

# NINTH CIRCUIT EXPANDS TIME FOR A BORROWER TO SUE TO ENFORCE RESCISSION OF A LOAN UNDER TILA

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For years, mortgage lenders defended TILA rescission actions by arguing that the notice of rescission or action was untimely and/or barred by applicable statute of limitation. In 2015, the U.S. Supreme Court dealt lender's efforts a severe blow when it held that the notice of rescission could be issued at any time within three (3) years after the loan closed, not file suit to rescind within three years, as the industry had argued (*Jesinoski v. Countrywide Home Loans, Inc.*, 135 S. Ct. 790 (2015)). Just recently on December 6, 2018, the Ninth Circuit issued an opinion that further weakened the lenders' position (*Hoang v. Bank of America, N.A.*, \_\_\_ F.3d \_\_\_, Case No. 17-35993, 2018 WL 6367268 (9th Cir. 2018)). Specifically, the Ninth Circuit expanded the time for a borrower to sue to enforce rescission of a loan if a lender fails to wind up the loan after a notice of rescission.

Under the Truth in Lending Action ("TILA"), borrowers have the right to rescind certain loans within three business days after consummation of the loan. 15 U.S.C. § 1635(a). However, if the lender fails to make the required disclosures under TILA, the deadline for borrowers to rescind the loan expands to three years from consummation of the loan. 15 U.S.C. § 1635(f). In its' 2015 *Jesinoski* decision the Supreme Court held that under TILA, a borrower only has to notify a lender of his or her intent to rescind within three years. The borrower is not required to bring suit within the three years to effectuate the rescission. A simple notice is all that is required. The Supreme Court explained, "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." *Jesinoski*, 135 S. Ct. at 792.

Under TILA, if a borrower provides notice within the three years, a creditor must take steps to "wind up"<sup>1</sup> the loan within 20 days of the notice. 15 U.S.C. § 1635(b). However, as is often the case, what if the lender fails to act to wind up the loan as required by TILA? In *Hoang v. Bank of America, N.A.*, \_\_\_ F.3d \_\_\_, Case No. 17-35993, 2018 WL 6367268 (9th Cir. 2018), the Ninth Circuit answered the following question: "when a borrower effectively rescinds a loan under TILA, but no steps are taken to wind up the loan, when must suit be brought to enforce that rescission?" *Id.* at \*3.

In *Hoang*, the district court ruled that a claim to enforce rescission is governed by the one-year statute of limitations for TILA damages claim. On appeal, the Ninth Circuit rejected the district court's application of the one-year statute of limitations that applies to TILA damage claims. The Ninth Circuit reasoned, "TILA provides for both legal damages and equitable relief but only includes a statute of limitations for legal damages relief. The statute does not suggest that the statute of limitations for legal damages relief is also applicable to claims for equitable remedies. If Congress intended that statute to apply, Congress surely knew how to draft the statute accordingly." *Id.* at \*4.

Because TILA does not provide a statute of limitations for rescission enforcement claims, case law requires federal courts to borrow a limitations period from analogous state law. In *Hoang*, the Ninth Circuit looked to its host state, Washington, as a guide. The Ninth Circuit ultimately used Washington's six (6) year statute of limitations for contract actions. The Court reasoned,

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<sup>1</sup> 15 U.S.C. § 1635(b) states,

When an obligor exercises his right to rescind under subsection (a), he is not liable for any finance or other charge, and any security interest given by the obligor, including any such interest arising by operation of law, becomes void upon such a rescission. Within 20 days after receipt of a notice of rescission, the creditor shall return to the obligor any money or property given as earnest money, downpayment, or otherwise, and shall take any action necessary or appropriate to reflect the termination of any security interest created under the transaction. If the creditor has delivered any property to the obligor, the obligor may retain possession of it. Upon the performance of the creditor's obligations under this section, the obligor shall tender the property to the creditor, except that if return of the property in kind would be impracticable or inequitable, the obligor shall tender its reasonable value.

Under Washington’s general contract law, the statute of limitations sets forth a six-year limitation period for an “action upon a contract in writing, or liability express or implied arising out of a written agreement.” The loan agreement between Hoang and the Bank is a contract in writing. An action to rescind that loan (under TILA or otherwise) arises out of that written agreement. Because TILA rescissions necessarily require a contract to be rescinded, contract law provides the best analogy and we adopt the general contract law statute of limitations.

*Id.* at \*4 (citation omitted). In summary, the Ninth Circuit concluded that “[a]pplication of Washington’s longer six-year contract statute of limitations would actually further TILA’s purpose, which is to protect consumers from predatory lending practices and promote the informed use of credit.” *Id.*

Therefore, under *Jesinoski* and *Hoang*, a borrower has up to three years to provide notice of rescission of the loan. If the lender fails to wind up the loan, the borrower has another six years to bring an action to enforce the rescission. Thus, a borrower can have to up nine years **from consummation of the loan** to enforce rescission under TILA. Although this is a decision by the Ninth Circuit, which applied Washington state law, borrowers will certainly rely on *Hoang* and argue that the Ninth Circuit’s reasoning should apply to their specific case. The statute of limitations to enforce a rescission claim may be shorter or longer than six years depending on the breach of contract statute of limitations for each specific state.

There are several take-away from the decisions in *Jesinoski* and *Hoang*. First, a lender/servicer should quickly and carefully review any notice of rescission or even an indication of rescission from the Borrower. Second, if a borrower properly rescinds the loan under TILA, the lender/servicer has twenty days to “wind up” the loan. Third, if there is a question about whether the lender provided the required TILA disclosures or if the borrower timely and properly gave notice of his or her intent to rescind, the lender should consider immediately filing a declaratory relief action to resolve those disputes at that time instead of waiting years for the borrower to file an action to enforce the rescission.

Wright, Finlay & Zak, LLP specializes in mortgage-related litigation, compliance and regulatory matters for its clients throughout the Western United States, including California, Nevada, Arizona, Washington, Utah and Oregon. If you have any questions regarding this issue or any other matter, please contact Robert Finlay at [rfinlay@wrightlegal.net](mailto:rfinlay@wrightlegal.net) or Michael Kelley at [mkelley@wrightlegal.net](mailto:mkelley@wrightlegal.net).



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