

**PLAINTIFFS NOT REQUIRED TO PLEAD TENDER OR ABILITY
TO TENDER TO SUPPORT TILA RESCISSION CLAIM**

On July 16, the U.S. Court of Appeals for the Ninth Circuit [held](#) that an allegation of tender or ability to tender is not required to support a TILA rescission claim. *Merritt v. Countrywide Fin. Corp.*, No. 17678, 2014 WL 3451299 (9th Cir. Jul. 16, 2014). In this case, two borrowers filed an action against their mortgage lender more than three years after origination of the loan and a concurrent home equity line of credit, claiming the lender failed to provide completed disclosures. The district court dismissed the borrowers' claim for rescission under TILA because the borrowers did not tender the value of their HELOC to the lender before filing suit, and dismissed their RESPA Section 8 claims as time-barred.

On appeal, the court criticized the district court's application of the Ninth Circuit's holding in *Yamamoto v. Bank of New York*, 329 F.3d 1167 (9th Cir. 2003) that courts may at the summary judgment stage require an obligor to provide evidence of ability to tender. Instead, the appellate court held that borrowers can state a TILA rescission claim without pleading tender, or that they have the ability to tender the value of their loan. The court further held that a district court may only require tender before rescission at the summary judgment stage, and only on a case-by-case basis once the creditor has established a potentially viable defense. The Ninth Circuit also applied the equitable tolling doctrine to suspend the one-year limitations period applicable to the borrower's RESPA claims and remanded to the district court the question of whether the borrowers had a reasonable opportunity to discover the violations earlier. The court declined to address two "complex" issues of first impression: (i) whether markups for services provided by a third party are actionable under RESPA § 8(b); and (ii) whether an inflated appraisal qualifies as a "thing of value" under RESPA § 8(a).