). The court also observed that the borrower had one year from the creditor's refusal of cancellation to file suit. *Id.* That did not help the consumer in *Miguel* because the three-year period for cancellation had already passed when the consumer gave notice. See *id.*

128. See 15 U.S.C. §§ 1640(a)(3), 1640(e) (2012).

129. There is some legislative support for the idea that Congress intended to apply the one-year statute of limitations to an enforcement action for rescission. The Senate Report relating to the amendment of TILA by the Truth in Lending Simplification and Reform Act, Pub. L. No. 96-221,

that in *McOmie-Gray* the court viewed § 1640(e) as providing for damages because of a lender's statutory violation, and the court was concerned that the section made no mention of rescission.¹³⁰ In the Ninth Circuit's view, therefore, the one-year limitation was not relevant to an action for rescission.¹³¹ But the court should have observed that § 1640(e) does not say anything about damages either and merely addresses an action brought under § 1640.¹³² This should include an action for rescission under subsection (a)(3) which, if successful, would produce costs and a reasonable attorney's fee.

In *Beach*, the consumers made no attempt to rescind within the statutory three-year period, but nevertheless tried to save the day by using rescission as a defense in foreclosure proceedings.¹³³ It was not until then that the lender realized there was something amiss with the Truth in Lending disclosures. Had the consumers been diligent in giving the proper notice to the lender before the right of rescission had expired, the lender would have been keenly aware of the risk it was taking in ignoring the consumers. After all, as a secured party, the lender would have been concerned about its lien on the consumers' property. On the other hand, a consumer's rescission defense in foreclosure proceedings may come well after the three-year period prescribed in § 1635, possibly leading to the uncertainty of title and the ultimate loss of the lender's security interest.

There is an advantage, therefore, in recognizing a consumer's notice as a defining moment in the rescission process because it makes the lender fully aware of the consumer's position in good time.¹³⁴ If the

tit. 6, 94 Stat. 168 (1980), indicated: "The bill . . . makes it explicit that a consumer may institute suit under section 130 to enforce the right of rescission and recover costs and attorney's fees in a successful action." S. REP. NO. 96-368, at 32 (1979), as reprinted in 1980 U.S.C.C.A.N. 236, 268. The language in § 1640(a)(3) seems to reflect the intent of the congressional report that a consumer who prevails in a rescission action should get costs and a reasonable attorney's fee. See 15 U.S.C. § 1640(a)(3).

130. See *McOmie-Gray*, 667 F.3d 1325, 1328 (9th Cir. 2012).

131. See *id.* at 1329-30.

132. Section 1640(e) begins with the following phrase: "[a]ny action under this section." 15 U.S.C. § 1640(e). The reference to "this section" relates to § 1640, and subsection (a)(3) specifically covers any action covering rescission. That is the connection that substantiates the application of the one-year rule. See NAT'L CONSUMER LAW CTR., TRUTH IN LENDING, *supra* note 25, § 12.2.2.4.2.

133. See *Beach v. Ocwen Fed. Bank*, 523 U.S. 410, 411 (1998).

134. If the consumer rescinds by giving notice to the lender, the lender may then initiate litigation if it does not agree that the consumer has any such right. On the other hand, the consumer himself may sue if the lender does not respond within twenty days. See 15 U.S.C. § 1635(b) (2012); 12 C.F.R. § 1026.23(d)(2) (2014). Neither party is particularly disadvantaged by treating the consumer's notice as the defining moment. A consumer does not have to sue for his rescission to be recognized. This is where the Tenth Circuit in *Rosenfield*, took a different view of the rescission remedy, when contrasted with that of the Third Circuit in *Sherzer v. Homestar Mortgage Servs.*, 707

lender does not agree with the rescission, it can then sue. But the lender's silence will also give the consumer the same opportunity to sue, and this should not prolong the matter too much once the consumer has given the proper notice within the three-year period. This is precisely what § 1635(f) was intended to do: create an opportunity for the consumer to rescind while he still has the right to do so. As a statute of repose, § 1635 does not allow a consumer to go beyond the prescribed time before rescinding, and Regulation Z indicates that a consumer must give notice to achieve that objective.¹³⁵ It says nothing about bringing a lawsuit.

This approach is consistent with a consumer's absolute right to rescind within three days following consummation of the transaction, delivery of the notice of the right to rescind, or delivery of the material disclosures, whichever happens last.¹³⁶ If the consumer exercises his right within the statutory period and the creditor does not respond, the consumer can nevertheless bring suit even though the three-day period has expired.¹³⁷ It is not arguable that the consumer must give his rescission notice and also sue within three days. When a consumer rescinds within the three-day period, a creditor has twenty days to react to the consumer's notice.¹³⁸ One would hardly expect a consumer to have the three-day rescission period shortened by inserting some additional requirement of a suit within that period. It is questionable whether the right of rescission relating to the three-year period should be subject to different rules when neither the statute nor the regulation

F.3d 255 (3d Cir. 2013) and the Fourth Circuit in *Gilbert v. Residential Funding LLC*, 678 F.3d 271 (4th Cir. 2012). The *Rosenfield* court believed that judicial action was necessary if a consumer wanted to invoke his right to rescind. *See Rosenfield v. HSBC Bank, USA*, 681 F.3d 1172, 1183 (10th Cir. 2012). It is noteworthy, however, that the court refrained from expressing its view on whether rescission can occur if a lender acts on the consumer's rescission notice. *See id.* at 1183 n.8. But if the legislative goal was to make rescission a private remedy that should be worked out between the parties themselves, it would seem that judicial action would be a last resort to achieve an objective where private interaction has failed. The First Circuit in *Belini v. Washington Mutual Bank* said it best: "section 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. The potential for damages . . . creates incentives for creditors to rescind mortgages when faced with valid requests without forcing debtors to resort to the courts, for such resort causes substantial delay and expense for debtors." *Belini v. Washington Mut. Bank, FA*, 412 F.3d 17, 25 (1st Cir. 2005).

135. Regulation Z provides that the consumer must notify the creditor "by mail, telegram or other means of written communication" if he wants to exercise his right to rescind. 12 C.F.R. § 1026.23(a)(2).

136. *See id.* § 1026.23(a)(3).

137. *See Sherzer*, 707 F.3d at 264; *Gilbert*, 678 F.3d at 277; NAT'L CONSUMER LAW CTR., TRUTH IN LENDING, *supra* note 25, § 12.2.2.4.1; *Third Circuit Finds Rescission Letter Sufficient to Exercise TILA Right to Rescind*, NCLC REPORTS, CONSUMER CREDIT & USURY EDITION, Jan./Feb. 2013, at 13-14.

138. *See* 12 C.F.R. § 1026.23(d)(2).

mandates anything different about notice.

III. ENFORCING THE RIGHT OF RESCISSION

A. *The Requirement of Tender*

When there is a rescission contest, some courts go through a trial to determine if the consumer is justified in rescinding the transaction.¹³⁹ If the consumer prevails in the suit, the court will order rescission only if the consumer convinces the court that he is able to return the loan proceeds.¹⁴⁰ Other courts insist that the consumer's complaint must indicate the consumer's ability to tender; if not, the consumer runs the risk of succumbing to a creditor's motion to dismiss.¹⁴¹ The rationale for this approach is that it is pointless to go through a trial only to find out that the consumer is unable to return the creditor's money.

Some variations on the theme allow a consumer to plead for a reasonable amount of time to tender the unpaid principal. In *Powell v. Residential Mortgage*, for example, the court wanted the consumer to admit a present ability to tender the loan proceeds or to provide some assurance that he would tender within a reasonable time once the consumer suggested he had enough equity in his property to meet his obligations after sale.¹⁴² The court in *Parham v. HSBC Mortgage* was similarly impressed when the consumer provided evidence that the appraisal for her house exceeded the amount due the creditor, thus confirming her ability to tender and avoiding the creditor's motion to dismiss.¹⁴³ If a court finds a consumer's ability to tender speculative, it

139. See *Sanders v. Mountain Am. Fed. Credit Union*, 689 F.3d 1138, 1143 (10th Cir. 2012); *Findlay v. CitiMortgage, Inc.*, 813 F. Supp. 2d 108, 116 (D.D.C. 2011); *Fed. Deposit Ins. Corp. v. Hughes Dev. Co.*, 684 F. Supp. 616, 621 (D. Minn. 1988), *aff'd*, 938 F.2d 889 (8th Cir. 1991); *Agustin v. PNC Fin. Servs. Grp., Inc.*, 707 F. Supp. 2d 1080, 1090 (D. Haw. 2010); *Lippner v. Deutsche Bank Nat'l Trust Co.*, 544 F. Supp. 2d 695, 702-03 (N.D. Ill. 2008); *Quenzer v. Advanta Mortg. Corp.*, 288 B.R. 884 (D. Kan. 2003).

140. See *supra* note 139.

141. *Abdel-Malak v. JP Morgan Chase Bank, N.A.*, 748 F. Supp. 2d 505, 512 (D. Md. 2010) (refusing to prevent sale because consumer could not tender); *Briosos v. Wells Fargo Bank*, 737 F. Supp. 2d 1018, 1029 (N.D. Cal. 2010) (holding that consumer must allege facts supporting his ability to tender); *Cheche v. Wittstat Title & Escrow Co.*, 723 F. Supp. 2d 851, 859 (E.D. Va. 2010) (holding that consumer's allegations that she "might be able" to tender was not enough to satisfy an ability to tender).

142. *Powell v. Residential Mortg. Capital*, No. C 09-04928 JF (PVT), 2010 WL 2133011, at *5 n.4 (N.D. Cal. May 24, 2010) (noting that the consumer might be able to allege that he has sufficient equity in his home and that a sale thereof could result in tender of loan proceeds).

143. *Parham v. HSBC Mortg. Corp.*, 826 F. Supp. 2d 906, 912 (E.D. Va. 2011) (finding that consumer's allegation that the appraisal of home was sufficient to pay off loan demonstrates plausible ability to tender, thus avoiding motion to dismiss), *aff'd*, 473 F. App'x 244 (4th Cir. 2012).

will not proceed to trial, and a defendant can stop the consumer in his tracks. It was not helpful for the consumer in *Cheche v. Wittstat & Escrow Co.* to suggest that she “might be able” to tender the loan proceeds after receiving any damages from the creditor for a breach of Truth in Lending.¹⁴⁴ There was little here to reassure the court that a tender would be forthcoming.¹⁴⁵ Some courts look for more than a possibility that the consumer will tender.¹⁴⁶

Courts like *Cheche* no doubt receive their inspiration from the Ninth Circuit’s decision in *Yamamoto v. Bank of New York*,¹⁴⁷ where the plaintiffs conceded in a motion for summary judgment that they could not meet a demand for tender.¹⁴⁸ Nevertheless, the district court gave the plaintiffs sixty days to tender; but when they could not perform, the court did not see any need to move forward on the substantive rescission claim.¹⁴⁹ In affirming the district court, the Ninth Circuit took an opportunity to remind the parties that it could condition rescission on the consumer’s ability to carry out the obligation to tender.¹⁵⁰

The Ninth Circuit’s pronouncement in *Yamamoto* that a court may modify the sequence of the parties’ performance, to make sure that the consumer can pay back the loan, has led to the determination by many lower courts that a consumer must plead his ability to tender the loan proceeds to avoid dismissal of the case. Although many of these courts are in the Ninth Circuit,¹⁵¹ other courts have also reacted favorably to

144. *Cheche*, 723 F. Supp. 2d 851, 858 (E.D. Va. 2010) (finding that consumer failed to demonstrate tender was plausible when she alleged that she “might be able” to tender loan proceeds).

145. The court differentiated between an allegation that the consumer “might be able” to tender and one that she “can and will” tender. *Id.* at 858-59. The court in *Cheche* provided plaintiff with an opportunity to amend his complaint. *Id.* at 859.

146. See *Wordell v. Fed. Nat’l Mortg. Ass’n*, No. CCB-10-1404, 2011 WL 1005041, at *1 (D. Md. March 11, 2011) (finding that consumer’s complaint for rescission would be deficient even if time had not expired because consumer did not allege that he could and would tender loan proceeds); *Hudson v. Bank of Am., N.A.*, No. 3:09-CV-462, 2010 WL 2365588, at *5 (E.D. Va. June 11, 2010) (dismissing rescission claim where consumer offered to repay loan proceeds only if he was given time to refinance or seek buyer for residence).

147. *Yamamoto v. Bank of N.Y.*, 329 F.3d 1167 (9th Cir. 2003).

148. See *id.* at 1169.

149. See *id.*

150. The court explained:

There is no reason why a court that may alter the sequence of procedures *after* deciding that rescission is warranted, may not do so *before* deciding that rescission is warranted when it finds that, assuming grounds for rescission exist, rescission still could not be enforced because the borrower cannot comply with the borrower’s rescission obligations no matter what.

Id. at 1173. The court was more concerned with making sure that it did not go through a trial knowing full well that a consumer could not repay the loan proceeds. See *id.*

151. See *Moore v. ING Bank, FSB*, No. C11-139Z, 2011 WL 1832797, at *3 (W.D. Wash.

Yamamoto by insisting on this pleading requirement even though *Yamamoto* itself does not require it.¹⁵²

B. The Argument Against Tender

Despite this trend, the Tenth Circuit took the opportunity in *Sanders v. Mountain America Federal Credit Union*¹⁵³ to reject the pleading rule so keenly accepted by many lower courts. The *Sanders* court emphasized that requiring a consumer to plead an ability to tender imposes a condition on the rescission remedy that does not appear either in the statute or the regulation.¹⁵⁴ Such a requirement imposes an obligation on the consumer to plead information that might not be immediately available, such as the refund of finance charges due the consumer. Moreover, since the pleading requirement would apply only in judicial proceedings to compel rescission, a creditor would have the incentive to ignore the consumer's rescission until the consumer lodges his petition for rescission. The creditor will delay responding to the consumer knowing full well that the consumer has to meet the challenge of satisfying the tender condition attached to the rescission remedy sought.¹⁵⁵

This possibility seems counter to the proposition that Congress intended rescission to be a private scheme for the benefit of the parties to

May 13, 2011) (dismissing rescission claim because consumer did not plead ability to tender); *Tancio v. Saxon Mortg. Servicing*, No. C10-0606 PJH, 2011 WL 672641, at *6 (N.D. Cal. Feb. 7, 2011) (granting motion to dismiss where consumer did not plead present ability to tender); *Angel v. BAC Home Loan Servicing, L.P.*, Civ. No. 10-00240 HG-LEK, 2010 WL 4386775, at *6 (D. Haw. Oct. 26, 2010) (granting defendant's motion to dismiss rescission claim because consumer did not allege an ability to repay); *Garcia v. Wachovia Mortg. Corp.*, 676 F. Supp. 2d 895, 900-01 (C.D. Cal. 2009) (dismissing rescission claim because consumer did not allege ability to tender the proceeds).

152. See *Abdel-Malak v. JP Morgan Chase Bank, N.A.*, 748 F. Supp. 2d 505, 512 (D. Md. 2010) (denying preliminary injunction against sale of property where consumer's ability to pay debt was speculative); see also *Cheche v. Wittstat Title & Escrow Co., L.L.C.*, 723 F. Supp. 2d 851, 859 (E.D. Va. 2010) (granting motion to dismiss where consumer alleged that she might be able to tender loan proceeds); *Hintz v. JP Morgan Chase Bank*, No. 10-119 (DWF/AJB), 2010 WL 4220486, at *4 n.2 (D. Minn. Oct. 20, 2010) (granting defendant's motion to dismiss where consumer did not allege an ability to tender loan proceeds), *aff'd*, 418 Fed. Appx. 567 (8th Cir. 2011); Arthur B. Axelson & Richard A. Vance, *Truth in Lending Update-2011*, 67 BUS. LAW. 541, 551 (2012).

153. *Sanders v. Mountain Am. Fed. Credit Union*, 689 F.3d 1138 (10th Cir. 2012).

154. See *id.* at 1143 (recognizing that such a pleading requirement would require consumers to plead information that they cannot readily obtain such as the value of the property bought with the loan and the exact amount of any refund due them); see also *Hindorff v. GSCR, Inc.*, No. 13-cv-00955-PAB-KLM, 2013 WL 2903451, at *6 (D. Colo. June 14, 2013) (finding that lender did not provide proper accounting of money due under loan and that although consumer need not plead ability to repay, a court may nevertheless impose conditions on rescission).

155. See *Sanders*, 689 F.3d at 1143.

the transaction.¹⁵⁶ After all, a pleading requirement of this sort only works in the end to put an additional burden on the consumer. Any creditor stands to benefit from this prerequisite without having to show that it is entitled to equitable relief.¹⁵⁷ Congress has already spelled out the procedure for rescission, and therefore any deviation therefrom should require an assessment of the equities between the parties.¹⁵⁸ Regulation Z requires the creditor to tender first, and therefore a creditor must offer some rationale for changing the procedure outlined there.¹⁵⁹ There is a danger in imposing a pleading requirement on the consumer because it opens the door to further demands for the consumer to give reasons why requiring his tender would be inappropriate.¹⁶⁰ So not only might a consumer have to plead ability to tender, but he might also have to go one step further and convince a court that there is nothing in the case to support a change in the statutory routine.

The *Yamamoto* decision has its supporters, but also its detractors. One significant aspect of the decision was that the plaintiffs left no doubt

156. See *Keiran v. Home Capital, Inc.*, 720 F.3d 721, 734 (8th Cir. 2013) (Murphy, J., concurring in part and dissenting in part) (finding that by “placing the initial investigation obligation on the lender, Congress evinced a clear intent that an ideal rescission would occur without judicial intervention”); *Sanders*, 689 F.3d at 1143 (finding that Congress intended rescission to be a private remedial scheme); *Andrews v. Chevy Chase Bank*, 545 F.3d 570, 575 (7th Cir. 2008) (same); *McKenna v. First Horizon Home Loan Corp.*, 475 F.3d 418, 421 (1st Cir. 2007) (recognizing that it is left to the creditor and consumer to work out the logistics of a rescission); see also S. REP. NO. 96-368, at 28 (1979).

157. See *Sanders*, 689 F.3d at 1144 (stating that a court should not exercise its equitable powers except when it is necessary to depart from the procedure designated by law); *Lenhart v. Bank of Am., N.A.*, No 2:12-cv-4184, 2013 WL 1814820, at *6 (S.D.W.Va. April 29, 2013) (stating that consumer’s ability to tender should be a matter for consideration in the court’s exercise of its equitable powers rather than as a pleading requirement); *Moore v. Wells Fargo Bank, N.A.*, 597 F. Supp. 2d 612, 616 (E.D. Va. 2009) (denying defendant’s motion to dismiss since consumer did not have to plead his ability to tender).

158. See *Sanders*, 689 F.3d at 1144 (observing that requiring consumer to allege ability to tender would inure to creditor’s benefit without creditor’s need for equitable relief); see also *Findlay v. CitiMortgage, Inc.*, 813 F. Supp. 2d 108, 116 (D.D.C. 2011) (stating that a pleading requirement would conflict with the rescission procedures outlined in TILA); *Lonberg v. Freddie Mac*, 776 F. Supp. 2d 1202, 1208 (D. Or. 2011) (denying motion to dismiss rescission claim and finding that pleading requirement of tender is unnecessary at that stage).

159. See 12 C.F.R. § 1026.23(d)(2) (2014).

160. See *Reyes v. Premier Home Funding*, 640 F. Supp. 2d 1147, 1158 (N. D. Cal. 2009) (granting defendant’s motion to dismiss because complaint did not allege that conditioning rescission on tender would be inappropriate); *Montoya v. Countrywide Bank, F.S.B.*, No. C09-00641JW, 2009 WL 1813973, at *5 (N.D. Cal. June 25, 2009) (granting defendant’s motion to dismiss because consumer did not allege any ability to tender or that there were equitable circumstances suggesting that conditioning rescission on tender would be inappropriate). But see *Frese v. Empire Fin. Servs.*, 725 F. Supp. 2d 130, 138 (D.D.C. 2010) (indicating that consumer does not have to plead ability to tender but that court may consider consumer’s ability to tender before ordering rescission); *Lonberg*, 776 F. Supp. 2d at 1208 (finding pleading requirement about tender unnecessary at pleading stage).

they would be unable to tender the loan proceeds even if the court ruled in their favor.¹⁶¹ It is questionable, therefore, whether *Yamamoto* should be seen as always demanding assurance from a plaintiff that he can tender before a court will consider grounds for rescission. It is one thing to recognize a plaintiff's admission of the inability to make the lender whole, but it is quite another to insist on a dismissal of the plaintiff's case because the plaintiff does not make ability to tender an essential part of the pleading.¹⁶² A court can hardly ignore a consumer's concession about the impossibility of tender, but this does not mean that dismissal should be a routine matter that puts the burden on the plaintiff to come forward with an assurance of performance. There is something to be said for not allowing a lender to dictate its own sequence for the parties' responses by merely creating doubt so early in the process about the plaintiff's ability to tender.¹⁶³ After all, a premature adjudication about that aspect takes the sting out of the defendant's Truth in Lending violation. If a court upholds a consumer's right to rescind in a particular case, then that consumer will have a negotiating position that should not be ignored. It is conceivable, indeed, that in the initial stages of litigation a rescinding consumer may not see the way clear to return the lender's proceeds, but as time goes on the consumer may be able to work out some plan towards that end.¹⁶⁴

161. See *Yamamoto v. Bank of N.Y.*, 329 F.3d 1167, 1173 (9th Cir. 2003). It is not clear why the consumer found it advantageous to give an early indication of their inability to tender when the court had made no assessment of the amount due or of the way in which the consumers might fulfill their obligations. See NAT'L CONSUMER LAW CTR., TRUTH IN LENDING, *supra* note 25, § 10.7.3.2.

162. See *Tacheney v. M & I Marshall & Ilsley Bank*, No. 10-CV-2067 (PJS/JJK), 2011 WL 1657877, at *4 (D. Minn. April 29, 2011) (holding that plaintiffs do not have to plead ability to tender in order to state claim under TILA); *Soto v. Quicken Loans*, No. 09-4862 (JAP), 2010 WL 5169024, at *3 (D.N.J. Dec. 14, 2010) (finding that inquiry about consumer's ability to repay loan would be premature at pleading stage); *Frese*, 725 F. Supp. 2d at 138 (holding that consumer does not have to plead ability to tender to sustain rescission claim); *Savard v. JP Morgan Chase, N.A.*, No. 09-CV-2108-WDM-MJW, 2010 WL 2802543, at *5-6 (D. Colo. July 12, 2010) (denying defendant's motion to dismiss rescission claim where consumer did not plead ability to tender).

163. It is noteworthy that *Yamamoto* was decided within the context of summary judgment when the court could consider evidence to determine whether it should make rescission conditional on the consumer's tender. See *Yamamoto v. Bank of N.Y.*, 329 F.3d 1167, 1173 (9th Cir. 2003). At the motion to dismiss stage, a court is concerned only with the pleadings, and the question of the consumer's ability to repay the proceeds does not arise. Therefore, a consumer's complaint should not be dismissed merely because it does not indicate the consumer's ability to tender the loan proceeds. See *Findlay*, 813 F. Supp. 2d at 116 (finding that consumer does not have to plead ability to tender in order to survive motion to dismiss); *Lonberg*, 776 F. Supp. 2d at 1208; *Botelho v. U.S. Bank, N.A.*, 692 F. Supp. 2d 1174, 1181 (N.D. Calif. 2010).

164. See *Carrington v. HSBC Bank USA, N.A.*, 760 F. Supp. 2d 589, 598 (E.D. Va. 2010) (concluding that consumer's claim that she would be able to tender funds was enough to withstand creditor's motion to dismiss); *Williams v. Saxon Mortg. Co.*, No. 06-0799-WS-B, 2008 WL 45739, at *6 (S.D. Ala. Jan. 2, 2008) (declining to grant summary judgment to creditor based on mere possibility that consumers may find it difficult to refinance loan).

A borrower may signal his intention not to return the loan proceeds by instead offering the home that secures the lender's mortgage. This may not be a satisfactory solution, since the property may be worth next to nothing and the borrower will enjoy an advantage to which he is not entitled. It was not surprising, therefore, when the court in *Siver v. CitiMortgage, Inc.*¹⁶⁵ followed the Ninth Circuit's guidance in *Yamamoto* by requiring the borrowers to show that they could tender the amount owed to the lender.¹⁶⁶ After all, the borrowers had indicated their willingness to turn over their home or sign a new promissory note in the lender's favor.¹⁶⁷ Neither of these proposals seemed consistent with the statutory requirements for rescission. The borrowers could not have made it any clearer that they were not going to return the loan proceeds. They were looking instead for an alternative that might satisfy the lender. The lender would have none of it, and it was then left for the court to set the record straight about what the borrowers had to do if they wanted to rescind. Since the borrowers had declared their hand, the court had the straightforward assignment of reminding them of the statutory mandate. The borrowers had hoped the court would force the creditor to take action before they had to tender the proceeds. But even then, they were not offering the proceeds, but rather the house itself.¹⁶⁸ It would have been pointless for the court to follow the literal statutory steps when the borrowers had already opted to substitute their own restitution for that of the loan proceeds.

In *Carlos v. Ocwen Loan Servicing, LLC*,¹⁶⁹ the borrowers introduced a variation on the theme by offering to turn over to the lender their home or its fair market value.¹⁷⁰ The borrowers did not seem to view their tender of the proceeds as an immediate requirement since their alternative strategy was to pay the proceeds in installments if the

165. *Siver v. CitiMortgage, Inc.*, 830 F. Supp. 2d 1194 (W.D. Wash. 2011).

166. *Id.* at 1198 (stating that the borrowers could not merely return the property or give a quit claim deed to lender, but must tender the amount owed to the lender).

167. *Id.*

168. Courts have not accepted this idea of tendering the borrower's home instead of the loan proceeds. See *Moore v. ING Bank, FSB*, No. C11-139Z, 2011 WL 1832797, at *3 (W.D. Wash. May 13, 2011) (stating that offer to turn over real property was not sufficient to satisfy rescission); *Brunat v. IndyMac Fed. Bank*, No. CV-09-1796-PHX-FJM, 2011 WL 1304589, at *3 (D. Ariz. April 6, 2011) (holding that offer to turn over the property secured by the loan is not a sufficient tender to support claim for rescission); *Curtis v. Option One Mortg. Corp.*, No. 1:09-CV-1982 AWI SMS, 2010 WL 2879842, at *5 (E.D. Cal. July 21, 2010) (stating that § 1635(b) requires consumer to return loan proceeds and not the property securing the loan); *Moore v. Wells Fargo Bank*, 597 F. Supp. 2d 612, 616 n.2 (E.D. Va. 2009) (stating that the property the consumer must tender is the loan proceeds).

169. *Carlos v. Ocwen Loan Servicing, LLC*, No. CV F 09-0260 LJO GSA, 2009 WL 1295873 (E.D. Cal. May 8, 2009).

170. *Id.* at *3.

court did not accept their first proposal.¹⁷¹ The borrowers in *Carlos* were not as plain spoken as those in *Yamamoto*, but the message was the same. The likelihood of restoring the parties to the *status quo ante* was remote, and the court in *Carlos* wanted to follow the *Yamamoto* model by deferring adjudication of the rescission claim if the plaintiffs could not meet their statutory obligation by returning the proceeds.¹⁷²

Despite the Ninth Circuit's decision in *Yamamoto*, many courts do not require a borrower to show an ability to tender before actually adjudicating a rescission claim.¹⁷³ Nevertheless, they support conditional rescission in appropriate cases, so that a lender will still have protection pending a borrower's return of the loan's proceeds.¹⁷⁴ In *Iroanyah v. Bank of America, N.A.*,¹⁷⁵ the district court gave a recent example of conditional rescission, confirming that "it would be inequitable to require a creditor to realize its security interest and return the borrower's payments if it appears that the creditor might not receive back the principal."¹⁷⁶ Faced with the requirement of tender, the borrowers wanted to make payments in monthly installments over the life of the original loan.¹⁷⁷ This would have been a remarkable arrangement, since the court would then have modified the loan on more favorable terms than if the loan was still in effect, with the installments bearing no interest.¹⁷⁸ In *Iroanyah*, the borrowers conceded that they suffered no

171. See *id.* at *4.

172. See *id.* The defendant in *Carlos* was concerned in any event that the property was worth less than the amount of the debt. See *id.*

173. See, e.g., *Butler v. F.D.I.C.*, No. 11 CV 6692, 2012 WL 1939109, at *3 (N.D. Ill. May 23, 2012) (holding that consumer need not plead ability to tender in order to state claim for rescission); *Tacheney v. M & I Marshall & Ilsley Bank*, No. 10-CV-2067 (PJS/JJK), 2011 WL 1657877, at *4 (D. Minn. April 29, 2011) (finding that requiring consumer to plead present ability to tender would dramatically "alter the statutory scheme in favor of lenders"); *Frese v. Empire Fin. Servs.*, 725 F. Supp. 2d 130, 138 (D.D.C. 2010) (finding that consumer's ability to tender is not a pleading requirement for rescission); *Deutsche Bank Nat'l Trust Co. v. Pelletier*, 31 A.3d 1235, 1239 (Me. 2011) (holding that consumers were not required to tender before grant of rescission).

174. See *Am. Mortg. Network, Inc. v. Shelton*, 486 F.3d 815, 821 (4th Cir. 2007); *Fed. Dep. Ins. Co. v. Hughes Dev. Co.*, 684 F. Supp. 616, 625 (D. Minn. 1988), *aff'd*, 938 F.2d 889 (8th Cir. 1991); *Ramirez v. Household Fin. Corp.*, (*In re Ramirez*), 329 B.R. 727, 742 (Bankr. D. Kan. 2005); *Rudisell v. Fifth Third Bank*, 622 F.2d 243 (6th Cir. 1980); *Zimmerman v. Logemann*, No. 09-CV-210, 2011 WL 1674956 (W.D. Wis. March 17, 2011); *Jones v. Rees-Max, LLC*, 514 F. Supp. 2d 1139 (D. Minn. 2007); *AFS Fin., Inc. v. Burdette*, 105 F. Supp. 2d 881 (N.D. Ill. 2000).

175. *Iroanyah v. Bank of Am., N.A.*, 851 F. Supp. 2d 1115 (N.D. Ill. 2012).

176. *Id.* at 1125-26.

177. *Id.* at 1126.

178. The court was doubtful whether a long-term installment plan could be characterized as rescission rather than reformation of the loan. See *id.* at 1127. For example, in *Shepard v. Quality Siding & Window Factory, Inc.*, when the borrower rescinded, the defendant had already installed siding on the borrower's property. The court allowed the borrower to continue making the same installment payments contained in the contract between the parties. See *Shepard v. Quality Siding & Window Factory, Inc.*, 730 F. Supp. 1295, 1308 (D. Del. 1990). It was as if nothing had changed

actual harm from the lender's violations, yet they were still seeking to implement an installment plan that in effect reformed, rather than rescinded, the loan.

The court would have none of it, preferring instead to give the borrowers three months to tender.¹⁷⁹ The court was unimpressed by other decisions that had given borrowers time to pay that ran as long as a year.¹⁸⁰ In at least one case the court allowed the borrower to make the same monthly payment to complete his tender obligation that he was making under the original security arrangement.¹⁸¹ Of course, the borrower did not have to pay any finance charges under the new arrangement.¹⁸² The *Iroanyah* court was skeptical that a long-term installment plan could fairly be identified as rescission rather than reformation of the original loan.¹⁸³ This skepticism seemed reasonable enough in light of the rationale for rescission. If the idea is to restore the parties to the *status quo ante*, then one should expect courts to devise some mechanism for achieving that goal in short order without recasting the loan in a way that keeps it alive, rather than rescinding it. In *Iroanyah*, the court saw three months as the shortest time for the borrower to wrap things up,¹⁸⁴ so that there would be no room for a magical transformation of the transaction that would leave the parties tied to an interest-free arrangement over the original loan period. It is reasonable for a court to give the borrower sufficient time to seek other financing in order to satisfy his tender obligation, but the parties should not be forced into an installment plan that produces more favorable terms for the consumer. This is why some courts bend over backwards to make sure that any modification plans include interest for the lender.¹⁸⁵ It is an effective compromise that recognizes a consumer's right to rescind without insisting on an immediate payback, while at the same

from the original arrangement; *see also* Mayfield v. Vanguard Sav. & Loan Ass'n, 710 F. Supp. 143, 149 (E.D. Pa. 1989) (ordering consumer to pay off loan in monthly installments equal to the same amount she had been paying on her previous mortgage payments).

179. *See Iroanyah*, 851 F. Supp. 2d at 1127.

180. *See id.* (citing Yamamoto v. Bank of N.Y., 329 F.3d 1167, 1172 (9th Cir. 2003); Fed. Deposit Ins. Corp. v. Hughes Dev. Co., 938 F.2d 889, 890 (8th Cir. 1991)).

181. *Id.* at 1126-27.

182. *Id.* at 1126.

183. *See id.* at 1127.

184. *See id.*

185. *See* Coleman v. Crossroads Lending Grp., Inc., No. 09-CV-0221 (PJS/FLN), 2010 WL 4676984, at *9 (D. Minn. Nov. 9, 2010) (finding that consumer can pay in installments with interest at a rate that is no more than necessary to compensate lender for inflation); Dawson v. Thomas (*In re* Dawson), 411 B.R. 1, 43 (Bankr. D.D.C. 2008) (ordering that consumer must repay net loan proceeds with interest); Sterten v. Option One Mortg. Corp. (*In re* Sterten), 352 B.R. 380, 390 (Bankr. E.D. Pa. 2006) (same).

time ensuring that the lender's interests are protected.

IV. NOTICE ABOUT THE RIGHT TO RESCIND

A. Identifying the Right Date

A creditor should normally not have any difficulty in giving adequate notice to the consumer of the right to rescind, for the regulation's model form provides the language and format for such a disclosure.¹⁸⁶ Nevertheless, some creditors get into trouble by failing to identify the date when the right of rescission expires, or by giving a date that precedes the time when the creditor gives the necessary disclosure to the consumer.¹⁸⁷ In some instances, therefore, a creditor converts the rescission disclosure into a mass of confusion. The resulting ambiguity is not necessarily a result of a creditor's lack of interest in giving the right information about the critical date for rescinding. It is instead a result of the creditor's inability to be consistent in disclosing the features of the rescission timeline. Creditors should bear the burden of determining the critical date for rescission and clearly relaying this information to the consumer in writing.

The drafters of TILA developed an impressive scheme for ensuring that the consumer understands when the right to rescind expires. The three-day period is geared to follow the date of the transaction, the date of receipt of the Truth in Lending disclosures, or the date the consumer receives the notice of the right to cancel, whichever occurs last.¹⁸⁸ The creditor must then also give a specific date by which the consumer must

186. See 12 C.F.R. pt. 226, app. H-8 (2014) (Rescission Model Form (General)).

187. Regulation Z gives a consumer the right to rescind until midnight of the third business day following consummation, delivery of the notice of the right to rescind, or delivery of all material disclosures, whichever happens last. 12 C.F.R. § 1026.23(a)(3)(i) (2014). The model form stipulates as follows:

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 _____;
- (2) the date you received your Truth in Lending disclosures; or
- (3) the date you received this notice of the right to cancel.

12 C.F.R. pt. 226, app. H-8. Another part of the model form allows a creditor to indicate the expiration date for the right of rescission in this way: "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)." *Id.* A creditor can cause problems by not filling in the right date on the form.

188. See 12 C.F.R. § 1026.23(a)(3)(i).

rescind.¹⁸⁹ It is this date that occasionally causes problems for creditors, especially if the creditor delays in making the necessary disclosures and the original expiration date of the consumer's right of rescission is no longer consistent with the creditor's timeline. The doubt about when the three-day rescission period expires raises questions about the clarity and conspicuousness of the creditor's disclosures. If the creditor leaves out a specific date for rescission, the consumer must then compute the three business days that will end the consumer's right to rescind. It is not always easy to do this even when the date of consummation coincides with the actual date of disclosures.

In an early case, the Ninth Circuit would not accept the creditor's argument that the omission of the expiration date on the disclosure form was only a technical violation that did not merit relief. The court in *Semar v. Platte Valley Federal Savings & Loan Ass'n*¹⁹⁰ resisted the creditor's invitation to use its equitable powers to avoid strict application of TILA for borrowers who did not really need protection.¹⁹¹ The creditor tried to persuade the court that the technicality attached to the expiration date of the rescission period did not warrant a violation in the absence of sympathetic plaintiffs, and these plaintiffs were not of that variety.¹⁹² Nevertheless, the court recognized that TILA required a creditor to give a specific date for the expiration of the consumer's right of rescission; a creditor could use the bona fide error defense in appropriate cases to resist a consumer's allegations that the creditor did not comply with the requirement of a specific date.¹⁹³ In *Semar*, the creditor's notice omitted a specific expiration date but indicated that the right of rescission expired "three business days after July 16."¹⁹⁴ It seemed simple enough for the consumer to compute the expiration date, given the designation of July 16. But this still would have left the consumer in a quandary if he was not sure about which day was a

189. The creditor's failure to give the date on which the rescission period expires is one of the events that will extend the right of rescission for three years. *See Semar v. Platte Valley Fed. Sav. & Loan Ass'n*, 791 F.2d 699, 701-02 (9th Cir. 1986); *New Maine Nat'l Bank v. Gendron*, 780 F. Supp. 52 (D. Me. 1991); *Aubin v. Residential Funding Co., LLC*, 565 F. Supp. 2d 392, 395 (D. Conn. 2008).

190. *Semar*, 791 F.2d at 699.

191. *See id.* at 704.

192. The court made the point: "Congress did not intend for TILA to apply only to sympathetic consumers; Congress designed the law to apply to all consumers, who are inherently at a disadvantage in loan and credit transactions." *Id.* at 705.

193. The bona fide error defense allows a creditor to show that "the violation was not intentional and resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid any such error." 15 U.S.C. § 1640(c) (2012).

194. *Semar*, 791 F.2d at 702.

business day for rescission purposes,¹⁹⁵ and that is why the regulation took care of that possibility by requiring a definite date.¹⁹⁶

B. The Problem of Competing Dates

If the creditor's notice to the consumer gives the correct date for the consumer to exercise the right to rescind, but gives the wrong transaction date, the result may be different. In *Young v. Bank of New York Mellon*,¹⁹⁷ the transaction date on the creditor's notice was March 16, and the expiration date for rescission was March 22.¹⁹⁸ Since the consumer received her disclosures and the notice about the right of rescission on March 19, the court found no violation because the creditor had complied with the regulation by giving an expiration date that came three days after the consumer received the notice and disclosures.¹⁹⁹ Unlike *Semar*, there was no missing expiration date in *Young*, and since the creditor in *Young* had disclosed the expiration date as three business days following the latest of three events covered in the regulation, the consumer had no cause for complaint.²⁰⁰

Even when a creditor gives a specific date by which cancellation must occur, questions may arise if the creditor's notice of the consumer's right to rescind gives a rescission deadline that has already passed. In *Palmer v. Champion Mortgage*,²⁰¹ the First Circuit found nothing wrong with this scenario because the creditor's misstatement of the deadline date was counteracted by the explanatory parenthetical phrase relating to "midnight of the third business day following the latest of . . . three (3) events."²⁰² The *Palmer* court's approach really put the burden on the consumer to examine both the stated deadline date and the date relating to the period after the third business day.²⁰³ It was only by

195. Regulation Z defines "business day" for rescission purposes as "all calendar days except Sundays and the legal public holidays specified in 5 U.S.C. 6103(a), such as New Year's Day, the Birthday of Martin Luther King, Jr., Washington's Birthday, Memorial Day, Independence Day, Labor Day, Columbus Day, Veterans Day, Thanksgiving Day, and Christmas Day." 12 C.F.R. § 1026.2(a)(6) (2014).

196. The specific expiration date for rescinding is supposed to correlate with the explanatory language in the model form relating to the third business day following the last of three events mentioned in § 1026.23(a)(3)(i) and repeated by the model form.

197. *Young v. Bank of N.Y. Mellon*, 848 F. Supp. 2d 1182 (D. Haw. 2012).

198. *Id.* at 1186-87.

199. *Id.* at 1190.

200. *See id.* n.8.

201. *Palmer v. Champion Mortg.*, 465 F.3d 24 (1st Cir. 2006).

202. *Id.* at 29.

203. It is questionable whether the drafters intended to give a consumer the assignment to treat the period following the third business day as an alternate calculation, thus relieving the creditor of the obligation to ensure the accuracy of its disclosures. *See* NAT'L CONSUMER LAW CTR., TRUTH IN

doing this that the consumer would have realized that the specific rescission date was no longer operative and that the consumer then had to decide when the third business day ended following the delivery of the rescission notice.²⁰⁴ The First Circuit found the creditor's rescission notice acceptable despite the passage of the rescission deadline because the consumer still could rely on the alternate date.²⁰⁵

The *Palmer* decision gives the creditor an option to provide either a correct, specific date for rescission or, in the alternative, the model language relating to the third business day. It seems hardly reasonable that this would satisfy the clear and conspicuous requirement imposed on the creditor.²⁰⁶ The Truth in Lending scheme did not intend to accommodate this kind of flexibility that sends a message to the consumer to be cautious about the accuracy of the date. It seems more consistent with Truth in Lending's objectives to treat the parenthetical about the third business day as explaining or describing the specific date set out in the creditor's rescission notice, and not as offering an alternative for arriving at a rescission deadline. If a consumer cannot rely on the accuracy of a specific date, he will hardly be comforted by reference to a third business day. The consumer must first be familiar with the definition of a business day if the reference is to stand on its own as a definitive time period for exercise of the right to rescind.²⁰⁷ It is

LENDING, *supra* note 25, § 10.4.4.7.3. Regulation Z requires a creditor to disclose clearly and conspicuously "[t]he date the rescission period expires." 12 C.F.R. § 1026.23(b)(1)(v) (2014). It is reasonable to assume that this means the correct date.

204. It is more convincing to treat the deadline date as describing when the rescission period ends rather than as an alternate formulation in case there is a discrepancy between that date and the date following the expiration of the third business day. Furthermore, the definition of "business day" poses a challenge for the average consumer. *See* 12 C.F.R. § 1026.2(a)(6) (2014).

205. The *Palmer* court could not understand "how any reasonably alert person—that is, the average consumer—reading the Notice would be drawn to the April 1 deadline without also grasping the twice-repeated alternative deadlines." *Palmer*, 465 F.3d at 29. This use of "alternative" in this context seems to place the burden on the consumer to make sure that the deadline date is consistent with the parenthetical phrase relating to the third business day following the last of the three listed events. *See* NAT'L CONSUMER LAW CTR., TRUTH IN LENDING, *supra* note 25, § 10.4.4.7.3.

206. Regulation Z allows a consumer to rescind until midnight of the third business day following consummation, delivery of the notice of the right to rescind, or delivery of all material disclosures, whichever comes last. 12 C.F.R. § 1026.23(a)(3)(i). The notice of the right to rescind must include, among other items, the date the rescission period expires. *Id.* § 1026.23(b)(1)(v). A creditor's disclosure of the wrong date should itself constitute a violation.

207. The definition of "business day" is hardly routine for the average consumer. For example, Saturday is a business day for rescission purposes. 12 C.F.R. § 1026.2(a)(6). If a certain federal holiday falls on a Saturday, but is observed on the preceding Friday, the observed day is nevertheless a business day for rescission purposes. Official Staff Commentary, 12 C.F.R. pt. 226, supp. 1, cmt. 2(a)(6)-2 (2014). The court in *Aubin* admitted surprise that the definition of "business day" included a Saturday. *Aubin v. Residential Funding, Co., LLC*, 565 F. Supp. 2d 392, 397 (D. Conn. 2008).

more meaningful to read the “business” day designation as reflecting how the creditor arrived at its specific rescission date, since the creditor is in the best position to make the necessary calculations about that date.

The *Palmer* court found that the creditor’s notice was “crystal clear” because it used the alternative deadline relating to the three business days that followed the date the creditor gave the notice.²⁰⁸ Thus it was not critical that the consumer received his notices after the specific designated date. In the court’s view, the technical misstatement of the date did not matter once the notice provided sufficient information about the final date for the consumer to exercise his right of rescission.²⁰⁹

The First Circuit continued this thinking in *Melfi v. WMC Mortgage Corp.*, where the creditor used the model form for the rescission notice, but left blank the spaces for the date of the transaction and the rescission deadline.²¹⁰ Nevertheless, the court was convinced that any reasonable person would have been able to arrive at the final date for rescission despite the blanks.²¹¹ The consumer in *Melfi* knew the date of the loan closing, and it was therefore easy for him to compute the three business days that followed that date.²¹² The court acknowledged, however, that if a creditor provides the correct information, the consumer avoids the risk of miscalculating the rescission period if he does not know, for example, that Saturday is a business day.²¹³ The court seemed comfortable in having the consumer assume this risk. But the statute itself provides a safe harbor for a creditor only if that creditor properly completes the model form.²¹⁴ Congress must have contemplated that a creditor would give the proper disclosures. The relevant inquiry, therefore, is not whether a reasonable borrower made the right computations about the final date for rescission, but whether the creditor provided the correct date to prevent the consumer from having to calculate the three business days relating to rescission.²¹⁵

208. *Palmer*, 465 F.3d at 29.

209. It is arguable that a creditor is in better shape if he gives an incorrect deadline date instead of omitting the date altogether. Compare *Semar v. Platte Valley Fed. Sav. & Loan Assoc.*, 791 F.2d 699 (9th Cir. 1986), with *Palmer*, 465 F.3d 24 (1st Cir. 2006).

210. *Melfi v. WMC Mortg. Corp.*, 568 F.3d 309 (1st Cir. 2009).

211. *See id.* at 313.

212. The court seemed to regard the missing information as a technical deficiency that did not prevent the borrower from getting effective notice about the final date for rescission. *See id.* at 312.

213. *See id.* It is questionable whether the court should have underestimated the risk involved in leaving the consumer to calculate the rescission period when he may not be sure about the definition of a business day. It seems reasonable that the information required by the notice is intended to ensure that the consumer does not have to guess about dates.

214. *See* 15 U.S.C. § 1635(h) (2012).

215. *See Williamson v. Lafferty*, 698 F.2d 767, 769 n.3 (5th Cir. 1983) (stating that the

The search for clarity and conspicuousness continued in *Aubin v. Residential Funding Co.*,²¹⁶ where the creditor dated the rescission notice February 28 instead of March 1, when the closing actually took place and the consumers received the notice.²¹⁷ As a result, the creditor mistakenly showed the rescission deadline as March 3, which was incorrect because the closing took place on March 1, and thus the three-day rescission period did not expire until March 4.²¹⁸

Even though the court was willing to assume that a creditor does not have to give perfect notice under Truth in Lending, it still demanded clear and conspicuous notice.²¹⁹ The question was whether the notice in *Aubin* met that standard. There was no question that the rescission notice failed to provide the correct expiration date, and so the creditor hoped that the language about three business days would save the day. This was somewhat reminiscent of the *Palmer* approach.²²⁰ The alternative language did not help the creditor's position in *Aubin* because, although the rescission notice referred to "business days," it did not give the slightest hint about what days were business days, and the actual expiration date fell on a Saturday.²²¹ Therefore, a consumer could get no help from the alternative formulation if the precise rescission date happened to be incorrect. The average consumer would have difficulty in determining when the three business days ended, and therefore there was no clear and conspicuous disclosure.²²²

In *Aubin* the creditor tried to convince the court that it should follow *Palmer*, which found no fault with the creditor giving the consumer the notice of the right to rescind after the expiration date in the

creditor should fill in the expiration date for rescission so that the consumer will not have to calculate the three business days); *Little v. Bank of Am., N.A.*, 769 F. Supp. 2d 954, 962 (E.D. Va. 2011) (finding that creditor's failure to state rescission deadline in the notice of the right to cancel was enough to constitute a violation); *Mayfield v. Vanguard Sav. & Loan Ass'n*, 710 F. Supp. 143, 146 (E.D. Pa. 1989) (stating that creditor's failure to specify the expiration date for rescission violated statute).

216. *Aubin v. Residential Funding Co.*, 565 F. Supp. 2d 392 (D. Conn. 2008).

217. *Id.* at 393-94.

218. *Id.*

219. *Id.* at 396.

220. In *Palmer*, the notice of the right to rescind gave a rescission deadline of April 1, 2003, but the consumer did not receive the notice until after the April 1 date. *Palmer v. Champion Mortg.*, 465 F.3d 24, 26 (1st Cir. 2006). The court took the view that the notice was not defective because, despite the April 1 deadline, the notice also informed the consumer that she had three business days to rescind from the date she received her disclosures. *Id.*

221. See *Aubin*, 565 F. Supp. 2d at 397. For purposes of rescission, Saturday is a business day. 12 C.F.R. § 1026.2(a)(6) (2014). The court was convinced that the average consumer believes that Saturday is not a business day. See *Aubin*, 565 F. Supp. 2d at 397.

222. *Aubin*, 565 F. Supp. 2d at 398.

notice had passed.²²³ The *Aubin* court was unwilling to go along because it viewed the *Palmer* notice as containing the correct expiration date, whereas the *Aubin* notice did not: the creditor had misstated the date of the transaction, thus leading to an incorrect expiration date.²²⁴ It is puzzling that the *Aubin* court recognized the *Palmer* notice as stating a correct expiration date, even though the consumer did not receive the notice until after the stated date, and the three-day period could not have expired until the creditor had given its disclosures and the rescission notice. The *Palmer* rescission date could only have been correct if the three stated events in the notice had all occurred on the same day, thus causing the three business days to expire thereafter. The *Palmer* date found favor with the *Aubin* court because the consumer could have computed the three business days once the last event had occurred. The *Aubin* court found this to be an acceptable alternative to an expiration date, even if the precise expiration date was no longer applicable because the creditor had not yet fulfilled its obligations.²²⁵

One wonders whether the *Aubin* court would have been sympathetic to the consumer's cause if the actual expiration date had fallen on a Friday. In that event, the consumer would not have been confused about a business day, and the court would have readily accepted the *Palmer* solution to the problem. It is arguable that the consumer in *Palmer* was aware that the rescission deadline had already passed when he received his rescission notice, and therefore it was unreasonable for him to rely on that expiration date in assessing his right to rescind.²²⁶ However, it is questionable whether the disclosure of a wrong expiration date fulfills the creditor's obligation to make clear and conspicuous disclosure of the rescission's expiration date.²²⁷ It would seem that the creditor is responsible for informing the consumer of the right to rescind, and part of the information to be included in that notice is "[t]he date the rescission period expires."²²⁸ There is nothing in Regulation Z to suggest that a creditor has flexibility in determining

223. In *Palmer*, the creditor prevailed because the consumer could see from the notice that the three business days for rescission began only when the consumer received her disclosures. See *Palmer*, 465 F.3d at 28.

224. See *Aubin*, 565 F. Supp. 2d at 399.

225. *Id.*

226. See *Palmer*, 465 F.3d at 28 (stating that courts must evaluate adequacy of Truth in Lending disclosures from the position of the average consumer); *Smith v. Cash Store Mgmt., Inc.*, 195 F.3d 325, 327-28 (7th Cir. 1999) (explaining that Truth in Lending disclosures must be viewed from the ordinary customer's perspective).

227. The creditor must "clearly and conspicuously" disclose certain information in the notice that it gives to the consumer about the right to rescind. 15 U.S.C. § 1635(a) (2012); 12 C.F.R. § 1026.23(b)(1) (2014).

228. 12 C.F.R. § 1026.23(b)(1)(v).

such a date, and a consumer should not have the burden of reaching the right result if the creditor has misled him about the expiration date. It is understandable that a creditor would rely on the regulation's model form for guidance, but that form does not protect a creditor from liability for errors of substance in completing the form containing disclosures to the consumer.²²⁹

The result in *Barnes v. Chase Home Finance*²³⁰ is more representative of the judicial treatment of incorrect rescission dates. In that case, the creditor's notice about the consumer's right of rescission indicated a rescission deadline of November 17 instead of November 18, thus creating an inconsistency with the deadline date that flowed from the narrative language relating to three business days.²³¹ The court denied the creditor's motion to dismiss on the ground that the notice was not clear and conspicuous because the creditor's notice stated an incorrect deadline date.²³² This decision seemed reasonable and consistent with other cases dealing with the rescission deadline,²³³ but even in *Barnes* the court seemed to appreciate the distinction in *Palmer* that the rescission deadline stated in the rescission notice had already expired when the consumer received that notice from the creditor.²³⁴ The incorrect rescission date indicated in *Barnes* was in fact one day before the actual expiration date for rescission, and according to the court that fact made the notice less clear and conspicuous.²³⁵ The creditor had therefore created an inconsistency between the narrative relating to three business days and the expiration date stated in the notice. The *Barnes* court appreciated the possibility of the consumer being confused by

229. A creditor may even rearrange the format of a model form as long as it does not affect the "substance, clarity, or meaningful sequence of the disclosure." 15 U.S.C. § 1604(b) (2012).

230. *Barnes v. Chase Home Fin., LLC*, 825 F. Supp. 2d 1057 (D. Or. 2011).

231. *Id.* at 1058.

232. *Id.* at 1070.

233. See *Williamson v. Lafferty*, 698 F.2d 767, 768 (5th Cir. 1983) (holding that omission of expiration date for rescission violated statute); *Stanton v. Bank of Am., N.A.*, 834 F. Supp. 2d 1061, 1081 (D. Haw. 2011) (holding that consumer did not receive clear and conspicuous notice of right to cancel because notice did not give specific cancellation date); *Peterson-Price v. U.S. Bank Nat'l Ass'n*, No. 09-495 ADM/JSM, 2010 WL 1782188, at *7 (D. Minn. May 4, 2010) (dismissing lender's motion for summary judgment where rescission notice omitted expiration date); *Aubin v. Residential Funding Co.*, 565 F. Supp. 2d 392, 397 (D. Conn. 2008) (finding violation where rescission notice stated wrong deadline date).

234. The *Barnes* court explained:

This matter is distinct from *Palmer*, in that the date used in *Palmer* had already passed at the time of closing, which logically would render unreasonable a borrower's reliance on that date if he was trying to determine when his right of rescission expired because it obviously could not expire before the transaction was consummated.

Barnes, 825 F. Supp. 2d at 1070.

235. See *id.*

different dates, but was not sympathetic to the consumer's plight in *Palmer* because the stated deadline for rescission had already passed when the consumer received the rescission notice.²³⁶ The average consumer would have understood the impossibility of having such a rescission date in the context of the *Palmer* notice. There was no such impossibility in *Barnes*.

V. PREMATURE ELECTION NOT TO RESCIND

A. *Conflicting Statements*

It is no secret that a consumer's right to rescind can leave a transaction unsettled for as long as three years if a creditor does not make the necessary disclosures.²³⁷ Some creditors try to avoid the possibility of the consumer's rescission by having the consumer sign, at the same time that the consumer signs the loan documents, a statement that he has elected not to rescind the transaction.²³⁸ This so-called "premature election not to cancel" sometimes carries the same date as the loan documents; other times, a date that is three days later. When the election statement given at closing indicates that the consumer's rescission period has expired, this represents a mischaracterization of the consumer's three-day right of rescission.²³⁹ If the three-day period has not yet expired, but the statement says that it has, the creditor is essentially leading the consumer to a distortion of the transaction. After all, the creditor should give the consumer a clear and conspicuous notice of the consumer's right to rescind, and the creditor cannot achieve this goal with conflicting statements.²⁴⁰ The conflict is even more serious if

236. *Id.*

237. Regulation Z provides in pertinent part as follows: "If the required notice or material disclosures are not delivered, the right to rescind shall expire 3 years after consummation, upon transfer of all the consumer's interest in the property, or upon sale of the property, whichever occurs first." 12 C.F.R. § 1026.23(a)(3)(i) (2014).

238. See *Rand Corp. v. Yer Song Moua*, 559 F.3d 842, 847-48 (8th Cir. 2009); *Rodash v. AIB Mortg. Co.*, 16 F.3d 1142, 1146 (11th Cir. 1994); *Adams v. Nationscredit Fin. Servs. Corp.*, 351 F. Supp. 2d 829, 833 (N.D. Ill. 2004); *Wiggins v. Avco Fin. Servs.*, 62 F. Supp. 2d 90, 96-97 (D.D.C. 1999).

239. See *Conrad v. Farmers & Merchants Bank*, 762 F. Supp. 2d 843, 846-47 (W.D. Va. 2011) (stating that requiring consumer to sign postdated statement that consumer had not rescinded did not fulfill the clear and conspicuous requirement for disclosure); *Daniels v. Equitable Bank, SSB*, 746 F. Supp. 2d 1021, 1023 (finding post-dated form not to rescind to be a violation of the clear disclosure requirement that consumer could rescind within three days); *Rodrigues v. Members Mortg. Co.*, 323 F. Supp. 2d 202, 209 (D. Mass. 2004) (denying defendant's motion to dismiss where consumer was required to sign both notice to rescind and confirmation of non-rescission).

240. The notice of the right to rescind must "clearly and conspicuously" disclose certain information to the consumer. 12 C.F.R. § 1026.23(b)(1).

the premature election not to cancel appears in the same document as the creditor's notice to the consumer about the right of rescission.²⁴¹ A consumer will usually be eager to consummate the transaction and will hardly be of a mind to appreciate the effect of a simultaneous election not to cancel. If anything, the consumer is likely to get the impression that he must sign as requested if he hopes to get the loan. If there is only one signature line that purports to cover both the acknowledgment of the creditor's notice and the consumer's premature election not to cancel, there is an even stronger case for finding a Truth in Lending violation because the consumer may be misled into thinking there is no choice about what to do.

It is no answer to say that a consumer waives his right to cancel under the regulation. While there is room for a waiver of the right of rescission, that waiver is available only in emergency situations and pursuant to a prescribed format.²⁴² A creditor's attempt to circumvent the waiver requirements usually fails simply because there is no emergency and the creditor is the one who wants to avoid the possibility of rescission.

The creditor in *Rodash v. AIB Mortgage Co.*²⁴³ should have sensed the difficulty it would have in convincing the Eleventh Circuit about the way it handled the disclosure of the consumer's right to rescind. It complied with Truth in Lending requirements by giving the consumer adequate notice about the right to rescind, but then confused matters by requiring the consumer to sign a separate document acknowledging that the creditor had given her a notice of her right to rescind, but also affirming in the same paragraph that the consumer had elected not to cancel the transaction.²⁴⁴

It was hardly surprising when the court found that the creditor did not give clear and conspicuous disclosure of the consumer's right to rescind.²⁴⁵ The Eleventh Circuit concluded that the contradictory

241. See *Conrad*, 762 F. Supp. 2d at 846 (finding that requiring consumer to sign postdated confirmation of election not to rescind constituted violation even if the practice was prevalent in the industry); *Wiggins*, 62 F. Supp. 2d at 96 (finding that placing the election not to cancel on the same pages as the notices of the right to rescind was objectively confusing because the average consumer might think that he had to sign the non-rescission statement in order to consummate transaction).

242. See 12 C.F.R. § 1026.23(e).

243. *Rodash*, 16 F.3d 1142 (11th Cir. 1994).

244. The consumer signed a pre-printed form containing the following language:

The undersigned hereby acknowledges and affirms that on or before January 18, 1991, each of us received two copies of the annexed "Notice of Right to Cancel." Furthermore, the undersigned hereby acknowledges and affirms that each of us have [sic] elected not to cancel the transaction to which the annexed Notice relates. /s/ Martha Rodash

Id. at 1145 n.2.

245. See *id.* at 1146 (holding that requiring the consumer to sign an election not to rescind

documents prevented clear and conspicuous disclosure from happening.²⁴⁶ By introducing into the mix the election not to cancel, the creditor sent a false message that a waiver was routinely available during the three-day cooling-off period.²⁴⁷ There was a contradiction here that nullified the consumer's right to reflect on the transaction for three days. Furthermore, the consumer's acknowledgment that she had elected not to cancel suggested that the parties had reached the point of no return, with the possibility of rescission out of the way. The creditor's placement of the acknowledgment and the election not to cancel in the same paragraph was sure to confuse the borrower, for the creditor simultaneously gave and then took away the same thing in one paragraph. The consumer would hardly know what to make of this inconsistent message.²⁴⁸ It had a good chance of misleading the consumer, for she may have believed that she had to sign the purported waiver if she wanted to consummate the transaction.

B. Acknowledgment and Confirmation

A little after *Rodash*, the Eleventh Circuit had another chance to reflect on the consumer's acknowledgment that the consumer had received a notice about his right of rescission appearing on the same page as the consumer's confirmation that the consumer had not rescinded. The court was keen to distinguish the situation in *Smith v. Highland Bank*²⁴⁹ from that in *Rodash*. The certification in *Smith* appeared on the same page as the consumer's acknowledgment, but in a separate paragraph which called for a separate signature.²⁵⁰ This arrangement certainly diminished the consumer's argument that the layout had produced a confusing situation. Furthermore, the certification indicated that the consumer was not to sign until three days had expired, and it was indeed dated several days after the acknowledgment of receipt of the right to rescind.²⁵¹ This was in contrast to the *Rodash* arrangement where the acknowledgment and the purported waiver appeared in the

prevented the clear and conspicuous notice of the consumer's right to rescind).

246. *Id.* at 1147.

247. *See id.* at 1146 (stating that "presentation of the waiver form on the day of the transaction contradicted the very purpose of the cooling off period: to give the consumer time to consider the terms of her financial commitments").

248. It is the contradictory statements in the document that precluded clear disclosure of the notice of the right to cancel the transaction. *See id.* at 1147.

249. *Smith v. Highland Bank*, 108 F.3d 1325 (11th Cir. 1997).

250. *Id.* at 1327. Unlike the situation in *Rodash*, the certificate of confirmation indicating that the consumer had not exercised her right to rescind was to be signed after the expiration of the three-day rescission period. *Id.* at 1326.

251. *Id.*

same paragraph that invited a single signature on the date of the transaction.²⁵²

The *Smith* court was not of a mind to go beyond *Rodash* because there was nothing in the document that made the certificate of confirmation effective on the same day as the transaction.²⁵³ As a matter of fact, the provision for separate signatures supported the proposition that the consumer's election not to cancel became effective only after the three-day rescission period had expired.²⁵⁴

When the Eighth Circuit confronted a *Smith*-like situation in *Rand Corp. v. Moua*, however, it reached a different result simply because it believed that the creditor's form was confusing, given the requirement that the consumers had to sign the receipt and the confirmation section simultaneously on the date of the transaction.²⁵⁵ Unlike *Smith*, the consumers in *Rand* confirmed that three business days had elapsed since that date and that the consumers had not rescinded.²⁵⁶ In fact, the court acknowledged that "[r]equiring borrowers to sign statements which are contradictory and demonstrably false is a paradigm for confusion."²⁵⁷ This was a little different from *Smith* because the consumers in *Rand* did not argue that placement of the confirmation and receipt sections in the same document led to any confusion. The consumers were asked to certify a falsehood, for the three-day rescission period had not yet expired when they confirmed that no rescission had occurred.

C. Postdating and Waiver

Leaving nothing to chance, some creditors try to avoid problems by postdating the consumer's confirmation that no rescission has occurred. The creditor's explanation in *Conrad v. Farmers and Merchants Bank*,²⁵⁸ that postdating was prevalent in the industry, did not persuade

252. See *Rodash*, 16 F.3d at 1145 n.2.

253. *Smith*, 108 F.3d at 1327.

254. The certificate of confirmation and the acknowledgment of receipt required separate signatures. The form also indicated that the consumer should not sign the certificate of confirmation that the consumer had not rescinded until three business days had elapsed. See *id.* at 1327. The certificate of confirmation was dated several days after the acknowledgment of receipt of the notice. *Id.*; see also NAT'L CONSUMER LAW CTR., TRUTH IN LENDING, *supra* note 25, § 10.4.4.8.

255. *Rand Corp. v. Yer Song Moua*, 559 F.3d 842, 846 (8th Cir. 2009).

256. The court acknowledged that requiring the consumers to sign contradictory statements was "a paradigm for confusion." *Id.* at 847. In *Smith*, the borrower did not sign to certify that the three-day rescission period had already passed until it had actually passed. See *Smith*, 108 F.3d at 1327.

257. *Rand Corp.*, 559 F.3d at 847; see also *Premature Signing of an I-Have-Not-Rescinded Form Extends Rescission Period*, CONSUMER CREDIT & TRUTH-IN-LENDING COMPLIANCE REPORT, May 2009, at 3.

258. *Conrad v. Farmers & Merchants Bank*, 762 F. Supp. 2d 843 (W.D. Va. 2011).

the court to grant the creditor's motion to dismiss the consumer's suit, since the practice did not meet the statutory requirement of clear and conspicuous disclosure of the right of rescission.²⁵⁹ The creditor's strategy in cases like *Conrad* is to send a message to the consumer that his opportunity to rescind has expired, and this is particularly dramatic when the election not to cancel appears conveniently on the same pages as the notice of the right to rescind. A creditor may even make things murkier by having a single signature line covering both events. That scenario leads to even more confusion for the consumer.

Since a premature election not to cancel is really an attempt to produce a waiver of the consumer's right to cancel, a creditor should be restricted to the requirements for such an event.²⁶⁰ Therefore, the solution to the problem of a premature election lies in recognizing that a waiver is limited to emergency situations, and a consumer should follow the prescribed format for accomplishing it. A creditor should understand the seriousness of the event by having a separate form that deals only with the waiver. This separate treatment should certainly drive home to the consumer the importance of the occasion, and would deprive the creditor of the opportunity to create a conflicting scenario.²⁶¹

A legitimate confirmation of non-rescission can come as soon as the rescission period expires, to allay the creditor's fears that a rescission may be lurking in the mail. There is nothing wrong, in principle, with the consumer's speedy assurance to the creditor on the expiration of the rescission period that the consumer has not rescinded. The creditor will have to wait its three days, but there is no ambiguity in this scenario, and the parties will be able to move promptly once the consumer has given his assurance. A postdated confirmation only serves to raise questions about its legitimacy when there is such great potential for a conflicting message about the consumer's right to rescind. If the parties cannot meet

259. See *id.* at 846. The creditor's obligation to disclose clearly and conspicuously the consumer's right to rescind a transaction is subject to an objective standard of review. See *Rand Corp.*, 559 F.3d at 845-46; *Wiggins v. Avco Fin. Servs.*, 62 F. Supp. 2d 90, 94 (D.D.C. 1999).

260. A waiver is indeed available, but it is restricted to a "bona fide personal financial emergency." 12 C.F.R. § 1026.23(e) (2014). Regulation Z emphasizes the seriousness of the waiver provision by prohibiting the use of printed forms for that purpose. See *id.*

261. Regulation Z drives home the point by requiring a creditor to delay its performance until the rescission period has expired and the creditor is reasonably satisfied that the consumer has not rescinded. *Id.* § 1026.23(c). If a consumer has mailed his rescission notice within the rescission period, the creditor may not receive it for a few days. In this event, the notice would still be effective. See NAT'L CONSUMER LAW CTR., TRUTH IN LENDING, *supra* note 25, § 10.5.1. If the consumer attempts to rescind by telefax after the rescission period has expired, he will be late even if the creditor does not delay performance to accommodate a possible rescission by mail. See *Nutase v. E. Sav. Bank (In re Nutase)*, No. 05-21747-WIL, 2007 WL 1704392, at *4 (Bankr. D. Md. June 11, 2007).

the criteria for a true waiver, then the creditor may be better off delaying its performance until the consumer notifies it that there is no rescission en route. With the parties' cooperation, the transaction should be consummated promptly once the rescission period has expired.

VI. CONCLUSION

Evidently, the courts cannot agree about when rescission occurs within the context of Truth in Lending.²⁶² It is not enough to rely on *Beach* without explaining that the consumers there did nothing before the three years had expired, and therefore it was not a question of distinguishing a consumer's notice from a consumer's lawsuit.²⁶³ The *Beach* Court simply clarified that the consumers' right of rescission had expired after three years for purposes of asserting it as a defense and for purposes of initiating a lawsuit.²⁶⁴ It said nothing about what it takes for a consumer to exercise his right of rescission, and therefore those courts that require a consumer's notice and filing to occur within the three-year period stand on shaky ground in relying on *Beach* for that proposition. It is more convincing to rely on the plain language of § 1635, which refers to the expiration of a right rather than to the prospect of litigation.²⁶⁵

There is a legitimate concern that once a consumer gives his notice

262. Compare *Sherzer v. Homestar Mortg. Servs.*, 707 F.3d 255, 267 (3d Cir. 2013) (holding that rescission occurs upon consumer's written notice); *Gilbert v. Residential Funding LLC*, 678 F.3d 271, 277-78 (4th Cir. 2012) (holding that consumers exercised their right to rescind through written notice to creditor); *Herzog v. Countrywide Home Loans (In re Hunter)*, 400 B.R. 651, 662 (Bankr. N.D. Ill. 2009) (holding that consumer exercised his right to rescind by notifying the creditor within the three-year period required by § 1635), with *McOmie-Gray v. Bank of Am. Home Loans*, 667 F.3d 1325, 1328 (9th Cir. 2012) (holding that consumer must bring suit within three years regardless of any notice the consumer gives within that time); *Rosenfield v. HSBC Bank, USA*, 681 F.3d 1172, 1188 (10th Cir. 2012) (holding notice by itself is not sufficient for a consumer to exercise his right to rescind); *Sobieniak v. BAC Home Loan Servicing*, 835 F. Supp. 2d 705, 710 (D. Minn. 2011) (noting the majority view of Congress's intention is that a consumer must sue within three years if he wants to enforce rescission).

263. In *Beach*, the consumers did not take any action to rescind their loan until the lender began foreclosure proceedings more than three years after the transaction. See *Beach v. Ocwen Fed. Bank*, 523 U.S. 410, 413-14 (1988); see also *Sherzer*, 707 F.3d at 262; *Calvin v. Am. Fiduciary Mortg. Servs., Inc.*, No.10-CV-7213, 2011 WL1672064, at *2 (N.D. Ill. May 3, 2011) (noting that *Beach* determined only that the right of rescission expired after three years but did not determine how their right should be exercised).

264. The *Beach* Court recognized § 1635(f) as governing the underlying right of rescission by referring to the expiration thereof at the end of three years. See *Beach*, 523 U.S. at 417.

265. There is a difference between § 1640(e), which allows a consumer to assert a violation as a matter of defense by recoupment even if the creditor brings an action for damages after the one-year period has expired and § 1635(f) which clearly states that the right of rescission shall expire after three years. See *Beach*, 523 U.S. at 417-18; see also *Gilbert*, 678 F.3d at 277 (stating that neither § 1635(f) nor Regulation Z imposes a requirement that a consumer must file a lawsuit to invoke his right to rescind).

of rescission, he will take his good time in enforcing his rights if the creditor ignores him. This does not mean, however, that a consumer can take forever to act on his rescission: a court should be able to use the one-year statute of limitations in § 1640(e), which seems applicable to any action under § 1640, including one where a consumer has the right to rescind.²⁶⁶ This one-year period puts a limit on the consumer's ability to extend indefinitely the time for the consumer to enforce the rights flowing from his rescission. In this sense, this situation would be a little different from *Beach*, where the consumers did not take any action at all to rescind their loan but wanted to use rescission as a defense in foreclosure proceedings.²⁶⁷ One can see how this *Beach* scenario would create uncertainty about a lender's security, and that is what concerned the Supreme Court in that case.²⁶⁸ Where a consumer sends his rescission within the three-year period, at least the lender is on notice about the consumer's rescission and the lender is able to resolve any problems almost immediately. The creditor also has it within its control to seek a judicial determination about the validity of the consumer's rescission while the transaction is relatively new. Surely it is not in the creditor's interest to prolong any uncertainty about the rescission's validity. The creditor has an incentive to resolve matters quickly, for its security interest is on the line.

In the final analysis, the conflict in the courts rests on the disagreement about how a consumer exercises his right of rescission. Congress gave a clear message about that in § 1635, and the courts should not ignore the plain meaning of the statute because of concerns about the *Beach* message, where there was no notice involved and the consumer was merely trying to use rescission as a defense after the three-year period had expired.²⁶⁹

266. It is noteworthy that § 1640(e) does not specifically mention damages or rescission, but instead refers to "any action under this section," meaning § 1640. It is possible that the drafters wanted to recognize the consumer's rescission action through § 1640(a)(3). See NAT'L CONSUMER LAW CTR., TRUTH IN LENDING, *supra* note 25, §12.2.2.4.1 (Supp. 2013).

267. See *Beach*, 523 U.S. at 411.

268. The *Beach* Court reflected: "Since a statutory right of rescission could cloud a bank's title on foreclosure, Congress may well have chosen to circumscribe that risk, while permitting recoupment damages regardless of the date a collection action may be brought." *Id.* at 418-19.

269. See *Sherzer v. Homestar Mortgage Servs.*, 707 F.3d 255, 267 (3d Cir. 2013). In *McOmie-Gray v. Bank of America Home Loans*, the Ninth Circuit recognized that § 1635(a) gives an obligor a right to rescind and that Regulation Z indicates how an obligor can rescind. See *McOmie-Gray v. Bank of Am. Home Loans*, 667 F.3d 1325, 1327 (9th Cir. 2012) (citing 15 U.S.C. § 1635(a) (2012); 12 C.F.R. § 226.23(a)(2) (2014)). Nevertheless, the court did not recognize an obligor's notice to the lender as exercising the right of rescission, but only as advancing a claim where the lender does not accept the obligor's rescission. See *id.* If the lender does not respond to the consumer and the obligor sues thereafter and wins, the question then becomes whether the obligor rescinded the transaction and then sought judicial enforcement thereof, or whether rescission would then be

There is also confusion about the effects of a consumer's rescission. Despite the language recognizing the voidness of a creditor's security interest, the courts recognize that there is more to this than meets the eye. It would be easier to understand the effects of the consumer's rescission if the drafters had included any reference to the voidness of the security interest in § 1026.15(d)(4) or Regulation Z when they specifically allowed for judicial modification of the timetable for the return of any money or property.²⁷⁰ The omission leaves the impression that nothing can affect the impact of the consumer's rescission on the security interest, but courts have not been opposed to interpreting Regulation Z in a way that denies the automatic voidness of such an interest.²⁷¹ That trend is justifiable, but those judicial efforts are necessary only because the drafters have not made it clear that the mere exercise of the right of rescission does not always result in the removal of the lien on the consumer's property. This lack of precision leaves in doubt the continued existence of the security interest, and thus courts have to do the best with what they have. In the same way that § 1026.15(d)(4) allows for judicial modification of the rescission procedures, so too should the regulation include some language clarifying what happens to the security interest once the creditor disputes the consumer's right to rescind.²⁷² The present language seems absolute and unconditional, but it leaves the wrong impression. There is no good

effective only when a court says so. After this Article was completed, the U.S. Supreme Court decided *Jesinoski v. Countrywide Home Loans, Inc.*, 135 S. Ct. 790 (U.S. 2015), thus resolving the circuit split relating to the time when rescission occurs. The Court held that a borrower need only give written notice of rescission within three years after consummation and that the borrower does not have to sue within three years. *Id.* at 793.

270. Section 1026.23(d)(4) of Regulation Z provides that "[t]he procedures outlined in paragraphs (d)(2) and (3) of this section may be modified by court order." 12 C.F.R. § 1026.23(d)(4) (2014). Paragraph (4) omits any reference to paragraph (1) dealing with the voidness of the lender's security interest. *See id.* § 1026.23(d)(1).

271. *See Am. Mortg. Network, Inc. v. Shelton*, 486 F.3d 815, 821 (4th Cir. 2007) (stating that a consumer's notification of rescission does not automatically make the security interest void); *Yamamoto v. Bank of N.Y.*, 329 F.3d 1167, 1172 (9th Cir. 2003) (stating that lender's security interest is not void upon the mere sending of the rescission notice, but only when the consumer is determined to have a right to rescind); *Hindorff v. GSCR, Inc.*, No. 13-CV-00955-PAB-KLM, 2013 WL 2903451 at *6 (D. Colo. June 14, 2013) (stating that rescission notice by itself does not void the transaction); *Iroanyah v. Bank of Am., N.A.*, 851 F. Supp. 2d 1115, 1124 (N.D. Ill. 2012) (stating that mere issuance of rescission notice does not void lender's security interest).

272. *Compare Am. Mortg. Network*, 486 F.3d at 821 (stating that the "unilateral notification of cancellation does not automatically void the loan contract"); *Yamamoto*, 329 F.3d at 1172 (stating that when creditor contests consumer's rescission notice, security interest does not vanish automatically); *Large v. Conseco Fin. Serv. Corp.*, 292 F.3d 49, 54-55 (1st Cir. 2002) (finding that creditor's security interest becomes void when a consumer exercises a right to rescind that is justified in a particular case), *with Sherzer*, 707 F.3d at 261 n.5 (3d Cir. 2013) (holding that contract is voided when consumer sends valid rescission notice).

reason to leave this matter in limbo.

Finally, the model form for rescission leaves much to be desired in the sense that it puts the burden on the consumer to satisfy himself that the specific deadline date for rescission correlates with the alternative formulation relating to the third business day following the last of the three events attending the transaction. It is more desirable for the creditor to assume the responsibility of giving a correct rescission date, and that it suffer the consequences of failing to do so. Otherwise, the consumer is put in the position of deciding when the third business day period expires, if there is any doubt about the specific rescission deadline. The creditor should be expected to stand behind its specific deadline date and not shift the burden to the consumer to find a correlation between that date and the explanatory language that follows in the model form.