

## Jesinoski Opinion Does Not Defeat The Statute of Limitations

Before the United States Supreme Court opinion in *Jesinoski v. Countrywide Home Loans, Inc.* (2015) \_\_ U.S. \_\_, 135 S.Ct. 790, the law in the Ninth Circuit was that a borrower who sought to exercise a conditional right of rescission under the Truth-In-Lending Act (“TILA”) was required to exercise that right within three (3) years of the consummation of the loan and to file suit within that same three (3) year period to enforce that right if the rescission request was not complied with. See, *McComie-Gray v. Bank of Am. Home Loans*, 667 F.3d 1325, 1329 (9th Cir. 2012) (“Because § 1635(f) is a statute of repose, it extinguished McComie Gray’s right to rescission on April 14, 2009, three years after the consummation of the loan”).

In *Jesinoski*, 135 S.Ct. at 793, the Supreme Court disagreed with cases like *McComie-Gray*, and instead held that a borrower need only *exercise* a right of rescission under TILA by notifying the lender of the *exercise* of that right within three (3) years of the consummation of the loan. The borrower did not also have to file a lawsuit within that three (3) year period to enforce the right to rescind under TILA.

Based on *Jesinoski*, borrowers now claim that TILA rescissions happen instantaneously upon the *exercise* of the right to rescind, regardless of whether a lawsuit is filed *or* the amount of time which elapses after the *exercise* of the right to rescind with no further action taken by the borrower.

Did *Jesinoski* hold that a borrower never has to file a lawsuit to enforce a contested right of rescission? **No, Jesinoski did not so hold.**

**The Supreme Court in *Jesinoski* did not hold that a borrower which makes a timely rescission request never has to file a lawsuit to enforce its contested rescission right.** The Supreme Court was not presented with this question in *Jesinoski*.

If the Supreme Court were presented with such a question in the future, it does not appear that the question could be answered in the affirmative. This is because the express language of **TILA PROVIDES FOR A ONE (1) YEAR STATUTE OF LIMITATIONS FOR RESCISSION CLAIMS.**

**15 U.S.C. § 1640(a) provides a borrower with remedies under TILA when a lender declines a borrower’s request for rescission:**

“[A]ny creditor who fails to comply with any requirement imposed under this part, including any requirement under section 1635 of this title...with respect to any person is liable to such person in an amount equal to the sum of—(1) any actual damage sustained by such person as a result of the failure...(3) in the case of...any action in which a person is determined to have a right of rescission under section 1635 or 1638(e)(7) of this title, the costs of the action together with a reasonable attorney’s fee as determined by the court...” [Emphasis added]

Moreover, 15 U.S.C. § 1640(e) provides a one (1) year time limit within which actions may be brought when a lender allegedly fails to comply with a request for rescission under TILA.

“[A]ny action under this section may be brought in any United States district court, or in any other court of competent jurisdiction, within one year from the date of the occurrence of the violation...” [Emphasis added]

TILA’s express language requires that an action to enforce a right to rescission—or any action under TILA for that matter—must be filed “...within one year of the date of the occurrence of the violation...” *Jesinoski* did not alter the statutory language of TILA and change its one (1) year statute of limitations. Nevertheless, borrowers now argue that it did.

Fortunately for lenders, it appears that the predominate post-*Jesinoski* trend in TILA rescission litigation involving the statute of limitations is that **the borrower must file a lawsuit within one (1) year of the exercise of the right to rescind and if the borrower does not do so, the rescission claim is time barred.** See, e.g., *Macklin v. Deutsche Bank Nt’l Trust Co. (In re Macklin)*, 2015 Bankr. LEXIS 1186, 95-96 and 98, fn. 2 (E.D. Cal. 2015) (“The plaintiff argues that under 15 U.S.C. § 1635, the Plaintiff has an absolute right to rescind for TILA violations. Plaintiff asserts only notice to the lender is required to effect rescission. The court finds the Plaintiff was entitled [to] send a notice of his intent to rescind, however, the court finds the time to litigate the validity of the rescission has passed...The court finds that even if the one-year statute of limitations...”).