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Suit Up!: Favoring Lenders Over Borrowers, Eighth Circuit Requires Lawsuit Commencement to Effect TILA Rescissions

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NOTE

Suit Up!: Favoring Lenders Over Borrowers, Eighth Circuit Requires Lawsuit Commencement to Effect TILA Rescissions

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

TIMOTHY M. GUNTLI*

I. INTRODUCTION

With about two-thirds of Americans, on average, owning their homes,¹ mortgages are big business in the United States. To protect home loan borrowers, Congress enacted the Truth in Lending Act (TILA) in the late 1960s as a protective measure to ensure that lenders provide material disclosure of credit terms so that consumers can borrow responsibly and safely.² As a remedy for a failure of a lender to make such disclosures, borrowers may rescind the loan if they do so within three years of the closing.³ Rescission is an enormously powerful tool, and in a process where borrowers have little control, it remains the “singular source of borrower leverage in a legal and economic climate that remains generally inhospitable to homeowners.”⁴

Recently, an examination of the language contained in TILA and the related regulations has centered around a seemingly simple issue: May a borrower exercise the right to rescind simply by sending the lender notice of intent to do so, or must the borrower file a lawsuit demanding rescission? Because rescission remains the only leverage that a borrower has over a lender in a mortgage transaction, the answer to this question is vitally important to borrowers. Prior to *Keiran v. Home Capital, Inc.*, the United States circuit courts of appeals had split evenly on the issue.⁵ Then, in *Keiran*, the U.S.

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1. *Table 14: Quarterly Homeownership Rates for the U.S. and Regions: 1965 to Present*, U.S. CENSUS BUREAU (2013), <http://www.census.gov/housing/hvs/data/histtab14.xls>.

2. See 15 U.S.C. § 1601(a) (2012); see also *infra* Part III.A.

3. 15 U.S.C. § 1635(f) (2012).

4. Lea Krivinkas Shepard, *It's All About the Principal: Preserving Consumers' Right of Rescission Under the Truth in Lending Act*, 89 N.C. L. REV. 171, 172 (2010).

5. Compare *Sherzer v. Homestar Mortg. Servs.*, 707 F.3d 255, 261 (3d Cir. 2013) (holding that written notice alone is sufficient to rescind), and *Gilbert v. Resi-*

Court of Appeals for the Eighth Circuit tipped the balance in favor of lenders when it held that sending notice of intent to rescind to a lender is insufficient and that a borrower must instead file suit in order to exercise the right of rescission.⁶ This Note argues that *Keiran* was decided incorrectly based on principles of statutory interpretation, application of legal precedent, and legislative intent.⁷

Part II of this Note will discuss the facts and holding of *Keiran*. Part III will examine the legal background and history of TILA and explain recent precedent regarding the specific issue presented in *Keiran*. In Part IV, this Note will explore the analysis of the majority and dissenting opinions in *Keiran*. Finally, Part V concludes this Note by criticizing the court's analysis in the instant decision and contemplating future effects of the decision on borrowers and lenders.

II. FACTS AND HOLDING

This appeal arose from two consolidated cases of borrowers, the Keirans and the Sobieniaks, attempting to rescind mortgage loans.⁸ In the Sobieniaks' case, the borrowers, seeking to refinance, executed a promissory note for a mortgage loan on March 22, 2007, which was secured by their principal residence.⁹ At closing, the Sobieniaks acknowledged receiving two copies of the notice of right to cancel (or rescind) the loan but only one copy of the TILA disclosure statement.¹⁰ On January 15, 2010, less than three years after execution of the promissory note, the borrowers sent a notice of rescission to the lender, claiming a rescission right on grounds that the lender had failed to provide two copies of the TILA disclosure at closing.¹¹ On January 29, the lender denied the rescission, claiming that the correct number of copies of all required documents was provided for the borrowers at closing.¹²

On January 14, 2011, more than three years after execution of the promissory note, the borrowers filed suit, claiming money damages, rescission of the loan, and a declaration that the loan was void because the lender failed to provide two copies of the TILA disclosure at the closing.¹³ The

dential Funding LLC, 678 F.3d 271, 276-77 (4th Cir. 2012) (holding that written notice alone is sufficient to rescind), *with* Rosenfield v. HSBC Bank, USA, 681 F.3d 1172, 1182 (10th Cir. 2012) (holding that mere "written notice to rescind is not enough for a consumer to invoke her right to rescission"), *and* McOmie-Gray v. Bank of Am. Home Loans, 667 F.3d 1325, 1327 (9th Cir. 2012) (holding that borrower's notice alone is insufficient to exercise right of rescission); *see also infra* Part III.B.

6. *Keiran v. Home Capital, Inc.*, 720 F.3d 721, 728 (8th Cir. 2013).

7. *See infra* Part V.

8. *Keiran*, 720 F.3d at 724.

9. *Id.*

10. *Id.*

11. *Id.*

12. *Id.*

13. *Id.*

trial court granted summary judgment for the lender, finding, among other things, that the borrowers “had no right to rescind because they did not file the suit for rescission within the three-year statute of repose contained in 15 U.S.C. § 1635(f).”¹⁴

In the Keirans’ case, the borrowers and the lender executed a promissory note for a mortgage loan in December 2006.¹⁵ At closing, the Keirans acknowledged receiving two copies of the notice of right to rescind but only one copy of the TILA disclosure statement.¹⁶ On October 8, 2009, less than three years after executing the promissory note, the Keirans sent rescission notices to the lender, claiming that they did not receive sufficient copies of required TILA disclosures at the closing.¹⁷ The lender denied the request and, on January 7, 2010, informed the Keirans that there was no basis for rescission.¹⁸

On October 29, 2010, the Keirans filed suit against the lender, seeking money damages, rescission of the loan, and a declaration that the lender’s security interest in the loan was void.¹⁹ Like the Sobieniaks, the Keirans alleged that rescission was proper because they did not receive, as required by statute, more than one copy of the TILA Disclosure Statement at closing.²⁰ Nevertheless, the district court granted summary judgment for the lender, holding that the three-year statute of repose contained in 15 U.S.C. § 1635(f) barred the Keirans’ claim for rescission.²¹

These cases were consolidated on appeal, and a panel of the Eighth Circuit affirmed the lower court’s decisions.²² The court held that when a borrower seeks to rescind a mortgage loan based on the lender’s failure to make required disclosures or provide rescission notices under TILA, a borrower must file a suit seeking rescission, rather than merely giving to the lender notice of intent to rescind, within three years of the execution of a promissory note.²³

III. LEGAL BACKGROUND

Part III.A will discuss the general history and intent of TILA as well as one of its specific purposes in assuring meaningful disclosure of terms and conditions to borrowers of home mortgage loans. Then, Part III.B will describe recent cases decided by various United States circuit courts of appeals

14. *Id.*

15. *Id.*

16. *Id.* at 724-25.

17. *Id.* at 725.

18. *Id.*

19. *Id.*

20. *Id.*

21. *Id.*

22. *Id.* at 730.

23. *Id.* at 728.

interpreting TILA and its associated regulations concerning the same issue presented in *Keiran*: May a borrower exercise the right of rescission simply by sending notice to the lender of intent to do so, or must the borrower file a lawsuit demanding rescission?

A. *The Truth in Lending Act*

With an underlying interest in protecting consumers and improving lending practices,²⁴ TILA was passed in 1968 as one of President Lyndon Johnson's "Great Society" initiatives.²⁵ The enactment of TILA marked the beginning of a consumer-protective era, and its "consumer-centric sentiments" were meant to shield borrowers from predatory lenders.²⁶ The official main 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."²⁷ In laymen's terms, TILA makes it possible for consumers to "comparison shop for credit," a feat previously impossible because lenders "had no uniform way of calculating interest or determining what [other] charges would be included in an interest rate."²⁸

To resolve the issue of a lack of uniformity in lenders' calculations and rates, TILA mandates that lenders provide potential borrowers with "specific, standardized information about . . . credit transactions in an attempt to both (1) increase transparency and competition in the credit markets and (2) promote the 'informed use of credit.'"²⁹ Congress authorized the Federal Reserve Board to implement TILA,³⁰ and the Board effected this implementation through Regulation Z.³¹

As one of its protections afforded to borrowers, TILA entitles borrowers to a three-business-day period within which he or she may rescind the execution of a mortgage loan on the borrower's principal dwelling.³² However, if the lender fails to provide the borrower with a notice of the right to rescind or other material information about the loan during the closing, the right to rescind extends to "three years after the date of consummation of the transaction or upon the sale of the property, whichever occurs first."³³ To exercise

24. See 15 U.S.C. § 1601(a) (2012); see also *Rosenfield v. HSBC Bank, USA*, 681 F.3d 1172, 1179 (10th Cir. 2012) (quoting 15 U.S.C. § 1601(a)).

25. Shepard, *supra* note 4, at 184.

26. *Id.*

27. 15 U.S.C. § 1601(a).

28. Shepard, *supra* note 4, at 184-85.

29. *Id.* at 185 (quoting 15 U.S.C. § 1601(a)).

30. *Id.* at 186.

31. 12 C.F.R. § 1026.1(a) (2012).

32. 15 U.S.C. § 1635(a) (2012).

33. 15 U.S.C. § 1635(f).

the right of rescission, Regulation Z's complementing provision states the following:

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, or when filed for telegraphic transmission, or, if sent by other means, when delivered to the creditor's designated place of business.³⁴

Because TILA was enacted with the purpose of protecting consumers by increasing transparency and competition in the credit markets from their previous levels and by better enabling consumers to compare available credit terms, it is remedial in nature, and multiple courts have held that it therefore must be construed liberally in favor of borrowers.³⁵

In addition to being a remedial statute, the Supreme Court of the United States has held that section 1635(f) is a statute of repose,³⁶ limiting the right of a borrower to assert rescission more than three years after execution of a mortgage loan as an affirmative defense when the borrower is a defendant in a collection action.³⁷

In *Beach v. Ocwen Federal Bank*, borrowers conceded that they did not have a right to an independent action of rescission because they had not made any attempt to rescind within three years of their loan's execution.³⁸ Nevertheless, they claimed that rescission could be asserted as an affirmative defense to the lender's collection efforts.³⁹ The Supreme Court of the United States held that section 1635(f) went "beyond any question whether it limits more than the time for bringing a suit, by governing the life of the underlying right as well."⁴⁰ Reasoning that the statute spoke in terms of a right's duration rather than a period within which a suit must be commenced,⁴¹ the Court concluded that "the Act permits no federal right to rescind, defensively or

34. 12 C.F.R. § 1026.15(a)(2).

35. *See, e.g.*, *Bragg v. Bill Heard Chevrolet, Inc.*, 374 F.3d 1060, 1065 (11th Cir. 2004); *see also, e.g.*, *Keiran v. Home Capital, Inc.*, 720 F.3d 721, 725 (8th Cir. 2013); *Sherzer v. Homestar Mortg. Servs.*, 707 F.3d 255, 261 (3d Cir. 2013); *Rosenfield v. HSBC Bank, USA*, 681 F.3d 1172, 1179-80 (10th Cir. 2012).

36. Whereas a statute of limitations is a "law that bars claims after a specified period . . . based on the date when the claim accrued (as when the injury occurred or was discovered)," a statute of repose "bar[s] any suit that is brought after a specified time since the defendant acted . . . even if this period ends before the plaintiff has suffered a resulting injury." *Waldburger v. CTS Corp.*, 723 F.3d 434, 441 (4th Cir. 2013) (alteration in original) (quoting BLACK'S LAW DICTIONARY 1546 (9th ed. 2009)) (internal quotation marks omitted).

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

38. *Id.* at 415.

39. *Id.*

40. *Id.* at 417.

41. *Id.*

otherwise, after the 3-year period of § 1635(f) has run.”⁴² The Court’s decision in *Beach* would become a pivotal part of subsequent courts’ rulings on whether borrowers are required to file suit or merely provide notice in order to effectuate their right to rescind under TILA.

*B. Recent Precedent Regarding Effective Rescission:
A Split in Authority*

Prior to the Eighth Circuit’s decision in *Keiran*, four federal courts of appeals had split evenly into two camps on the issue of what constitutes effective rescission. The Third and Fourth Circuits had held that borrowers need only send notice of rescission to their mortgage servicer within three years of a loan’s closing to exercise effectively their right to rescind a mortgage transaction under TILA,⁴³ but the Ninth and Tenth Circuits had held that borrowers must commence a lawsuit for rescission against their mortgage servicer within three years of a loan’s closing to exercise effectively their right to rescind under TILA.⁴⁴

The first case to consider the issue of whether a borrower must file suit for rescission rather than merely send notice to a lender was decided in February 2012 by the Ninth Circuit in *McOmie-Gray v. Bank of America Home Loans*.⁴⁵ In *McOmie-Gray*, the Ninth Circuit held that merely sending notice to a lender to request rescission of a mortgage loan did not satisfy the requirements of TILA.⁴⁶ In drawing its conclusion, the court reasoned that “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.”⁴⁷ Further, relying on *Beach*’s plain-language

42. *Id.* at 419.

43. *Sherzer v. Homestar Mortg. Servs.*, 707 F.3d 255, 261 (3d Cir. 2013) (“We thus join the Fourth Circuit in holding that an obligor exercises his right of rescission by sending the creditor valid written notice of rescission, and need not also file suit within the three-year period.”); *Gilbert v. Residential Funding LLC*, 678 F.3d 271, 276 (4th Cir. 2012) (“Further, we disagree with the Ninth Circuit that a borrower must file a lawsuit within the three-year time period to exercise her right to rescind, as opposed simply to notifying the creditor.”).

44. *Rosenfield v. HSBC Bank, USA*, 681 F.3d 1172, 1182 (10th Cir. 2012) (“We agree that the provision of written notice to rescind is not enough for a consumer to invoke her right to rescission under TILA”); *McOmie-Gray v. Bank of Am. Home Loans*, 667 F.3d 1325, 1327 (9th Cir. 2012) (“Rescission is not automatic upon a borrower’s mere notice of rescission”).

45. *McOmie-Gray*, 667 F.3d at 1326.

46. *Id.* at 1327.

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

interpretation, the court held that section 1635(f) simply did not permit a right to rescind, “defensively or otherwise,” after the three-year period.⁴⁸

In *Gilbert v. Residential Funding LLC*, decided in May 2012, the Fourth Circuit split from the Ninth, holding that notifying the lender of intent to rescind, rather than filing a lawsuit, was sufficient to exercise the right to rescind under section 1635(f).⁴⁹ In reaching its holding, the court noted, just as the Ninth Circuit had done, the importance of the plain-meaning rule and courts’ duty to apply statutes and regulations as written when the language is unambiguous.⁵⁰ However, the Fourth Circuit found that “[s]imply 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.”⁵¹ The court took care to distinguish the issue of whether a borrower exercised the right to rescind (governed by section 1635(f) and Regulation Z) from whether the rescission has been completed (requiring the lender to acknowledge the availability of the right of rescission or the borrower to sue so that the court can enforce such a right).⁵² The court then noted that *Beach* did not control its analysis because *Beach* addressed only whether a right of rescission had expired without addressing “the proper method of exercising a right to rescind or the timely exercise of that right.”⁵³ Therefore, the court held that even though the borrowers had “failed to seek *enforcement* of their right to rescind within the [three-year period],” such a failure did not affect “the fact that they [had] *exercised* their right of rescission within that time.”⁵⁴

One month later, in June 2012, the Tenth Circuit countered *Gilbert* in *Rosenfield v. HSBC Bank, USA*, holding that a borrower’s provision of notice of intent to rescind to a lender was insufficient to exercise the right of rescission.⁵⁵ As the Ninth Circuit had done in *McOmie-Gray*, the court first noted the significance of *Beach*, drawing attention to its underlying rationale of a potential for uncertainty in the chain of title of real estate purchased from foreclosure sales.⁵⁶ Labeling *Beach* as “dispositive,” the court reiterated that TILA imposes a “strict repose period” that “operates to *completely* extinguish the right being claimed *after it lapses*.”⁵⁷ Crucial to the court’s holding was

48. *Id.* at 1328-29 (quoting *Beach v. Ocwen Fed. Bank*, 523 U.S. 410, 419 (1998)).

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

50. *Id.*

51. *Id.* at 277.

52. *Id.*

53. *Id.* at 278.

54. *Id.* (emphasis added).

55. *Rosenfield v. HSBC Bank, USA*, 681 F.3d 1172, 1182 (10th Cir. 2012).

56. *Id.* at 1181.

57. *Id.* at 1182.

that TILA “establishes a *right of action* that is *generally* redressable only when a party seeks recognition of it by invoking the power of the courts.”⁵⁸

Further, the court, noting that contract rescission is an equitable remedy and that the TILA rescission remedy is materially the same as the form of rescission generally available for avoidance of voidable contracts, reasoned that the purpose of rescission is to “return the parties to the status quo prevailing before the existence of an underlying contract” and that “it is not an appropriate remedy in circumstances where its application would lead to prohibitively difficult (or impossible) enforcement.”⁵⁹ In a “significant number” of cases, the court explained, “the remedial economy of the remedy would be jeopardized” if borrowers were allowed to exercise their right to rescission by giving notice alone because “the underlying circumstances . . . are likely to have changed significantly” when a borrower decides at a later point in time to file suit against the lender,⁶⁰ thus, enforcement would become “costly and difficult” in contradiction to the general goal of the rescission remedy.⁶¹ Finally, under a plain-language analysis, the court reasoned that Regulation Z established that giving notice to a lender of intent to rescind was a necessary, rather than sufficient, requirement.⁶²

The final decision in the quartet of cases leading up to *Keiran* came in February 2013 in *Sherzer v. Homestar Mortgage Services*, in which the Third Circuit held that borrowers may exercise their right of rescission by sending written notice to lenders rather than filing suit.⁶³ Beginning its analysis with the text of the statute, the court noted that while section 1635 “explicitly address[es] both how the right of rescission is exercised and when the rights and corresponding obligations flowing therefrom are incurred by the parties to the loan,” and while Regulation Z “specifies that the obligor must notify his lender ‘by mail, telegram, or other means of written communication,’” neither provision “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.”⁶⁴

The court then distinguished *Beach*, noting that it had addressed the issue of *whether* a borrower who had never taken any action to rescind within the three-year period could assert rescission as a defense rather than the issue of *how* such a right of rescission must be exercised in the first place.⁶⁵ The court also made an effort to demonstrate that the phrase from *Beach* on which

58. *Id.* at 1183. The court remarked in a footnote that a possible exception to this general rule would be voluntary allowance of rescission on the part of a lender. *Id.* at 1183 n.8.

59. *Id.* at 1183-84.

60. *Id.* at 1185.

61. *Id.*

62. *Id.*

63. *Sherzer v. Homestar Mortg. Servs.*, 707 F.3d 255, 261 (3d Cir. 2013).

64. *Id.* at 258 (quoting 12 C.F.R. §§ 1026.15(a)(2), 1026.23(a)(2) (2012)).

65. *Id.* at 262.

the Ninth and Tenth Circuits had relied so heavily⁶⁶ was actually consistent with its own holding that only notice is necessary to exercise the right of rescission: “The most that can be gleaned from the oft-quoted statement is that, however the right of rescission is to be exercised, it must be done within three years.”⁶⁷ Finally, the court stated that although lenders’ concerns about increased costs and difficulties were not unwarranted, the fact that allowing mere notice, rather than the filing of a lawsuit, to exercise the right to rescind may be more costly “is not, in and of itself, a reason to disregard the text of the statute.”⁶⁸

After the decision in *Sherzer*, the federal appellate courts were split evenly as to whether provision of notice was sufficient to make the exercise of rescission effective.⁶⁹ In *Keiran v. Home Capital, Inc.*, the Eighth Circuit was given an opportunity to tip the scales in favor of either lenders or borrowers in TILA rescission actions.⁷⁰

IV. THE INSTANT DECISION

In *Keiran*, the Eighth Circuit held that the filing of a lawsuit is necessary to accomplish rescission,⁷¹ in so holding, the court relied heavily on *Rosenfield*.⁷² The court offered the following reasons for its conclusion: the nature of a statute of repose as a total bar to a cause of action;⁷³ the remedy of contract rescission as a remedial, equitable remedy;⁷⁴ uncertainties in the chain of title that would likely arise if a suit were not filed within the statutory period;⁷⁵ and the plain text of the statute (including explication by *Beach*).⁷⁶

Relying heavily on *Rosenfield*’s interpretation of *Beach*, the court began its opinion by indicating the significance of the general nature of statutes of repose, referencing their purpose of “*completely* extinguish[ing] the right

66. The Supreme Court of the United States had declared that TILA “permits no federal right to rescind, defensively or otherwise, after the 3-year period of § 1635(f) has run.” *Beach v. Ocwen Fed. Bank*, 523 U.S. 410, 419 (1998); *see also Rosenfield*, 681 F.3d at 1187; *McOmie-Gray v. Bank of Am. Home Loans*, 667 F.3d 1325, 1328 (9th Cir. 2012).

67. *Sherzer*, 707 F.3d at 263.

68. *Id.* at 267.

69. The Third and Fourth Circuits had found that written notice alone could exercise the right of rescission. *Sherzer*, 707 F.3d at 261; *Gilbert v. Residential Funding LLC*, 678 F.3d 271, 276 (4th Cir. 2012). The Tenth and Ninth Circuits had found that the filing of a lawsuit was necessary to exercise the right of rescission. *Rosenfield*, 681 F.3d at 1182; *McOmie-Gray*, 667 F.3d at 1327.

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

71. *Id.* at 728.

72. *Id.*

73. *Id.* at 727.

74. *Id.* at 727-28.

75. *Id.* at 728.

76. *Id.*

being claimed *after it lapses*.⁷⁷ The majority then emphasized the underlying rationale of such statutes, explaining that their absolute bar on causes of action is “unconcerned with ‘plaintiffs’ diligence” but instead functions to provide would-be defendants with peace of mind once the statutory period has passed.⁷⁸ Therefore, the court held, it was logically consistent with the underlying purpose of statutes of repose (i.e., limiting the ability to file an action) to require borrowers to file rescission actions within the three-year period prescribed by TILA.⁷⁹

Next, the court elaborated on the general essence of the remedy of rescission.⁸⁰ Noting that rescission is an equitable remedy designed to put the parties in the positions in which they would have been if the contract had never been executed, rather than to award parties compensation such as damages, the court reasoned that such a remedial goal is not effectively achieved when rescission is difficult to enforce.⁸¹ If a borrower were able to satisfy the rescission requirement merely by notifying a lender of her intent to rescind, she could leave open the possibility of filing suit on that claim for an indefinite period of time;⁸² however, if the property were foreclosed upon before any such action was filed, the borrower’s notice would act “as a cloud” on the lender’s title.⁸³

Finally, the majority provided a plain-language analysis of TILA.⁸⁴ After acknowledging the language of Regulation Z and the potential interpretation that notice is sufficient to preserve the right of rescission, the court reasoned that while the regulation does outline *one* requirement of rescission, it does not lay out *all* requirements for successful accomplishment of rescission.⁸⁵ The court buttressed this conclusion by reasoning that even though Regulation Z does not explicitly require filing suit, “filing suit will certainly be necessary to actually accomplish rescission in most cases where rescission under TILA is sought.”⁸⁶

In her dissent, Judge Diana Murphy opined that the majority’s decision was inconsistent with the plain language of TILA and the congressional intent behind it, asserting that the majority had broadly construed the Act in favor of lenders rather than borrowers.⁸⁷

First, and crucially to its reasoning, the dissent drew attention to the plain language of TILA, noting that section 1635 requires borrowers to notify

77. *Id.* at 727 (quoting *Rosenfield v. HSBC Bank, USA*, 681 F.3d 1172, 1182 (10th Cir. 2012)) (internal quotation marks omitted).

78. *Id.* (quoting *Rosenfield*, 681 F.3d at 1183).

79. *Id.*

80. *Id.*

81. *Id.*

82. *Id.* at 727-28.

83. *Id.* at 728.

84. *Id.*

85. *Id.*

86. *Id.*

87. *Id.* at 731 (Murphy, J., dissenting).

lenders of rescission in accordance with Regulation Z and that Regulation Z allows for notification to take place by written communication alone.⁸⁸ Because the borrowers undisputedly had sent written notification to the lenders within three years of execution of the loan, and because of the clarity of the statute, the borrowers had properly exercised their right of rescission.⁸⁹ Further, reasoned the dissent, the majority had misplaced its reliance on *Beach* as governing the instant case.⁹⁰ *Beach* was different: In that case, the Supreme Court of the United States dealt with borrowers who had never sent written notice or filed a suit against the lender until more than five years after the loan contract had been executed.⁹¹ Accordingly, the Court there had decided only that the statute of repose barred exercise of the right of rescission after three years without deciding *how* a borrower could properly exercise such a right within the three-year period.⁹²

The dissent next reasoned that although statutes of repose extinguish some prescribed rights unless certain action is taken within a given time period, such action is not necessarily a lawsuit.⁹³ Rather, the type of action required depends on what the statute provides, and TILA clearly allowed borrowers to exercise the right of rescission by mere notification.⁹⁴ The dissent reasoned that when Congress had previously chosen to utilize a statute of repose to require the filing of a lawsuit in other legislation, it had done so explicitly, but TILA contained no language even intimating that a lawsuit was required to exercise the right of rescission.⁹⁵ In the absence of such a requirement, the dissent found that the plain language requiring only notice was dispositive.⁹⁶

Additionally, the dissent noted that section 1635(a), which allows for a borrower to rescind within three days of contract execution merely by notifying the lender in writing, was structurally identical to section 1635(f), and therefore, there was “no textual reason” to determine that the three-year rescission right must be exercised by the filing of suit instead.⁹⁷ Finally, regarding statutory interpretation, the dissent pointed out that section 1635 consistently contemplated rescission to be the result of actions taken by the borrowers and lenders rather than the court.⁹⁸ In light of an almost-complete lack of mention of the judiciary in section 1635, the right of rescis-

88. *Id.*

89. *Id.*

90. *Id.*

91. *Id.*

92. *Id.* at 731-32.

93. *Id.* at 732.

94. *Id.* at 733.

95. *Id.* at 732-33.

96. *Id.* at 733.

97. *Id.* (citing *Sherzer v. Homestar Mortg. Servs.*, 707 F.3d 255, 264 (3d Cir. 2013)).

98. *Id.*

sion could be exercised by borrower notification to lenders rather than filing of a suit in court.⁹⁹

In response to the majority's concerns that allowing rescission by mere notice would grant borrowers a unilateral ability to cloud title for more than three years after closing, the dissent reasoned that such concerns were unfounded because lenders are always free to file a declaratory or quiet title action to establish whether any purported exercise of a right of rescission was legally valid.¹⁰⁰ Further, if filing suit were required to exercise the right of rescission, such a filing would still create a cloud on the title that could be resolved only by court order or a negotiated agreement between the parties;¹⁰¹ thus, the rule mandating filing of a lawsuit did not actually solve clouding problems as the majority had contemplated.¹⁰²

Finally, the dissent pointed out that a litigation-oriented interpretation of TILA requiring the filing of suit by borrowers to exercise their right of rescission was incongruent with the Act's purpose because Congress had intended for rescission to be a private matter between the parties without judicial intervention, as evidenced by extending the time period within which a lender must refund a borrower's money after a borrower exercises his right to rescind.¹⁰³ The dissent then concluded by reasoning that Congress, in its discretion, had chosen to protect borrowers by enacting TILA as a remedial statute, and as such, its status required a liberal construction in favor of borrowers.¹⁰⁴

V. COMMENT

This Part begins with a discussion of the court's interpretation of TILA and accompanying regulations and then argues that the majority opinion not only disregarded the plain language of the statute but also ignored the legislative intent underlying it. Following that argument, Part V.B will elaborate on the court's interpretation of *Beach v. Ocwen Federal Bank*, arguing that the majority improperly applied that case in *Keiran* because the issue presented had not actually been raised or decided in *Beach*. Part V.C then focuses on the title-clouding rationale that the majority used to buttress its holding, arguing that such a rationale is unfounded. Finally, Part V.D offers a discussion of the practical effects of *Keiran*.

99. *Id.*

100. *Id.* at 734.

101. *Id.*

102. *Id.*

103. *Id.*

104. *Id.* at 735.

A. Statutory Interpretation and Legislative Intent

Perhaps the most troubling aspect of the court's decision in *Keiran* is its departure from basic principles of statutory interpretation. As the dissent pointed out, when language in a statute is clear and unambiguous, a court needs only to enforce the plain language of the statute without seeking out sources of meaning beyond the statute itself.¹⁰⁵ However, the majority insisted on reading into the plain language a requirement that is otherwise absent.¹⁰⁶ In reading in the additional requirement, the majority made a conclusory statement that the plain text of the statute requires the filing of a suit simply because the section "does not set forth the entirety of things necessary to accomplish rescission."¹⁰⁷ However, the majority never actually gave any reason *why* the plain language should be interpreted as requiring a lawsuit when the statute is silent about such a requirement. There is no reason that supplying notification to a lender cannot be both necessary and sufficient.

As justification for imposing the suit-filing requirement, the majority posited that the filing of a suit would be necessary to accomplish effective rescission in most cases where rescission is sought under TILA.¹⁰⁸ Assuming for the sake of argument that it is true that filing suit is typically necessary, this fact alone is not sufficient to require such a suit to be filed. The law should not require that all borrowers take a certain action simply because most of them ultimately will need to do so under similar circumstances. The fact that a lawsuit is likely to be necessary should not require that one be filed; such required suits will ultimately result in a waste of time and money in situations in which the parties would have privately agreed to rescission without legal action. Further, the majority's assertion that filing suit is almost always ultimately necessary to enforce rescission cannot be taken for granted based on the underlying congressional intent for TILA to facilitate dispute resolution among private parties without judicial intervention.¹⁰⁹

As the dissent pointed out, "Congress evinced a clear intent that an ideal rescission would occur without judicial intervention."¹¹⁰ Section 1635 contains only two provisions that make reference to the judiciary,¹¹¹ and neither alludes to a suggestion that a court proceeding is necessary to exercise the right of rescission.¹¹² By inserting a requirement of commencement of a lawsuit where no such filing is required by the plain language of the statute, the majority replaced Congress's intent with its own and placed an unneces-

105. *Id.* at 731 (Murphy, J., dissenting) (citing *Coop v. Frederickson*, 545 F.3d 652, 656 (8th Cir. 2008)).

106. *Id.* at 728 (majority opinion).

107. *Id.*

108. *Id.*

109. *See id.* at 734 (Murphy, J., dissenting).

110. *Id.*

111. *See* 15 U.S.C. § 1635(b), (g) (2012).

112. *Sherzer v. Homestar Mortg. Servs.*, 707 F.3d 255, 260 (3d Cir. 2013).

sary burden on borrowers in spite of TILA's status as a consumer protection statute. The majority's disregard of the legislative intent behind this particular provision is indicative of its overlooking Congress's general intent in enacting TILA.

As discussed above, TILA was enacted by Congress to provide protection for borrowers by requiring meaningful disclosures of credit terms;¹¹³ as a consumer protection statute, courts must interpret TILA broadly in favor of consumers.¹¹⁴ Even if the court had found the statute to be ambiguous in some way, any such ambiguities should have been resolved in favor of the consumer-borrowers. Given Congress's specific intent to protect consumers, the majority's construction has troubling implications for future cases brought under TILA and other consumer protection statutes: By ignoring the principle requiring broad construction in favor of consumers in this case, the majority has opened the door for narrow constructions in future cases as well.

In addition to disregarding classical tenets of plain-language construction, the majority also ignored authoritative interpretations of TILA. On July 21, 2011, Congress transferred exclusive authority for the interpretation and promulgation of rules regarding TILA from the Federal Reserve System to the Consumer Financial Protection Bureau (CFPB).¹¹⁵ The CFPB, which filed an amicus brief on behalf of the Sobieniaks, has taken the official position that borrowers need only notify their lenders of the rescission right within three years of obtaining a loan.¹¹⁶ In light of the official stance taken by the CFPB and the bureau's urging the court to adopt its interpretation, it is disconcerting that the majority flatly refused to apply such an interpretation after mentioning that it was "not unmindful" of the CFPB's position.¹¹⁷

By summarily disregarding the CFPB's argument despite the bureau's express interpretive authority, the majority divested the CFPB of its legislatively-granted power. Although the majority may have disagreed with the CFPB's contention, and although the CFPB's interpretation may not have been binding on the court, the majority should have paid great deference to the CFPB in light of the bureau's congressionally-granted authority and TILA's status as a consumer protection statute. If Congress's intent were ever an issue for the court in interpreting the plain language of TILA, any such doubts should have been resolved unmistakably by the entry of the CFPB as an amicus.

113. *See supra* Part III.A; *see also* 15 U.S.C. § 1601(a) (2012).

114. *Rand Corp. v. Moua*, 559 F.3d 842, 845 (8th Cir. 2009).

115. Brief of the Consumer Fin. Prot. Bureau as Amicus Curiae in Support of Plaintiffs-Appellants and Reversal at 3, *Keiran*, 720 F.3d 721 [hereinafter Brief of the Consumer Fin. Prot. Bureau] (No. 12-1053), 2012 WL 1514738.

116. *Id.*

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

B. Misapplication of Legal Precedent

Aside from its disregard for rules of statutory construction, the majority also incorrectly applied legal precedent in reaching its conclusion. The majority relied heavily on the *Beach* decision (and *Rosenfield's* interpretation of it) and its holding that TILA does not permit a right to rescind, defensively or otherwise, after the three-year period has run.¹¹⁸ However, *Beach* concerned a different issue than did *Keiran*: The *Beach* Court was concerned with *whether* a right of rescission was available after the three-year period had run without the borrowers either notifying the lender or filing a suit.¹¹⁹ By contrast, the *Keirans'* and *Sobieniaks'* cases were concerned with *how* to exercise the right of rescission in the first place.¹²⁰ Unlike the *Beach* borrowers, the *Keirans* and *Sobieniaks* had actually notified their respective lenders within the three-year period.¹²¹

Though the *Keiran* majority found otherwise, it does not necessarily logically follow that *Beach's* total ban on rights to rescission applied to the present case. If the borrowers in *Beach* had actually sent notification to their lenders within the three-year period, the Supreme Court's holding would have laid down a rule applicable to the instant case (i.e., whether such notification effectively exercised the right of rescission). However, because the issue was never actually addressed by the Supreme Court in *Beach*, its holding barring a right to rescission need not, and should not, be applied in the instant case.

C. Logical Inconsistency

Aside from the legal inconsistencies in the majority opinion, the opinion is also logically faulty because it cited an implausible theoretical problem of title clouding. The majority made much ado about the potential influx of title clouding issues if notification alone were sufficient to exercise the right of rescission, asserting that borrowers could then “unilaterally impair[]” a lender's security interest.¹²² However, what the majority opinion seems to overlook is that even if borrowers were required to file suit to rescind, such a suit would have the exact same effect (i.e., title cloud creation) under TILA.¹²³ Further, if notice were sufficient on its own to exercise the right to rescind, then a lender's interest would not truly be unilaterally impaired because the lender could still file an action for declaratory or quiet title relief.¹²⁴ A lender would have its interest impaired only if it sat idly after receiving notice of

118. *Id.* at 726-29.

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

120. *Keiran*, 720 F.3d at 732 (Murphy, J., dissenting) (citing *Sherzer v. Homestar Mortg. Servs.*, 707 F.3d 255, 258 (3d Cir. 2013)).

121. *Id.* at 724-25 (majority opinion).

122. *Id.* at 728.

123. *Id.* at 734 (Murphy, J., dissenting) (citing 15 U.S.C. § 1635(b) (2012)).

124. *Id.*

rescission. Therefore, the court was ultimately presented with this question: If one party (i.e., either the borrower or the lender) will inevitably have to file suit in order to resolve an issue of rescission and clear title, should that onus be placed on the borrower or the lender? Despite an unmistakable imperative to construe TILA in favor of borrowers as a consumer protection statute, the majority placed this burden on the borrowers.

D. Practical Implications

The court's decision in *Keiran* raises a host of practical implications for home loan borrowers, including that a typical borrower will not know that the filing of a lawsuit is required to exercise the right to rescind effectively. The CFPB has produced model forms for lenders to use in the closing of a loan, and such forms contain information about borrowers' right of rescission.¹²⁵ For example, Form H-8(A) Rescission Model Form (General), which reads, "Your Right to Cancel This Loan" centered at the top of the form, gives directions on how to cancel the loan: the borrower is instructed to submit the bottom portion of the form to the lender named on the form.¹²⁶ Conspicuously absent from the form is any instruction for borrowers to file a suit, initiate other conduct involving the courts, or take any other action whatsoever.¹²⁷ A typical borrower, unsophisticated in the study of law, or even a reasonable attorney well-learned in the law, would have no reason to think that he or she is required to file a suit in addition to notifying the lender of rescission. By requiring the filing of a suit, the court potentially allows lenders to prey on, or at least unjustly benefit from, borrowers' understandable ignorance, and borrowers are penalized for following the plain language of the statute. In light of TILA's consumer protection purpose, this result is exactly the opposite of what Congress intended.

Additionally, by requiring the filing of a suit to exercise the right of rescission, the court essentially nullifies the notice provision of the statute, rendering it meaningless. It is a basic principle of civil procedure that parties to a lawsuit have a right to receive notice of that lawsuit.¹²⁸ If borrowers file a lawsuit, then they are already obligated to provide notice to the lenders as a requirement of such a suit. Thus, *Keiran* renders TILA's rescission notice provision redundant. Such an interpretation, rendering the entire provision mere surplusage (i.e., "of no consequence"), should be avoided as a matter of statutory interpretation canon.¹²⁹ At best, then, providing notice to the lender becomes a mere formality. However, given that notice is expressly men-

125. Brief of the Consumer Fin. Prot. Bureau, *supra* note 115, at 6.

126. *Id.*

127. *See id.*

128. *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950).

129. *See, e.g., Ratzlaf v. United States*, 510 U.S. 135, 140-41 (1994).

tioned in the statute, whereas commencement of a lawsuit is not, it is inconsistent with the statute's language that notice be merely a formality.¹³⁰

Finally, requiring borrowers to file suits in order to rescind also serves to add additional cases to an already overburdened court system. If borrowers were required only to notify lenders in order to rescind, then the lenders and borrowers would have an incentive to bargain amongst themselves as to whether a rescission was effective before resorting to the courts for assistance. This type of private negotiation, free of unnecessary judicial intervention, is what Congress intended when it enacted TILA.¹³¹ In contrast, by requiring court action, *Keiran* imposes additional costs onto borrowers that they otherwise would not incur if commencement of a suit were not required. Such additional costs may be especially burdensome for borrowers attempting to rescind a home loan because the very reason they are requesting rescission is likely that they are already in desperate financial straits. To be sure, the filing of a suit will ultimately be necessary in some cases to resolve the issue of whether a borrower is actually entitled to have a claimed rescission enforced. But needlessly subjecting all borrowers to that requirement as a blanket obligation is detrimental to too great a number of borrowers. This argument is buttressed even further by the fact that TILA is meant to protect consumers, and any debatable requirements should be resolved in favor of borrowers rather than lenders.¹³²

VI. CONCLUSION

The Eighth Circuit tipped the balance in favor of lenders in *Keiran*, but the issue with which it dealt remains closely contested; indeed, even other members of the same circuit believe that the case was wrongly decided.¹³³ Nevertheless, in the Eighth, Ninth, and Tenth Circuits, borrowers will be required to file suit within the statutory time period in order to accomplish rescission unless the Supreme Court of the United States rules otherwise¹³⁴ or

130. 15 U.S.C. § 1635 (2012).

131. *Keiran v. Home Capital, Inc.*, 720 F.3d 721, 734 (8th Cir. 2013) (Murphy, J., dissenting).

132. *See, e.g., id.* at 725 (majority opinion); *Sherzer v. Homestar Mortg. Servs.*, 707 F.3d 255, 261 (3d Cir. 2013); *Rosenfield v. HSBC Bank, USA*, 681 F.3d 1172, 1179-80 (10th Cir. 2012); *Bragg v. Bill Heard Chevrolet, Inc.*, 374 F.3d 1060, 1065 (11th Cir. 2004).

133. *See, e.g., Jesinoski v. Countrywide Home Loans, Inc.*, 729 F.3d 1092, 1093-94 (8th Cir. 2013) (deciding a case per curiam in favor of the lender on essentially the same facts as *Keiran* with two judges concurring, each noting that he would have decided the case in favor of the borrower if the court were not bound by the precedent set in *Keiran*).

134. As this Note goes to press, the Court is deciding whether it will grant the *Keiran* plaintiffs' petition for certiorari. *See Search*, SUPREME COURT OF THE U.S., <http://www.supremecourt.gov/Search.aspx?FileName=/docketfiles/13-705.htm> (last visited July 13, 2014).

Congress expressly amends TILA.¹³⁵ In the meantime, the CFPB must consider requiring lenders to include in their disclosures at closing an explicit statement that the commencement of a suit is necessary to exercise the right to rescind in some states.

Critics of *Keiran* are likely to decry the decision as anti-consumer judicial overstepping while supporters will praise it as reasonable protection for lenders against uncertainty of title and exorbitant costs that flow from such uncertainty. Only time will reveal whether the next Circuit Court to take up a *Keiran*-style case will once again even the balance or push it even further in the direction of lenders.

135. See *Keiran*, 720 F.3d 721; *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).