

## **ILLINOIS SUPREME COURT HOLDS TRUSTEE OF LAND TRUST HAS TILA RIGHT TO RESCIND**

The Supreme Court of Illinois recently held that the trustee of a land trust involved in a reverse mortgage loan transaction is entitled to receive disclosures, including notice of the right to rescind, under the federal Truth in Lending Act (TILA), 15 U.S.C. § 1601 et seq.

The Court also held that, because the disclosures were not provided to the land trust trustee, the three-day right to rescind was extended to three years after the transaction and the trustee timely exercised that right. In addition, the Court held the trustee's claim for statutory damages was not time barred.

A copy of the opinion is available at: [Link to Opinion](#).

In July 2009, a consumer obtained a reverse mortgage secured by her condominium unit, title to which was held by a land trust of which she was the beneficiary.

The mortgage contained a customary exculpatory clause, which provided that the trustee was not personally obligated on the note "and the only means of enforcing a security interest was through the property itself." In addition, the note provided that the loan became immediately due upon the death of the borrower, the sale of the property by the borrower, or if the borrower failed to use the property as her principal dwelling for more than 12 consecutive months.

Although the loan documents, including the notice of right to cancel disclosure required by TILA (15 U.S.C. § 1635(a)), were prepared for the trustee as the mortgagor, they were delivered only to the borrower/trust beneficiary.

The borrower/trust beneficiary died in May 2010, and in October 2010 the mortgagee sued to foreclose.

In June 2011, the defendant trustee sent the plaintiff mortgagee a letter purporting to exercise its right to rescind the transaction. In July 2011, the defendant/trustee filed a counterclaim under TILA, seeking rescission, termination of the security interest, statutory damages and attorney's fees.

In January 2012, the trial court dismissed the counterclaim with prejudice. Shortly thereafter, the defendant/trustee paid the mortgagee the full amount due under the note and mortgage, and then terminated the trust, conveying the mortgaged property to a third party.

The mortgagee then moved to voluntarily dismiss the foreclosure action, and in March 2012, the court dismissed the case with prejudice. The defendant/trustee appealed the dismissal of its TILA counterclaim.

On appeal, the defendant/trustee argued that it had the right to rescind under TILA, and timely exercised that right. The plaintiff mortgagee argued that “a land trust is not a ‘consumer’ as that term is defined in TILA and, therefore, [the trustee] had no standing to rescind.” The plaintiff mortgagee also argued that the trustee “had no right to rescind because the property was not [its] principal dwelling and because [the trustee] was not a party to the transaction.”

The appellate court affirmed the circuit court’s dismissal of the counterclaim in a divided opinion, reasoning that the mortgage’s exculpatory clause meant that the borrower/beneficiary, not the trustee, was the “obligor,” and therefore that the borrower/beneficiary was the only person entitled to rescind under TILA.

Although neither TILA nor its implementing Regulation Z define “obligor,” the appellate court, looking to the dictionary definition, found that obligor meant “the person to whom credit is extended” and, because the trustee was not the obligor, it could not plead any set of facts under which it had the right to rescind the transaction. The appellate court also held that the trustee forfeited its claim to statutory damages because it failed to raise the issue on appeal.

#### Court Allows TILA Damages Claim for Failure to Rescind After Notice

The Illinois Supreme Court granted the trustee’s petition for leave to appeal, and began its opinion by discussing the background of TILA, enacted by Congress in 1968 “to ensure credit terms are disclosed in a meaningful way so consumers can readily and knowledgeably compare the credit options available to them.”

The Court then pointed out that Regulation Z and the Federal Reserve Board's Official Staff Commentary in effect during the period relevant here were entitled to great deference "absent some obvious repugnance to TILA."

After analyzing the applicable provisions of TILA, Regulation Z and Official Staff Commentary, the Court concluded that "Congress did not intend to limit rescission rights to only obligors, as that term is generally defined." The Court based its conclusion primarily on the commentary stating that "to possess the right to rescind one need not be liable (i.e., an obligor) on the underlying consumer credit transaction."

The Court also reasoned that the applicable provisions of TILA and commentary have existed since 1968, and "Congress has not amended TILA to exclude consumers who are not liable on the underlying credit transaction from having the right to rescind."

The Illinois Supreme Court found that "[t]he appellate court majority failed to take into account the fact a reverse mortgage was at issue in this case and the nature of such mortgages." The Court noted that, because a reverse mortgage is a "nonrecourse consumer credit transaction, secured by the consumer's principal dwelling ... the borrower has not undertaken any obligation to make payments ... [and] ... [t]here is no personal liability of any kind in such a transaction since the only recourse is against the property itself ... there is no obligor within the ordinary meaning of that term."

The Court therefore concluded that "the appellate court erred in affirming the circuit court's finding that [the defendant trustee] has no right to rescind because it was not an 'obligor' within the meaning of TILA."

The Court stressed that the exculpatory clause in the mortgage, on which the appellate court relied for its decision, was "simply irrelevant." The trustee "was not personally liable nor did it undertake any type of obligation because the only recourse in a reverse mortgage is against the property itself."

Having held that "the right to rescind extends to 'each consumer whose ownership interest is or will be subject to the security interest' or 'is subject to the risk of loss,'" the Illinois Supreme Court turned to the question of "whether a trustee under a land trust maintains an ownership interest subject to the security interest such that it is entitled to TILA disclosures and may exercise the right to rescind."

The Court defined a land trust as a “form of land ownership where a trustee holds title to property for the benefit of the true owner/beneficiary of the trust.”

“Legal and equitable title of the property rests with the trustee, including the right to transfer and encumber the property. ... However, the trustee must deal with the property as the beneficiary directs.”

“Conversely, the beneficiary’s interest in the real property changes to a personal property interest in the trust. ... The beneficiary’s name does not appear publicly as an owner of record either in title documents or tax records and generally the trustee is required to keep the beneficiary name(s) confidential [and] [t]he beneficiary retains certain ownership rights such as the right of possession, operation, maintenance and control along with the right to use and enjoy the property.”

The Court then analyzed the two provisions of the Official Staff Commentary to Regulation Z that address land trusts, both of which provide that, for purposes of the definition of the term “consumer,” credit extended to a land trust is considered to be extended to a natural person. Because “the trustee of the land trust is a consumer, whose ownership interest is subject to the security interest,” the Court concluded that the trustee “was entitled to TILA disclosures and has the right to rescind the transaction,” reversing the appellate court’s holding to the contrary.

The Illinois Supreme Court also rejected the plaintiff’s alternative argument that the trustee’s right to rescind terminated when it sold the property to a third party, reasoning that although the right to rescind terminates upon sale of the property or transfer of the consumer’s interest therein, “section 1635(f) addresses only the time for exercising that right to rescind ... [and] [b]ecause [the trustee] gave notice to plaintiff that it was exercising that right, its right to rescind did not terminate upon the sale of the property.”

Relying on a 2010 bankruptcy case in which the bankruptcy court held that once the right to rescind was timely exercised, the subsequent sale of the property did not extinguish that right, the Illinois Supreme Court reasoned that “[i]f a sale of the property subsequent to the exercise of the right to rescind served to extinguish that right, a consumer would lose the right to damages based on the creditor’s failure to rescind when it was legally required to do so.”

Finally, the Illinois Supreme Court addressed the trustee's argument that it was entitled to statutory damages under TILA.

The Court found that the appellate court committed error by holding that the trustee forfeited its claim for statutory damages because "the circuit court never addressed this issue and, therefore, there was no order from which [the trustee] could appeal."

The Illinois Supreme Court also held that the trustee's "claim for damages resulting from plaintiff's failure to rescind is not time barred as plaintiff contends," relying on a 2009 bankruptcy court decision which held that "[f]or claims of failure to effectuate rescission, the date of the occurrence of the violation is the earlier of when the creditor refuses to effectuate rescission, or twenty days after it receives the notice of rescission."

Because the trustee sent the notice of rescission in June 2011, the plaintiff did not respond thereto, and the trustee filed its counterclaim in July 2011, the trustee's "claim for statutory damages was brought within one year of the occurrence" of the violation, as required by TILA, 15 U.S.C. § 1640(e).

The appellate court's judgment was reversed, and the case remanded to the trial court for further proceedings.