

HOW DO I KNOW IF I CAN RESCIND MY MORTGAGE UNDER THE TRUTH IN LENDING ACT?

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A Truth in Lending Act (“TILA”), 15 U.S.C. §1601 *et seq.* rescission claim is based upon the original lender’s failure to provide the borrower with the required disclosures at closing of a mortgage loan refinance that secures a principal dwelling. *See* 15 U.S.C. § 1635 and 12 C.F.R. § 226.23. TILA provides a consumer with an unconditional right of rescission within three (3) business days following consummation of a residential loan refinance. TILA rescission rights apply to loans that are *not* used to fund the construction or purchase of property therefore it is generally required that they be a refinance.

For the applicable transactions, there is an unconditional right to rescind through midnight on the third business day following consummation of the loan. Where certain material disclosures were not provided, this three-day right to rescission never begins to tick and can extend up to three years. 15 U.S.C. § 1635(f); 12 C.F.R. §§226.15(a)(3), 226.23(a)(3).

Due to the violations apparent on the face of the TILA disclosures documents, or lack thereof, a borrower may have a cause of action to rescind their mortgage pursuant to the Truth in Lending Act, 15 U.S.C. § 1601 *et seq.* (“TILA”), and Federal Reserve Board Regulation Z, 12 C.F.R. § 226 *et seq.* (“Regulation Z”). Even a technical violation in a material disclosure will give rise to a three-year extended right of rescission.

The material disclosure required for a refinance loan that secures a principal dwelling, are:

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[T]he annual percentage rate, the method of determining the finance charge and the balance upon which a finance charge will be imposed, the amount of the finance charge, the amount to be financed, the total of payments, the number and amount of payments, [and] the due dates or periods of payments scheduled to repay the indebtedness....

15 U.S.C. § 1602(u).

A borrower may rescind for a failure to provide TILA disclosures that contain the required material information. For example, the disclosures did not provide clear payment schedule information, an understated finance charge, or an inaccurate APR. *See* 15 U.S.C. §1602(u) and 12 C.F.R. § 226.18(g). Other actionable disclosure violations include a lender's failure to provide each person with a security interest in the home with two copies of the Notice of Right to Cancel.

The purpose of rescission is to place the parties back to the positions they held prior to the extension of the loan. A successful rescission operates to void the bank's security interest in the borrower's home, and allow for the recovery of statutory damages for any failure to honor rescission. To effectuate rescission, a borrower must send a notice of rescission outlining the material violations under TILA and explicitly requesting rescission of the loan. The borrower should send the notice of rescission to the current mortgage holder, servicer *and* the original lender, just to be safe. If the borrower is unsure of the address where to send the notices, the borrower may call the bank to request the appropriate mailing address. The borrower *must* send the notice of rescission within three-years of consummation of the loan or he or she will lose the right to rescind pursuant to the statute of limitations. 15 U.S.C. §1635(f).

Despite that it is the original lender's failure to supply accurate material disclosures, TILA allows the borrower to rescind against the assignee of the loan. A notice of rescission under TILA is effective against assignees of the loan. *Schmit v. Bank Uninted FSC*, 2009 WL

320490 at *3 (N.D.Ill. Feb. 6, 2009) (“Assignees...may not ‘hide behind the assignment’; timely notice to the original creditor rescinds the transaction in its entirety.”) *quoting Hubbard v. Ameriquest Mortgage Co.*, 2008 WL 4449888 (N.D.Ill. Sept. 30, 2008).

Upon receipt, the mortgage holder has twenty (20) days to comply with the request, void its security interest in the home and return any interest and finance charges paid by the borrower. To effectuate rescission the mortgage holder must release its security interest in the home and return all funds that that the borrower paid over the course of the loan, including interest and costs. At which point, the borrower must tender either loan proceeds or the property to mortgage holder. In other words borrower must be prepared to either (1) give the property to the mortgage holder, (2) obtain a loan to repay the mortgage holder the remaining principal balance of the loan (of course with better terms than the rescinded loan). If the borrower is unwilling to tender the property, and cannot obtain another loan to pay back the mortgage holder, the borrower must seek a repayment plan by settling with the mortgage holder or pursuing assistance from the courts. In the event that the mortgage holder disputes the borrower’s right to rescind or if it is unwilling to tender first, the mortgage holder is obligation to seek assistance from the courts.

Where mortgage holder will reject rescission and does not itself seek a declaratory judgment or other assistance from the courts, the borrower must take legal action to enforce rescission. If after 20 days the mortgage holder rejects, fails to honor rescission or fails to seek a rescission modification from the courts, then the borrower must file a complaint to enforce rescission. The complaint should join the mortgage broker, the original lender, and the current servicer as defendants. The complaint should allege rescission and damages against the mortgage holder for a failure to honor rescission.

TILA rescission is a powerful tool, but notable limitations are that a borrower must rescind within three-years, for material violations of TILA, and only for a refinance of a mortgage securing the borrower's principal dwelling. Otherwise, TILA rescission is beneficial to a borrower not interested in keeping the property, because the borrower may tender the property and receive a return of all interest and other costs he or she paid over the course of the loan. The mortgage holder and other servicer is then required to cure all bad credit marks associated with the loan. Therefore, a borrower with a mortgage eligible for rescission may want to consider looking over their documents from the closing for TILA violations or have a qualified attorney consider their case for rescission.