Use It or Lose It: The Fourth Circuit Keeping the Right to Rescind Under TILA Out of the Courts in *Gilbert v. Residential Funding LLC.*[*]

INTRODUCTION

Over the past four decades, courts have been charged with the task of interpreting Congress's Truth in Lending Act ("TILA" or "the Act").[1] Aimed at ensuring the informed use of credit, the Act intends to place borrowers and creditors on a level playing field in order to give borrowers a fair shot at assessing the total cost of securing credit.[2] In the event a lender falls short of the duties imposed under TILA, the Act provides the borrower with several remedies.[3]

Briefly stated, § 1635(a) of TILA grants a borrower the right to rescind his or her loan agreement within three days following the consummation of a loan transaction or delivery of the required disclosures.[4] This right expires three years after the consummation of the transaction, even if the lender never makes the required disclosures.[5] If, in the three years following the consummation of the transaction, the borrower discovers that the lender has failed to comply with the requirements of § 1635(a), the borrower may elect to rescind the loan by providing notice of rescission to the lender.[6] Despite the seemingly straightforward language, questions remain as to how the borrower is to exercise this right. For instance, is notice to the lender sufficient to invoke the right of rescission, or merely a necessary step? If the lender refuses to cooperate or fails to respond, must the borrower also file a suit to enforce the right? And, if notice is tendered within three years from the date of consummation and the lender refuses to terminate the security interest, is a subsequent suit, filed more than three years from the date of consummation, barred?

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1. Truth in Lending Act, 15 U.S.C. §§ 1601–1693r (2006).

2. See 15 U.S.C.A. § 1635(a) (West Supp. 2012); Regulation Z, 12 C.F.R. § 226.18 (2012) (delineating the content of required disclosures).

3. *See, e.g.*, 15 U.S.C.A. § 1635(a); 15 U.S.C.A. § 1640(a) (West 2011 & Supp. 2012).

4. *See* 15 U.S.C.A. § 1635(a) (West Supp. 2012); *see also, e.g.*, Rosenfield v. HSBC Bank, USA, 681 F.3d 1172, 1184 (10th Cir. 2012) (stating that TILA "provides a federally recognized basis for a party to rescind her loan agreement where she has not been provided the required statutory disclosures"); McOmie-Gray v. Bank of Am. Home Loans, 667 F.3d 1325, 1327 (9th Cir. 2012) (stating that "TILA grants borrowers the right to rescind . . . in the event the lender has failed to make the required disclosures").

5. *See* 15 U.S.C. § 1635(f).

6. *See id.* § 1635(a), (f).

Of the four circuits that have answered these questions, three have held that mere notice is insufficient when the lender fails to consent to rescission.[7] These courts relied on *Beach v. Ocwen Federal Bank*,[8] a Supreme Court decision closely related to, but not dispositive on, the questions presented in these cases.

The Fourth Circuit stands alone in holding that mere notice *is* sufficient to exercise the right of rescission.[9] The court found that *Beach* is dispositive as to the fact that the right is completely extinguished when the three-year timeframe expires, but that it does not reach the issue of notice and therefore does not control on that point.[10]

This Recent Development argues that the Fourth Circuit, in *Gilbert v. Residential Funding LLC*,[11] correctly held that when a borrower provides notice of rescission within the three-year limitation, the right has been exercised.[12] The statute unambiguously requires only that the borrower provide *notice* of rescission, and Regulation Z—which provides interpretive guidance on TILA—explicitly states that to exercise the right of rescission, the borrower is to provide notice to the lender.[13] Further, the Consumer Financial Protection Bureau (CFPB), the agency designated to create and revise interpretive guidelines for this statute[14] adopts this position.[15] Plainly put, the *Gilbert* court accurately interpreted Congress's intent and gave effect to the plain meaning of the statute; any contrary reading would be an unwarranted judicial gloss.

Part I of this Recent Development analyzes the history and purpose of TILA, highlighting the absence of any requirement to file suit and the explicit directive to deliver notice in order to exercise the right of rescission. Part II analyzes the Supreme Court's holding in *Beach* and distinguishes it from the cases addressing the proper

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7. *See infra* Part II.
8. 523 U.S. 410 (1998).
9. *See infra* Part III.
10. *See infra* Part II.
11. 678 F.3d 271 (4th Cir. 2012) [hereinafter *Gilbert II*].
12. *See id.* at 277–78 (answering in the affirmative the question of "whether the [borrowers] . . . exercised their right to rescind with the . . . letter [of notice]").
13. *See* 12 C.F.R. § 226.23(a)(2) (2012).
14. *See* 12 U.S.C.A. § 5491 (West Supp. 2012) (defining Bureau as the "Bureau of Consumer Financial Protection" and listing duties); *id.* § 5581(b) (transferring powers to the Bureau); *id.* § 5581(a) (defining "consumer financial protection functions" to mean "all authority to prescribe rules or issue orders or guidelines pursuant to any Federal consumer financial law, including performing appropriate functions to promulgate and review such rules, orders, and guidelines").
15. *See infra* notes 110–23 and accompanying text.

method of exercising the right to rescind. Part II also analyzes the Third, Ninth, and Tenth Circuits' holdings. Part III discusses the Fourth Circuit's decision in *Gilbert* and analyzes why it is the correct interpretation. Part IV also discusses the American Banking Association's and the CFPB's position, as stated in amicus briefs filed for a similar case waiting to be heard by the United States Court of Appeals for the Fourth Circuit. Finally, this Recent Development will conclude with a discussion of the effect of § 1635(f), which will illustrate that the alleged negative effects of the Fourth Circuit's interpretation are valid, but misdirected, and that the holding accurately reflects Congress's intent.

I. THE RIGHT TO RESCISSION IN THE TRUTH IN LENDING ACT

Congress enacted TILA "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."[16] To effectuate this purpose, the Act provides the borrower with a right to rescind[17] a loan agreement within three days of either the "consummation of the transaction" or the lender's delivery of the "information and rescission forms" and required disclosures, whichever is later.[18]

Even if the lender fails to provide the required information and rescission forms, or to make the required disclosures, the right to rescind expires three years from the consummation of the transaction.[19] After three years pass, a suit to enforce the right is not simply barred, the underlying right itself is extinguished.[20] Since this is a use-it-or-lose-it right, how does one use it?

Courts finding that mere notice is sufficient for a borrower to exercise the right to rescind rely upon the language of Regulation Z: "To exercise the right to rescind, the consumer shall notify the creditor of the rescission by mail, telegram or other means of written communication."[21] Looking at the language alone, the only stated

16. 15 U.S.C. § 1601(a) (2006).

17. Not every loan transaction carries this right. In order to fall within the rescission provision of § 1635(a), the security interest held by the lender must be in a "property which is used as the principal dwelling of the person to whom credit is extended." 15 U.S.C.A. § 1635(a) (West Supp. 2012).

18. *Id. See generally* Regulation Z, *supra* note 2 (listing required disclosures). Of particular relevance is the requirement to disclose to the borrower the rights of rescission and to "provide, in accordance with regulations of the Bureau, appropriate forms for the obligor to exercise his right to rescind any transaction." *Id.*

19. 15 U.S.C. § 1635(f) (2006).

20. *See* Beach v. Ocwen Fed. Bank, 523 U.S. 410, 412 (1998).

21. 12 C.F.R. § 226.23(a)(2) (2012).

requirement is to provide notice to the creditor. Courts that find notice sufficient are reluctant to read in a requirement that the borrower also bring suit.[22]

Conversely, other courts find that notice alone is insufficient and simply a necessary requirement: the borrower must first give notice and then file suit before the three-year period expires.[23] To clarify this reading and understand why the Third, Ninth and Tenth Circuits[24] have interpreted the statute to require more than notice alone, it is helpful to contrast Regulation Z, discussed above, with some language from § 1635(a): "[T]he obligor shall have the right to rescind the transaction . . . by notifying the creditor . . . of his intention to do so."[25] This statutory language places a premium on the relation between "shall have the right" and "by notifying the creditor," making notice a condition precedent to the existence of the right. In this reading, the right to rescind becomes available only when the borrower provides notice to the creditor. Therefore, until the borrower provides notice, the right does not exist or, at minimum, is not enforceable.

Although this reading has its merits, it subverts the intent of Congress and leaves the borrower unable to rely upon the information she receives, or is supposed to receive, as part of the loan transaction. Section 1601(a)[26] sets forth Congress's intent and purpose: to effectuate the "informed use of credit."[27] In the course of seeking to inform consumers and allow them to secure credit in the most fair and equitable manner, Congress provided the right to rescind and required that the lender deliver to the borrower "appropriate forms for the obligor to exercise his right to rescind."[28]

The Code of Federal Regulations supplies a model rescission form to aid borrowers in the rescission process. The form contains no provision requiring the borrower to file a claim to enforce the right.[29] In fact, under the sub-heading "How to Cancel," the form reads: "If you decide to cancel this transaction, you may do so by notifying us in

22. *See infra* Part III.

23. *See, e.g.*, Rosenfield v. HSBC Bank, USA, 681 F.3d 1172, 1188 (10th Cir. 2012) ("[N]otice, by itself, is not sufficient to exercise (or preserve) a consumer's right of rescission under TILA. The commencement of a lawsuit within the three-year TILA repose period [is] required.").

24. *See infra* Part II.

25. 15 U.S.C.A. § 1635(a) (West Supp. 2012).

26. *See supra* note 16 and accompanying text.

27. 15 U.S.C. § 1601(a) (2012).

28. 15 U.S.C.A § 1635(a).

29. 12 C.F.R. pt. 226.23 app. H-8.

writing at (creditor's name and business address)."[30] The form also describes the process of rescission once notice is delivered, namely that the burden of cancelling the loan transaction falls on the creditor.[31] While Regulation Z and the model rescission form are not dispositive law, they are supported by the CFPB.[32] If the notice-is-insufficient reading is followed, these forms are considerably less helpful and likely detrimental to the purpose which they are intended to achieve.

II. *BEACH*: THE SUPREME COURT TIDAL WAVE

The Third, Ninth and Tenth Circuits, each requiring the borrower to file a suit, have relied primarily on the Supreme Court's decision in *Beach v. Ocwen Federal Bank*.[33] In *Beach*, the borrowers ceased making mortgage payments on a refinanced loan secured against their home.[34] In the foreclosure proceeding, the borrowers asserted that the lender's claim should be reduced by the "actual and statutory damages" borrowers sustained as a result of the lender's failure to make certain disclosures required by TILA.[35] The borrowers stopped paying approximately five years after the consummation of the loan transaction, and the bank instituted foreclosure proceedings a year later.[36] The borrowers never delivered notice to the lender or attempted to exercise the right of rescission in any way. The Court acknowledged that the right to rescind had expired and that "Congress had included no saving clause to revive an expired right of rescission as a defense in the nature of recoupment or setoff."[37] Further, the Court found that § 1635(f) governs the duration of the right, not the time within which a suit must be commenced: "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."[38] Ultimately, the Court held

30. *Id.*

31. *Id.* ("If you cancel the transaction, the [mortgage/lien/security interest] is also cancelled. Within 20 calendar days after we receive your notice, we must take the steps necessary to reflect the fact the [mortgage/lien/security interest] . . . has been cancelled, and we must return to you any money or property you have given to us or to anyone else in connection with this transaction.").

32. *See infra* Part IV.C.

33. 523 U.S. 410 (1998).

34. *Id.* at 413.

35. *Id.* at 413–14.

36. *Id.* at 413.

37. *Id.* at 414.

38. *Id.* at 417.

that the borrowers were barred from using the right to rescind defensively in this suit.[39]

One key difference between *Beach* and the cases discussed below is that the borrowers in *Beach* "conceded that any right they may have had to institute an independent proceeding for rescission under § 1635 [had] lapsed."[40] The borrowers' claim rested instead on the theory that since they had a basis upon which to rescind and would have been allowed to rescind within the three-year timeframe, they could raise this right as a defense to a creditor's collection action even though they had failed to bring, or had chosen not to pursue, a claim for rescission within the three-year period.[41] The Court, however, did not agree because this theory required that § 1635(f) be read as a statute of limitation, and in the Court's view, this reading was unfeasible.[42] Thus, the Court concluded that there is "no federal right to rescind, defensively or otherwise, after the 3-year period of § 1635(f) has run."[43]

Identification of the appropriate method to exercise the right to rescission within the three-year timeframe is not only absent from the *Beach* Court's discussion, but also irrelevant to the case's outcome. This absence creates a gap between the holding in *Beach* and the issues that arise regarding the legal process for exercising this right of rescission. The notice-is-insufficient courts have erroneously interpreted *Beach* by holding that it forecloses the possibility of a valid suit brought to enforce a right of rescission after the three-year timeframe passes. The courts that address the issue of valid notice and untimely suit are not being asked to revive the right or to extend the right beyond the three-year timeframe, but to acknowledge that the borrower had validly exercised the right within the three-year period.

In a 2011 Third Circuit decision, *Williams v. Wells Fargo Home Mortgage, Inc.*,[44] the borrower provided notice of her intent to rescind on November 22, 2004, just over two years after the consummation of

39. *See id.* at 419.

40. *Id.* at 415.

41. *See id.*

42. *See id.* at 417 ("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. . . . 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.").

43. *Id.* at 419.

44. 410 F. App'x 495 (3d Cir. 2011).

the loan transaction.[45] The lender failed to respond, and the borrower filed a complaint on August 22, 2006, against the lender to enforce rescission.[46] Facing split results from the lower courts in the circuit, the court found *Beach* dispositive, claiming that the Court in *Beach* "implicitly recognized that any claim for rescission under § 1635 must be filed within the three-year period."[47] While the provision of notice may have invoked the right, the court said, "[m]ere invocation without more . . . will not preserve the right beyond the three-year period."[48] Thus, according to the Third Circuit, "[A] legal action to enforce the right must be filed within the three-year period or the right will be 'completely extinguishe[d].' "[49]

The Ninth Circuit, in *McOmie-Gray v. Bank of America Home Loans*,[50] faced a similar set of circumstances.[51] The borrower sent notice of her intent to rescind to the lender on January 18, 2008, nearly two years after the consummation of the loan transaction on April 14, 2006.[52] She subsequently filed an untimely suit to enforce the rescission on August 28, 2009.[53] Relying heavily on *Beach* and the circuit's own precedent,[54] the court held: "Rescission is not automatic

45. *Id.* at 497.

46. *Id.*

47. *Id.* at 499. The court reached this conclusion from the declaration that the right is extinguished and cannot be exercised "defensively or otherwise, after the 3-year period . . . has run." *Id.* (quoting *Beach*, 523 U.S. at 419).

48. *Id.* This logic makes notice sufficient in the context of a consensual rescission between the lender and the borrower, but only as a necessary step to enforce the right against an unwilling lender.

49. *Id.* (internal citations omitted).

50. 667 F.3d 1325 (9th Cir. 2012).

51. There is one key difference between *McOmie-Gray* and *Williams*: unlike the lender in *Williams*, the lender in *McOmie-Gray* did respond to the borrower's notice by initially refusing to honor the rescission. *Id.* at 1327. In fact, the borrower claimed that the lender negotiated with her for more than a year before reaching an agreement to toll the statute of limitations on her claim until August 30, 2009. *Id.* Nevertheless, the *McOmie-Gray* court declined to give effect to the borrower's notice and did not address any bad faith issues that may have driven the bank to negotiate a tolling agreement as the borrower alleged. *Id.* at 1329.

52. *Id.* at 1326.

53. *Id.* at 1327.

54. The *McOmie-Gray* court relied on *Miguel v. Countrywide Funding Corp.*, in which the court held that the borrowers had lost their right by failing to provide notice to the correct lienholder within the three-year timeframe. 309 F.3d 1161, 1165 (9th Cir. 2002). In *Miguel*, the borrowers notified the mortgage servicer and actually filed suit on the last day of the three-year timeframe. *Id.* at 1162–63. But, the mortgage servicer to whom they sent notice and against whom they filed suit was merely a servicing agent for the lienholder bank. *Id.* at 1163. Thus, the borrowers filed an amended complaint but failed to provide notice to the lienholder bank. *Id.* The court found no authority that notice to the servicing agent would suffice as notice to the bank and thus held, "The Bank was not required to cancel the loan because [the borrower] . . . did not notify the Bank of cancellation within the limited three-year period." *Id.* at 1165. *But see* Palmer v. Wilson, 359 F. Supp 1099,

upon a borrower's mere notice of rescission. . . . Instead, where a lender fails to comply with § 1635(b), the statute and regulations contemplate that a borrower, who by sending notice of rescission has 'advanced a claim seeking rescission,' will seek a determination that rescission is proper."[55] Thus, in the Ninth Circuit, a borrower must file a suit to enforce the right of rescission when the lender refuses or fails to comply with its obligations under § 1635(b).

The Tenth Circuit issued the most recent decision on this issue in *Rosenfield v. HSBC Bank, USA*.[56] In this case, the borrower consummated the loan transaction on November 3, 2006.[57] Nearly two years later, the borrower delivered notice of rescission to the lender.[58] After receiving no response, the borrower filed a claim on December 21, 2009.[59] The court held that

> the provision of written notice to rescind is not enough for a consumer to invoke her right to rescission under TILA where a creditor fails to respond—i.e., fails to "return to the [borrower] any money or property . . . and . . . take any action necessary or appropriate to reflect the termination of any security interest created under the transaction [within twenty days of receiving notice]."[60]

Thus, like the Ninth Circuit, the court in effect said notice is insufficient when the lender fails to comply with its obligations under § 1635(b).[61] Such a regime forces upon the borrower the extra burden of filing a suit when the lender fails or refuses to comply with its obligations under the Act. This approach gives the lender unwarranted control over the legal process of rescission and encourages the lender to be uncooperative.

1102 (N.D. Cal. 1973), *vacated by* 502 F.2d 860 (9th Cir. 1974) (holding that "[b]y sending their notice to [the lender] . . . , plaintiffs did all that was required of them"). Although this district court decision was ultimately vacated, the court of appeals did so on grounds unrelated to notice. *See Palmer*, 502 F.2d at 862 (noting that the district court "apparently was unaware that it had the equitable power to condition its decree [on tender of repayment]" and remanding for consideration of this issue).

55. *McComie-Gray*, 667 F.3d at 1327 (internal citations omitted). Section 1635(b) discusses the lender's obligations upon receiving notice from the borrower of the intent to rescind. *See* 15 U.S.C. § 1635(b) (2006).

56. 681 F.3d 1172 (10th Cir. 2012).

57. *Id.* at 1175.

58. *Id.* at 1176.

59. *Id.*

60. *Id.* at 1182 (quoting § 1635(b)).

61. Section 1635(b) requires the creditor to "return to the obligor any money or property given as earnest money, downpayment, or otherwise, and shall take any action necessary or appropriate to reflect the termination of any security interest created under the transaction." § 1635(b).

III. *GILBERT*: THE FOURTH CIRCUIT'S PLAIN MEANING APPROACH

In *Gilbert*, the Fourth Circuit addressed the issue and found that mere notice *is* sufficient to exercise the right to rescind under §1635(a).[62] On May 5, 2006, the borrowers executed a note to refinance the lien on their home.[63] In 2008, the borrowers defaulted on the loan, and a foreclosure action was subsequently brought on March 12, 2009.[64] The borrowers' counsel wrote a letter to the lender on April 5, 2009, alleging several violations of TILA and providing notice that the borrowers were rescinding the loan transaction.[65] This letter also requested that the lender cancel its security interest in the borrowers' property and return all consideration the borrowers paid to the lender.[66] The lender's counsel responded on April 14, 2009, saying they "had reviewed the . . . [borrower's] file and found 'no basis to conclude that there were any material disclosure errors that would give rise to an extended right of rescission.' "[67]

On September 14, 2009, the borrowers filed a suit in state court to rescind the loan transaction.[68] The lender removed the case to the district court, which granted the lender's motion to dismiss; the borrowers appealed.[69] The United States Court of Appeals for the Fourth Circuit undertook a de novo review.[70]

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62. Gilbert v. Residential Funding, 678 F.3d 271, 276 (4th Cir. 2012).

63. *Id.* at 274.

64. *Id.*

65. *Id.*

66. *Id.* Pursuant to § 1635(b), the lender, "[w]ithin 20 days" of receiving notice of rescission, "*shall* take any action necessary or appropriate to reflect the termination of any security interest created under the transaction." 15 U.S.C. § 1635(b) (emphasis added). It is not until after the creditor performs these obligations that the borrower must return the property or its reasonable value. *Id.* However, some courts have conditioned the creditor's obligations following notice of rescission on the borrower's return of the property or the reasonable value. *See, e.g.*, Am. Mortg. Network, Inc. v. Shelton, 486 F.3d 815, 821 (4th Cir. 2007) ("Once the trial judge . . . determined that the [borrowers] . . . were unable to tender the loan proceeds, the remedy of unconditional rescission was inappropriate."); Palmer v. Wilson, 502 F.2d 860, 862 (9th Cir. 1974) ("[T]he court may condition the granting of rescission on the debtor's compliance with the court's order to tender to the creditor the principal of the loan that the debtor has received.").

67. *Gilbert*, 678 F.3d at 274 (internal citations omitted).

68. *Id.* at 274–75.

69. *Id.* at 275.

70. *Id.* Shortly after the district court granted the lender's motion to dismiss, the borrowers filed a Rule 60(b) motion for relief when they learned the lender's signing officer had engaged in "improper affidavit practices in unrelated cases . . . ." *Id.* In the state courts, addressing foreclosure, the North Carolina Court of Appeals reversed the lower court's decision to allow foreclosure on the basis of the improper affidavit practices. *Id.* The district court then filed an order stating, "[S]hould the Fourth Circuit return jurisdiction to this court, the court would grant . . . [borrower's Rule 60(b)] motion, dismiss the federal claims . . . , and remand all state-law claims to . . . [the superior court]." *Id.*

In the district court, the borrowers' claimed that their right to rescission was validly exercised when their counsel sent the lender the notice of rescission on April 5, 2009.[71] The court disagreed, citing *American Mortgage Network, Inc. v. Shelton*,[72] controlling Fourth Circuit precedent.[73] In *Shelton*, the court held, "[U]nilateral notification of cancellation does not automatically void the loan contract."[74] Until "'the appropriate decision maker has [determined that the right is available,] . . . the [borrowers] have only advanced a claim seeking rescission.' "[75] The *Gilbert* district court also relied on the policy reasons underlying the *Shelton* decision, namely, to allow automatic rescission upon notice alone would allow "a borrower . . . [to] get out from under a secured loan simply by claiming TILA violations, whether or not the lender had actually committed any."[76]

The *Gilbert* court first considered the borrowers' claim in light of the plain meaning of the statute and determined that the statute requires only the provision of notice to exercise the right of rescission.[77] In construing a statute, the court said, "We . . . must presume that a legislature says in a statute what it means and means in a statute what it says there."[78] Turning to § 1635(f), the court noted the language that causes the right to expire, notwithstanding any outstanding failures of the lender to provide required disclosures, "three years after the date of consummation of the transaction[,]"[79] and focused its attention on the implementing regulation.

In interpreting the regulation, the court began with the same plain-meaning canon. Quoting the Third Circuit, the court said, "[I]f 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."[80] Regulation Z reads: "To exercise the right to rescind, the consumer shall notify the creditor of the rescission by

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However, the Fourth Circuit chose to undergo the de novo review, likely for the reason of setting the precedent for rescission in the circuit.

71. Gilbert v. Deutsche Bank Trust Co. Ams., No. 4:09-CV-181-D, 2010 WL 2696763, at *5 (E.D.N.C. July 7, 2010).

72. 486 F.3d 815 (4th Cir. 2007).

73. *Gilbert*, 2010 WL 2696763, at *5.

74. *See id.* (quoting *Shelton*, 486 F.3d at 821).

75. *Id.* (citing Large v. Conseco Fin. Servicing Corp., 292 F.3d 49, 54–55 (1st Cir. 2002)).

76. *See id.* (quoting *Shelton*, 486 F.3d at 821).

77. Gilbert v. Residential Funding, 678 F.3d 271, 276 (4th Cir. 2012).

78. *Id.* (internal citations omitted).

79. 15 U.S.C. § 1635(f) (2006).

80. *Gilbert*, 678 F.3d at 276 (quoting Textron, Inc. v. Comm'r, 336 F.3d 26, 31 (1st Cir. 2003)).

mail, telegram or other means of written communication."[81] The court bolstered this statement by echoing the Supreme Court: "[A]bsent some obvious repugnance to the statute, the . . . regulation implementing [TILA] should be accepted by the courts."[82]

The court found that the plain reading of the statute indicates the borrowers "exercised their right to rescind with the April 5, 2009, letter."[83] The court noted, "[N]either 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."[84] Thus, unlike the approach taken in the Third, Ninth and Tenth Circuits, the *Gilbert* court refused to read in a requirement that the borrower file a suit to enforce the right to rescind. The court distinguished the case at hand from *Shelton*, on which the lower court had so heavily relied, by pointing to the difference between what is required to *exercise the right* and what is required to *complete the rescission and void the loan*.[85] Regulation Z and § 1635(f), the court said, govern what is required to exercise the right.[86] To complete the rescission, however, "[e]ither the creditor must 'acknowledge[ ] that the right of rescission is available' and the parties must unwind the transaction amongst themselves, or the borrower must file a lawsuit."[87] The court concluded its treatment of *Shelton* by saying, "At this stage of the litigation, we are not concerned with whether the contract has been effectively voided[,] . . . [but] whether . . . [the borrowers] exercised their right to rescind with the April 5, 2009, letter."[88]

After distinguishing *Shelton*, the court dealt with *Beach*. Unlike the many courts finding *Beach* dispositive on the issue at hand, the Fourth Circuit recognized that *Beach* does not quite reach the issue of effective rescission.[89] The court reasoned, correctly, that *Beach* dealt with whether § 1635(f) works as a statute of limitation to prevent enforcement of the right of rescission, or whether it extinguishes the right completely.[90] The *Beach* Court said, "[Section 1635(f)] talks not

81. 12 C.F.R. § 1026.23(a)(2) (2012).

82. *Gilbert*, 678 F.3d at 277 (quoting Anderson Bros. Ford v. Valencia, 452 U.S. 205, 219 (1981)).

83. *Id.* at 277.

84. *Id.*

85. *Id.*

86. *Id.*

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

88. *Id.*

89. *See supra* notes 40–55 and accompanying text.

90. *Gilbert*, 678 F.3d at 278.

of a suit's commencement but of a right's duration . . . ."[91] Thus, the Fourth Circuit reasoned, since *Beach* held only that § 1635(f) governs the expiration of the underlying right, the decision does not require borrowers to file a suit to enforce the right.[92] The court's conclusion thus gave effect to *Beach* and adhered to the plain meaning of the statute and regulation.

Conversely, one could argue that the Fourth Circuit maneuvered delicately around *Beach* and its own precedent, but such an argument requires a heavy dose of inference. *Beach* simply does not reach the issue of notice.[93] In fact, *Beach* did not reach at all the method by which a borrower could exercise rescission, but addressed only whether the right is extinguished absolutely once the three-year timeframe of § 1635 has ended.[94] When the question is presented as the Fourth Circuit presents it—that is, despite whether or not the rescission has been completed, has the right been exercised?—the holding in *Gilbert* is in line with *Beach*.

In addressing the borrowers' claims de novo, the Fourth Circuit in *Gilbert* effectuated Congress's intent through a plain language interpretation of the statute and accompanying regulation, distinguished *Shelton* and *Beach*, and issued a rule that alleviates the policy concerns expressed by the district court.

IV. POLICY VERSUS THE PLAIN LANGUAGE

A. Criticism of Mere Notice as Sufficient

Opponents of the Fourth Circuit's interpretation criticize its holding that mere notice is sufficient to exercise the right of rescission, claiming it will unnecessarily cloud titles and burden the lending industry.[95] The opposition is rooted in the view that allowing a suit for rescission beyond the three-year timeframe in § 1635(f) will create uncertainty as to the state of the loan.[96]

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91. Beach v. Ocwen Fed. Bank, 523 U.S. 410, 417 (1998).

92. *Gilbert*, 678 F.3d at 278.

93. In fact, the borrowers in *Beach* conceded that they had lost their right to rescission under § 1635. *See Beach*, 523 U.S. at 415.

94. Thus, it follows that when the right is successfully exercised during the three-year period, the question involved in *Beach* is irrelevant.

95. *See* Rosenfield v. HSBC Bank, USA, 681 F.3d 1172, 1177 (10th Cir. 2012) ("[B]anks must be protected from the possibility that a foreclosed home could have a 'cloudy title' because of a delayed rescission claim by a borrower."); Brief of Amici Curiae American Bankers Association, Consumer Bankers Association, and Consumer Mortgage Coalition Supporting Appellees and Affirmance at 12, Wolf v. Fed. Nat'l Mortg. Ass'n, No. 11-2419, 2013 WL 749652 (4th Cir. 2013) [hereinafter ABA Brief].

96. ABA Brief, *supra* note 95, at 6.

In *Rosenfield*, the Tenth Circuit restated the concern of the district court: "[T]o hold [that mere notice is sufficient] . . . introduces a lacuna between the expiration of the right to rescind and the time in which the lender might learn of a purportedly timely [r]escission that it does not recall receiving, with foreclosure (and perhaps even subsequent sale) falling within that temporal no-man's-land."[97] In sum, the court said, "[B]anks must be protected from the possibility that a foreclosed home could have a 'cloudy title' because of a delayed rescission claim by a borrower."[98]

The American Bankers Association, Consumer Bankers Association, and Consumer Mortgage Coalition cite "uncertainty over the housing finance market" as the most daunting detriment of the *Gilbert* decision.[99] Without a requirement to file suit, they claim that meritless rescission claims will abound.[100] To require the borrower to file suit, they claim, will force borrowers "to consider whether it is worth investing time and money in futile claims."[101]

While the logic of these policy concerns is sound, the aims are flawed. First, the potential for title gaps between the expiration of the three-year timeframe in § 1635(f) and the conclusion of foreclosure proceedings carries significantly less weight if the lender has been notified of the borrower's intent to rescind before the three-year period expires. TILA was enacted to "assure a meaningful disclosure of credit terms . . . and avoid the uninformed use of credit."[102] To this end, Congress provided the borrower with the right to rescind the loan transaction unconditionally within the three days following consummation, and at any time in the following three years if the lender fails to make required disclosures.[103] When a borrower exercises the congressionally conferred right in the manner stated in the statute (and accompanying regulation), a lender should not be able to ignore the notice and force the borrower to go above and beyond the actions Congress required to enforce the right. If the

97. *Rosenfield*, 681 F.3d at 1177 (internal citations omitted).

98. *Id.*

99. ABA Brief, *supra* note 95, at 3.

100. *Id.* at 8 (stating that "in the experience of amici and their members, TILA rescission claims frequently lack merit[,] . . . [are] raise[d] . . . on the eve of bankruptcy or in the midst of a foreclosure proceeding in a last ditch effort[,] . . . [and are brought by] borrowers [who] rarely have the ability to 'return the loan principal' as TILA requires" (internal citations omitted)).

101. *Id.* This cuts both ways, as requiring litigation is likely to give pause to borrowers to bring valid claims as well.

102. 15 U.S.C. § 1601(a) (2006).

103. *See id.* § 1635(a), (f).

borrower gives timely and valid notice[104] and the lender fails to respond, the fault for any cloud on the title rests with the lender.[105] Second, if the lender does respond and disputes the borrower's exercise of the right of rescission, the lender should foresee a suit to enforce the rescission and conduct foreclosure proceedings or any sale of the property accordingly. Although the lender might view the claim as delayed, Congress plainly provided the borrower the right to rescind for up to three years from the date of consummation of the loan transaction. A claim pursuant to a valid exercise of the right is not delayed.

Further, requiring a borrower to file suit to dissuade would-be plaintiffs from bringing meritless claims is to add an unwarranted burden to the exercise of the right. Not surprisingly, lenders will favor such a requirement, because they are necessarily better positioned to handle these suits. Generally, lenders will have far greater resources, a more experienced legal team, and much less to lose, whereas borrowers are typically facing foreclosure and mounting debt, and are not likely to have an attorney on tap who is well-versed in TILA claims.[106] Thus, courts requiring borrowers to file suit in addition to providing notice are likely to dissuade borrowers from attempting to assert their right of rescission whether or not the claim is meritorious. For a court to impose this requirement through language even suggesting such a mandate is absent from the governing statute would be unwarranted judicial gloss that clearly favors lenders.

B. TILA's Built-In "Remedial Economy" Mechanisms

Even without such a requirement, the structure of a TILA rescission claim forces any outstanding rescission claims to be settled

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104. Timely and valid notice would be notice sent within the timeframe specified by 15 U.S.C. § 1635(a) and (f), and sent to the specified location listed on the rescission form the lender is required to provide. If part of the borrower's TILA claim were to consist of a failure to provide the rescission form, a good-faith effort to provide notice ought to suffice since improper notice would be the direct result of the lender's initial failure to disclose.

105. *See* Brief of the Consumer Financial Protection Bureau as Amicus Curiae in Support of Plaintiff-Appellant and Reversal at 26, Wolf v. Fed. Nat'l Mortg. Ass'n, No. 11-2419, 2013 WL 749652 (4th Cir. 2012), [hereinafter CFPB Brief] ("If . . . the lender chooses not to file suit, it assumes the risk of a later adverse determination and has little cause to complain about protracted uncertainty regarding the validity of its security interest.").

106. For instance, GMAC, the subservicer on the loan transaction at issue in *Gilbert*, is the financial arm of General Motors, which in the years leading up to the financial crisis in 2008 was more profitable than any other unit of the General Motors Company. Steven M. Davidoff, *Profits in G.M.A.C. Bailout to Benefit Financiers, Not U.S.*, DEALBOOK (Aug. 21, 2012, 6:57 PM), http://dealbook.nytimes.com/2012/08/21/profits-in-g-m-a-c-bailout-to-benefit-financiers-not-u-s/.

in court. As the *Rosenfield* court noted, "The primary justification of rescission . . . is 'remedial economy,' not, for instance, the compensatory goal of a damages award."[107] Thus, when a borrower seeks rescission, the goal is to place both parties in the same or similar position as they would have been had the loan never been consummated. To accomplish this goal, TILA requires that a borrower send notice to the lender, thereby imposing upon the lender the requirement to relinquish any security interest and return all consideration paid.[108] Then, TILA requires that "[u]pon the performance of the creditor's obligations . . . , the obligor shall tender the property to the creditor, except that if return of the property in kind would be impracticable or inequitable, the obligor shall tender its reasonable value."[109] Therefore, a borrower seeking to effect a TILA rescission will be required to forfeit the secured property or its reasonable value. This safeguard is intended to place the parties in equal positions upon the completion of rescission. Further, the procedure as a whole will require either cooperation or judicial determination. A borrower who gives notice will necessarily seek judicial enforcement if the lender, who fails to meet its obligations under § 1635(b), attempts to foreclose; the lender will seek judicial enforcement if the borrower fails to return the property or its reasonable value after the lender complies with its obligations. Requiring a suit at the outset would foreclose the possibility of cooperation and force the courts to be arbiters in the debtor-creditor relationship, when parties might otherwise settle their dispute outside the courts.

Critics argue that some borrowers will give notice of their intent to rescind without any valid claim in order to stall foreclosure proceedings. Without a doubt, those pressed to the ends of their means, faced with the loss of their primary residence, will certainly take actions that may seem unreasonable to the disinterested observer. It is not at all a stretch to assume that some borrowers in this position will deliver frivolous notice as a last ditch effort to delay foreclosure. However, if the lender, upon receiving such notice,

107. Rosenfield v. HSBC Bank, USA, 681 F.3d 1172, 1184 (10th Cir. 2012) (internal citations omitted).

108. 15 U.S.C. § 1635(b) (2006). Notice the mandatory language of § 1635(b): "[T]he creditor *shall* return to the obligor any money or property given as earnest money, downpayment, or otherwise, and *shall* take any action necessary or appropriate to reflect the termination of any security interest created under the transaction." *Id.* (emphasis added).

109. *Id.*

provides a good-faith refusal,[110] the borrower will still be required to file a suit to enforce the rescission under the *Gilbert* holding.[111] Since the borrower must seek out judicial enforcement of the rescission if the lender does not agree to rescind the loan, the borrower that lacks a valid claim will be wary of entering a costly legal battle. Unfortunately, borrowers with valid claims may also hesitate to initiate a legal battle. Ideally, lenders will cooperate with borrowers with valid claims for rescission; however, because lenders generally enjoy a financial advantage, they can afford either to choose not to respond to a borrower's notice or to refuse rescission outright without regard to the validity of the claim. They can wait instead and see if the borrower files suit. This wait-and-see approach is harmful to the purpose of the statute; Congress or the CFPB should consider additional penalties to be imposed on lenders that deliberately refuse to cooperate.

C. *The Consumer Financial Protection Bureau's Position and the Fourth Circuit's Second Chance*

The CFPB has filed an amicus brief in the Fourth Circuit for an upcoming case, *Wolf v. Federal National Mortgage Association*, asserting its interest in the correct interpretation of TILA and Regulation Z.[112] The CFPB, with exclusive authority to create and explain rules concerning TILA,[113] contends that notice alone is sufficient to exercise the right of rescission within the three-year timeframe of § 1635(f).[114] The CFPB's position reinforces the plain language interpretation of the statute and supports the *Gilbert* holding. The CFPB explains, "To rescind a mortgage loan under TILA and Regulation Z, consumers must notify their lenders within three years of obtaining the loan, but are not also required to sue their lenders within that same timeframe if the lenders contest the rescission."[115] Subsequent litigation, while not necessary in the event of a cooperative unwinding of the transaction, is "simply to determine

110. That is, the refusal must be based on a reasonable belief that no violations exist that will give rise to rescission under TILA.

111. *See supra* notes 86–88 and accompanying text.

112. *See* CFPB Brief, *supra* note 105, at 3.

113. *See supra* note 14; Dodd-Frank Wall Street Reform and Consumer Protection Act, 12 U.S.C. § 5581(b)(1) (Supp. 2011) (transferring the exclusive authority from the Board of Governors of the Federal Reserve System to the Consumer Protection Financial Bureau).

114. *See* CFPB Brief, *supra* note 105, at 3.

115. *Id.*

whether the lender's refusal to honor the rescission was justified."[116] Further, "Under TILA, the rescission is effective as of the notice date or not at all . . . ."[117]

The CFPB finds additional support for its claim that notice is sufficient in the history of rescission in contract law, drawing primarily from dicta in a previous Fourth Circuit case, *Griggs v. E.I. DuPont de Nemours & Company*.[118] Distinguishing between rescission at law and rescission in equity, the CFPB explains, "Rescission in equity is 'effected by the decree of the equity court which entertains the action for the express purpose of rescinding the contract and rendering a decree granting such relief.' "[119] Conversely, rescission at law can be effected "when one party 'has a right to unilaterally avoid a contract.' "[120] Rescission at law is complete when the party with the unilateral right to avoid the contract informs the other party to the contract of the intent to rescind.[121] The CFPB concludes that rescission under § 1635(a) is rescission at law because "consumers have a unilateral right to rescind upon notice to their lender."[122]

According to the CFPB, requiring borrowers to sue the lender in addition to providing notice within the three-year timeframe "misunderstands the role of litigation in a contested rescission."[123] Rescission is not accomplished by a victory in court, but rather by the provision of notice. When the lender refuses to rescind, or fails to respond, either the borrower or the lender may choose to seek judicial determination of whether or not there has been a valid rescission. At this point, the issue "is not whether the consumer *may* rescind, but whether he *did* rescind."[124] Going further, the CFPB suggests that the borrowers' argument in *Beach* would have been successful if the borrowers had provided timely notice.[125]

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116. *Id.* at 18.

117. *Id.* (stating, in addition, that "if the court finds the consumer did not have (or improperly exercised) a right to rescind, the rescission was not achieved, and the loan remains in place").

118. 385 F.3d 440, 445–46 (4th Cir. 2004).

119. *See* CFPB Brief, *supra* note 105, at 13 (citing *Griggs*, 385 F.3d at 446).

120. *See id.* (citing *Griggs*, 385 F.3d at 445).

121. *See id.*

122. *See id.* at 14 n.3 ("Section 1635(b) reflects 'a reordering of common law rules governing rescission,' in that it requires the lender to release the security interest before the consumer tenders." (internal citations omitted)).

123. *See id.* at 17.

124. *See id.* at 18 (emphasis in the original).

125. *See id.* ("[T]he consumer also may raise the rescission as a defense in foreclosure." (citing 15 U.S.C. § 1635(i) (2006))).

The Fourth Circuit will have a chance either to reaffirm *Gilbert* or reverse its position in the upcoming *Wolf* case.[126] The facts of *Wolf* are similar to *Gilbert*,[127] and it is likely the court will be unable to distinguish *Gilbert* as to the issue of notice.[128]

CONCLUSION

Contrary to the claims of critics, the Fourth Circuit's interpretation does not extend the right of rescission or provide for any tolling period. As the Fourth Circuit sees it, the consumer has, by the time the claim is filed, already exercised the right of rescission. Should the lender refuse to unwind the transaction, the dissatisfied party would, in the natural course, seek judicial determination. There is not now, nor has there ever been, an express or implied requirement to file suit. Imposing such a requirement on borrowers, who act according to the plain interpretation of the statute by providing notice without also filing suit within the three-year timeframe, would deprive them of the right of rescission.

The borrower, however, should not be permitted to tarry in filing a suit to enforce rescission when necessary. Although *Gilbert* did not address this issue, it will need to be clarified should this tactic gain popularity. That said, a time limit may not be necessary for two reasons. First, courts could extrapolate § 1640(e), a one-year statute of limitation on damages for TILA violations,[129] to the issue at hand.[130] However, some courts have explicitly rejected this

126. In fact, the Fourth Circuit may have several opportunities to revisit the issue since the attorneys for the lenders in Gilbert are working to petition the Fourth Circuit for a rehearing. *See Borrower Cannot Sue after Three Years to Rescind Mortgage Loan, 10th Circuit Rules* (June 14, 2012), BALLARD SPAHR, http://www.ballardspahr.com/AlertsPublications/LegalAlerts/2012-06-14-Borrower-Cannot-Sue-After-Three-Years-to-Rescind-Mortgage-Loan-10th-Circuit-Rules.

127. The borrower in *Wolf* executed a loan transaction on May 14, 2007 and defaulted on the loan on March 10, 2010. On May 2, 2010, the borrower gave notice to the lender of the intent to rescind, and although the lender initially cancelled the foreclosure sale, it ultimately sold the property in a subsequent foreclosure sale in July 2010 to Fannie Mae. *See* Wolf v. Fed. Nat'l Mortg. Ass'n, 830 F. Supp. 2d 153, 156–57 (W.D. Va. 2011).

128. Although there are other issues that arise in both cases, the underlying question of whether notice alone was sufficient to rescind the loan transaction will turn on fact patterns that are not easily distinguished.

129. 15 U.S.C. § 1640(e) (2006) (providing a one-year statute of limitations to bring suit for damages based on a TILA violation).

130. For instance, courts could require a suit to enforce rescission in the face of a stubborn lender to be brought within one year from the delivery of notice of the intent to rescind. Although, as discussed in Part III.A, it is likely that a suit will be filed by one of the parties well within one year from the date of notice.

argument.[131] Second, even if a court rejected this approach, the natural forces of a foreclosure sale will fetter out any potential suits: the borrower would either file suit or be forced to seek enforcement in the face of a foreclosure proceeding, either in an independent suit or as a defense to the foreclosure suit.[132]

It is, however, foreseeable that suits might arise after the conclusion of a foreclosure sale.[133] There are at least two possible responses to this situation: impose liability (1) on the lender for proceeding with a foreclosure sale where the lender should have recognized the valid rescission claim, or (2) on the borrower for failing to seek judicial enforcement of rescission. The latter raises the same issues as the notice-is-insufficient position; it encourages the lender to ignore the notice or refuse to rescind and proceed with the foreclosure waiting to see if the borrower will take any further action. If the borrower does not, the lender wins, regardless of whether or not the borrower had a valid claim. Conversely, imposing liability on the lender encourages the lender to determine the validity of rescission before proceeding with the foreclosure sale. While this will likely delay foreclosures, it will ensure that there are no title gaps. Further, it will encourage lenders to be diligent in making the required disclosures to avoid delayed foreclosures or, worse, rescinded loans.

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131. *See* McComie-Gray v. Bank of Am. Home Loans, 667 F.3d 1325, 1329 (9th Cir. 2012) ("We . . . now hold that adopting § 1640's one-year statute of limitations to rescission actions contradicts the plain language of the statute."). *But see* Rosenfield v. HSBC Bank, USA, 681 F.3d 1172, 1177–78 (10th Cir. 2012) (noting that the district court below "concluded in the alternative that even if [borrower's] . . . rescission claims were viable under TILA's statute of repose, they would still be barred by application of TILA's one-year statutory limitations provision in § 1640(a), (e)"). The *Rosenfield* district court flirted with the notion that § 1640(e) would allow a rescission claim (following valid notice) to be brought within one-year of the notice, though it did not expressly state such. *See* Rosenfield v. HSBC Bank, USA, Civil Action No. 10-cv-58-MSK-MEH, 2010 U.S. Dist. WL 3489926, at *3 (D. Colo. Aug. 31, 2010). Unfortunately, the *Rosenfield* court did not reach the issue on appeal. *Id.*

132. *See supra* Part III.A. This is similar to what the borrower did in *Beach*. However, the borrowers in that case did not provide notice and conceded they had no right to rescind. *See supra* notes 34–40 and accompanying text.

133. *See, e.g.*, Wolf v. Fed. Nat'l Mortg. Ass'n, 830 F. Supp. 2d 153, 156–57 (W.D. Va. 2011).

The borrower has every reason to believe that the statute and regulation say what Congress intended. A borrower that files notice with the intent that such notice will rescind the mortgage, and who does so in reliance upon the statute or rescission form supplied by the lender, should not be deprived of the right of rescission for failing to comply with an unknown and unstated requirement. Whatever the wisdom of the statute, the authority to revise falls not to the courts, but to Congress. Whatever the wisdom of the regulation, the authority to revise falls not to the courts, but to the CFPB.

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