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## The Jesinoski Opinion Vs. The Statute Of Limitations

Law360, New York (September 13, 2016, 4:00 PM EDT) -- Before the U.S. 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 years of the consummation of the loan and to file suit within that same three 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").



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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 years of the consummation of the loan. The borrower did not also have to file a lawsuit within that three year period to enforce the right to rescind under TILA.



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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 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 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 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 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 Nat'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...").

On July 19, 2016, the California Court of Appeal issued an opinion in *U.S. Bank Nat'l Assoc. v. Naifeh* (2016) 2016 Cal. App. LEXIS 599, which is the first published opinion by a California appellate court in which the effect of Jesinoski is discussed. In *Naifeh*, the borrower obtained a loan in March of 2007, and purported to exercise a conditional right of rescission by sending letters to the lender in July of 2009, December of 2009 and January of 2010, but the lender did not comply with the rescission request. The borrower then began recording fraudulent documents which purported to reflect that the borrower was released from the debt. After the secured property was foreclosed upon, the borrower continued recording fraudulent documents and even purported to convey title to the secured property to a third party. In 2011, the lender was ultimately required to file a

lawsuit to cancel the fraudulent recorded documents.

The Superior Court entered judgment in favor of the successor to the lender and against the borrower and others, but the Court of Appeal in Naifeh, 2016 Cal.App. LEXIS \* 31, vacated the judgment and remanded the case, "for further proceedings with respect to appellant's affirmative defense of rescission." The California Court of Appeal in Naifeh did not issue any opinion on the TILA statute of limitations issue which is the subject of this article, but instead stated in footnote 9 that, "We need not and do not decide these issues, because the trial court did not decide them, and the parties did not fully brief them in this appeal."

The TILA rescission statute of limitations issue is currently pending before the Ninth Circuit Court of Appeals, but it is unclear if the Ninth Circuit will resolve this issue or decide the pending appeal on other grounds. On July 19, 2016, the California Court of Appeal in Naifeh determined not to address the statute of limitations issue at this time. Until such an opinion is issued by the California Court of Appeal, the California Supreme Court, or the Ninth Circuit Court of Appeals, lenders in the Ninth Circuit must continue to assert that TILA "means what it says" and that a TILA rescission claim brought more than one year after the borrower's exercise of a purported right to rescind, is time-barred.

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