THE TRUTH SHALL SET YOU FREE: EXPLAINING JUDICIAL HOSTILITY TO THE TRUTH IN LENDING ACT'S RIGHT TO RESCIND A MORTGAGE LOAN

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ABSTRACT

The United States Supreme Court recently entertained an issue dividing the federal circuit courts of appeal over whether the federal Truth in Lending Act (TILA) requires a consumer borrower to file a lawsuit in order to exercise her statutory right to rescind, or cancel, certain types of mortgage loans where the lender fails to disclose information mandated by the statute. The Supreme Court ruled against the federal circuits' majority-held view, holding that the statute does not require the filing of a lawsuit. Before the high court's ruling, many commented on the appropriate interpretation of the statute and its implementing regulation, but there is a gap in the academic literature addressing the circuit divide. This article goes beyond interpretation of the relevant statute and regulation to explore and consider unarticulated explanations for the majority-held view. That view holds that TILA implicitly requires a consumer borrower to file a lawsuit to exercise her right to rescind even though the statute expressly provides that written notice is sufficient. Five circuits imposed this requirement even though Congress did not, explaining that they are constrained by Supreme Court precedent — precedent that the Supreme Court conclusively declared inapposite in its brief decision resolving the circuit split. This article posits that some evolving trend,

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beyond *stare decisis*, underlies the majority circuits' rulings. Among the possibilities the article explores are: (1) the federal judiciary's interest in regulating consumer litigation behavior; (2) a paradigm shift in agency deference doctrine, including the reconsideration of *Seminole Rock/Auer* deference; and (3) disagreement with Congress's liberalization of common law rescission by statute.

INTRODUCTION

In the wake of the mortgage crisis and ensuing recession, consumer protection law is enjoying a starring role in the proverbial limelight. Lawmakers and regulators have devoted enormous resources to address gaps in the regulation of consumer financial services in an effort to protect consumer borrowers from unscrupulous business actors.

Industry, media, and regulatory attention is largely focused on the new federal regulatory regime, which puts significant authority in the hands of a relatively new agency, the Consumer Financial Protection Bureau (CFPB), to create and enforce rules that regulate a wide array of marketplace actors and financial services. The CFPB's regulatory portfolio encompasses payday lending, student lending, residential mortgage lending, debt collection, and credit cards, among other credit products.[1] Proposed and new rules and initiatives are debated, announced, and critiqued nearly every week and have been since its doors opened in July 2011.

Unlike these newer initiatives, litigation over existing — rather than nascent — laws does not feature prominently in the headlines. But as consumer lawyers in the trenches are well aware, the outcome of these battles is no less important.

Consumer lawyers are concerned that recent case decisions curtail existing consumer protection measures. One particular measure in danger of limitation is a consumer's right to rescind, or cancel, her mortgage loan, thanks to recent circuit-level disagreement over how to interpret and apply a provision of the federal Truth in Lending Act (TILA).[2]

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[1] *See generally About Us,* CONSUMER FIN. PROTECTION BUREAU, http://www.consumerfinance.gov/the-bureau/ (last visited May 1, 2015).

[2] *See* 15 U.S.C. § 1601(a) (2014).

TILA is the seminal consumer protection law statute whose purpose is to protect consumers from fraud, abuse, and deception in the consumer credit marketplace.[3] It accomplishes its consumer protective purpose by mandating that lenders disclose certain information to borrowers about their loan costs.[4] To ensure that lenders comply with TILA's mandatory disclosures, the statute gives borrowers the right to rescind certain types of mortgage loans within three years of the closing of the deal where the lender has failed to make certain material disclosures.[5] Rescission permits parties to unwind a transaction and restores them to their pre-transaction status.[6] It is this ability of a consumer borrower to rescind a mortgage loan as a result of illegal creditor conduct that is potentially in danger of restriction.

Recent circuit-level jurisprudence has revealed disagreement among the federal appellate courts over how a consumer borrower exercises her right to rescind her mortgage loan. Specifically, the federal circuit was divided over whether a consumer borrower must merely send written notice of rescission to the lender within the three-year limitations period, or whether she must file a lawsuit within that timeframe seeking a judicial declaration of rescission**.**

A total of eight circuits — remarkably, six in less than three years — ruled on this precise issue before the Court decided to resolve the issue. These courts disagreed whether written notice to the lender is sufficient to validly exercise the consumer's right to rescind as opposed to the formal filing of a complaint in federal court.[7] Three circuits held that written notice to the

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[3] *Id.*

[4] *See id.* at § 1601-1667.

[5] *Id.* § 1635(f), entitled "Right of rescission as to certain transactions."

[6] JAMES M. FISCHER, UNDERSTANDING REMEDIES 730 (2d ed. 2006). Rescission is a conceptually distinct remedy from damages, which are based on affirmance, or acknowledgment, of a valid contract. *Id.*

[7] *See generally* Rosenfield v. HSBC Bank, USA, 681 F.3d 1172, 1188 (10th Cir. 2012) (holding that a consumer borrower must file a lawsuit to exercise her right to rescission under TILA); McOmie-Gray v. Bank of Am. Home Loans, 667 F.3d 1325 (9th Cir. 2012) (same). *Cf.* Sherzer v. Homestart,

lender is sufficient.[8] Five circuits, in contrast, ruled that written notice alone is insufficient to validly exercise TILA's right to rescind.[9] These courts (the majority circuits) ruled that a borrower must file a lawsuit seeking rescission in order to comply with TILA.[10] The majority circuits so ruled because of a United States Supreme Court case that is only tangentially relevant.[11] Exacerbating the split were three separate Eighth Circuit decisions on this issue that contain dissenting and concurring opinions that illustrate how federal judges are divided on what appears to be an issue of simple statutory interpretation.[12]

This discrete issue was subject to such intense dispute that the Supreme Court decided to resolve the issue.[13] In early 2015, the Court followed the minority review in a perfunctory decision, emphasizing that the statutory language unequivocally requires nothing more than written notice to the lender.[14]

Mortg. Servs., 707 F.3d 255 (3d Cir. 2013) (holding that written notice is sufficient to exercise the right to rescission under TILA); Gilbert v. Residential Funding, LLC, 678 F.3d 271 (4th Cir. 2012) (same).

[8] *See Sherzer,* 707 F.3d at 255; *Gilbert*, 678 F.3d at 271; Williams v. Homestake Mortg. Co., 968 F.2d 1137 (11th Cir. 1992).

[9] *See* Jesinoski v. Countrywide Home Loans, Inc., 729 F.3d 1092 (8th Cir. 2013) *cert. granted*, 134 S. Ct. 1935 (2014) and *rev'd and remanded*, 135 S. Ct. 790 (2015); Hartman v. Smith, 734 F.3d 752 (8th Cir. 2013); Lumpkin v. Deutsche Bank National Trust Co., 534 F. App'x 335 (6th Cir. 2013); Keiran v. Home Capital, Inc., 720 F.3d 721 (8th Cir. 2013); Sobieniak v. BAC Home Loans Servicing, No. 12-1053 (8th Cir. filed July 12, 2013); *Rosenfield*, 681 F.3d at 1172; *McOmie-Gray*, 667 F.3d at 1325; Large v. Conseco Fin. Servicing Corp., 292 F.3d 49 (1st Cir. 2002).

[10] *See Jesinoski* 729 F.3d at 1092; *Hartman,* 734 F.3d at 752; *Lumpkin*, 534 F. App'x at 335; *Keiran*, 720 F.3d at 721; *Sobieniak*, No. 12-1053; *Rosenfield*, 681 F.3d at 1172; *McOmie-Gray*, 667 F.3d at 1325; *Large*, 292 F.3d at 49.

[11] *See* Beach v. Ocwen Fed. Bank, 523 U.S. 410 (1998), discussed in Part IV *infra*.

[12] *Jesinoski*, 729 F.3d at 1092; *Keiran,* 720 F.3d at 721.

[13] *See* Jesinoski v. Countrywide Home Loans, Inc., 134 S. Ct. 1935 (2014)

[14] *See* Jesinoski v. Countrywide Home Loans, Inc., 135 S. Ct. 790 (2015).

Before the Court's ruling, several commenters opined on the correct interpretation of the statute.[15] But this article goes beyond the basic question of what the statute requires: instead, it searches for an explanation for federal appellate hostility to the consumer's right to rescind. The statute and its implementing regulation are extremely clear that a lawsuit is not required to exercise the right, yet a surprising number of federal courts held otherwise. Their judicial creativity flouts cardinal judicial conventions that respect agency deference and congressional intent. There must be some deeper reason at work.

Part I explains the relevant statutory and regulatory framework that comprises TILA's right to rescind. Part II details the circuit split of authority on whether TILA requires a consumer borrower to send notice or to file a lawsuit in order to exercise her right to rescind (the rescission cases). Part III reflects on the majority view, which required the filing of a lawsuit in order to exercise the right to rescind. It considers whether some other evolving trend underlies the majority circuits' view in the rescission cases. It also outlines possible explanations for why the federal judiciary would require the filing of a lawsuit where Congress did not intend it, which in turn are explored in Parts IV, V, and VI. Specifically, in Part IV, the article posits that the federal judiciary's interest in regulating consumer litigation behavior explains the majority circuits' rulings. Part V explores the possibility that the rulings are another signal of a paradigm shift in agency deference. Finally, Part VI considers whether the rulings reflect the federal judiciary's disagreement with Congress's liberalization of common law rescission by statute.

[15] *See, e.g.*, Francesco Ferrantelli, Jr., Comment, *Truth in Lending? The Survival of a Borrower's Statutory Claim for Rescission*, 44 SETON HALL L. REV. 695 (2014); *see also* Caroline Hatton, Comment, *TILA: The Textualist-Intentionalist Litmus Act?*, 44 SETON HALL L. REV. 207 (2014).

I. RELEVANT STATUTORY AND REGULATORY FRAMEWORK

A. TILA'S RIGHT TO RESCIND

Congress enacted TILA in 1968 to "assure meaningful disclosure" of the costs of consumer credit and to promote the "informed use of credit" among consumers.[16] To that end, TILA requires that lenders disclose to prospective consumer borrowers specific information about the costs of credit.[17] TILA's requirements apply whenever a creditor extends credit to a consumer primarily for personal, family or household use.[18] In short, TILA is a disclosure statute that standardizes the information a lender must provide to a prospective consumer borrower. Congress hoped that TILA would not only provide information to consumers about the true cost of their loans, but also permit them to compare the costs of similar lending products. [19]

TILA also provides for remedies where the lender fails to comply with the statute's disclosure requirements. Relevant to home mortgages, under Section 1635 of TILA, a consumer has a right to rescind certain home mortgages.[20] Rescission unwinds the transaction, and returns the parties to their pre-mortgage transaction status.[21] Congress enacted Section 1635 to protect

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[16] 15 U.S.C. § 1601(a) (2014).

[17] *Id.*

[18] *Id.* § 1602(i).

[19] *Id.* § 1601(a).

[20] *Id.* § 1635(a).

[21] Rescission is defined as "[a] party's unilateral unmaking of a contract for a legally sufficient reason, such as the other party's material breach." BLACK'S LAW DICTIONARY (10th ed. 2014). It is also defined as "an agreement by contracting parties to discharge all remaining duties of performance and terminate the contract." *Id.* In short, rescission is accomplished either unilaterally or by mutual agreement of the parties. *Id.*

consumers from unfair and deceptive home-improvement lending practices, in which home improvement businesses and lenders deceived homeowners into signing high-cost loan contracts in exchange for work on their homes.[22]

Specifically, under Section 1635, a consumer who borrows to finance a non-purchase money mortgage, such as a home refinancing, home equity loan, or home improvement credit sale[23] that results in a lien on her home, has a right to cancel the loan within three business days after the loan closes.[24] This section provides that a borrower whose loan is secured with his "principal dwelling" may rescind the loan contract entirely "until midnight of the third business day following the consummation of the transaction."[25]

Congress later amended TILA to expand the consumer's right to rescind from three days to three years.[26] This extension, provided for in Section 1635(f), applies when the lender completely fails to provide certain material disclosures to the consumer.[27] Two categories of events trigger the extended rescission period:

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[22] 90 CONG. REC. H14388 (daily ed. May 22, 1968) (statement of Rep. Sullivan).

[23] 15 U.S.C. § 1635(e)(1) provides that the right of rescission does not apply to a "residential mortgage transaction." A residential mortgage transaction is defined in TILA as a purchase-money mortgage. *Id.* § 1602(x); *see also* Lea Krivinkskas Shepard, *It's All About the Principal: Preserving Consumers' Right of Rescission Under the Truth in Lending Act*, 89 N.C. L. REV. 171, 179 n.32 (explaining difference between purchase and non-purchase money mortgages).

[24] 15 U.S.C. § 1635(a). This section provides that a borrower whose loan is secured with his "principal dwelling" may rescind the loan contract entirely "until midnight of the third business day following the consummation of the transaction or the delivery of the information and rescission forms required under this section together with a statement containing the material disclosures required under this subchapter, whichever is later." *Id.*

[25] *Id.*

[26] *See* Pub. L. No. 93-495, § 405, 88 Stat. 1500, 1517 (1974) (codified at 15 U.S.C. § 1635(f) (2011)).

[27] 15 U.S.C. §1635(f) (stating that the right to rescind expires three years after the loan closes or upon the sale of the secured property, whichever date is earlier).

> (1) failure to provide each consumer with an interest in the property with one copy of the TILA disclosure form with all material information correctly disclosed; and (2) failure to give each consumer two copies of the notice of the right to cancel, one copy to keep and one to use if the option to rescind is exercised.[28]

Material disclosures include the loan's annual percentage rate (APR), finance charge, amount financed, payment schedule, the total of payments, among others provided for throughout the statute and TILA's implementing regulation, Regulation Z.[29]

TILA is a strict liability statute such that even minor, technical violations of the statute's disclosure requirements may form the basis for rescission.[30] Failure to provide the required information or forms or misstating the information, even if inadvertent, triggers a consumer borrower's right to rescind.[31]

TILA rescission includes a punitive element: it punishes a lender for material disclosure violations. A consumer borrower who properly exercises her right to rescind "is not liable for any finance or other charge, and any security interest given by [him], including any such interest arising by operation of law, becomes

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[28] *See, e.g., In re* Regan, 439 B.R. 522, 527 (Bankr. D. Kan. 2010) (citing 15 U.S.C. § 1635(a) and 12 C.F.R. §§ 226.5(b), 226.15(b), & 226.23(b)).

[29] 12 C.F.R. §1026.1–1026.60 (2014), also known as Regulation Z, is the implementing regulation for TILA. It defines material disclosures. It requires a lender provide to "each consumer whose ownership interest is or will be subject to [a] security interest," two copies of a notice of the right to rescind, and a TILA disclosure statement outlining the annual percentage rate (APR), the calculation method for the finance charge, among other requirements that are referred to as the material disclosures. *Id.* §§ 1026.23(a)(1), (b)(1), (a)(3).

[30] *See, e.g.*, *In re Regan*, 439 B.R. at 527 (holding that when a lender has violated TILA provisions, courts impose strict liability regardless of the nature of the violation or the creditor's intent and that the court has no discretion to decline rescission "because of the equities of the case").

[31] *See, e.g.,* Newton v. United Cos. Fin., 24 F. Supp. 2d 444 (E.D. Pa. 1998) (acknowledging that TILA is a strict liability statute with the result that a lender that violates its provisions is liable regardless of whether lender's conduct was intentional, negligent, or inadvertent).

void" upon rescission.[32] The lender loses its finance charges for the period of time that the borrower enjoyed the loan proceeds or property, which can range from three days to three years, depending on when a consumer borrower exercises her right to rescind before it expires.[33]

As explained below, the Section 1635(b) and Regulation Z dictate the process by which a consumer borrower exercises her right to rescind.

B. REGULATION Z AND MECHANICS OF TILA RESCISSION

When Congress enacted TILA, it empowered the Federal Reserve Board with rulemaking authority to implement the statute to achieve TILA's purposes.[34] TILA's implementing regulations became known as Regulation Z and included a rescission process.[35]

Congress subsequently enacted landmark financial regulatory reform legislation, the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, and transferred this authority from the Federal Reserve Board to the CFPB in 2011.[36] The CFPB is now the agency empowered by Congress to promulgate rules implementing TILA and to enforce TILA's

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[32] 15 U.S.C. § 1635(b) (2011).

[33] *See In re* Ramirez, 329 B.R. 727, 736 (Bankr. D. Kan. 2005) (noting that a lender is also subject to a fine for each TILA violation).

[34] The Federal Reserve Board originally had authority to promulgate regulations implementing TILA. *See* Consumer Credit Protection Act, Pub. L. No. 90-321, § 105, 82 Stat. 146 (1968) (codified as amended at 15 U.S.C. § 1604(a)). The Board promulgated Regulation Z, TILA's implementing regulations, pursuant to this authority. *See* 12 C.F.R. § 226 (2011).

[35] 12 C.F.R. § 1026.23 (2014).

[36] The Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 transferred the Federal Reserve Board's authority to the Consumer Financial Protection Bureau on July 21, 2011. Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, Pub. L. No. 111-203, § 1061, 124 Stat. 2035 (2010), (codified as amended at 12 U.S.C. § 5511).

provisions.[37] Thus, the CFPB is the primary source for interpretation and application of TILA.

The CFPB re-promulgated the relevant provision of Regulation Z, which details how a consumer exercises her right to rescind a mortgage loan for which the lender failed to provide the statutorily-mandated disclosures.[38] That provision, Section 1026.23, confirms that written notification is the means by which borrowers exercise their right to rescind.[39]

Section 1635(b) of TILA and Section 1026.23(d) of Regulation Z set forth the TILA rescission process. First, the consumer borrower must notify the lender, in writing, that she is exercising her right to rescind.[40] Notice may be sent by mail, telegram, or "other means of written communication.[41] When a consumer rescinds the loan, the security interest or lien becomes void by operation of law.[42] Within twenty days after receiving the rescission notice, the lender must return to the consumer borrower any money or property that has been given to anyone in connection with the loan.[43] The lender must also take steps to terminate the security interest.[44] Once the lender has satisfied its obligations, the consumer borrower must tender the amount owed on the loan, less interest and finance charges.[45] She cannot merely turn over the physical property to

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[36] In December 2011, the CFPB re-promulgated Regulation Z. *See* 12 C.F.R. § 1026.

[38] *Id.* at § 1026.23.

[39] *Id.*

[40] *Id.* § 1026.23(a)(2).

[41] *Id.*

[42] 15 U.S.C. §1635(b) (2011); 12 C.F.R. § 1026.23(d)(1).

[43] 15 U.S.C. § 1635(b); 12 C.F.R. § 1026.23(d)(2).

[44] 15 U.S.C. § 1635(b); 12 C.F.R. § 1026.23(d)(2).

[45] 15 U.S.C. § 1635(b); 12 C.F.R. § 1026.23(d)(3).

the lender or exercise a quitclaim deed in its favor.[46] As stated earlier, the lender is not entitled to any interest, fees, or costs associated with the loan as a consequence of rescission.[47]

What seems like a straightforward process has proved difficult to interpret and apply, even in the wake of the Supreme Court's recent ruling. Specifically, courts, lenders, and consumers have disagreed over whether written notice effectuates rescission. One interpretation of the statute and Regulation Z posits that under the plain language of Sections 1635 and 1026.23, the consumer borrower's giving of the notice of rescission automatically voids the security interest and accomplishes rescission.[48] Section 1635(a) provides, in relevant part, that a consumer "shall have the right to rescind the transaction . . . by notifying the creditor, in accordance with the regulations of the [CFPB], of his intention to do so."[49] Regulation Z, in turn, provides that "to exercise the right to rescind, the consumer shall notify the creditor."[50]

The contrary interpretation disagrees that notice effectuates rescission. These courts and lenders posit that the consumer's notice is just one step in the statutory rescission process set forth in TILA and Regulation Z.[51] Under this view, the borrower merely exercises his right to rescind by giving notice, and the security interest becomes void only when the remainder of the

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[46] *See, e.g.*, Yamamoto v. Bank of New York, 329 F.3d 1167, 1173 (9th Cir. 2003); Siver v. CitiMortgage, Inc., 830 F. Supp. 2d 1194, 1198 (W.D. Wash. 2011).

[47] 15 U.S.C. § 1635(b); 12 C.F.R. § 1026.23(d)(1).

[48] *See, e.g.*, Brief of Consumer Fin. Protection Bureau, as Amicus Curiae in Support of Plaintiff-Appellant and Reversal, Rosenfield v. HSBC Bank, USA, 681 F.3d 1172 (10th Cir. 2012) (No. 10-1442), 2012 WL 1074082.

[49] 15 U.S.C. § 1635(a).

[50] 12 C.F.R. § 1026.23(a)(2).

[51] Cromwell v. Countrywide Home Loans, Inc., 483 B.R. 36, 46 (Bankr. D. Mass. 2012) (quoting Large v. Conseco Finance Servicing Corp., 292 F.3d 49, 55 (1st Cir. 2002) ("Rescission under the TILA is 'automatic' [only] in the sense that, in contrast to common law rescission, the borrower need not first return the loan proceeds received under the agreement to effect a rescission.")).

steps in the TILA rescission process is complete.[52] Arguably, "[t]he plain language of the statute [and Regulation Z] indicates that exercising the right to rescind is a discrete event; and rescission is a separate discrete event."[53]

The language of the statute and Regulation Z are less than clear about the precise moment when rescission is complete. Specifically, the statute states that the security interest "becomes void upon rescission."[54] Regulation Z provides that the security interest becomes void "[w]hen a consumer rescinds a transaction."[55] Arguably, a consumer exercises her right to rescind by giving written notice, but rescission is only complete when the remaining steps provided for in the TILA rescission sequence have been taken.[56]

Notably, TILA and Regulation Z give the courts power to modify certain aspects of the statutory rescission mechanism.[57] Specifically, a court may modify "by court order" the sequence of events following a lender's receipt of the consumer borrower's rescission notice.[58] The language of this specific regulation implies that a court can alter TILA's statutory rescission scheme on a case-by-case basis rather than by a single decision that applies universally to TILA rescission cases. Courts have exercised this discretionary authority to alter the TILA rescission sequence where the equities demand it.[59] Specifically,

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[52] *See, e.g.*, *In re* Regan, 439 B.R. 522, 527 (Bankr. D. Kan. 2010).

[53] *In re* Ramirez, 329 B.R. 727, 737-38 (Bankr. D. Kan. 2005).

[54] 15 U.S.C. § 1635(b).

[55] 12 C.F.R. § 1026.23(d).

[56] *In re Ramirez*, 329 B.R. at 737-38.

[57] 15 U.S.C. § 1635(b) (stating that "[t]he procedures prescribed by this subsection shall apply except when otherwise ordered by a court."); 12 C.F.R. § 1026.23(d)(4).

[58] 12 C.F.R. § 1026.23(d)(4).

[59] *See, e.g.*, Yamamoto v. Bank of New York, 329 F.3d 1167, 1171 (9th Cir. 2003); *In re* Stanley, 315 B.R. 602 (Bankr. D. Kan. 2004) (acknowledging that courts can equitably modify TILA rescission procedures with regard to termination of the security interest).

the courts have employed this equitable authority to condition rescission on tender by the consumer borrower before requiring the lender to cancel the security interest.[60] Courts disagree about how expansive this authority is and continue to debate its limits.[61]

The circuit divide that evolved is not about the mechanics of TILA rescission, per se, though certainly the circuit courts have entertained this topic, whether appropriate or not. And the debate is not about the limits of a court's equitable authority to modify the TILA rescission process. Rather, it is about how a consumer exercises her right of rescission under TILA. The statute provides for written notice to the lender within three years of closing of the loan transaction to trigger the TILA rescission process. The majority circuits, however, held that implicit in the statute is the requirement that a consumer borrower also file a lawsuit before the three-year period expires in order to exercise her right to rescind. This split of authority is explained further below.

II. CIRCUIT SPLIT: CONSTRAINED BY *STARE DECISIS*

The circuit-level dispute over what is sufficient notice to satisfy TILA's right to rescind pitted the Third and Fourth Courts of Appeal, which employ traditional canons of statutory interpretation, against the First, Sixth, Eighth, Ninth, and Tenth Circuit Courts of Appeal, which think that there is Supreme Court precedent that controls. In other words, the majority circuits think that the doctrine of *stare decisis* constrains them.

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[60] The ways federal courts have modified TILA rescission pursuant to Section 1635(b) is discussed further in Part IV.A.

[61] Merritt v. Countrywide Fin. Corp., 759 F.3d 1023, 1031-33 (9th Cir. 2014) (enumerating case holdings on the scope of federal courts' Section 1635(b) equitable authority to modify TILA rescission procedures).

A. THE THIRD AND FOURTH CIRCUIT COURTS OF APPEAL HELD THAT WRITTEN NOTICE TO THE LENDER IS SUFFICIENT TO EXERCISE THE RIGHT TO RESCIND

The Third and Fourth Circuits held that notifying a creditor in writing within three years of the closing of the loan is sufficient to exercise TILA's right to rescind.[62] Because this issue is one of statutory interpretation, these courts resolved the dispute with the ordinary starting point for any question of statutory interpretation — the text of the statute itself.[63] In each case, the court concluded that the plain language of Section 1635(f) is clear and unambiguous: a consumer's right to rescind expires three years after the loan transaction has closed.[64]

Because the statute does not speak to the means by which a consumer exercises this right, whether by written notice or the filing of a lawsuit, the judges next looked at the text of the implementing regulation on point.[65] Here, again, the courts were persuaded that the plain language of the regulation was clear and unambiguous as to the means by which a consumer exercises her right to rescind: a consumer must mail written notice in order to exercise her right to rescind. [66]

These courts were additionally persuaded that TILA does not require a consumer to file a lawsuit in order to exercise her right to rescind because neither the statute nor the implementing regulation makes any mention of civil actions or the filing of a

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[62] *See generally* Sherzer v. Homestart, Mortg. Servs., 707 F.3d 255 (3d Cir. 2013); Gilbert v. Residential Funding, LLC, 678 F.3d 271 (4th Cir. 2012); Williams v. Homestake Mortg. Co., 968 F.2d 1137 (11th Cir. 1992).

[63] *Sherzer,* 707 F.3d at 258; *Gilbert*, 678 F.3d at 276; *Williams,* 968 F.2d at 1139-40.

[64] *Sherzer,* 707 F.3d at 258; *Gilbert*, 678 F.3d at 276.

[65] *Sherzer,* 707 F.3d at 258; *Gilbert*, 678 F.3d at 276; *Williams,* 968 F.2d at 1141-42.

[66] *Sherzer,* 707 F.3d at 258; *Gilbert*, 678 F.3d at 276.

complaint.[67] These courts refused to graft a requirement onto the statute that Congress seemingly did not intend.[68]

Surprisingly, this common-sense approach to a straightforward question of statutory interpretation was widely acknowledged as the minority approach to this issue.[69]

B. THE FIRST, SIXTH, EIGHTH, NINTH, AND TENTH CIRCUIT COURTS OF APPEAL HELD THAT TILA REQUIRES THE FILING OF A LAWSUIT TO EXERCISE THE RIGHT TO RESCIND.

Five Circuit Courts of Appeal (the majority circuits) complicated this simple question of statutory interpretation. These courts held that a consumer borrower, despite having sent timely written notice to her creditor exercising her right to rescind, is also required to file a lawsuit, a ruling that effectively amends TILA.[70] The analytical starting point for the majority circuits' analysis is an inapposite Supreme Court case, *Beach v. Ocwen Federal Bank*, from which they extrapolate the answer, rather than from the statute itself.[71]

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[67] *Sherzer*, 707 F.3d at 260 ("[T]he absence of any reference to causes of action or the commencement of suits in [Section] 1635 also suggests that rescission may be accomplished without a formal court filing."); *Gilbert*, 678 F.3d at 277 ("Simply stated, neither [Section] 1635 nor Regulation Z says anything about the filing of a lawsuit, and we refuse to graft such a requirement upon them.").

[68] *See Sherzer*, 707 F.3d at 260; *Gilbert*, 678 F.3d at 277.

[69] *See, e.g.*, Ferrantelli, *supra* note 15, at 716-17*;* Hatton, *supra* note 15, at 227-34.

[70] Jesinoski v. Countrywide Home Loans, Inc., 729 F.3d 1092 (8th Cir. 2013) *cert. granted*, 134 S. Ct. 1935 (2014) and *rev'd and remanded*, 135 S. Ct. 790, 190 L. Ed. 2d 650 (2015); Hartman v. Smith, 734 F.3d 752 (8th Cir. 2013); Lumpkin v. Deutsche Bank National Trust Co., 534 F. App'x 335 (6th Cir. 2013); Keiran v. Home Capital, Inc., 720 F.3d 721 (8th Cir. 2013); Sobieniak v. BAC Home Loans Servicing, No. 12-1053 (8th Cir. filed July 12, 2013); 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); Large v. Conseco Finance Servicing Corp., 292 F.3d 49 (1st Cir. 2002).

[71] Beach v. Ocwen Fed. Bank, 523 U.S. 410 (1998).

In *Beach*, the Court addressed whether borrowers, who never sent a notice of rescission to the lender, could raise TILA's right of rescission as "an affirmative defense in a collection action brought more than three years after" the loan closed.[72] The Court thought the issue was whether Section 1635(f), which extends the right to rescind from three days to three years for material disclosure violations, was a statute of limitation or a statute of repose.[73] A statute of limitations limits the time to sue to enforce the right and can be equitably tolled while a statute of repose governs the life of the underlying right and cannot be tolled.[74]

Beach concluded, based on the TILA's statutory language and Congressional intent, that Section 1635(f) is a statute of repose with the effect that the three-year provision cannot be tolled.[75] The Court explained that Section 1635(f) made no mention of bringing an action whereas Congress expressly provided for the filing of a lawsuit in other TILA provisions.[76] Instead, the court explained, Congress provided for "expiration" of the right of rescission.[77] Accordingly, it concluded, Congress did not intend for 1635(f) to operate as a statute of limitations.[78]

Then, in dicta, *Beach* suggests that a policy reason supports its ruling that Section 1635(f) acts as a statute of repose. The Court explained that were it to find that Section 1635(f) is a statute of limitations, which could be tolled indefinitely, a consumer borrower would have a statutory right to rescission without an identifiable endpoint.[79] According to the Court, a

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[72] *Id.* at 411.

[73] *Id.* at 416.

[74] *See id.*

[75] *Id.* at 417-419.

[76] *Id.* at 418.

[77] *Id.* at 413,

[78] *See id.*

[79] *Id.* at 418-19.

right to rescind that does not expire would "cloud a bank's title on foreclosure" and "Congress may well have chose to circumscribe that risk."[80] The Court justified its interpretation of Section 1635(f) as promoting Congressional intent.[81]

The majority circuits have extrapolated from *Beach*'s dicta about the need for finality as to the exercise of TILA rescission rights.[82] These courts concluded that implicit in the statute is a requirement that a consumer borrower file a lawsuit: "it is the filing of an action in a court . . . that is required to invoke the right limited by the TILA statute of repose."[83] These courts expressly rejected traditional methods of statutory interpretation, favoring the policy argument articulated in *Beach*, and even going as far as to state that *Beach* constrained them. [84]

The majority circuits' reliance on *Beach* was misplaced. *Beach*, answered a question irrelevant to the issue here, and as the Supreme Court has expressly acknowledged, *Beach* is neither dispositive nor instructive on the question of how a consumer borrower exercises his right to rescind, only how much time she has to exercise that right.[85] Nothing in *Beach* merits the majority circuit rulings that TILA requires the filing of a lawsuit to exercise the right to rescind.[86]

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[80] *See id.*

[81] *Id.*

[82] *See* Rosenfield v. HSBC Bank, USA, 681 F.3d 1172, 1186-87 (10th Cir. 2012). Rescission may "negatively affect the certainty of title in a foreclosure sale." *Id.*

[83] *See, e.g., id.* at 1183.

[84] *See, e.g., id.* at 1182; McOmie-Gray v. Bank of Am. Home Loans, 667 F.3d 1325, 1328 (9th Cir. 2012).

[85] *See* Jesinoski v. Countrywide Home Loans, Inc., 135 S. Ct. 790, 792 (2015) ("Although §1635(f) tells us *when* the right to rescind must be exercised, it says nothing about *how* that right is exercised.").

[86] *Id.*

Complicating the issue is the temptation to entertain disputes regarding the mechanics of TILA rescission, rather than focusing on the narrow issue of what the statute requires for a consumer borrower to exercise her right. The parties involved in the rescission cases briefed the issues for the circuits, debating the role Congress intended the judiciary to play in TILA's rescission process.[87] For example, the CFPB contended that all a consumer borrower needs to do is send a written timely notice of rescission to the lender.[88] The notice "effectuates the rescission as a matter of law," and a consumer borrower need not seek a judicial declaration of rescission to unwind the loan.[89] Under this view, the notice accomplishes the rescission. Three mortgage industry trade groups, the American Bankers Association, the Consumer Bankers Association, and Consumer Mortgage Coalition, have also put such issues before the courts. [90] They argued the opposite, that the notice merely triggers a more complex TILA rescission mechanism that requires a judicial declaration to accomplish rescission.[91]

The majority circuits effectively amended TILA and its implementing regulation by ruling that a judicial declaration is required to effectuate rescission under Section 1635.

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[87] *See, e.g.,* Brief of Consumer Fin. Protection Bureau, *supra* note 48.

[88] *Id.*

[89] *Id.* at *10 (explaining that TILA's statutory right of rescission is consistent with common law in that it is accomplished privately and without judicial intervention); *see also* Belini v. Wash. Mut. Bank, FA, 412 F.3d 17, 25 (1st Cir. 2005) ("[S]ection 1635 is written with the goal of making the rescission process a private one, worked out between creditor and debtor without the intervention of the courts."); Peterson v. Highland Music, Inc., 140 F.3d 1313, 1322 (9th Cir. 1998) ("When a party gives notice of rescission, it has effected the rescission, and any subsequent judicial proceedings are for the purpose of confirming and enforcing that rescission.").

[90] *See, e.g.,* Brief of Amici Curiae Am. Bankers Ass'n, Consumer Bankers Ass'n, and Consumer Mortg. Coalition Supporting Appellees and Affirmance, *Rosenfield*, 681 F.3d 1172 (No. 10-1442), 2012 WL 1656042.

[91] *See id.*

C. THE SUPREME COURT RESOLVED THE SPLIT IN FAVOR OF THE MINORITY VIEW

In early 2015, the Supreme Court resolved the issue in an extremely brief, perfunctory decision that emphasizes the plain language of Section 1635(a) as controlling. In reversing the Eighth Circuit, it held:

> Section 1635(a) explains in unequivocal terms how the right to rescind is to be exercised: It provides that a borrower "shall have the right to rescind . . . *by notifying the creditor, in accordance with regulations of the Board, of his intention to do so"*. The language leaves no doubt that rescission is effected when the borrower notifies the creditor of his intention to rescind. It follows that, so long as the borrower notifies within three years after the transaction is consummated, his rescission is timely. The statute does not also require him to sue within three years.[92]

The Court further rejected all of the lender's arguments that TILA should be interpreted as requiring a consumer borrower to file a lawsuit in order to rescind a qualifying mortgage loan.[93]

Finally, the Court's decision arguably resolves the debate over how to effectuate, or accomplish, rescission under Section 1635. Among the arguments for requiring the filing of a lawsuit is that the TILA rescission mechanism looks more like rescission-in-equity, which requires a judicial declaration of rescission, and less like rescission-at-law, which is accomplished privately by the parties upon tender of the rescinding party.[94] *Jesinoski* is clear that "rescission is effected" by a consumer

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[92] Jesinoski v. Countrywide Home Loans, Inc., 135 S. Ct. 790, 792 (2015) (emphasis added).

[93] *See id.*

[94] *See infra* Section VI.

borrower's written notice to the lender that he intends to rescind.[95] As a practical consequence of this ruling, a lender now bears the burden of filing a lawsuit to contest the borrower's ability to rescind. In short, any questions about the mechanics of TILA rescission should be resolved.

III. LOOKING BENEATH *STARE DECISIS* TO EXPLAIN THE MAJORITY CIRCUITS' RESCISSION CASES

As explained, this article is less concerned with the correct interpretation of the statute or the Supreme Court's resolution of the issue. Instead, it is interested in explaining the majority circuits' hostility to TILA rescission, a remedial consumer protection measure.

TILA is a consumer protection oriented law that has also evolved into a safe harbor for lenders in some respects. As long as a lender complies with TILA, it is immune to challenges. Further, some courts have applied less than a strict liability standard for certain TILA violations on the grounds that TILA is a hypertechnical statute that inequitably punishes lenders for minor infractions.[96] As a consequence, certain TILA protections have been eroded, thereby impeding consumers' access to courts to enforce the statute and undermining the consumer protective purpose of the statute. Nowhere is this more evident than in how federal courts have tampered with the TILA rescission mechanism, at times arguably exceeding their equitable authority under the statute to modify the rescission sequence.

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95 *Jesinoski*, 135 S. Ct. at 792.

96 *See, e.g.*, Melfi v. WMC Mortgage Corp., 568 F.3d 309, 312 (1st Cir. 2009) (holding that technical violations of TILA did not permit the borrower to exercise an extended right of rescission under Section 1635(f)*; see also* Michael Sabet, Comment, *Slamming the Door in the Consumer's Face: Courts' Inadequate Enforcement of TILA Disclosure Violations and the False Hope of a Foreclosure Defense*, 115 PENN ST. L. REV. 183 (2010) (discussing how some courts have favored lenders for mere technical violations of TILA on equitable grounds).

Given the anti-consumer nature of such decisions, one wonders whether something more than *stare decisis* is motivating the majority rulings in the rescission cases. This remainder of this article considers whether some other evolving trend underlies the majority circuits' view in the rescission cases to explain why these courts would require the filing of a lawsuit where Congress did not intend it.

Specifically, in Part IV, the article posits that the federal judiciary's interest in regulating consumer litigation behavior explains the majority circuits' rulings. Part IV examines how federal courts are modifying TILA rescission in ways that deter consumer borrowers from suing to enforce TILA rescission claims. In addition to creating barriers to TILA rescission actions, federal courts have curtailed consumers' access to courts in other contexts in recent years, handing down rulings favoring lenders and other corporations in consumer adhesion contracts and debt collection agencies.

Part V explores the possibility that the majority circuits' rulings signal that a paradigm shift in agency deference is on the horizon. The decisions in the rescission cases blatantly ignore any notion of administrative deference to the CFPB's regulation and its interpretation of the regulation. This silence comes in the wake of Supreme Court decisions that have made applying traditional canons of administrative deference uncertain. Part V tries to explain why the imminent change may have made the circuit courts reluctant to address administrative law.

Finally, Part VI considers whether the rulings reflect the federal judiciary's disagreement with Congress's liberalization of common law rescission by statute. The majority circuits' rulings ensure that TILA rescission requires judicial intervention and supervision in all TILA rescission cases even though the plain language of the statute does not contemplate a role for the courts unless a lender contests a consumer's right to rescind.

IV. INTERPRETING THE LAW AS A MEANS TO REGULATE CONSUMER LITIGATION BEHAVIOR

One possible motivation underlying the majority circuits' hostility to TILA rescission is to regulate consumer litigation

behavior. Since the onset of the global financial crisis, consumers have been filing record numbers of cases in district courts under TILA, the Fair Debt Collection Act (FDCPA), and the Fair Credit Reporting Act (FCRA).[97] This spike in consumer cases puts consumer disputes and the laws to enforce consumer rights in front of the courts regularly. Many consumers assert their claims in good faith even if, inevitably, they are ultimately unsuccessful. Against this backdrop, the courts may be interpreting the law in ways that create disincentives for consumers to sue in order to control the number of cases consumers file.

As explained further below, an anti-consumer trend has become apparent in recession and post-recession era court rulings on TILA rescission and in contexts involving consumers, such as the enforceability of mandatory arbitration clauses and class action waivers in consumer adhesion contracts and the ability of consumers to sue debt collectors for illegal and abusive conduct. The rulings in each instance reduce likelihood that consumers will sue to enforce their rights, and in some instances, completely eviscerate the ability of consumers to avail themselves of courts as a way to address corporate wrongdoing. In short, the trend indicates that courts impair access to justice either by discouraging consumers from suing to enforce their rights or by taking away litigation as an option altogether. The majority circuits' hostility to TILA rescission may be a manifestation of this trend.

A. REGULATING CONSUMER LITIGATION BEHAVIOR BY CURTAILING TILA RESCISSION

In the context of TILA rescission, perhaps the majority circuits' decisions may reflect an attempt to exert some discipline on consumers (and their lawyers) who may be using the statute to delay enforcement of valid mortgage obligations.

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[97] *See* *FDCPA Lawsuits Set Another Record in 2011,* INSIDEARM.COM (Jan. 10, 2012), http://www.insidearm.com/daily/collection-laws-regulations/collection-laws-and-regulations/fdcpa-lawsuits-set-another-record-in-2011/. In 2011, TILA filing rates tripled over 2010. *Id.*

Lenders allege that often consumers are behind on their mortgage payments when they send a rescission notice and claim a TILA material disclosure violation.[98] Lenders also claim that when a consumer sends a TILA rescission notice, she often sends it on the eve of a bankruptcy or foreclosure proceeding, perhaps in an attempt to gain leverage and negotiate a loan workout agreement. [99] Lenders claim that consumer borrowers send rescission notices even if there is no TILA violation, and even if there has been a violation, the consumers generally are unable to tender or demonstrate tender.[100] Finally, lenders argue that rescission is "effectively an 'interest-free loan,'" with the result that the longer a consumer has to exercise the right to rescind, "the greater the benefit to the consumer" to the detriment of the lender.[101]

Perhaps the majority circuits found some merit in these allegations. The consumer borrowers in the rescission cases certainly possess some of the characteristics that lenders allege. Perhaps they think that many consumer borrowers sent TILA rescission notices with some strategic motivation, regardless of whether there has actually been a material disclosure violation, thereby subverting the consumer protective purpose of the right to rescind. By requiring the filing of a lawsuit to exercise the right to rescind, the judiciary ensures that consumer borrowers (and their lawyers) contemplate and commit to the investment of time and money required to assert and litigate a rescission claim. Additionally, the judiciary arguably protects the pro-consumer policies underlying TILA because consumer lawyers would be reluctant to file a frivolous TILA rescission claim and be subject to professional discipline or sanction.

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[98] Brief of Amici Curiae Am. Bankers Ass'n, Consumer Bankers Ass'n, and Consumer Mortg. Coalition Supporting Appellees and Affirmance, *supra* note 90.

[99] *Id.*

[100] *Id.*

[101] *Id.* at *13 (quoting Daniel Rothstein, Comment, *Truth in Lending: The Right to Rescind and the Statute of Limitations*, 14 PACE L REV. 633, 657 (1994)).

It is not illogical to conclude that these rationales lay beneath the surface of the majority-view decisions. It is well-known that the federal judiciary's civil dockets are busy and growing,[102] so there must be some reason why these courts would invite new litigation where Congress has not required it, and further, where traditional common law governing rescission did not require it. By requiring the filing of a lawsuit, rather than merely send written notice, the judiciary can regulate consumer litigation behavior to ensure that only clear and egregious material disclosure violations appear on their dockets. In short, by requiring litigation, the number TILA rescission cases actually filed is likely less than if lenders had to bring cases to defend against frivolous rescission notices.

Federal courts have manipulated the TILA rescission mechanism to deter consumers from enforcing rescission rights in another way. Courts interpreting and applying Section 1635 and Regulation Z have employed their equitable authority under TILA to alter the statute's rescission mechanism.[103] Section 1635(b) authorizes courts to modify on a case-by-case basis the statutory rescission sequence.[104] Many courts have employed this equitable authority to condition rescission on tender by the consumer borrower before requiring the lender to cancel the security interest.[105] So-called conditional rescission shifts the bargaining power back to the lender to protect it from risk of

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[102] *See, e.g.*, Adam Liptak, *A Busy Year for Judiciary, Roberts Says*, N.Y. TIMES, Jan. 1, 2010, at A18, *available at* http://www.nytimes.com/2010/01/01/us/01scotus.html?_r=0.

[103] The court's equitable power to modify TILA's statutory rescission process has been acknowledged for four decades. *See, e.g.*, Palmer v. Wilson, 502 F.2d 860, 862 (9th Cir. 1974). Congress amended TILA in 1980 to codify the court's equitable authority in TILA rescission cases. *See* Truth in Lending Simplification and Reform Act, Pub. L. No. 96–221, § 612(a)(4), 94 Stat. 175 (1980) (codified as amended at 15 U.S.C. § 1635(b) (2014)).

[104] 15 U.S.C. § 1635(b) (stating that "[t]he procedures prescribed by this subsection shall apply except when otherwise ordered by a court.").

[105] *See* Yamamoto v. Bank of New York, 329 F.3d 1167, 1171 (9th Cir. 2003); *In re* Stanley, 315 B.R. 602 (Bankr. D. Kan. 2004) (acknowledging that courts can equitably modify TILA rescission procedures with regard to termination of the security interest).

forfeiture,[106] and arguably balances the competing interests of the consumer borrower and the lender.

But some courts have done more than reverse the TILA rescission sequence for tender. Beginning with *Yamamoto v. Bank of New York*, case law has developed that further curtails the availability of TILA rescission as a consumer remedy for material disclosure violations.[107] In *Yamamoto*, the Ninth Circuit held that "district courts may, if warranted by the circumstances of the particular case, require the [borrower] to provide evidence of ability to tender as a condition for denial of a summary judgment motion advanced by the [lender]."[108] The Ninth Circuit explained that where the evidence is clear that the consumer borrower is unable to pay back amounts she has received (less interest, finance charges, etc.), the court may refuse to enforce rescission before trial.[109]

Some federal judges have construed *Yamamoto* as permitting a court to require a consumer borrower allege a "present" ability to tender in order to avoid dismissal of her rescission claim at the pleading stage.[110] The rationale for such

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[106] Permitting cancellation of the security interest before the consumer borrower tenders leaves the lender in an unsecured, and therefore vulnerable, position in a potential intervening bankruptcy. *See Yamamoto*, 329 F.3d at 1171.

[107] *Id.* at 1167.

[108] Merritt v. Countrywide Fin. Corp., 759 F.3d 1023 (9th Cir. 2014) (citing *Yamamoto,* 329 F.3d at 1171-73).

[109] *Yamamoto,* 329 F.3d at 1173.

[110] *See, e.g.*, Kimball v. Flagstar Bank F.S.B., 881 F. Supp. 2d 1209, 1223 (S.D. Cal. 2012) (dismissing, with leave to amend, plaintiffs TILA rescission claim for failure to plead ability to tender); Siver v. Citimortgage, Inc., 830 F. Supp. 2d 1194, (W.D. Wa. 2011) (requiring consumer borrowers to plead ability to tender in order to be entitled to an adjudication of their TILA rescission claim); Santos v. U.S. Bank N.A., 716 F. Supp. 2d 970, 977 (E.D. Cal. 2010) (holding that the consumer had to allege ability to tender in order to state claim for TILA rescission); Avina v. BNC Mortgage, No. C 09–04710 JF, 2009 WL 5215751, at *9 (N.D. Cal. Dec. 29, 2009) (concluding that the court could exercise its equitable authority under Section 1635 to require the homeowner plaintiff to allege "either the present ability to tender the loan proceeds or the expectation that she will be able to tender within a reasonable time").

rulings is varied. Some courts explain that rescission is an empty remedy without ability to repay amounts borrowed.[111] Others explain that requiring a consumer borrower to plead tender satisfies a less-often articulated goal of TILA rescission, namely to return parties to their pre-transaction status.[112] This construction of Section 1635(b) arguably exceeds a court's Section 1635(b) equitable power to modify the TILA rescission mechanism because it bolsters lender protections at the expense of individual consumer borrowers and Congressional intent.

The courts are not in agreement on this construction of *Yamamoto*.[113] Further, the Ninth Circuit recently clarified that the cases holding that a consumer borrower must demonstrate the ability to tender as a pleading requirement in TILA rescission cases is an unintended consequence of *Yamamoto*.[114] It expressly rejected this principle, noting that *Yamamoto* was decided in the context of summary judgment, a procedural posture where a court can consider a "full range of evidence" in ruling whether to reorder TILA rescission sequence and require conditional rescission, as contrasted with the pleading stage where a court lacks the evidence to properly evaluate the equitable considerations.[115]

Regardless, some courts have too broadly applied their equitable powers under the Section 1635(b) to modify the procedural mechanics of TILA rescission in a way that thwarts TILAs consumer protective purpose. Courts that impose a tender pleading requirement undoubtedly deter consumers from filing otherwise valid claims to enforce their TILA

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[111] *See* Botelho v. U.S. Bank, N.A., 692 F. Supp. 2d 1174, 1180 n.3 (N.D. Cal. 2010) (internal citations omitted).

[112] *See id.*

[113] *See e.g.*, Sakugawa v. Countrywide Bank F.S.B., 769 F. Supp. 2d 1211, 1219 (D. Haw. 2011) (concluding that a consumer borrower not required to allege tender to state a TILA rescission claim).

[114] Merritt v. Countrywide Fin. Corp., 759 F.3d 1023, 1031-33 (9th Cir. 2014) (rejecting the requirement articulated in *Yamamoto* that plaintiffs must plead the ability to tender in their complaint).

[115] *Id.* at 1031.

rescission rights. Consumers ordinarily refinance or sell their home in order to generate the proceeds to fulfill TILA's tender requirement.[116] But refinancing and selling is more difficult in the post-recession era.[117] Demonstrating creditworthiness for a refinance is more challenging; and selling in a slow housing market takes time.[118] Pairing these challenges with the three-year time limitation on exercising the right to rescind plus the time, expense, and additional uncertainty involved in litigating to enforce rescission rights means that many consumers will forgo enforcing valid TILA rescission claims altogether.

As to whether a lawsuit must be filed, the question is what TILA and Regulation Z require for a consumer borrower to exercise her right to rescind. As to whether a consumer borrower must plead tender in order to avoid dismissal of her TILA rescission claim, the more appropriate question is what TILA and Regulation Z permit. But as to both instances, the courts are manipulating Section 1635 of TILA in a way that weeds out lawsuits to enforce TILA rescission rights. Consumer borrowers will decide not to litigate valid TILA rescission claims as a consequence of these decisions. When the courts issue rulings such as these, they improperly impair consumer access to the court system and justice.

B. OTHER RECENT RULINGS THAT AFFECT CONSUMER LITIGATION BEHAVIOR

Recent decisions from the Supreme Court illustrate how federal courts are curtailing consumer access to courts in other contexts.

In 2011, for example, the Court upheld the enforceability of mandatory arbitration clauses and class action waivers in consumer adhesion contracts,[119] thereby impeding consumers'

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[116] Shepard, *supra* note 23, at 177-79.

[117] *Id.*

[118] *Id.* at 180-182.

[119] AT&T Mobility, L.L.C. v. Concepcion, 131 S. Ct. 1740, 1748-53 (2011).

access to courts to vindicate corporate wrongdoing. Since then, the Court has developed a thread of decisions that enforce individual arbitration over class arbitration.[120]

Mandatory arbitration clauses require resolution of any dispute arising under the subject contract in arbitration rather than in a court of law.[121] Class action waiver provisions eliminate the possibility that a consumer plaintiff aggregate her claim with other similarly-situated plaintiffs to obtain relief, whether in arbitration or in a court of law. Both types of provisions have become increasingly common in all kinds of consumer contracts, including those for financial services and products.

The CFPB recently completed a study about the use of these types of provisions in consumer contracts (CFPB Arbitration Study).[122] The CFPB Arbitration Study, while merely preliminary, found widespread use of mandatory arbitration clauses in contracts covering consumer financial services and products.[123] The agency concluded that mandatory arbitration clauses are a "common . . . feature of consumer financial

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[120] *See, e.g.*, Am. Express Co. v. Italian Colors Rest., 133 S. Ct. 2304, 2309-13 (2013) (Thomas, J., concurring) (holding that a party cannot escape binding individual arbitration by asserting that the procedures of a class action suit are necessary for the effective litigation of the party's claim, even when it involves a low-value amount and the economics of a non-class arbitration); Marmet Health Care Ctr., Inc. v. Brown, 132 S. Ct. 1201, 1204 (2012) (per curiam); CompuCredit Corp. v. Greenwood, 132 S. Ct. 665, 668-70 (2012); Nitro-Lift Techs., L.L.C. v. Howard, 133 S. Ct. 500, 503 (2012) (per curiam); KPMG L.L.P. v. Cocchi, 132 S. Ct. 23, 24-26 (2011) (per curiam).

[121] Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 1414(e)(1), 124 Stat. 1376 (2010) (codified at 15 U.S.C. § 1639c(e) (2012)) (barring pre-dispute mandatory arbitration clauses in residential mortgage transactions).

[122] CONSUMER FIN. PROT. BUREAU, ARBITRATION STUDY PRELIMINARY RESULTS: SECTION 1028(A) STUDY RESULTS TO DATE (2013), *available at* http://files.consumerfinance.gov/f/201312_cfpb_arbitration-study-preliminary-results.pdf (last visited May 1, 2015) [hereinafter CFPB ARBITRATION STUDY].

[123] *Id.* at 12-13.

contracts."[124] The report also found that about ninety percent of such contracts contain class action waiver clauses applicable to both judicial and arbitration proceedings.[125]

The findings in the CFPB Arbitration Study come in the wake of the Supreme Court rulings upholding mandatory arbitration clauses and class action waivers. These types of provisions affect consumers' access to justice.[126] Mandatory arbitration clauses ensure that a consumer seeking to enforce her contractual rights is barred from doing so in court. Class action waiver provisions eliminate the possibility that a consumer plaintiff aggregate her claim with other similarly-situated plaintiffs to obtain relief, whether in arbitration or in a court of law. This line of decisions curtails the ability of consumers to enforce rights in the court system by redirecting the litigation to arbitration and by forcing a consumer to litigate individually rather than as a class. Consumers often have low-value claims and are unwilling to invest the resources in arbitrating or litigating small claims. The ability to aggregate small claims is critical to vindicating corporate wrongdoing. Further, arbitrations are subject to considerable criticism as biased in favor of corporations and unable to provide adequate remedies.[127]

In the debt collection context, the Supreme Court handed down a ruling that undoubtedly will discourage consumers and their attorneys from bringing even meritorious claims against collection agencies for violations of the Fair Debt Collection Practices Act.[128]

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[124] *Id.* at 5; *see id.* at 12-13 (finding that mandatory arbitration clauses existed in fifty percent of outstanding credit card accounts, eighty-one percent of prepaid charge cards, and in checking accounts covering forty-four percent of all insured deposits).

[125] *Id.* at 12-13.

[126] *See, e.g.*, Herman Schwartz, *How Consumers Are Getting Screwed by Court Enforced Arbitration*, NATION (July 8, 2014), http://www.thenation.com/article/180551/how-consumers-are-getting-screwed-court-enforced-*arbitration#*.

[127] *See, e.g.*, CFPB ARBITRATION STUDY, *supra* note 122, at 7-8.

[128] *See* Marx v. Gen. Revenue Corp., 133 S. Ct. 1166, 1171-72 (2013). By way of background, the Fair Debt Collection Practices Act (FDCPA) is a consumer

In *Marx v. General Revenue Corp.*,[129] the Court held a prevailing defendant in a FDCPA lawsuit may be entitled to costs even though the consumer-plaintiff did not bring the case in bad faith or for purposes of harassment.[130] Debt collectors have celebrated this ruling and for good reason. The Court's holding discourages meritorious and good faith claims for FDCPA violations because of the risk that a consumer is subject to further liability if she loses her case. In the wake of *Marx*, most consumers will conclude that the risk of incurring additional debt, in the form of costs for the prevailing defendant, is just too high to justify filing a lawsuit. Few rationale consumers, who are already sought by collection agencies for allegedly delinquent debt and who are struggling financially, would file a lawsuit, thereby incurring additional debt in the form of attorney's fees, only to be held responsible for the collection agency's costs as well. The *Marx* ruling undermines the purposes of the FDCPA.

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protection statute that seeks to insulate consumers from certain abusive, deceptive, and unfair debt collection practices by debt collectors. *See* Fair Debt Collection Practices Act, Pub. L. No. 95-109, 91 Stat. 874 (1977) (codified as amended at 15 U.S.C. § 1692-1692p (2012)).

[129] *Marx*, 133 S. Ct. at 1174-79. There, Plaintiff Olivia Marx defaulted on her student loans. *Id.* at 1171. In response, her lender hired a debt collection agency called "General Revenue Corporation" to collect on the delinquent debt. *Id.* Marx alleged that General Revenue, in connection with the collection of the debt, lied to her, harassed her, and threatened her in violation of the Fair Debt Collection Practices Act. *Id.* She, however, lost on the merits of her claim. *Id.* at 1171-72.

[130] In *Marx*, the Supreme Court had to interpret the interplay between Rule 54 of the Federal Rules of Civil Procedure and Section 1692k(a)(3) of the FDCPA, which address recovery of costs. *Id.* at 1171. Rule 54(d)(1) provides that "[u]nless a federal statute, these rules, or a court order provides otherwise, costs — other than attorney's fees — should be allowed to the prevailing party." *Id.* at 1172 (citing and quoting FED. R. CIV. P. 54(d)(1)). The relevant provision of the FDCPA provides that "[o]n a finding by the court that an action under this section was brought in bad faith and for the purpose of harassment, the court may award to the defendant attorney's fees reasonable in relation to the work expended and costs." 15 U.S.C. § 1692k(a)(3) (2011). The Court ruled that the FDCPA provision does not displace a court's discretion to award costs under Rule 54 to the prevailing party. *Marx*, 133 S. Ct. at 1179.

These rulings, which apply in TILA cases, in FDCPA cases, and in disputes involving ordinary consumer adhesion contracts, all suggest that federal courts are trying to control consumer litigation behavior, namely to influence a consumer's decision to sue or not to sue.

V. THE MAJORITY CIRCUITS' SILENCE ON ADMINISTRATIVE DEFERENCE SIGNALS A POSSIBLE PARADIGM SHIFT IN AGENCY DEFERENCE DOCTRINE

Judicial retreat from agency deference is another plausible reason for the majority circuits' interpretation of the TILA rescission provision.

Federal courts ordinarily accord deference to the administrative agency vested with the authority to apply and enforce a statute.[131] Indeed, the Supreme Court has expressly acknowledged that courts should accord agency deference in the process of interpreting and applying TILA and Regulation Z.[132] Among the rationales for this administrative deference is that the CFPB possesses agency expertise necessary to promulgate and enforce rules that are consistent with the statute.[133]

But the majority circuits' decisions in the rescission cases blatantly ignore any notion of administrative deference. Their

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[131] *See, e.g.*, Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 843 (1984); Ford Motor Credit Co. v. Milhollin, 444 U.S. 555, 566 (1980) (stating "[t]he Court has often repeated the general proposition that considerable respect is due 'the interpretation given [a] statute by the officers or agency charged with its administration.' An agency's construction of its own regulations has been regarded as especially due that respect.") (internal citations omitted).

[132] *See, e.g.*, *Ford Motor Credit Co.*, 444 U.S. at 565 (concluding that "caution requires attentiveness to the views of the administrative entity appointed to apply and enforce a statute. And deference is especially appropriate in the process of interpreting the Truth in Lending Act and Regulation Z."); *In re* Ramirez, 329 B.R. 727, 737-38 (Bankr. D. Kan. 2005)

[133] *See* Melanie E. Walker, *Congressional Intent and Deference to Agency Interpretations of Regulations*, 66 U. CHI. L. REV. 1341, 1344-45 (1999).

silence suggests that a paradigm shift in agency deference doctrine is on the horizon, at least as it applies to TILA. Some Supreme Court justices have criticized the substantial deference accorded an agency's interpretation of its own regulation.[134] Their criticisms, articulated in various dissents, indicate that at least some members of the Supreme Court are interested in reconsidering and even reversing well-established canons of administrative deference.[135] The majority circuits' failure to analyze issues of administrative deference may well have been deliberate. Cognizant of a potential shift, the majority circuits may have avoided the issue.

This section explores the possibility that such a shift underlies the majority circuits' failure to accord any level of deference to the CFPB's interpretation of TILA, as manifested in the regulation, and its interpretation of TILA and Regulation Z, as articulated in its various amicus filed in some of the rescission cases.

A. THE RESCISSION CASES FAIL TO ANALYZE WHETHER REGULATION Z IS A REASONABLE INTERPRETATION OF TILA UNDER THE CHEVRON STANDARD.

Agencies promulgate rules to implement a regulatory framework authorized by Congress. The statute that authorizes an agency to implement a regulatory regime may be ambiguous, leaving the agency to create regulations that interpret those ambiguities and even fill in statutory gaps.

The Supreme Court, in *Chevron U.S.A. Inc. v. Natural Resource Defense Council, Inc.*, held that an agency's "permissible construction" of a statute that is "silent or ambiguous with respect to the specific issue" is to be given "controlling weight" so long as the construction is reasonable.[136]

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[134] For example, Chief Justice Roberts and Justices Alito, Scalia, and Thomas have all criticized *Seminole Rock*/*Auer* deference for its tendency to foster agency overreaching and unfairness to regulated parties. *See, e.g.*, Decker v. Nw. Envtl. Def. Ctr., 133 S. Ct. 1326, 1338-44 (2013) (Roberts, C.J., concurring) (Scalia, J., concurring in part and dissenting in part); Thomas Jefferson Univ. v. Shalala, 512 U.S. 504, 512 (1994) (Thomas, J., dissenting).

[135] *See, e.g.*, *Decker*, 133 S. Ct. at 1337-41.

[136] 467 U.S. at 843.

This is true even where Congress's delegation to the agency on the issue is "implicit rather than explicit."[137] In that case, a court is expressly instructed to refrain from substituting its own interpretation of the statutory provision, for that of the agency.[138]

The *Chevron* standard has been a canon of administrative law for three decades. As Michael Healy has noted:

> *Chevron*'s formal approach was motivated by separation of powers: the Court would require an agency to conform to law that Congress clearly defined in a statute. If, however, the statute were ambiguous, the Court would defer to an agency's interpretation because Congress had effectively delegated resolution of the ambiguity to the agency.[139]

Chevron involves a two-step analysis.[140] The first involves ascertaining Congressional intent.[141] A court must ask whether Congress has directly addressed the precise issue.[142] If so, then the inquiry is over because the "agency must give effect to the unambiguously expressed intent of Congress."[143] If however, the statute does not address the precise issue in dispute, a court

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[137] *Id.* at 844.

[138] *Id.*

[139] Michael P. Healy, *The Past, Present and Future of* Auer *Deference: Mead, Form and Function in Judicial Review of Agency Interpretations of Regulations,* 62 U. KAN. L. REV. 633, 645-46 (2014).

[140] *Chevron*, 467 U.S. at 842–43.

[141] *Id.*

[142] *Id.* at 842.

[143] *Id.* at 843.

resolves whether the "agency's answer is based on a permissible construction of the statute."[144]

In a subsequent case, *United States v. Mead Corp.*,[145] the Court revisited *Chevron* deference and clarified the standard as it applies to review of an agency's implementation of a statute. It explained "that administrative implementation of a particular statutory provision qualifies for *Chevron* deference when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority."[146] Accordingly, "when a statute explicitly or implicitly delegates rulemaking authority to an agency and the agency has exercised that authority with the force of law, its interpretation falls within *Chevron* and is the law unless it is arbitrary or capricious."[147]

As described, Congress has vested the CFPB with the quasi-legislative authority to promulgate rules for purposes of implementing and enforcing TILA.[148] Thus, the CFPB has principal responsibility for interpretation and application of TILA. And as explained, the CFPB re-promulgated Section 1226.23 of Regulation Z to implement TILA's statutory rescission mechanism.[149] This section details how a consumer exercises her right to rescind a mortgage loan for which the lender failed to provide the statutorily-mandated disclosures. Among its provisions is a section that is clear that a consumer exercises her right to rescind by giving written notice to the lender. Regulation Z is silent as to the filing of a lawsuit to enforce TILA's right of rescission.

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[144] *Id.*

[145] 533 U.S. 218, 226-37 (2001).

[146] *Id.* at 226-27.

[147] Daniel Mensher, *With Friends Like These: The Trouble with* Auer *Deference*, 43 LEWIS & CLARK ENVTL. L. REV. 849, 857 (2013).

[148] *See supra* Part I.B.

[149] *See id.*

The majority circuits could have engaged in a *Chevron* analysis. They could have first inquired whether TILA is silent or ambiguous as to how a consumer borrower exercises her right to rescind. If these courts concluded that TILA is silent or ambiguous, then they could have resolved whether the CFPB's interpretation of the statute through the implementing regulation is reasonable. Under *Chevron*, Regulation Z would then be accorded deference as long as reasonable.

But what if the majority circuits had concluded that Section 1026.23 of Regulation Z is ambiguous? Even if the majority circuits had determined that the CFPB's interpretation of TILA rescission through Regulation Z remained sufficiently ambiguous to preclude *Chevron* deference, as explained below, there is another layer of administrative deference doctrine that would govern. Here too, the majority circuits failed to at least acknowledge the possibility that the rescission cases implicate another agency deference doctrine, which upholds an agency's interpretation of its own regulation unless "plainly erroneous or inconsistent with the regulation."[150] The majority circuits' failure to address this type of administrative deference is discussed below.

B. THE RESCISSION CASES FAIL TO CONSIDER WHETHER THE CFPB'S INTERPRETATION OF ITS OWN REGULATION IS ENTITLED TO SEMINOLE ROCK/AUER DEFERENCE.

Regulations enacted by agencies, much like the statutes enacted by Congress, can lack clarity.[151] When a regulation is ambiguous, administrative law doctrine provides for substantial deference to an agency's interpretation of its own regulations.[152] Seven decades ago, the Supreme Court ruled in *Bowles v. Seminole Rock & Sand Co.* that a court must defer to an agency's interpretation of its own regulations unless that interpretation is

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[150] Bowles v. Seminole Rock & Sand Co., 325 U.S. 410, 414 (1945).

[151] DANIEL T. SHEDD, CONG. RESEARCH SERV., *SEMINOLE ROCK* DEFERENCE: COURT TREATMENT OF AGENCY INTERPRETATION OF AMBIGUOUS REGULATIONS 1 (2013).

[152] *See* Christensen v. Harris Cnty., 529 U.S. 576 (2000).

"plainly erroneous or inconsistent with the regulation."[153] In another landmark administrative law case, *Auer v. Robbins*,[154] the Supreme Court held that deference to an agency's interpretations of its own regulation is appropriate when it appears as amicus.[155]

This remains true even if there is more than one possible interpretation of the regulation.[156] The Supreme Court recently restated what is commonly referred to as "*Seminole Rock*" or "*Auer*" deference in *Decker v. Northwest Environmental Defense Center*. [157] In *Decker*, Justice Kennedy wrote for the majority:

> It is well established that an agency's interpretation need not be the only possible reading of a regulation — or even the best one—to prevail. When an agency interprets its own regulation, the Court, as a general rule, defers to it "unless that interpretation is 'plainly erroneous or inconsistent with the regulation.'"[158]

The CFPB's interpretation of the TILA rescission regulations articulated in their briefs is arguably entitled to *Seminole Rock/Auer* deference unless a court concludes that its

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[153] 325 U.S. at 414.

[154] Auer v. Robbins, 519 U.S. 452 (1997).

[155] *See id.* at 461-64; *see also* Decker v. Nw. Envtl. Def. Ctr., 133 S. Ct. 1326, 1341-44 (2013) (upholding the EPA's interpretation of its rule offered for the first time in an amicus brief).

[156] *See* Thomas Jefferson Univ. v. Shalala, 512 U.S. 504, 512 (1994) (stating "[w]e must give substantial deference to an agency's interpretations of its own regulations. Our task is not to decide which among several competing interpretations best severs the regulatory purpose." (internal citations omitted)).

[157] *Decker*, 133 S. Ct. at 1339 (Scalia, J., concurring).

[158] *Id.* at 1337.

interpretation is plainly erroneous or inconsistent with the regulation.[159] The CFPB filed briefs as amicus curiae in three of the rescission cases, seizing the opportunity to clearly articulate to the federal courts the agency's interpretation of Section 1635 and Regulation Z.[160] In those briefs, the CFPB explained that in its view, the plain language of Section 1635 and Regulation Z are clear that a borrower exercises her right to rescind by written notice to the lender.[161]

The majority circuits' decisions, however, barely acknowledge the existence of the CFPB's amicus brief, let alone entertain the agency's interpretation of the statute and Regulation Z.[162] There is no mention of *Seminole Rock/Auer* deference in the rulings. Only Judge Melloy's *Hartman* concurrence in the Eighth Circuit stands as an advocate for any

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[159] *See, e.g.*, Chase Bank USA, N.A. v. McCoy, 131 S. Ct. 871, 880 (2011) (stating: "[u]nder *Auer v. Robbins* . . . , we defer to an agency's interpretation of its own regulation, advanced in a legal brief, unless that interpretation is 'plainly erroneous or inconsistent with the regulation." (internal citations omitted)).

[160] *See, e.g.*, Brief for CFPB as Amici Curiae Supporting Plaintiff-Appellant, Wolf v. Federal Nat'l Mortg. Ass'n, 512 F. App'x 336 (4th Cir. 2013) (No. 11-2419) (per curiam), *available at* http://files.consumerfinance.gov/f/201204_CFPB_Wolf-amicus-brief.pdf; *see also Amicus Program*, CFPB, http://www.consumerfinance.gov/amicus/ (last visited May 1, 2015) (listing the rescission cases in which the CFPB filed an amicus brief in the Federal Court of Appeals and the Supreme Court); Keiran v. Home Capital, 720 F.3d 721, 728 (8th Cir. 2013) (acknowledging the CFPB's interpretation but no mention of agency deference); Rosenfield v. HSBC Bank, USA, 681 F.3d 1172, 1186 n.10 (10th Cir. 2012) (failing to mention agency deference); Sherzer v. Homestart Mortg. Servs., 707 F.3d 255 (3d Cir. 2013) (agreeing with CFPB's interpretation, but no mention of agency deference).

[161] *See, e.g.*, Brief for CFPB as Amici Curiae in Support of Plaintiff-Appellant, *Rosenfield*, 681 F.3d 1172 (No. 10-1442), *available at* http://files.consumerfinance.gov/f/201203_CFPB_Rosenfield-amicus-brief.pdf.

[162] *See, e.g.*, *Keiran*, 720 F.3d at 728 ("We are not unmindful of the language of Regulation Z or the interpretation of that regulation — that notice, as opposed to filing suit, is enough to preserve the right — that the Consumer Financial Protection Bureau (CFPB), amicus in this case, has advanced in favor of the plaintiffs."); *Rosenfield*, 681 F.3d at 1186 n.10 (refuting the relevance of the CFPB's argument that TILA's rescission process is non-judicial).

level of agency deference in the rescission cases.[163] Meanwhile, Judge Murphy's partial dissent in *Kieran*, also in the Eighth Circuit, gives a respectful nod to the agency's position.[164]

C. The Majority Circuits May Have Deliberately Avoided Issues of Administrative Deference, Signaling a Possible Paradigm Shift in Agency Deference

The courts' lack of deference to the CFPB is perplexing at best in that it signifies a departure from a decades-long convention of deferring to an agency's interpretation of its regulations, whether based on agency expertise or a delegation of authority from Congress.[165] Moreover, the lack of agency deference here is particularly troubling in that it occurs at two levels. First, the majority circuits' decisions ignore the implementing regulation itself as a reasonable interpretation of the statute, which could be entitled to *Chevron* deference. Second, these decisions discount the CFPB's amicus briefs, in

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[163] Hartman v. Smith, 734 F.3d 752, 764 (8th Cir. 2013). Judge Melloy states:

> Here, the administrative agency charged with enforcing TILA and Regulation Z is the Consumer Financial Protection Bureau (the "Bureau"). The Bureau has weighed in as amicus curiae in courts around the country on the issue of how a borrower properly exercises the right to rescind a loan transaction . . . and argued that sending notice is all that is required.

Id. (internal citations omitted).

[164] *Keiran*, 720 F.3d at 731 (J. Murphy, concurring in part, dissenting in part) ("The majority decision is contrary to the plain language of TILA, the congressional intent behind it, and the position of the agency for enforcing it.").

[165] *See* Walker, *supra* note 133, at 1366 (explaining that two reasons support deference to agency interpretations of statutes and regulations: the first is based on a delegation rationale, namely that deference is appropriate where Congress has delegated the agency the power to implement a statute; the second is based on agency expertise, namely that deference to is appropriate because the agency possesses special insight and expertise in the regulated field and better understands how different interpretations affect).

which it articulates its authoritative interpretation of the statute and its own regulation, thereby bucking another conventional canon of agency deference.

All this signals that the majority circuits' avoidance of administrative deference issues may be deliberate. The courts may be less inclined to defer to the CFPB because it did not originally have rulemaking and enforcement authority under TILA.[166] But this possibility is too thin to support such a glaring lack of agency deference in the rescission cases.

More likely is that the majority circuits' decisions in the rescission cases represent a significant paradigm shift that is occurring with respect to *Seminole Rock/Auer* deference.

The Court has imposed limits on the applicability of *Seminole Rock/Auer* deference in recent years. These developments to *Seminole Rock/Auer* deference has made it difficult for courts to apply the doctrine in a consistent manner. For example, an agency's interpretation of a regulation that is clear and unambiguous is not entitled to deference.[167] An unambiguous regulation does not need to be interpreted.[168] Additionally, courts accord substantially less deference to an agency's interpretation of a regulation that is inconsistent with a prior interpretation or is a post hoc rationalization against a challenge to past agency action.[169] The Court established this

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[166] *See id.* (discussing deference to transferee agency expertise).

[167] *See* Christensen v. Harris Cnty., 529 U.S. 576, 588 (2000).

[168] *See id.*

[169] *See, e.g.*, Christopher v. SmithKline Beecham Corp., 132 S. Ct. 2156, 2166 (2012). The U.S. Supreme Court stated:

> [D]eference is likewise unwarranted when there is reason to suspect that the agency's interpretation "does not reflect the agency's fair and considered judgment on the matter in question." This might occur when the agency's interpretation conflicts with a prior interpretation or when it appears that the interpretation is nothing more than a convenient litigating position, or a "*post hoc* rationalization advanced by an agency seeking to defend past agency action against attack."

Id. (internal citations omitted).

cannon in *Christopher v. SmithKline Beecham Corp.,* in which it withheld *Seminole Rock/Auer* deference to an agency's interpretation of its own regulation where the agency had changed its interpretation, resulting in unfair surprise.[170]

When *Seminole Rock/Auer* deference does not apply, the Court has concluded that a lesser standard of review is warranted, *Skidmore* review.[171] *Skidmore* review accords a level of deference to the agency interpretation that reflects the "thoroughness evidence in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it the power to persuade."[172] This standard is considerably more challenging for lower courts to apply with any consistency when dealing agency interpretations of their own regulations.

Potentially relevant here, *Seminole Rock* deference is not appropriate when the regulation merely "parrots" the relevant statutory language.[173] In *Gonzales v. Oregon*, the Court held that regulations which simply restate the statute are not entitled to *Seminole Rock/Auer* deference because the challenge is to the interpretation of the statute, not the interpretation of a regulation promulgated by the agency delegated power to implement the statute.[174] Where "Congress, rather than agency, [is] the source of the law being interpreted," *Seminole Rock/Auer* deference does not apply.[175] There is an argument that the anti-parroting cannon applies as a bar to deference in

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[170] *Id.* at 2167.

[171] *See id.* (citing Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944)).

[172] *Skidmore*, 323 U.S. at 140.

[173] In Gonzales v. Oregon, 546 U.S. 243, 257 (2006), the Court articulated an anti-parroting canon in the context of agencies interpretations of their own regulations. If an agency promulgates a regulation that merely parrots the parallel statutory language, the agency's interpretation is not entitled to *Seminole Rock/Auer* deference. *Accord* Glover v. Standard Fed. Bank, 283 F.3d 953, 959-62 (8th Cir. 2002); Richard J. Pierce & Joshua Weiss, *An Empirical Study of Judicial Review of Agency Interpretations of Agency Rules*, 63 ADMIN. L. REV. 515, 518-19 (2011).

[174] *Gonzales,* 546 U.S. at 257; *see also* Healy, *supra* note 139, at 659.

[175] Healy, *supra* note 139 at 659.

the case of TILA rescission, but its applicability here remains unclear.

Further, empirical research has shown that lower courts are generally less likely to uphold an agency's interpretation of its own regulation on the basis of *Seminole Rock/Auer* deference as compared with the Supreme Court. One empirical study has found that the Supreme Court upholds 91% of disputes that involve agency interpretations of its own rules and regulations.[176] Another has concluded that lower courts accord *Seminole Rock/Auer* deference in 76% of cases.[177] The authors of the latter study concluded that the Court "appears to be alone in the extreme deference it accords agency interpretations of rules."[178] This may evidence that lower courts are skeptical of *Seminole Rock/Auer* deference. It may also demonstrate that lower courts are uncertain how to apply the standard in a consistent manner. The majority circuits may have ignored administrative deference issues so they would not have to grapple with application of *Seminole Rock/Auer* deference.

Finally, critics' call to reconsider the viability of the doctrine is gaining momentum. Several Supreme Court justices have expressed concern that *Seminole Rock/Auer* deference promotes ambiguous regulations, and potentially violates separation of powers principles.[179] It is clear: at least four members of the Supreme Court are willing reconsider the continued vitality of *Seminole Rock/Auer* deference.[180]

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[176] William N. Eskridge & Lauren E. Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from* Chevron *to* Hamdan, 96 GEO. L. J. 1083, 1138-42 (2008).

[177] Pierce & Weiss, *supra* note 173, at 519.

[178] *Id.* at 520.

[179] *See e.g.*, Decker v. Nw. Envtl. Def. Ctr., 133 S. Ct. 1326, 1339-44 (2013) (Scalia, J., concurring in part and dissenting in part); Thomas Jefferson Univ. v. Shalala, 512 U.S. 504, 524 (1994) (Thomas, J., dissenting).

[180] *Decker,* 133 S. Ct. at 1339 (Roberts, C.J., concurring) ("Questions of *Seminole Rock* and *Auer* deference arise as a matter of course on a regular basis. The bar is now aware that there is some interest in reconsidering those cases, and has available to it a concise statement of the arguments on one side of the issue.")

Among the concerns the justices have expressed about *Seminole Rock/Auer* deference is that it is too deferential. It permits an agency to promulgate broad or ambiguous rules and regulations and then allows the agency to refine them through interpretations, which, in turn, receive judicial deference.[181] Because it accords substantial deference to an agency's interpretation of its own regulation, Justice Thomas has expressed concern that it encourages an agency to promulgate rules lacking clarity, which it can later interpret more precisely and to its convenience, secure in the knowledge that its regulation will be upheld in the face of a challenge.[182] Ambiguous regulations, in turn, may translate into lack of notice for parties subject to the regulation.[183] The regulated parties are then adversely affected in their ability to comply with the regulatory framework, which has the force of law.[184]

Justice Scalia has expressed concern that no persuasive rationale supports the *Seminole Rock/Auer* rule, that courts have blindly followed the rule simply because it has been

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[181] *See* SHEDD, *supra* note 151, at 9.

[182] *Thomas Jefferson Univ.*, 512 U.S. at 525. In his dissenting opinion, Justice Thomas stated:

> It is perfectly understandable . . . for an agency to issue vague regulations, because to do so maximizes agency power and allows the agency greater latitude to make law through adjudication rather than through the more cumbersome rulemaking process. Nonetheless, agency rules should be clear and definite so that affected parties will have adequate notice concerning the agency's understanding of the law.

Id. (internal citations omitted); *see also* SHEDD, *supra* note 151, at 9 ("If an agency knows that its own interpretation will become controlling, there is little need for the agency to promulgate a clear rule from the start—the agency can instead promulgate a broad rule and then attach more precise interpretations of the rule at a later time.").

[183] *Thomas Jefferson Univ.*, 512 U.S. at 524 (Thomas, J., dissenting); SHEDD, *supra* note 151, at 9.

[184] *See Thomas Jefferson Univ.*, 512 U.S. at 524 (Thomas, J., dissenting); SHEDD, *supra* note 151, at 9.

there.[185] Another more serious concern articulated by Justice Scalia is that *Seminole Rock/Auer* deference violates the doctrine of separation of powers[186] unlike *Chevron*.[187] It violates separation of power principles because it gives an agency power to both write and interpret the law.[188] Chief Justice Roberts and Justice Alito have indicated a willingness to reconsider the *Seminole Rock* standard of deference.[189] In *Decker*, Chief Justice Roberts, joined by Justice Alito, invited future parties to seek to overturn *Seminole Rock/Auer* deference.[190] *Decker* could be construed as an invitation to lower courts to entertain the possibility as well.

The Court has indicated it wants to reshape the traditional formulation of agency deference. It is "now less willing to defer to an agency's interpretation of its own regulations."[191] *Christopher* and *Gonzales* have transformed *Seminole Rock/Auer* deference, making it more challenging for lower courts to apply the standard in a consistent manner. And

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[185] Decker v. Nw. Envtl. Def. Ctr., 133 S. Ct. 1326, 1339-40 (2013) (Scalia, J., concurring in part and dissenting in part) ("For decades, and for no good reason, we have been giving agencies the authority to say what their rules mean, under the harmless-sounding banner of 'defer[ring] to an agency's interpretation of its own regulations' . . . . Our cases have not put forward a persuasive justification for *Auer* deference.") (internal citations omitted).

[186] *Decker*, 133 S. Ct. at 1341 (Scalia, J., concurring in part and dissenting in part).

[187] Healy, *supra* note 139, at 676 (stating that "[t]he lack of theoretical support for *Auer* deference contrasts sharply with the articulation of administrative law theory to support *Chevron* deference.").

[188] *Decker,* 133 S. Ct. at 1341 (Scalia, J., concurring in part and dissenting in part) (concluding "[w]hile the implication of an agency power to clarify the statute is reasonable enough, there is surely no congressional implication that the agency can resolve ambiguities in its own regulations. For that would violate a fundamental principle of separation of powers—that the power to write a law and the power to interpret it cannot rest in the same hands.").

[189] *Decker,* 133 S. Ct. at 1338-39 (Roberts, C.J., concurring).

[190] *See id.*

[191] Healy, *supra* note 139, at 635 (internal citations omitted).

existing empirical data already suggests that lower courts are less likely to uphold challenges to regulations, though the reason for this is less than clear.[192] Against this backdrop, the majority circuits may have deliberately avoided addressing deference issues, generally and specifically as it relates to TILA.

Notably, in ruling on *Jesinoski*, the Court also ignored any arguments the parties made regarding deference to the CFPB's interpretation of its own regulations, likely concluding it unnecessary to reach such questions where the relevant statutory language is clear.[193]

VI. THE MAJORITY RULINGS MAY SIGNAL DISAGREEMENT WITH CONGRESS'S LIBERALIZATION OF COMMON LAW RESCISSION

The majority circuits' decisions may also signify disapproval of TILA's liberal rescission mechanism, which promotes consumer protection at the expense of lender interests.

Traditionally, there are two types of rescission available to parties: legal and equitable rescission.[194] Legal rescission is "effected by the agreement of the parties."[195] In this situation, one party unilaterally cancels the contract because the other party committed a material breach of the agreement or because of some other valid reason.[196] Ordinarily, the rescinding party

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192 *See generally* Pierce & Weiss, *supra* note 173.

193 *See* Jesinoski v. Countrywide Home Loans, Inc., 135 S. Ct. 790 (2015).

194 *See, e.g.*, Omlid v. Sweeney, 484 N.W.2d 486, 490 (N.D. 1992) (stating "[a] rescission action at law is essentially an action for restitution based upon a party's prior unilateral rescission whereas an action in equity seeks to have the court terminate the contract and order restoration." (internal citation omitted)).

195 BLACK'S LAW DICTIONARY 1332 (8th ed. 2004).

196 FISCHER, *supra* note 6, at 736; Megan Bittakis, *The Time Should Begin to Run When the Deed Is Done: A Proposed Solution to Problems in Applying Limitations Periods to the Rescission of Contracts*, 44 U.S.F. L. REV. 755, 758 (2010).

tenders – or returns – the value of any consideration received from the other party in order to effectuate rescission.[197] Judicial intervention is ordinarily not involved unless other party does not reciprocate.[198] If the other party did not reciprocate, the rescinding party would then sue for restitution of the value being retained.[199]

Equitable rescission is a court-ordered unwinding of a contract.[200] In this situation, one of the parties asks the court to make a judicial declaration cancelling the contract.[201] No tender is required to effectuate rescission.[202]

But TILA is a form of statutory rescission that is neither entirely legal nor equitable in nature. Rather, TILA rescission shares characteristics with both. Nothing in the statute specifies whether TILA rescission is meant to be equitable or legal. But the TILA rescission process is meant to be non-judicial.[203] Additionally, the plain language of Regulation Z indicates that written notice to the lender triggers a rescission process.[204] TILA rescission therefore appears analogous to legal rescission, which requires tender by the party seeking to rescind.[205]

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[197] *See, e.g.*, FISCHER, *supra* note 6, at 736; 17A AM. JUR. 2D *Contracts* § 574 (2d ed. 2015) (stating "[i]nherent in the remedy of rescission is the return of the parties to their precontract positions. Therefore, the general rule is that a party who wishes to rescind a contract must return the opposite party to the status quo." (internal citations omitted)).

[198] FISCHER, *supra* note 6, at 736.

[199] *Id.*

[200] *Id.*

[201] Bittakis, *supra* note 196, at 758.

[202] FISCHER, *supra* note 6, at 736-37.

[203] *See* Belini v. Wash. Mut. Bank, FA, 412 F.3d 17, 25 (1st Cir. 2005)

[204] FISCHER, *supra* note 6, at 738-39.

[205] *Cf.* Ray v. CitiFinancial, Inc., 228 F. Supp. 2d 664, 667-68 (D. Md. 2002) (holding that Congress's use of the word "rescission" in its legal sense did not signify a cancellation accomplished by unilateral notice, but rather provide a

However, TILA, as courts have acknowledged, substantially liberalizes common law rescission by reversing the sequence in which the consumer borrower – the rescinding party – must tender.[206] Specifically, TILA requires the lender to release the security interest before the consumer borrower must tender.[207]

Under Section 1635(b), all that the consumer must do is notify the lender that she is rescinding.[208] Then the lender must return any consideration paid by the consumer borrower and cancel the security interest in the property within twenty days of receiving a notice of rescission.[209] Only after the lender has performed its obligations under Section 1635(b) must a consumer borrower then tender to the lender.[210] This reordering of the tender sequence is consistent with TILA's pro-consumer purposes because the consumer assumes a stronger bargaining position than she would have under common law rescission.[211]

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remedy that restores the *status quo ante*, which is accomplished only by the rescinding party returning any benefit she has received).

[206] *See* Williams v. Homestake Mortg. Co., 968 F.2d 1137, 1140 (11th Cir. 1992) (characterizing Section 1635(b) as a "reordering of common law rules governing rescission."); *see also*

Palmer v. Wilson, 502 F.2d 860, 861 (9th Cir. 1974) ("Although tender of consideration received is an equitable prerequisite to rescission, the requirement was abolished by the Truth in Lending Act.").

[207] 15 U.S.C.A § 1635(b) (2011); *see also* 12 C.F.R. 1026.23 (2014).

[208] 15 U.S.C.A § 1635(b) (2011); *see also* 12 C.F.R. 1026.23 (2014); *see also Williams*, 968 F.2d at 1140.

[209] 15 U.S.C.A § 1635(b) (2011); *see also* 12 C.F.R. 1026.23 (2014).

[210] 15 U.S.C.A § 1635(b) (2011); *see also* 12 C.F.R. 1026.23 (2014).

[211] *Williams*, 968 F.2d at 1140; Merritt v. Countrywide Fin. Corp., 759 F.3d 1023, 1030 (9th Cir. 2014) (citing Shepard, *supra* note 23, at 196 (stating: "by reversing the traditional sequence for common law rescission sequence", TILA shifts significant leverage to consumers, consistent with the statute's general consumer-protective goals. (internal citation omitted))); Shepard, *supra* note 23, at 178 n.29 ((stating "[i]t is common for creditors to ignore borrowers' rescission notices.") (citing Prince v. U.S. Bank Nat'l Ass'n, No. 08-00574-KD-N, 2009 WL 2998141, at *1 (S.D. Ala. Sept. 14, 2009)).

TILA's rescission mechanism also has some characteristics of equitable rescission because judicial intervention in TILA rescission cases is common. Lenders often fail to respond to written notices, or if they do, they refuse to void the security interest because the rescission is not valid.[212] As a consequence, consumer borrowers frequently find themselves in court, seeking enforcement of rescission rights they have already exercised by written notice.

The majority courts effectively ruled that implicit in the statute is a requirement that a consumer borrower file a lawsuit to exercise her right to rescind. The reason for legislating in this manner is unclear. But it is possible to articulate a few possibilities.

As explained, the courts appeared interested in controlling the TILA rescission process and managing the types of cases that they adjudicate.[213]

Additionally, the majority circuits appeared concerned about the risks TILA rescission poses to lender's interest. The TILA rescission process that Congress enacted alters the common law recession sequence, thereby rendering a lender's position more vulnerable in the event of a foreclosure or potential bankruptcy. The majority courts are concerned about imposing this vulnerability on lenders. Their decisions focus on the risks the TILA rescission process raises for lenders, including cloudy title in a foreclosure and insecurity in a bankruptcy context.[214] So these courts decided that a consumer borrower must file a lawsuit to obtain a judicial declaration of rescission in each and every case, even though arguably, Congress intended the TILA rescission process be non-judicial.

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[212] Shepard, *supra* note 23, at 178 n.29 ((stating "[i]t is common for creditors to ignore borrowers' rescission notices.") (citing *Prince*, 2009 WL 2998141, at *1). A lender's failure to respond to a valid notice of rescission may constitute a separate TILA violation for which a consumer borrower is entitled to damages. *See e.g.*, Bell v. Parkway Mortg., Inc. (*In re* Bell), 309 B.R. 139, 168 (Bankr. E.D. Pa. 2004); Williams v. BankOne Nat'l Ass'n. (*In re* Williams), 291 B.R. 636, 655-63 (Bankr. E.D. Pa. 2003)

[213] *See supra* Part IV.

[214] *See, e.g.,* Keiran v. Home Capital, 720 F.3d 721, 727-28 (8th Cir. 2013); Rosenfield v. HSBC Bank, USA, 681 F.3d 1172, 1177 (10th Cir. 2012); McOmie-Gray v. Bank of Am. Home Loans, 667 F.3d 1325 (9th Cir. 2012).

By requiring the filing of a lawsuit, where the statute does not, the majority circuits attempted to dictate the mechanics of TILA rescission in a way that contradicts the express terms of the statute and Regulation Z. Further, these courts arguably overstepped the scope of the issue for resolution, specifically whether a consumer borrower exercises her right to rescind by written notice to the lender within the three-year period.

Rather, the majority circuits answered issues arguably not before them, such as whether the written notice effects or accomplishes rescission, and even arguably, whether a court is enforcing a rescission right already exercised or deciding that rescission is appropriate. In short, the majority circuits announced a new TILA rescission mechanism not provided for in the statute.

The majority circuits justified the rulings as satisfying Congressional intent. These decisions rationalize that TILA's rescission statute exists not only to protect consumers but also to fulfill the remedial goal of rescission, namely to restore parties to their pre-transaction status.[215] They posit that to fully realize the remedial goals Congress intended, the rescission statute must require a consumer borrower to file a lawsuit seeking rescission in order fulfill TILA's remedial goals.[216]

But this justification is inconsistent with Congressional action in other aspects of TILA. For example, Congress provided for modification of TILA rescission process where it wanted to in Section 1635(b).[217] Further, Congress has expressly provided for the filing of a lawsuit elsewhere in TILA where it intended.[218]

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[215] *See, e.g.*, *Williams*, 968 F.2d at 1140.

[216] *See, e.g.*, *id.*; *Rosenfield*, 681 F.3d at 1186-87.

[217] *See supra* Part I.B and II.A.

[218] *See* Beach v. Ocwen Fed. Bank, 523 U.S. 410, 418 (1998) ((quoting Bates v. United States, 522 U.S. 23, 29-30 (1997) ("[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion") (internal citations omitted)).

Finally, the majority circuits' justification for requiring a consumer-originated lawsuit ignores that TILA's rescission statute as written fulfills Congress's remedial goals. The additional requirement is unnecessary because upon a consumer borrower's written notice to the lender of its intent to rescind, a *lender* is free to contest the rescission by filing a lawsuit. Notably, in *Jesinoski*, the Court validates TILA's negation of traditional rescission-at-law sequence.[219] *Jesinoski* is clear that "rescission is effected" by a consumer borrower's written notice to the lender that he intends to rescind.[220] The practical consequence of this ruling is that a lender may sue to contest the borrower's ability to rescind.

CONCLUSION

The majority-held view among the federal circuits that TILA requires a consumer borrower to file a lawsuit in order to exercise her statutory right to rescind a mortgage loan may be based upon more than *stare decisis*. TILA is silent as to such a requirement. And the Supreme Court has held that *Beach,* upon which the majority circuits based their decisions, does not control here. Accordingly, it is possible that the rulings signify some other trend.

This article has explored the possibility that the rulings represent the federal judiciary's interest in regulating consumer litigation behavior. It has also considered whether the rulings signal a paradigm shift in agency deference doctrine, including the reconsideration of *Seminole Rock/Auer* deference. Four members of the Court have invited reconsideration of the issue. Finally, this article has hypothesized that the federal judiciary

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[219] Jesinoski v. Countrywide Home Loans, Inc., 135 S. Ct. 790, 793 (2015) ("It is true that rescission traditionally required either that the rescinding party return what he received before a rescission could be effected (rescission at law), or else that a court affirmatively decree rescission (rescission in equity). But the negation of rescission-at-law's tender requirement hardly implies that the Act codifies rescission in equity . . . this is simply a case in which statutory law modifies common-law practice").

[220] *Jesinoski*, 135 S. Ct. at 790.

disagrees with Congress's liberalization of common law rescission in TILA.

The reason for the majority circuits' clearly erroneous interpretation of TILA's right to rescind ultimately remains unclear. The brevity and clarity with which the Supreme Court dispensed with the matter indicates that the majority circuits' rulings overcomplicated a straightforward issue of statutory interpretation. Those rulings favored lenders under the guise of *stare decisis* and fulfilling Congressional remedial goals. But where, as here, the statutory language is unequivocal, and there is clearly no relevant precedent, one could conclude that the erroneous decisions cloak some unarticulated reason.