

# Alerts & Publications

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## TILA Rescission Rights

June 20, 2012

*Exacerbating a circuit split, the Tenth Circuit joined the Ninth Circuit in ruling that mere notice of a Truth in Lending Act (TILA) violation does not toll the three year statute of limitations for rescinding a loan.*

**The Issue:** As described in our prior alert (found [here](#)), a circuit split has developed regarding whether a borrower may file suit seeking rescission under TILA after the expiration of the limitations period as long as the borrower notified the defendant of her alleged right to rescind during the limitations period.

In *Williams v. Wells Fargo Home Mortg., Inc.*, 410 Fed. Appx. 495 (3d Cir. Pa. 2011) (non-precedential and unpublished opinion found [here](#)), and *McOmie-Gray v. Bank of America Home Loans*, 667 F.3d 1325 (9th Cir. Feb. 8, 2012) (opinion found [here](#)), the Third and Ninth Circuits ruled that borrowers must file a lawsuit within the three-year limitations period to enforce their alleged TILA rescission rights; otherwise the right to rescind is lost. The Fourth Circuit disagreed. In *Gilbert v. Residential Funding LLC*, 10-2295, 2012 WL 1548580 (4th Cir. May 3, 2012) (opinion found [here](#)), the Fourth Circuit ruled that mere notice of intent to rescind was sufficient to exercise the right of rescission, even if the borrower did not enforce that right by filing a lawsuit within the three-year deadline. The CFPB agrees with the Fourth Circuit's interpretation and has filed amicus briefs in the Third, Fourth, Eighth, and Tenth Circuits arguing that mere notice to the lender within the three-year deadline is sufficient to exercise the rescission right.

One of the CFPB's amicus briefs was filed in *Rosenfield v. HSBC Bank*,

*USA et al.*, 10-1442 (10th Cir.) (amicus brief found [here](#)). On June 11, the Tenth Circuit ruled in that case, siding with the Third and Ninth Circuits (opinion found [here](#)) and rejecting the CFPB’s amicus argument. The Tenth Circuit ruled that allowing mere notice to toll the statute of limitations “would indirectly enlarge the congressionally established three-year limitations period under TILA, and it could work to cloud the title of the property for an indefinite period of time.” The court was not swayed by the CFPB’s argument in its amicus brief that the Ninth Circuit’s rule “encourage[s] lenders to stonewall in response to a notice of rescission” in the hopes that the consumer will not file suit within the three-year time limit. The Tenth Circuit also ruled that raising the TILA issue in a Colorado Rule 120 foreclosure hearing did not toll the statute of limitations, because such “streamlined” hearings address “issues related specifically to the existence of default” and they “do not appear to contemplate any adjudication of a TILA rescission claim.” However, the Tenth Circuit did say in dicta that if a lender “acts on the consumer’s wishes, and, for instance, purports to cancel the underlying transaction” then “courts may recognize this conduct as completing the circle contemplated by TILA” and “hold the lender responsible in equity.”

**Implications:** Despite the recent victory in the Tenth Circuit, lenders may wish to evaluate the way they process notices of rescission, which borrowers will likely continue to use to gain leverage during loan-restructuring negotiations and/or foreclosure proceedings. In the meantime, it will be interesting to see whether the Eighth Circuit, in which the CFPB also filed an amicus brief addressing this issue, agrees with the bureau. The Third Circuit will also have another opportunity to address this issue in another pending case in which the CFPB has filed an amicus brief.[1]

[1] The CFPB has filed amicus briefs addressing this issue in *Sherzer v. Homestar Mortgage Services*, No. 11-4254 (3rd Cir.); *Wolf v. Fannie Mae*, No. 11-2419 (4th Cir.); and *Sobieniak v. BAC Home Loans Servicing*, No. 12-1053 (8th Cir.); but the courts in those cases have not yet ruled.