

# PUBLICATION

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## Supreme Court to Rule on Controversial Right of Rescission Timeline for Mortgages

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The Supreme Court agreed this month to resolve a stark divide in the United State Courts of Appeals regarding the time bar for residential mortgage borrowers to file suits related to mortgage loan rescissions under the Truth in Lending Act (TILA). *Jesinoski v. Countrywide Home Loans, Inc.*, Docket No. 13-684 (U.S. Sup. Ct.). The circuit split the Court will resolve is whether a three-year deadline for borrowers to rescind certain loans also bars lawsuits against lenders for violations of the same statutory provision more than three years from origination of the loan.

The Consumer Financial Protection Bureau (CFPB) has taken a keen interest in the issue, filing amicus curiae briefs in each Court of Appeals case that considered the issue. The CFPB argued that the three-year deadline for borrowers to effectuate rescission is not a time bar for lawsuits or a statute of repose for claims arising out of Section 1635(a) of TILA. The CFPB's position would not only expand beyond three years the time in which lenders could face rescission lawsuits, but it could also create enormous uncertainty, because even the Bureau recognizes that its position does not provide for a clear time bar to litigation, with the result that courts may have to fashion one over time.

The CFPB's amicus briefs highlighted its current and future role in interpretation and enforcement of TILA, and it pointed out that in the Dodd-Frank enforcement world, the CFPB is charged with promulgating regulations regarding loan rescission under TILA. The Supreme Court also may address for the first time whether the CFPB's interpretation of TILA should be given deference by the Courts. Petitioners have argued that the CFPB's litigation position and its interpretation of TILA through regulation deserves full agency deference. If the Supreme Court gives agency deference to the CFPB's amicus brief, then the CFPB's interpretation of the statute would control so long as there was an ambiguity in the statute and the CFPB's interpretation was permitted by the text. This deference would be significant because the pending appeal arises from a private lawsuit and not from an administrative proceeding. At a minimum, the CFPB's interest in this matter implies potential growth in rescission-related enforcement actions. In addition, the CFPB's interpretations of TILA, if given deference, could lead to an increase in TILA litigation from borrowers.

This dispute concerns TILA's provision that borrowers can rescind certain non-purchase money mortgage loans can in two situations: (1) within three days of origination for any reason; or (2) within three years of origination when the originator fails to provide the borrower with complete and accurate statutory disclosures at closing. Borrowers rescind by notifying the originator or an acquiring lender in writing of their intent pursuant to Regulation Z, 12 C.F.R. § 226.23(a)(2). The lender must then return all funds received from the borrower, and the borrower must return the balance of the loan itself. This process can be at best tricky and at worst nearly impossible for lenders to administer without litigation.

Most lenders have believed that the three-year deadline acted as a bar for rescission lawsuits based on the United State Supreme Court's ruling of *Beach v. Ocwen Federal Bank*, 523 U.S. 410 (1998), in which the Court held that a borrower who tendered notice of rescission and filed suit after the three-year deadline was barred from pursuing the action. The *Beach* Court seemed to imply that the three-year deadline acted as statute of repose, barring any action filed more than three years after origination. The Eighth Circuit, joined by the First, Sixth, Ninth and Tenth Circuits, agreed with that interpretation. However, the Third, Fourth and Eleventh

Circuits held that the text of TILA does not bar lawsuits filed more than three years after origination and the statute requires only that the borrower send notices of rescission within three years.

At stake in this case is first certainty and repose for lenders dealing with potential rescission lawsuits filed years after origination. And beneath the surface of this case is the specter of potential agency deference to the CFPB's interpretation of TILA and other consumer loan statutes.