

Is Sending Notice Within Three Years Sufficient to Preserve Rescission Rights Under Truth-in Lending?

Why Not?

By Steven Herrera*



Procedure and Relevant Statutes

As the law stands today, courts are split on whether the filing of a lawsuit is the only way to preserve the right of rescission before the expiration of the three-year limitation of section 1635(f) of the Truth in Lending Act (TILA). Currently, the majority of courts have ruled that a lawsuit must be filed within the statutory limitations period. A minority, however, have taken the position is that mere notice to rescind is sufficient to satisfy the statute, and preserve the right to subsequently file suit.

Under the TILA, a debtor generally has right to rescind on a transaction up to three days after the consummation of the transaction.¹ This three-day “cooling off” period, allows a debtor to rescind for any reason or for no reason.² However, pursuant to 15 U.S.C. §1635(a) and (f), if the creditor fails to deliver “the information and rescission forms required under [§1635] together with a statement containing the material disclosures required under TILA, then the borrower may rescind until the earlier of (i) that delivery or (ii) ‘three years after the date of consummation of the transaction[.]’”³ Specifically, section 1635(f) provides, in relevant part, the following:

An obligor’s right of rescission shall expire *three years after the date of consummation of the transaction* or upon the sale of the property, whichever occurs first, notwithstanding the fact that the information and forms required under this section or any other disclosures required under this part have not been delivered to the obligor.⁴

But section 1635 is not the only section of the TILA that deals with limitations. Section 1640(e) sets out a one-year statute of limitations, stating, “Any action under this section may be brought...in any other court of competent jurisdiction, within one year from the date of the occurrence of the violation.”⁵ The relationship between sections 1635 and 1640 is clouded by the language of Regulation Z, the implementing regulation of 1635(f), which states:

To exercise the right to rescind, the consumer shall

notify the creditor of the rescission by mail, telegram or other means of written communication. Notice is considered given when mailed, when filed for telegraphic transmission or, if sent by other means, when delivered to the creditor’s designated place of business.⁶

The issue is whether the TILA, as supplemented by Reg. Z, declares that mere notice is sufficient to exercise the right of rescission, after which the consumer would have one-year to file suit, or if section 1635 requires the filing of a lawsuit within the three-year period. Both interpretations of the timing of the right of rescission rely on an interpretation §1635(f), as discussed by the Supreme Court in *Beach v. Owen Fed. Bank*, 523 U.S. 410 (1998). In *Beach*, the Court stated:

Section 1635(f)...takes us beyond any question whether it limits more than the time for bringing a suit, by governing the life of the underlying right as well. The subsection says nothing in terms of bringing an action but instead provides that the “right of rescission [under the Act] shall expire” at the end of the time period. It 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.⁷

In light of the Court’s ruling, §1635(f) has continuously been labeled as a statute of repose, thus, a firm bar, rather than a statute of limitations.⁸ The conflict between the finality of §1635(f)’s three-year limitation and the simple requirements to exercise a right to rescission under Regulation Z is the reason for

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the disparity in interpreting how rescission may be exercised.

The Right of Rescission May Only be Exercised by Filing an Action for Enforcement

The majority view insists the holding in *Beach* is dispositive as to when and how a debtor must exercise his right to rescission. As explained by the Third Circuit in *Williams v. Wells Fargo Home Mortg., Inc.*, the Court's analysis of §1635(f) in *Beach* implicitly holds that "any claim for rescission under §1635 must be filed within the three-year period."⁹ Thus, while a debtor can invoke the right to rescission by notice, that invocation alone will not preserve the right beyond the three-year period, even if suit is commenced within one year following a notice of rescission.¹⁰

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The Ninth Circuit concluded generally the same in *McOmie—Gray v. Bank of Am. Home Loans*, by stating, "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."¹¹ However, *McOmie* went a step further and expressly found the one-year period of §1640(e) did not extend the right of rescission past the three-year limitation of §1635(f).¹²

While asserting that *Beach* was dispositive to this issue, the Tenth Circuit also considered a policy argument in rejecting a debtor's claim that she was entitled to exercise her right to rescission by mere notice. In *Rosenfield v. HSBC Bank, USA*¹³, the court noted the purpose of the TILA is, "to assure a meaningful disclosure of credit terms so that the consumer will be able to compare... various credit terms[,] avoid the uninformed use of credit, and to protect the consumer against inaccurate and unfair credit billing and credit card practices."¹⁴ The court weighed this purpose with the practical effects of allowing debtors to easily exercise their right to rescission, for example, clouding a "bank's title on foreclosure."¹⁵ The court held that without requiring the filing of a lawsuit, the "time period for solidifying the legal relationship between lenders and borrowers [would] effectively [be] enlarged, thus upset[ting] the economic best interests of the public as a whole."¹⁶

The Virginia district courts have reached the same conclusion, but with different reasoning.¹⁷ For example, in *Bradford v. HSBC Mortg. Corp.*, the court reviewed the statutory process of debtor rescission under the TILA and concluded that mere notice was insufficient to rescind after the three-day "cooling off" period.¹⁸ First, the court noted the process begins with debtors sending a notice to rescind to the creditor.¹⁹ At this point, "the lender has twenty days to decide whether it will (i) recognize the existence of a rescission right and privately arrange rescission with the borrower and any other interested parties, or instead (ii) dispute the existence of a rescission right and await the borrower's initiation of suit."²⁰ Therefore, notice only *advances* a claim of rescission and a court order is required to determine whether to order rescission, the effect of rescission, and the obligations of the debtor or creditor.²¹ It follows, the court continued, that because a lender cannot be obligated under §1635(b) to rescind upon receiving notice, the borrower has not yet fully "exercise[d] his right to rescind" and more is needed.²² The court held that until the right to rescind was fully exercised, the debtor's claim

to rescission was not fully advanced, notwithstanding the fact that the notice was sent before the §1635(f) three-year limitation.²³

The Right of Rescission May be Exercised by Notice to the Creditor

Contrary to the majority of courts, some decisions have relied solely on Regulation Z as authority for the position that mere notice is sufficient to exercise a debtor's right to rescission.²⁴ Most of these courts, however, narrow the Court's ruling in *Beach* to answer only the question of when the right to rescission expires, not how it must be exercised.²⁵ For example, in *Gilbert v. Residential Funding LLC*, the Fourth Circuit found mere notice enough to exercise the right to rescind, while narrowing the holding of *Beach*.²⁶ In *Gilbert*, the debtors executed an adjustable rate note with their creditors on May 5, 2006, sent a letter attempting to exercise their right to rescind on April 5, 2009, and filed suit to enforce that right on September 14, 2009.²⁷ The circuit court construed the holding in *Beach* as dispositive only in answering "whether §1635(f) is a statute of limitation, that is, 'whether [it] operates, with the lapse of time, to extinguish the right which is the foundation for the claim' or 'merely to bar the remedy for its enforcement.'"²⁸ Further, relying heavily on a plain language interpretation the court stated "neither 15 U.S.C. §1635(f) nor Regulation Z says anything about the filing of a lawsuit, and we refuse to graft such a requirement upon them."²⁹ Thus, the court in *Gilbert* held that the debtors exercised their right to rescind with their April 5 notice of intent to rescind.³⁰ Other courts have agreed with the analysis of *Gilbert*, and have held that the one-year limitation imposed by 15 U.S.C. §1640(e) limits the length of time a debtor has to file a claim after rescission is denied or unanswered.³¹

Conclusion

While it may be that the Supreme Court intended to impose a final bar to rescission claims in *Beach*, the plain language of Regulation Z and §1635(f) clearly indicate the proper way to exercise the right of rescission and lack any language requiring debtors to file suit. As stated in §1635(f), "an obligor's right of rescission shall expire *three years after the date of consummation of the transaction*." Regarding the same "right," Regulation Z allows debtors to "exercise the right to rescind, the consumer shall *notify* the creditor of the rescission by mail." As the court noted in *Gilbert*, "the Supreme Court has repeatedly emphasized the importance of the plain meaning rule, stating that if the language of a statute or regulation has a plain and ordinary meaning, courts need look no further and should apply the regulation as it is written."³² Thus, clearly Regulation Z must have some effect, because any other interpretation would render the right in Regulation Z's "right to rescind," and the right in §1635(f)'s "right of rescission," distinct.

Understandably, however, courts have noted potential title hindrances for restricting the exercise of the right of rescission.³³ However, this is not sufficient to curtail the potency of Regulation Z.³⁴ Even if the exercise of the right to rescind under Regulation Z were admissible, title would not be "clouded" for a significant period of time. For example, if a debtor attempted to exercise her right to rescission the day before the three-year expiration, a claim regarding her denial would arise after the 20-day mark of §1635(b). Moreover, due to the statute of limitations under §1640(e), a denial of a valid right to rescission would only last one year. At most, one year plus 20 days would be the maximum amount of time allowed past the three-year limitation.³⁵ Accordingly, if Regulation Z is given effect and the exercise of the right of rescission begins with notice, there is no rational fear of continuous, unrestricted "clouding" of title. Additionally, it seems Massachusetts finds four years suitable to effectuate the purpose

of the TILA and give debtors ample time to file their rescission claims.³⁶

The reasoning of the Fourth Circuit in *Gilbert* is the most compelling view of the relationship between section 1635 and 1640 of the TILA. While *Beach* set a strict bar for rescission claims, it did not answer the question of *how* rescission must be exercised. Regulation Z must be given credence—debtors should be able to exercise their right to rescission and begin the process by notice. While the reasoning of the cases that hold otherwise is persuasive, none are compelling enough to negate the effect of Regulation Z.

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1 15 U.S.C. §1635(a).

2 See *McKenna v. First Horizon Home Loan Corp.*, 475 F.3d 418, 421 (1st Cir. 2007).

3 *Bradford v. HSBC Mortg. Corp.*, 838 F. Supp. 2d 424, 429 (E.D. Va. 2012) (quoting 15 U.S.C. §635(f)). See also *Geraghty v. BAC Home Loans Servicing LP*, CIV. 11-336 JNE/TNL, 2011 WL 3920248 (D. Minn. Sept. 7, 2011).

4 15 U.S.C. §1635(f) (emphasis added).

5 15 U.S.C.A. §1640.

6 12 C.F.R. §1026.23(a)(2) (emphasis added).

7 *Id.* at 417.

8 See *In re Cmty. Bank of N. Virginia*, 622 F.3d 275, 301 n.18 (3d Cir. 2010), *as amended* (Oct. 20, 2010) (§1635(f) is not a statute of limitations, but a statute of repose); *Jones v. Saxon Mortg., Inc.*, 537 F.3d 320, 327 (4th Cir. 1998) (“by its terms, §1635(f) mirrors a typical statute of repose in that it ‘precludes a right of action after a specified period of time rather than’ providing that a cause of action must be brought within a certain period of time after the cause of action accrued.”) (quoting *Beach v. Great Western Bank*, 692 So.2d 146, 152 (Fla.1997), *aff’d*, 523 U.S. 410 (1998)); *Miguel v. Country Funding Corp.*, 309 F.3d 1161, 1164 (9th Cir. 2002) (§1635(f) is a statute of repose).

9 *Williams*, 410 F. Appx. 495, 499 (3d Cir. 2011); See also *DeCosta v. U.S. Bancorp*, 2010 WL 3824224 (D. Md. Sept. 27, 2010); *Sam v. Am. Home Mortg. Servicing*, 2010 WL 761228 (E.D. Cal. Mar. 3, 2010); *Falocchia v. Saxon Mortg., Inc.*, 709 F.Supp.2d 860 (E.D.Cal. Feb.12, 2010).

10 *Id.*; See *Sherzer v. Homestar Mortg. Services*, 2011 WL 5075086 (E.D. Pa. Oct. 24, 2011) (suit must be filed within three years, despite filing within one year following notice of rescission); *Chevy Chase Bank, F.S.B. v. Carrington*, 2010 WL 745771 (M.D. Fla. Mar. 1, 2010) (no matter what actions [debtor] took or failed to take, her right to rescind was extinguished [three years after consummation of the transaction]—well before filing the instant suit); *Sobieniak v. BAC Home Loans Servicing, LP*, 835 F. Supp. 2d 705, 710 (D. Minn. 2011) (language of the TILA, the holding in *Beach* and the strong public policy favoring certainty of title all support the majority view that Congress intended that any lawsuit to enforce the right of rescission be brought within the three-year repose period); *In re Dawson*, 437 B.R. 15, 19 (Bankr. D.D.C. 2010) (“if a borrower has given timely notice of rescission *and* sued to enforce that right prior to the expiration of three years without having sold the property, the right of rescission has been exercised”) (emphasis added); *Beaukes v. GMAC Mortgage, LLC*, 2012 WL 1204635 (D. Minn. Apr. 11, 2012); *Dietz v. Beneficial Loan and Thrift Co.*, 2011 WL 6739504, at *3–4 (D.Minn. Dec. 22, 2011).

11 667 F.3d 1325, 1328 (9th Cir. 2012).

12 *Id.* at 1329; See 15 U.S.C. §1640(e) (“any action...may be brought in...within one year from the date of the occurrence of the violation”).

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

14 *Rosenfield*, 681 F.3d at 1179 (quoting 15 U.S.C.A. §1601(a) (West)).

15 *Id.* at 1186; See *Sobieniak*, 835 F.Supp.2d at 710 (“strong public policy favoring certainty of title” supports a firm bar on rescission claims after three year limitation).

16 *Id.* (quoting *Saxon Mortg.*, 537 F.3d at 327).

17 See *Wolf v. Fed. Nat. Mortg. Ass’n*, 830 F. Supp. 2d 153, 160 (W.D. Va. 2011) (three-year limitation of §1635(f) “extinguishes the borrower’s rescission right regardless of whether any notice of rescission was filed within three years of closing”) (quoting *Yowell v. Residential Mortg. Solution, LLC*, 2011 WL 3654388, *9 (W.D.Va. Aug. 17, 2011), *appeal docketed*, No. 11–1994 (4th Cir. Sept. 20, 2011)).

18 *Bradford*, 838 F.Supp.2d at 429.

19 *Id.*

20 *Id.*

21 *Id.* (emphasis added) (quoting *Am. Mortg. Network, Inc. v. Shelton*, 486 F.3d 815, 821 (4th Cir.2007)).

22 *Id.* at 434-35.

23 *Id.* at 436.

24 See *Siver v. CitiMortgage, Inc.*, 830 F.Supp.2d 1194, 1196 (W.D. Wash. 2011) (notice of rescission, without the filing of suit, within the three years of §1635(f) is timely); *Carson v. Wells Fargo Bank, N.A.*, 2011 WL 2470099 (M.D. Fla. June 20, 2011) (because notifying the creditor automatically triggers rescission, it is this notification, not the filing of the suit, that must be within the three-year period).

25 See *Cocroft v. HSBC Bank USA, N.A.*, 2012 WL 1378645 (N.D. Ill. Apr. 20, 2012) (“*Beach* addresses *when* the right to rescind expires and whether it can be tolled. It leaves unresolved the question of *how* a consumer must exercise that right to rescind—suit, or notice via letter”) (quoting *Stewart v. BAC Home Loans Servicing, LP*, 2011 WL 862938, at *6) (N.D.Ill. May 10, 2011) (emphasis in original); *Barnes v. Chase Home Fin., LLC*, 825 F. Supp. 2d 1057, 1064 (D. Or. 2011) (limitation in §1635(f) applies to the borrower’s exercise of his right of rescission rather than to the timing of a lawsuit to enforce that right); *In re Hunter*, 400 B.R. 651, 658 (Bankr. N.D. Ill. 2009) (the *Beach* decision did not discuss the method for exercising this right to rescind under TILA); *Seneca v. First Franklin Fin. Corp.*, 2011 WL 3235647 (S.D. Cal. July 28, 2011) (cited *Beach*, but found exercise of rescission timely, notwithstanding the fact that suit was after three-year limitation); *Calvin v. Am. Fid. Mortg. Services, Inc.*, 2011 WL 1672064 (N.D. Ill. May 3, 2011) (*Beach* did not discuss how the right must be asserted within the three-year period).

26 678 F.3d 271, 278 (4th Cir. 2012).

27 *Id.* at 275.

28 *Id.* at 278.

29 *Id.* at 277.

30 *Id.* at 277-78.

31 See *Sultan v. BAC Home Loans Servicing L.P.*, 2011 WL 1557933 (W.D. Mo. Apr. 25, 2011) (because debtors filed a notice of rescission within three years of closing, they have one year from creditor’s refusal to rescind to file a claim); *Ibrahim v. MortgageIT, Inc.*, 2011 WL 2560233 (N.D. Cal. June 28, 2011); *Santos v. Countrywide Home Loans*, 2009 WL 2500710 (E.D. Cal. Aug. 14, 2009) (“Plaintiff could file suit after the end of the three year period of repose but within the one year limitations period borrowed from Section 1640”); *Pearce v. Bank of Am. Home Loans*, 2010 WL 2348637 (N.D. Cal. June 8, 2010) (notice of intent to

rescind within three years is sufficient, but plaintiff must bring the claim within one year of the creditor's denial or failure to respond); *Sherzer v. Homestar Mortg. Services*, 2010 WL 1947042 (E.D. Pa. May 7, 2010) *report and recommendation adopted as modified*, 2010 WL 2649852 (E.D. Pa. July 1, 2010); *Lee v. U.S. Bank*, 2010 WL 2635777 (N.D. Cal. June 30, 2010); *Briosos v. Wells Fargo Bank*, 737 F.Supp.2d 1018, 1026-27 (N.D. Cal. 2010) (because debtor exercised his right to rescission before the right expired by operation of §1635(f)'s three-year limitations period and filed suit less than one year after creditor rejected his request for rescission, claim is not barred); *Cf. Palmer v. Champion Mortg.*, 465 F.3d 24, 27 (1st Cir. 2006) (if a creditor does not respond to a rescission request within 20 days, the debtor may file suit in federal court to enforce the rescission right).

32 *Gilbert v. Residential Funding LLC*, 678 F.3d 271, 276 (4th Cir. 2012) (citing *Textron, Inc. v. Comm'r*, 336 F.3d 26, 31 (1st Cir.2003)).

33 *See Beach*, 523 U.S. at 411 (since a statutory rescission right could cloud a bank's title on foreclosure, Congress may well have chosen to circumscribe that risk).

34 *See Leonard v. Bank of Am. NA*, 2012 WL 3001266 (E.D. Wis. July 23, 2012) ("concerns regarding the potential threat to a clear title in cases where it is difficult to discover that a rescission demand has been made, it cannot ignore the plain language of §1635(f) and Regulation Z").

35 *See* §§1635(f), (b), 1640(e); *Abubo v. Bank of New York Mellon*, 2012 WL 2022327 (D. Haw. June 5, 2012) (the date of occurrence of a TILA violation for failure to honor a borrower's rescission "is the earlier of when the creditor refuses to effectuate rescission, or twenty days after it receives the notice of rescission") (citing *Kruse v. U.S. Bank, N.A.*, 2010 WL 331354, at *3 (D.Colo. Jan.20, 2010)).

36 *See* Mass. Gen. Laws Ann. ch. 140D, §10(f) (West) ("An obligor's right of rescission shall expire *four years* after the date of consummation of the transaction or upon the sale of the property, whichever occurs first, notwithstanding that the information and forms required under this section or any other disclosures required under this chapter have not been delivered to the obligor") (emphasis added).