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Insights

TILA and the Right of Rescission: Illinois Adopts One-Year Limitation Period

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The Illinois Court of Appeals recently joined the growing list of courts choosing to impose a one (1) year limitations period to enforce rights of rescission under the federal Truth in Lending Act, 15 U.S.C. §§ 1601, *et seq*. ("TILA").[1] TILA requires originating lenders in particular consumer credit transactions to provide certain disclosures about the loan terms and the rights available to the borrowers. If a lender fails to adhere to the TILA requirements, consumers are provided certain remedies, such as suing for damages or rescinding the loan entirely.[2] The timing for a consumer to enforce these rights has always perplexed courts, causing uncertainty about liability exposure for lenders. By adopting a one (1) year limitation period, the Illinois Court of Appeals provided much needed clarity to lenders regarding their extent of liability under TILA.

I. Truth in Lending Act

The operative TILA sections for this discussion are § 1635 and § 1640. Under § 1635(a), in the case of any consumer credit transaction in which a security interest will be retained, the obligor(s) "shall have the right to rescind the transaction 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…"[3] The creditor is required to clearly and conspicuously disclose the obligor(s) right of rescission under § 1635(a) and provide the appropriate forms for the obligor to exercise their right.[4] Once an obligor exercises its right, the creditor has twenty (20) days to return all funds and the granted security interest becomes void by law.[5]

Although § 1635(a) generally provides a consumer three (3) days to rescind from the closing date or day of receipt of the disclosures, in instances where the lender never provides the disclosures, § 1635(f) provides an absolute limitation of three (3) years from the loan's consummation date.[6] Specifically, § 1635(f) provides:

> An obligor's right of rescission shall expire three years after the date of consummation of the transaction or upon the sale of the property, whichever occurs first, notwithstanding the fact that the information and forms required under this section or any other disclosures required under this part have not been delivered

to the obligor…"[7]

Thus, read together, § 1635(a) and (f) give consumers three (3) business days from the transaction's closing, or, if not done concurrently, three (3) business days from date the required disclosures and forms are provided. However, the consumer's right to rescind expires three (3) years from the transaction's closing date, even if the disclosures have still not been provided.

On the other hand, § 1640 imposes civil liability on any creditor that fails to comply with the provisions of TILA, including § 1635.[8] In addition to recovering the actual damages incurred, for actions in which a consumer is determined to have a right of rescission under §1635(a), they are also entitled to attorney fees and costs.[9] However, any action brought pursuant to § 1640 must be brought "within one year of the date of the occurrence of the violation…"[10]

II. Judicial Interpretation of TILA

The interplay between § 1635 and § 1640 always has perplexed courts. Prior to 2015, a circuit split existed on the issue of when a consumer must bring an action to enforce their right of rescission under § 1635(a).[11] For instance, some courts read § 1635(f) as requiring a consumer to both send a notice of rescission to the creditor and to commence an action for rescission within three (3) years of the transaction's consummation.[12] On the other hand, other courts found that the right of rescission was effectuated by simply sending the notice of rescission within three (3) years of the loan's origination, and nothing else was required.[13]

In 2015, the Supreme Court of the United States addressed the issue in *Jesinoski*.[14] The petitioners, Larry and Cheryle Jesinoski, refinanced their mortgage on February 23, 2007.[15] They sent a notice of rescission on February 23, 2010, exactly three years after the loan consummation date. Bank of America, the holder of their mortgage, refused to acknowledge the validity of the rescission, and the Jesinoskis filed their lawsuit on February 24, 2011, four years after the loan origination.[16] The District Court held that TILA requires consumers to file an action for rescission within three (3) years of the loan's consummation, and the Eight Circuit affirmed.[17]

The Supreme Court disagreed, and instead held that the language of § 1635(a) "leaves no doubt that rescission is effected when the borrower notifies the creditor of his intention to rescind."[18] Thus, rescission is timely as long as the borrower sends notification within three (3) years; there is nothing in the statute that also requires commencement of a lawsuit.[19] At first glance, *Jesinoski* would seem to address the split of authority by holding that the right of rescission is effected by sending the notice of rescission within three (3) years, and that filing a lawsuit is not required. However, the question that still remains is how long a consumer has to bring an action to enforce a right of rescission under TILA. Specifically, if a consumer sends a notice of rescission within the prescribed three (3) year period, but the lender does not accept its validity, or the lender fails to respond within twenty (20) days, when does the consumer have to file a lawsuit? The court in *Miller* sought to answer this question.[20]

III. *U.S. Bank Nat'l Ass'n v. Miller*, 2020 IL App (1st) 191029

On July 2, 2007, John Miller and Roosjati Miller ("Millers") refinanced a mortgage against their property by executing a promissory note in the amount of $210,000.00 (the "Loan") in favor of U.S. Bank.[21] On August 14, 2009, U.S. Bank filed a complaint to foreclose the mortgage granted by the Millers.[22] After the Millers' motion to dismiss was denied, they filed an answer with affirmative defenses, and counterclaims. One of the counterclaims alleged that U.S. Bank violated TILA for failure to provide proper notice under the federal Real Estate Settlement Procedures Act and for materially altering terms of the loan on the day of closing.[23] The counterclaim further alleged that as a result of U.S. Bank's violations, the Millers rescinded the loan in writing on June 28, 2010, but U.S. Bank did not respond within the twenty (20) day period, nor did the bank rescind the loan. Thus, the Millers' counterclaim requested that the mortgage be terminated, the loan rescinded, funds returned, and for all forms of relief permitted under § 1635, but they also asked for attorneys' fees and costs pursuant to § 1640(a).[24]

The *Miller* court's analysis first hinged on the intersection between § 1640 and § 1635. While § 1640 offers legal damages for any violations, § 1635 offers equitable relief in the form of a right of rescission.[25] Moreover, § 1640's limitation period is rather clear; any action brought for an alleged violation must be "within one year of the date of the occurrence of the violation."[26]

With this in mind, the *Miller* court found the Millers were not entitled to attorneys' fees and costs pursuant to § 1640. They filed their Counterclaim on November 16, 2011, which, by the court's calculation, was one (1) year and four (4) months after U.S. Bank failed to respond to the June 28, 2010 rescission letter.[27]

The court then discussed the current split in authority as to when a consumer must file an action for rescission when the lender either fails to respond within twenty (20) days, or outright rejects the notice of rescission. Because there has not been an Illinois decision directly on point, U.S. Bank relied heavily on the Seventh Circuit's decision in *Fendon* .[28] In *Fendon*, the borrowers filed an action for rescission in federal court after their property had been sold pursuant to a judgment of foreclosure and sale had been entered in state court.[29] As a result, the Seventh Circuit found that pursuant to the *Rooker-Feldman* doctrine, federal courts were prohibited from unwinding the state court judgment. Despite this, the Seventh Circuit did consider whether it could at least afford relief for damages under § 1640, but determined that the plaintiffs were barred by § 1640's one (1) year limitation period.[30] The *Miller* court found *Fendon* easily distinguishable due to the fact the Millers were seeking relief under § 1635, and the *Rooker-Feldman* doctrine precluded the Seventh Circuit from ruling on this issue.[31]

The *Miller* court then considered other cases more directly on point. In a recent Ninth Circuit decision, *Hoang*, the court applied the relevant state statute of limitation for breach of contract actions, rather than the one (1) year period under § 1640(e).[32] The *Hoang* court reasoned that § 1640 offers legal relief, while § 1635 only is equitable in nature.[33] Thus, the Ninth Circuit reasoned that Congress surely intended the one (1) year period to apply only to a consumer's right to legal relief, and not to equitable relief. If Congress intended to limit the right of rescission, so the court reasoned, Congress could have drafted the provision accordingly by including an express limitation period.[34] Thus, the Ninth Circuit relied on precedent which directed it to apply a comparable state statute of limitations for an analogous cause of action when the federal statute does not expressly provide one.[35]

There are multiple district cases, however, that apply the one (1) year limitation period under § 1640 for actions brought to enforce rescission under § 1635. The court in *Miller* found the one (1) year limitation period to be the better choice, but also invited the Supreme Court of Illinois to weigh-in on this issue.[36] Per the *Miller* court, to hold otherwise would have negative policy implications. For one, adopting a longer limitations period, such as in *Hoang*, would allow borrowers to sit on their right of rescission claim while keeping their property and proceeds from the transaction.[37] Also, a borrower should be aware of its claim to enforce rescission after twenty (20) days lapse from the submission of the notice of rescission.[38] The two relevant sections, § 1635 and § 1640, also are heavily intertwined. It is counterintuitive that Congress intended to limit a consumer's ability to recover attorneys' fees and costs to one (1) year for a rescission enforcement action, but at the same time implicitly encourages a consumer to bring an action for rescission for a longer period of time.[39]

IV. Going Forward

For Illinois lenders, *Miller* is an important case to know. U.S. Bank relied heavily on the Seventh Circuit's decision in *Fendon*, but the *Miller* court found *Fendon* easily distinguishable, *Miller* essentially presented a matter of first impression for Illinois state courts.[40] Absent a contrary decision from the Supreme Court of Illinois, lenders and their counsel should rest assured that consumers only have one (1) year to judicially enforce their right of rescission under § 1635 following a lender's rejection or failure to respond.

While the somewhat clear one (1) year limitation period is welcome relief to lenders and their counsel, it may also present new challenges. The short timeframe pressures consumer attorneys to assert all relevant defenses and counterclaims in the foreclosure proceedings. Otherwise, any potential claims may be barred after one (1) year of sending a notice of rescission, or precluded by the *Rooker-Feldman* doctrine if the consumer brought a subsequent action in federal court.[41] Thus, the unfortunate but foreseeable consequence of *Miller* is that it may incentivize attorneys to engage in discovery, particularly in cases where their clients are unable to locate their closing documents, despite not having a reasonable basis to believe that the lenders violated TILA in the first place. Accordingly, lenders and their attorneys should be prepared for the possibility of "fishing expeditions" and prolonged foreclosures. For lenders and in-house counsel, *Miller* also underscores the necessity of maintaining robust in-house regulatory compliance procedures to minimize liability exposure. A well-rounded document retention policy that preserves all notices from loan origination also protects lenders when consumers allege certain TILA violations.

The jurisprudential value of *Miller* warrants discussion too. The Ninth Circuit is the only federal Court of Appeals squarely to address the question presented in *Miller*.[42] The Seventh Circuit's *Fendon* decision, its only case touching upon the issue, was limited because the subject property already had been sold pursuant to a foreclosure judgment and sale had been entered in state court.[43] However, although in *dicta*, the Seventh Circuit stated that if the facts were different, it would consider adopting the four (4) year limitation period in § 1658, or adopting a comparable state limitation period for actions under § 1635.[44] Thus, the Seventh Circuit may have reached a decision contrary to *Miller*. The Illinois Appellate Court's decision is not binding, but it lends further support to the argument that courts should apply the one (1) year limitation, which the Seventh Circuit may give weight to, especially since some cases are from federal district courts.[45] Also, while the Third Circuit has not addressed this issue, a Pennsylvania federal district court observed that the Third Circuit most likely would follow the reasoning of *Miller*.[46]

Applying the one-year limitation approach seems the most practical. As held in *Jesinoski*, a borrower's right of rescission is effectuated once the borrower mails its notice of rescission. The statute provides twenty (20) days for the lender to respond, and if it fails to respond, or rejects the notice of rescission, a new TILA violation occurs.[47] It logically follows that a lender's failure to respond or reject the notice of rescission timely is a new TILA violation, and that the violation would be governed by the express one (1) year limitation in § 1640. To hold otherwise seems to obscure a plain reading of the statute.

Perhaps most importantly, *Miller* provides assurance and repose to mortgagees and lenders. For one, the holding further cements Illinois jurisprudence that applies the one (1) year limitation period to rescission claims under TILA. As the *Miller* court noted, several federal district courts have applied the one (1) year limitation, and two of those cases were from Illinois.[48] Thus, *Miller* simply is building on Illinois jurisprudence, making it much more difficult to prevail on an alternative theory. Also, the Illinois statute of limitations for breach of contract actions is ten (10) years.[49] If the *Miller* court opted to follow *Hoang's* reasoning, mortgage holders and lenders may have been exposed to nearly a decade of liability for rescission claims. Instead, the Illinois Court of Appeals provided much needed clarity to lenders, which also limits their potential liability. By inviting the Supreme Court of Illinois to opine on the issue, the court in *Miller* also opened the window for additional insight on the issue.[50] Until then, lenders should rest assured that consumers are subject to a one (1) year limitation period to file a lawsuit after sending their notice of rescission.

[1] *See U.S. Bank Nat'l Ass'n v. Miller*, 2020 IL App (1st) 191029.

[2] *See generally* 15 U.S.C.A. § 1635; 15 U.S.C.A. § 1640.

[3] 15 U.S.C.A. § 1635(a) (West).

[4] *Id.*

[5] *Id.* at (b).

[6] *Id.* at (f).

[7] *Id.*

[8] 15 U.S.C.A. § 1640(a) (West).

[9] *Id.* at (a)(1)-(3).

[10] *Id.* at (e).

[11] *See Keiran v. Home Capital, Inc.*, 720 F.3d 721, 726-728 (8th Cir. 2013).

[12] *U.S. Bank Nat'l Ass'n v. Miller*, 2020 IL App (1st) 191029, ¶ 27.

[13] *Id.*

[14] *Jesinoski v. Countrywide Home Loans, Inc.*, 574 U.S. 259 (2015).

[15] *Id.* at 261.

[16] *Id.*

[17] *Id.*

[18] *Id.* at 262.

[19] *Id.*

[20] *U.S. Bank Nat'l Ass'n v. Miller*, 2020 IL App (1st) 191029.

[21] *Id.* at ¶ 3

[22] *Id.* at ¶ 4

[23] *Id. at* ¶ 5.

[24] *U.S. Bank Nat'l Ass'n v. Miller*, 2020 IL App (1st) 191029, ¶ 19.

[25] *Id.* at ¶ 20.

[26] 15 U.S.C.A. § 1640(e) (West).

[27] *U.S. Bank Nat'l Ass'n v. Miller*, 2020 IL App (1st) 191029, ¶ 22.

[28] *Id* at ¶ 25. *See also Fendon v. Bank of Am., N.A.*, 877 F.3d 714 (7th Cir. 2017).

[29] *Fendon v. Bank of Am., N.A.*, 877 F.3d 714, 716 (7th Cir. 2017). *See also Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923); *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462 (1983).

[30] *U.S. Bank Nat'l Ass'n v. Miller*, 2020 IL App (1st) 191029, ¶ 27.

[31] *Id.*

[32] *Id.* at ¶ 28. *See also Hoang v. Bank of Am., N.A.*, 910 F.3d 1096, 1101 (9th Cir. 2018).

[33] *Hoang v. Bank of Am., N.A.*, 910 F.3d 1096, 1102 (9th Cir. 2018).

[34] *Id.*

[35] *Id.*

[36] *U.S. Bank Nat'l Ass'n v. Miller*, 2020 IL App (1st) 191029, ¶ 30.

[37] *Id.*

[38] *Id.* at ¶ 31.

[39] *Id.*

[40] *Id.* at ¶25-26.

[41] *See Fendon v. Bank of Am., N.A.*, 877 F.3d 714 (7th Cir. 2017).

[42] *See Hoang v. Bank of Am., N.A.*, 910 F.3d 1096 (9th Cir. 2018).

[43] *Fendon v. Bank of Am., N.A.*, 877 F.3d 714 (7th Cir. 2017).

[44] *Id.* at 717.

[45] *See In re Hunter*, 400 B.R. 651, 662 (Bankr. N.D. Ill. 2009); *Stewart v. BAC Home Loans Servicing, LP*, No. 10 C 2033, 2011 WL 862938, at *6 (N.D. Ill. Mar. 10, 2011); *Mathers v. HSBC Bank*, No. 16 C 9572, 2018 WL 3831529, at *4 (N.D. Ill. Aug. 13, 2018).

[46] *See U.S. Bank Nat'l Ass'n v. Gerber*, 380 F. Supp. 3d 429 (M.D. Pa. 2018).

[47] *Mathers v. HSBC Bank*, No. 16 C 9572, 2018 WL 3831529, at *4 (N.D. Ill. Aug. 13, 2018).

[48] *See In re Hunter*, 400 B.R. 651, 662 (Bankr. N.D. Ill. 2009); *Stewart v. BAC Home Loans Servicing, LP*, No. 10 C 2033, 2011 WL 862938, at *6 (N.D. Ill. Mar. 10, 2011); *Mathers v. HSBC Bank*, No. 16 C 9572, 2018 WL 3831529, at *4 (N.D. Ill. Aug. 13, 2018).

[49] 735 ILCS 5/13-206.

[50] *U.S. Bank Nat'l Ass'n v. Miller*, 2020 IL App (1st) 191029, ¶ 30.