St. John's Law Review

Volume 85
Number 1 *Volume 85, Winter 2011, Number 1*

Article 6

October 2011

Striking a Balance: When to Extend the Right to Rescind Under TILA

Kimberley Ayer

STRIKING A BALANCE: WHEN TO EXTEND THE RIGHT TO RESCIND UNDER TILA

KIMBERLEY AYER†

INTRODUCTION

Before the subprime mortgage market collapsed, a number of public figures warned of the oncoming crisis. In May 2007, Chairman of the Federal Reserve Ben Bernanke gave a speech at the Federal Reserve Bank in Chicago on the development of the subprime mortgage market since the 1990s.[1] In that speech, Bernanke laid out the background of the subprime mortgage market and the growth of the secondary mortgage market.[2] Almost a year later, Lydia B. Parnes, the Director of the Bureau of Consumer Protection at the Federal Trade Commission ("FTC"), delivered a prepared statement in which she voiced the FTC's "concern[s] about the rise in delinquencies and foreclosures in the subprime market, and the impact on communities . . . [as well as the FTC's] commit[ment] to using all of its tools to protect consumers in [that] market."[3] Parnes went on to enumerate the

---

† Notes & Comments Editor, *St. John's Law Review*; J.D. Candidate, 2011, St. John's University School of Law; M.A., 2007, University of Connecticut; B.A., Gettysburg College, 2005.

[1] Ben S. Bernanke, Chairman, Fed. Reserve, Speech at the Federal Reserve Bank of Chicago's 43rd Annual Conference on Bank Structure and Competition: The Subprime Mortgage Market (May 17, 2007), *available at* http://www.federalreserve.gov/newsevents/speech/bernanke20070517a.htm Bernanke explained that the expansion of the subprime mortgage market in the 1990s was "spurred in large part by innovations that reduced the costs for lenders of assessing and pricing risks," "technological advances [that] facilitated credit scoring by making it easier for lenders to collect and disseminate information on the creditworthiness of prospective borrowers," and "new techniques [developed by lenders] for using this information to determine underwriting standards, set interest rates, and manage their risks." *Id.*

[2] *See id.* (noting that "subprime mortgage lending began to expand in earnest in the mid-1990s, the expansion spurred in large part by innovations that reduced the costs for lenders of assessing and pricing risks").

[3] *Improving Consumer Protections in Subprime Lending*: *Hearing Before the Subcomm. on Interstate Commerce, Trade & Tourism of the S. Comm. on Commerce, Sci. & Transp.*, 110th Cong. 1 (2008) (statement of Lydia B. Parnes, Director, Bureau of Consumer Protection, FTC).

FTC's various mechanisms for protecting consumers in the subprime market, including bringing a number of legal actions against mortgage institutions and other mortgage industry entities,[4] educating consumers in how mortgage lending works,[5] and conducting continuing research in order to understand the ever-changing mortgage market and develop policies to better protect borrowers.[6]

One of the most powerful tools borrowers have at their disposal to protect themselves from unscrupulous lenders is the Truth in Lending Act ("TILA").[7] Under TILA, borrowers have the right to rescind a mortgage transaction for up to three years if the lender fails to adhere to the requirements of the Act,[8] including failing to disclose the expiration date of the three-day rescission period to which all borrowers are entitled.[9] Until recently, various circuit courts have employed what is essentially a strict liability standard, finding that a relatively minor technical violation of TILA entitles a borrower to the extended three-year rescission period.[10] Recently, however, the First Circuit split from tradition and established a new "reasonable person" test to determine whether a borrower understood that he had three days to rescind his mortgage transaction. Under this test, if an average, reasonable borrower would have understood that he had three days to rescind the transaction, then the court will not extend the rescission period to three years.[11]

This Note argues that the reasonable person standard that the First Circuit implemented in *Melfi v. WMC Mortgage Corp.*[12] to determine whether a consumer has a right to the three-year

---

[4] *See id.* at 5–12.

[5] *See id.* at 12–13.

[6] *See id.* at 13–17.

[7] *See* 15 U.S.C. §§ 1601–1667(f) (2006).

[8] *See* 15 U.S.C. § 1635(f); *infra* notes 49–51.

[9] *See* 12 C.F.R. § 226.23(a)(3) (2010).

[10] *See, e.g.*, Semar v. Platte Valley Fed. Sav. & Loan Ass'n, 791 F.2d 699, 704 (9th Cir. 1986) (finding that even a minor technical violation of the Act such as failure to include the expiration date of the rescission period entitled the borrower to the extended rescission period); Williamson v. Lafferty, 698 F.2d 767, 768 (5th Cir. 1983) (holding that "failure properly to complete the right to rescission form automatically violates the Act" and that "failure to fill in the expiration date of the rescission form is a violation").

[11] *See* Melfi v. WMC Mortg. Corp., 568 F.3d 309, 312–13 (1st Cir. 2009) (ruling that when "a reasonable borrower cannot have been misled," it is inappropriate to allow the extended rescission period), *cert. denied*, 130 S. Ct. 1058 (2010).

[12] *Id.*

extended rescission period is not practicable in light of the recent subprime mortgage crisis and the predatory practices that characterized subprime lending. Part I.A explains the background of the proliferation of subprime mortgages and the eventual crisis that they caused in the mortgage market. Part I.B contains a brief history of the Truth in Lending Act, as well as a more detailed discussion of a consumer's rescission rights under that Act. Part II.A lays out the methodology that various circuit courts have used to determine whether a borrower is entitled to the extended rescission period. Part II.B explains how the First Circuit recently departed from this long-used methodology by implementing a reasonable person test instead of the traditional "strict liability" standard. Part III argues that while the First Circuit was correct to reject the traditional strict liability standard, its new reasonable person test fails to take into account the realities of predatory lending. Predatory lenders specifically target potential borrowers that they perceive as vulnerable—borrowers that they can scare into taking on a subprime loan, who are in some way less likely to understand fully the transaction.[13] Because predatory lenders do not target the average, reasonable consumer, it is unfair to apply a reasonable person standard when determining a consumer's rights.

When lenders do not include the expiration date of the rescission period in the borrower's paperwork, courts should employ a rebuttable presumption that the borrower did not know when the rescission period ended and is entitled to the extended three-year rescission period. Such a presumption would uphold the purpose of TILA by providing protection for the borrower and also would ensure that lenders have an incentive to include the expiration date of the rescission period in the borrower's rescission notice. The burden of proof must be on the lender to rebut that presumption by demonstrating that the borrower did know when the three-day rescission period expired. Use of this rebuttable presumption would result in two significant benefits. First, courts would be able to provide relief to consumers who were taken advantage of by predatory lenders during the

[13] *See* Joshua M. Stolly, Comment, *Subprime Lending: Ohioans Fall Prey to Predatory Lending at Record Levels—What Next?* 34 OHIO N.U. L. REV. 289, 294–96 (2008) (outlining the various groups predatory lenders target because they perceive those groups as vulnerable).

subprime mortgage boom. Second, courts would not be forced to reward consumers who did understand the nature of the rescission period but nevertheless are attempting to use a minor technical TILA violation as a loophole to get out of a bad mortgage.

I. SUBPRIME MORTGAGES AND TILA

A. *The Rise and Fall of the Subprime Mortgage Market*

Subprime mortgage lending is tailored to those borrowers who have less than pristine credit.[14] With the rise of subprime mortgages in the 1990s, gone were the days in which local banks issued mortgages only "to individuals with perfect or near-perfect credit" and "held on to the loans and provided all the necessary servicing and documentation."[15] At the same time, lending institutions began issuing subprime loans with exorbitantly high interest rates to individual consumers with poor credit who otherwise would not have been able to obtain mortgages.[16] Private banks purchased subprime loans, packaged them as "collateralized debt obligations (CDOs) or collateralized mortgage obligations (CMOs)," and made them available to mutual funds and pension plans for investment.[17] This practice led to an

[14] *See* Solomon Maman, Note, *New Tools for Combating Unfair, Deceptive and Abusive Mortgage Practices: New Amendments to Regulation Z*, 21 LOY. CONSUMER L. REV. 194, 199 (2008) ("The term 'Subprime Lending' was coined sometime in the early 1990s by the securitization industry, Wall Street firms or rating agencies in an attempt to distinguish securities backed by mortgages made to borrowers with excellent credit from securities backed by mortgages made to borrowers with impaired credit."); *see also* Jonathan Macey et al., *Helping Law Catch up to Markets: Applying Broker-Dealer Law to Subprime Mortgages*, 34 J. CORP. L. 789, 798–99 (2009) (defining subprime mortgage lending as "the making of loans to people with less than perfect creditworthiness" and emphasizing that "the key point is that subprime loans are those to borrowers whose risk profile makes default a more realistic possibility than for those made to prime borrowers").

[15] Macey et al., *supra* note 14, at 799.

[16] *See* Stolly, *supra* note 13, at 293. The author recounts an instance in which he was solicited by an insurance agent to refinance his home, was quoted a nineteen percent interest rate, and told that only subprime borrowers paid such an exorbitant rate. *See id.* at 289–90.

[17] Macey et al., *supra* note 14, at 800; *see also* Bernanke, *supra* note 1 (noting that "regulatory changes and other developments have permitted lenders to more easily sell mortgages to financial intermediaries, who in turn pool mortgages and sell the cash flows as structured securities").

"influx of money into the subprime mortgage lending industry," which made mortgages available to a larger number of Americans who previously would not have been eligible.[18]

At first blush, the proliferation of subprime mortgages appeared to have a positive impact on American home ownership.[19] Subprime mortgage lending was seen "in many cases . . . [as] a welcome financing tool to those who could not otherwise obtain home mortgage financing."[20] Indeed, subprime lending principally became known as a way for consumers who would typically have been excluded from the mortgage market to become homeowners.[21]

Subprime mortgages were not, however, the boon to high-risk prospective homeowners that they seemed to be at first. Such mortgages came with extremely stringent terms that seemed almost to set up the consumer for failure.[22] Because subprime lenders were taking on "the additional risk correlated with low credit scores,"[23] lenders charged higher interest rates than they would charge for prime loans[24] and included prepayment penalties in the terms of subprime loans.[25] Consumers were hooked into signing on to subprime mortgages despite these unfavorable terms because many such mortgages

---

[18] Macey et al., *supra* note 14, at 800.

[19] *See id.* at 799 (noting that traditional mortgage "terms and the credit requirements meant that only middle- and upper-class Americans were able to obtain mortgages, making it hard for large segments of the population to own homes"). The article goes on to add that these traditional requirements led to a disparate impact on racial minorities. *See id.*

[20] Stolly, *supra* note 13, at 293.

[21] Maman, *supra* note 14 ("Subprime lending carved its niche in the consumer credit market by providing a source of funds for those borrowers who were underserved by commercial banks and thrifts, borrowers with blemished credit characteristics, borrowers with low-to-moderate income, and minorities.").

[22] *See* Robert Murken, Comment, *Can't Get No Satisfaction? Revising How Courts Rescind Home Equity Loans Under the Truth in Lending Act*, 77 TEMP. L. REV. 457, 462 (2004) (noting that "many subprime loans can create their own risk by saddling a borrower of limited means, who was nonetheless able to maintain payments on her prior debt load, with a loan she simply cannot afford, which pushes her over the edge into default").

[23] Macey et al., *supra* note 14, at 801.

[24] *See* Murken, *supra* note 22 (stating that subprime mortgages that cross the line into predatory lending "include interest rates well above the market rate, . . . which typically do not reflect the actual risk of the loan").

[25] *See* Macey et al., *supra* note 14, at 801 (describing a prepayment penalty as "a charge to the mortgage holder for paying off a mortgage before the payments are due" and noting that such penalties "are present in roughly 80% of subprime loans but only 2% of prime loans").

"often feature[d] two-year low 'teaser' rates before switching to a high floating-interest rate."[26] While the housing market was still booming, more savvy consumers were able to avoid the floating-interest rate by beginning "cycle[s] of refinancing upon the end of the two-year 'teaser' period."[27]

Chairman Bernanke warned of serious problems developing in the subprime mortgage market, including a high level of delinquencies,[28] a corresponding rise in home foreclosures,[29] and rapidly falling home values.[30] Many of these problems were a direct result of the widespread practice of extending subprime loans to high-risk consumers,[31] who were ultimately unable to repay their mortgages and defaulted.[32]

In fact, at the time of Bernanke's speech, the subprime market was already in a tailspin, fueled by increasing corruption in the secondary mortgage market.[33] One major factor that initiated the corruption was the collateralization of subprime mortgages; "because the originators and brokers did not hold the loans they created, standards and diligence in originating loans were compromised."[34] Further contributing to the instability in the mortgage market was the change in compensation for mortgage brokers from a fixed salary to a commission-based

[26] *Id.* at 802.

[27] *Id.*

[28] *See* Bernanke, *supra* note 1 (stating that "the rate of serious delinquencies—corresponding to mortgages in foreclosure or with payments ninety days or more overdue—rose sharply during 2006 and recently stood at about 11 percent, about double the recent low seen in mid-2005").

[29] *See id.* ("In the fourth quarter of 2006, about 310,000 foreclosure proceedings were initiated, whereas for the preceding two years the quarterly average was roughly 230,000. Subprime mortgages accounted for more than half of the foreclosures started in the fourth quarter.").

[30] *See id.*

[31] *See* Stolly, *supra* note 13, at 294 ("Subprime borrowers' high risks are generally caused by delinquencies, charge-offs, judgments, foreclosures, bankruptcies, debt-to-income ratios, and low credit scores.").

[32] *See id.* at 291 (characterizing subprime lending as "one form of predatory lending" and noting that "victims frequently fail to meet their heavily lopsided financial obligations and are forced into foreclosure").

[33] *See id.* at 294 (noting that although "[t]heoretically, subprime lending is completely ethical . . . [it] runs afoul and turns predatory when the lenders use illegal and/or unethical tactics to secure the loans, or worse, when they offer subprime loans to those who qualify for prime loan treatment"). The author goes on to describe typical predatory lending practices. *See id.* at 294–99.

[34] Macey et al., *supra* note 15, at 801.

salary, which led mortgage brokers to issue increasingly risky mortgages to clients who in the past would not have been able to get a mortgage, in order to boost their own salaries.[35]

Finally, lenders engaged in predatory practices, specifically targeting consumers based on factors such as race, gender, age, and economic status.[36] Predatory lenders steered those borrowers toward subprime mortgages that the lenders knew those consumers could never afford[37] or got them involved in procedures such as flipping,[38] practices that imposed severe financial burdens on consumers who were ill-equipped to take on such burdens. Moreover, predatory lenders created "no doc loans" and "liar loans," which allowed consumers to obtain mortgages either without including their income information or by affirmatively misrepresenting their income.[39] In return for the risk of extending credit to such financially unstable

---

[35] *See* Macey et al., *supra* note 14, at 794–95. Macey notes that corruption in the subprime lending market only increased with the development of the "yield spread premium ("YSP"), a device developed to provide incentives for mortgage brokers" to talk consumers into taking on higher-interest mortgages by providing kickbacks to the brokers based on the difference between the average interest rate on that day and the interest rate attached to the loan the broker talks the unwitting borrower into. *Id.*; *see also* Stolly, *supra* note 13, at 304 ("A common example of a kickback is when the lender tells the mortgage broker it will lend at a 15% rate, and in turn, the broker tells the customer that they will get them a 15.25% rate, and the amount above the 15% goes to the broker as a 'kickback.' ").

[36] *See* Stolly, *supra* note 13, at 294–96 (noting that predatory lenders aggressively target victims based on their low income, race, gender, or age).

[37] *See id.* at 294–95 (describing the predatory practice of "steering" as " 'the practice of directing consumers to high rate/high cost loans based simply on their race or economic status and their lack of information, rather than based on their credit histories or credit risks' " (quoting U.S. DEP'T OF HOUS. & URBAN DEV. & U.S. DEP'T OF THE TREASURY, CURBING PREDATORY HOME MORTGAGE LENDING 72 (2000)).

[38] *See* Murken, *supra* note 22 (describing flipping as an "exploitative technique some predatory lenders use . . . where the lender will convince an unwitting consumer to needlessly refinance a loan, sometimes several times, racking up more fees and points each time").

[39] Stolly, *supra* note 13, at 297 (describing a "no doc loan" as one "in which lenders allow borrowers to state any amount of income they desire while providing no proof of employment or income" and a "liar loan" as one where "the income is exaggerated to a level that guarantees the approval of the loan").

consumers, lenders issued them subprime mortgages, which resulted in higher costs to the consumer[40] and which, ultimately, many consumers were unable to repay.[41]

Eventually, the "unprecedented boom of mortgage activity" that this country experienced between 2001 and 2006 slowed "as rising interest rates and declining house values began affecting consumers in the subprime market."[42] The decline in home values around this time prevented subprime borrowers from refinancing their mortgages, and thus, they could no longer avoid having to pay the much higher floating interest rates that kicked in after the two-year "teaser" rate had ceased.[43] Consumers who entered into subprime mortgages were unable to make their payments, and they defaulted at an overwhelming pace.[44]

B. TILA as an Escape Valve

Congress enacted TILA in large part to enable consumers to make informed choices when they enter into credit contracts with lenders. Prior to TILA, credit contracts were confusing documents with unclear terms that very few consumers truly understood.[45] Congress created TILA to allow consumers to make informed choices when shopping for credit;[46] it requires that lenders make a great deal of information about a credit transaction available to the consumer and to do business in a

---

[40] *See* Maman, *supra* note 14, at 203 (noting that subprime mortgages "generally result[ ] in higher costs of credit for subprime borrowers in terms of rates and fees and loan terms").

[41] *See* Stolly, *supra* note 13, at 291.

[42] Maman, *supra* note 14, at 195.

[43] *See* Macey et al., *supra* note 14, at 802–03.

[44] *See* Maman, *supra* note 14, at 195 (noting that since the housing bubble burst in 2006–2007, "subprime . . . mortgage delinquencies have reached unprecedented levels and mortgage foreclosures are now at an all time high"); *see also* Vikas Bajaj, *Builders and Homeowners Under Strain*, N.Y. TIMES, Mar. 7, 2008, at 1 ("'The Mortgage Bankers Association reported . . . that loans past due or in foreclosure jumped to 7.9 percent . . . from 7.3 percent at the end of September [2007] and 6.1 percent from December 2006.").

[45] *See* Christopher L. Peterson, *Truth, Understanding, and High-Cost Consumer Credit: The Historical Context of the Truth in Lending Act*, 55 FLA. L. REV. 807, 875–76 (2003).

[46] *See* Daniel Rothstein, Comment, *Truth in Lending: The Right To Rescind and the Statute of Limitations*, 14 PACE L. REV. 633, 635 (1994) (remarking that TILA was meant to be "an information protection device aimed at allowing informed credit shopping").

transparent way.[47] Under TILA, lenders are required to disclose the terms of credit contracts "in a clear and uniform manner."[48] One way TILA protects consumers is by giving them substantial leverage over lenders and by creating mechanisms to make consumers whole should they be taken advantage of by unscrupulous or predatory lenders.[49]

TILA provides an important safety valve by giving consumers the right to rescind a credit transaction within three business days where the consumer's home is used as a security interest.[50] During these three days, the consumer is free to rescind the mortgage for any reason or no reason at all.[51] If, however, the lender has failed to make material disclosures to the consumer at the outset of the transaction, the consumer's right to rescind may be extended to three years.[52] Information that is regarded as material includes

> the 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

---

[47] *See* 15 U.S.C. § 1601(a) (2006) ("It is the purpose of this subchapter to assure a meaningful disclosure of credit terms so that the consumer will be able to compare more readily the various credit terms available to him and avoid the uninformed use of credit, and to protect the consumer against inaccurate and unfair credit billing and credit card practices.").

[48] *See* Peterson, *supra* note 45, at 876–77.

[49] *See* Williams v. Homestake Mortg. Co., 968 F.2d 1137, 1140 (11th Cir. 1992) ("Though one goal of the statutory rescission process is to place the consumer in a much stronger b argaining position, another goal of § 1635(b) is to return the parties most nearly to the position they held prior to entering into the transaction.").

[50] *See* 15 U.S.C. § 1635(a) ("[I]n the case of any consumer credit transaction . . . in which a security interest . . . is or will be retained or acquired in any property which is used as the principal dwelling of the person to whom credit is extended, the obligor shall have the right to rescind the transaction until midnight of the third business day following the consummation of the transaction or the delivery of the information and rescission forms required under this section together with a statement containing the material disclosures required under this subchapter, whichever is later, by notifying the creditor . . . of his intention to do so.").

[51] *See TJAGSA Practice Notes: Legal Assistance Items*, ARMY LAW., Mar. 1990, at 44 ("At this stage, a consumer need not have or provide a reason for the rescission; the right to rescind during the first three days is unlimited."). This three-day period is often referred to as the consumer's "cooling-off period." *See* Rothstein, *supra* note 46, at 633.

[52] *See* 12 C.F.R. § 226.23(a)(3) (2010) ("If the required notice or material disclosures are not delivered, the right to rescind shall expire 3 years after consummation, upon transfer of all of the consumer's interest in the property, or upon sale of the property, whichever occurs first."); *see also* 15 U.S.C. § 1635(f).

> to be financed, the total of payments, the number and amount of payments, the due dates or periods of payments scheduled to repay the indebtedness, and the disclosures required by section 1639(a) of [TILA].[53]

The lender can use model forms provided by Regulation Z to inform the borrower of his rights in a simple and easily understandable manner.[54]

Along with the other required TILA disclosures, the lender must also provide the consumer with notice of his right to rescind.[55] The notice of the right to rescind must "clearly and conspicuously disclose"[56] several pieces of information, including "[t]he date the rescission period expires."[57] This "clear and conspicuous" standard means that "[i]f the notice is subject to two or more sensible readings that produce different results, then the creditor has not given a clear disclosure" and the consumer is entitled to the extended three-year rescission period.[58] Additionally, a consumer can exercise his right to rescind if the lender failed to use a statutorily appropriate form for the notice of the right to rescind or did not comply with other statutory notice requirements.[59]

---

[53] 15 U.S.C.A. § 1602(u) (West 2011); *see also id.* § 1639(a)–(b) (requiring the lender to make specific disclosures regarding the consumer's completion of the agreement; the consequences of making the loan and the annual percentage rate; and laying out guidelines for the time in which the lender must make disclosures to the consumer); 15 U.S.C. § 1611 (2006) (providing that a lender who "willfully and knowingly" fails to make the required disclosures "shall be fined not more than $5,000 or imprisoned not more than one year, or both").

[54] *See* 12 C.F.R. § 226 app. H; *see also* 15 U.S.C. § 1604(b) (providing "model disclosure forms" as a means to encourage lenders to comply with the material disclosures requirement as well as to help the consumer to "understand[ ] the transaction by utilizing readily understandable language to simplify the technical nature of the disclosures").

[55] *See* Elwin Griffith, *The Truth and Nothing But the Truth: Confronting the Challenge in the Truth in Lending Act and Regulation Z*, 40 HOUS. L. REV. 345, 370 (2003).

[56] 12 C.F.R. § 226.23(b)(1).

[57] *See id.* § 226.23(b)(1)(v); *see also* Semar v. Platte Valley Fed. Sav. & Loan Ass'n, 791 F.2d 699, 701–02 (9th Cir. 1986) ("If the lending institution omits the expiration date and fails to cure the omission by subsequently providing the information, the borrower may rescind the loan within three years after it was consummated.").

[58] Griffith, *supra* note 55, at 377.

[59] *See* 15 U.S.C. § 1635(i)(1) ("[A]fter the initiation of any judicial or nonjudicial foreclosure process on the primary dwelling of an obligor securing an extension of credit, the obligor shall have a right to rescind the transaction . . . if . . . the form of notice of rescission for the transaction is not the appropriate form of written notice

Rescission is meant to return the parties—the consumer and lender—to the positions they were in before the transaction occurred.[60] If the loan is rescinded under TILA, "the security interest is dissolved, the lender returns the borrower's payments, and the borrower returns the loan proceeds, less any 'finance or other charge.' "[61] Under this sequence of events, the lender "is supposed to return the consumer's property and terminate the security interest once the consumer notifies him of rescission" and before the consumer has returned any money or property to the lender.[62] The problem with this exchange from a lender's perspective is that it generally favors consumers far more heavily, especially when the consumer invokes his or her right to rescind as a defense to a lender's foreclosure action in response to the consumer's mortgage default.[63] A consumer who is allowed to rescind a loan several years after the transaction has to give back whatever money he or she received from the lender, but the lender has to give back everything the consumer paid over that same time period—generally leading to the lender losing out on the interest it was supposed to be collecting on that loan.[64] The consumer is put back in the position he or she was in before the transaction, but the lender essentially has to take a loss.

II. DISAGREEMENT AMONG THE CIRCUIT COURTS

The traditional approach to technical violations of TILA has been to apply a type of strict liability standard. Over the years, circuit courts have held that technical violations of TILA, such as failing to include the expiration date of the rescission period, entitle the borrower to an extended three-year rescission period.[65] Recently, however, the First Circuit departed from

---

published and adopted by the Board or a comparable written notice, and otherwise complied with all the requirements of this section regarding notice.").

[60] *See* Griffith, *supra* note 55 ("The result of a consumer's rescission is that the parties return to the *status quo ante*, and the consumer is not responsible for any costs or charges associated with the loan.").

[61] *Semar*, 791 F.2d at 702.

[62] Elwin J. Griffith, *Truth in Lending—Rescission, Consumer Remedies and Creditor Defenses in Closed-End Transactions*, 19 U. TOL. L. REV. 491, 508–09 (1988).

[63] *See* Rothstein, *supra* note 46, at 637.

[64] *See id.* at 657 ("The essential effect of the remedy is to afford the consumer an interest-free loan from the date of the transaction to the exchange of money after rescission.").

[65] *See infra* Part II.A.

tradition and instead chose to apply a reasonable person standard. Under this standard, the borrower is not entitled to an automatic extension of his rescission period based on a technical violation of TILA. Rather, whether he receives the extended period depends on the borrower's ability as an average, reasonable person to understand when his rescission period expired, regardless of the lender's failure to include that date in the notice.[66]

A. *Traditional Approach: Technical TILA Violation Merits Extended Rescission Period*

For almost three decades, circuit courts have consistently ruled that a lender's failure to include the expiration of the three-day rescission period in the notice of the right to rescind was a technical violation of TILA, entitling the consumer to the extended three-year rescission period.[67] In 1983, the Fifth Circuit ruled in *Williamson v. Lafferty* that the lender's failure to provide the expiration date of the three-day rescission period in a consumer's notice of the right to rescind was an automatic violation of TILA entitling the consumer to retain her right to rescind for three years.[68] In *Williamson*, the Plaintiff consumer had signed all of the documents, including a notice of the right to rescind, necessary to create a deed of trust to her property in order to finance some improvements on her home.[69] The notice included a space for the lender to fill in the expiration date of the three-day rescission period, but the lender failed to provide that date.[70]

Although the lender argued that the consumer could have calculated when the rescission period expired because the date of the transaction was on the paperwork, the Fifth Circuit rejected this reasoning, stating, "the precise purpose of requiring the creditor to fill in the date is to prevent the customer from having

---

[66] *See infra* Part II.B.

[67] *See* Griffith, *supra* note 62, at 504–05 (noting that in two cases it was appropriate for the courts to extend the consumers' rescission periods because "the omission of the expiration date on the notice was really a technical violation but . . . the [consumer] had a right to rely on that mandatory requirement in the Regulation").

[68] *See* Williamson v. Lafferty, 698 F.2d 767, 768–69 (5th Cir. 1983).

[69] *Id.* at 768.

[70] *Id.*

to calculate three business days."[71] This approach has been commended as "sensible . . . because the disclosure of a specific date would forestall any disagreement about the end of the rescission period."[72]

That same year, the Fourth Circuit made a similar ruling in *Mars v. Spartanburg Chrysler Plymouth, Inc.*, reversing the judgment of the district court that had ruled that technical TILA violations that did not cause the Plaintiff any actual injury did not give rise to creditor liability.[73] The Plaintiff consumer in that case argued that a number of technical TILA violations in the disclosure form, such as minor variations in terminology and an instance of the wrong font size, should give rise to liability on the part of the lender.[74] The district court rejected this argument, reasoning that the minor violations "could not have influenced [the consumer's] choice of credit" and thus, the purpose of TILA was still met.[75]

The Fourth Circuit reversed, finding that even though Plaintiff had not sustained any actual injury from the minor TILA violations, because the purpose of TILA is to protect consumers, lenders must comply strictly with TILA regulations.[76] Therefore, the lender's failure to adhere to those regulations gave rise to liability and the consumer was entitled to statutory damages, the cost of bringing the action, and reasonable attorney fees.[77]

Three years later, in *Semar v. Platte Valley Federal Savings & Loan Ass'n*, the Ninth Circuit faced a similar question when Plaintiff homeowners argued that they were entitled to a three-year rescission period due to the lender's failure to provide the expiration date of the rescission period in the notice of the right to rescind.[78] The consumers had taken out a fifteen-year,

---

[71] *Id.* at 769 n.3. A "business day" is defined as "[a] day that most institutions open for business, usu. a day on which banks and major stock exchanges are open, excluding Saturdays and Sundays." BLACK'S LAW DICTIONARY 454 (9th ed. 2009).

[72] Griffith, *supra* note 62, at 505.

[73] 713 F.2d 65, 66 (4th Cir. 1983).

[74] *See id.*

[75] *Id.* at 67.

[76] *See id.* ("To insure that the consumer is protected, as Congress envisioned, requires that the provisions of the Act and the regulations implementing it be absolutely complied with and strictly enforced.").

[77] *See id.*

[78] 791 F.2d 699, 701–02 (9th Cir. 1986).

$134,000 loan with a 16.875% annual interest rate.[79] After making thirteen payments totaling $26,655.33, the consumers defaulted.[80] The lender began foreclosure proceedings upon default, and the consumers defensively brought an action to rescind.[81]

Part of the consumers' argument was that the lender had omitted the expiration date of the rescission period, although it did state in the paper work that "the rescission right expired three business days after July 16."[82] They argued that, like the consumer in *Williamson*, the technical TILA violation entitled them to an extended three-year rescission period.[83]

The Ninth Circuit agreed and affirmed the district court's ruling that the technical TILA violation entitled the Plaintiffs to the three-year extension of their rescission rights. The court reasoned that "[t]echnical or minor violations of TILA . . . as well as major violations, impose liability on the creditor and entitle the borrower to rescind."[84] In fact, the court went so far as to say that it need not even reach the other prong of the consumers' argument for rescission; a simple technical violation in this case was dispositive.[85]

Additionally, the Ninth Circuit disapproved of the lender's argument that the court ought to exercise its equitable discretion based on how sympathetic or unsympathetic the particular consumer is or how much protection any given consumer warranted.[86] In rejecting that argument, the court reasoned that deciding cases based on how sympathetic the plaintiff is, or appears to be, "would frustrate the very purpose of TILA. Congress did not intend for TILA to apply only to sympathetic consumers; Congress designed the law to apply to all consumers, who are inherently at a disadvantage in loan and credit transactions."[87] Consequently, the court endorsed the district

[79] *Id.* at 701 n.2.
[80] *Id.* at 702.
[81] *Id.*
[82] *Id.*
[83] *Id.* at 704–05.
[84] *Id.* at 704.
[85] *See id.* at 703.
[86] *See id.* at 704 (defendant lender argued that its case should be distinguished from the earlier *Williamson v. Lafferty* because plaintiff in that case was more sympathetic and in need of protection than plaintiff in the case at hand).
[87] *Id.* at 705.

court's finding that, although the consumers in this case were "unsympathetic plaintiffs," they were nevertheless entitled to rescission based on the technical TILA violation.[88] Moreover, the court noted that "case law was contrary to [the lender's] assertion that courts should assert equitable powers in cases with unsympathetic facts."[89]

B. The First Circuit's New "Reasonable Person" Approach

Recently, however, in *Melfi v. WMC Mortgage Corp.*,[90] the First Circuit departed from this well-established principle of extending the rescission period for technical TILA violations. In *Melfi*, a homeowner who refinanced his home mortgage attempted to rescind the transaction twenty months after consummation of the loan, arguing that he was entitled to a three-year rescission period because the blanks for the date of the transaction[91] and the deadline of the three-day right to rescind were left blank[92] .

When the consumer brought his case in the district court, he relied on *Semar* and *Williamson* in arguing for an extended rescission period.[93] The district court pointed out, however, that in *Santos Rodriguez v. Doral Mortgage Corp.*,[94] the First Circuit had already rejected the strict liability test that those two cases promulgated by announcing, "we do not require perfect disclosure. The question before us is . . . only whether the notification [the consumer] actually received met the requirements of the clear and conspicuous standard laid out in Regulation Z."[95] The court in *Santos-Rodriguez* concluded that it was required to evaluate the lender's disclosure "from the

---

[88] *Id.* at 704.

[89] *Id.*

[90] 568 F.3d 309 (1st Cir. 2009), *cert. denied*, 130 S. Ct. 1058 (2010).

[91] *Id.* at 310 (noting that although the blank was not filled in, the date of the transaction was "stamped on the top right corner of the notice").

[92] *Id.*

[93] Melfi v. WMC Mortg. Corp., No. 08-024ML, 2009 WL 64338, at *2 (D.R.I. 2009).

[94] Santos-Rodriguez v. Doral Mortg. Corp., 485 F.3d 12, 13–14 (1st Cir. 2007). This case involved two sets of consumers who each defaulted on the original home loan they obtained from defendant buyer, elected to refinance with the same lender to avoid foreclosure. *Id.* Two years after consummation of the refinancing loans attempted to rescind, claiming that they had three years to do so on the basis of the lender's "alleged failure to disclose properly their rescission rights." *Id.*

[95] *Id.* at 18; *see also Melfi*, 2009 WL 64338, at *2.

vantage point of the hypothetical average consumer"[96] and that from that perspective, extension of the rescission period was inappropriate.[97] Based on this precedent, the district court in *Melfi* determined that the lender's notice was sufficient and that the consumer therefore was not entitled to the extended rescission period.[98]

In affirming the district court's denial of extension of the rescission period, the First Circuit again departed from the previous circuits' rulings that a technical TILA violation warranted extension of the rescission period, claiming that the previous circuits' decisions were outdated.[99] It noted with disapprobation that the consumer's argument for extension of the rescission period was dependent on the principle "that any flaw or deviation should be penalized automatically in order to deter such errors in the future."[100] The court went on to reject the argument that Congress intended for technical violations to lead to extension of the rescission period in order to protect the consumer,[101] instead contending that Congress had amended TILA specifically to combat the problem of "widespread rescission for minor violations."[102] The First Circuit therefore declared that

[96] *Santos-Rodriguez*, 485 F.3d at 18.

[97] *See id.* (concluding that "because plaintiffs were told, clearly and conspicuously, that rescission would only operate as to their pending refinance transaction, any conclusions that they might have drawn from that disclosure about their previously existing mortgages were unreasonable (and, thus, not a valid basis for any TILA claim)").

[98] *See* Melfi v. WMC Mort. Corp., 568 F.3d 309, 311–13 (1st Cir. 2009), *cert. denied*, 130 S. Ct. 1058 (2010).

[99] *See id.* at 312 (arguing that "the circuit cases are now elderly and may be in tension with later TILA amendments").

[100] *Id.* at 313.

[101] *See id.* ("[T]here is no evidence in TILA or any Board regulation that either Congress or the Board intended to render the form a nullity because of an uncompleted blank in the form or similar flaw where, as here, it could not possibly have caused [the consumer] to think that he had months in order to rescind.").

[102] *Id.*; *see* also 15 U.S.C. § 1635(h) (2006) ("An obligor shall have no rescission rights arising solely from the form of written notice used by the creditor to inform the obligor of the rights of the obligor under this section, if the creditor provided the obligor the appropriate form of written notice published and adopted by the Board, or a comparable written notice of the rights of the obligor, that was properly completed by the creditor, and otherwise complied with all other requirements of this section regarding notice.").

> technical deficiencies do not matter if the borrower receives a notice that effectively gives him notice as to the final date for rescission and has the three full days to act. Our test is whether any reasonable person, in reading the form provided in this case, would so understand it.[103]

The court seemed to base its ruling on the suspicion of consumer wrongdoing, claiming that "[t]he incentives for a borrower to [attempt to have a mortgage transaction rescinded well after the three-day cooling-off period has expired] may be substantial where a new loan is available, especially if rates have fallen or substantial interest has been paid during the period of the original loan."[104] The First Circuit concluded that allowing a "reasonable borrower [who could not] have been misled" to take advantage of the lender's minor omission and rescind his loan after almost two years would be to grant that borrower a windfall.[105] Because the court saw this outcome as fundamentally unfair and inconsistent with TILA's purpose, the First Circuit affirmed the district court's denial of the three-year extension, preventing the consumer from rescinding his loan.[106]

III. CREATING A NEW STANDARD: TRANSFORMING STRICT LIABILITY INTO A REBUTTABLE PRESUMPTION

Although the First Circuit's concerns about the strict liability test previously employed by the circuit courts in these Truth in Lending Act cases were valid, in applying a reasonable person test instead, the First Circuit failed to uphold the purposes of TILA: to protect consumers and provide incentive to lenders to be clear and honest in their dealings with consumers. If courts were to presume that borrowers did not know when their rescission periods ended due to the lenders' failures to include the ending dates but to allow the lenders to rebut that presumption through evidence of the contents of the notice or the sophistication of a particular borrower, for example, they would dispel the uneasiness of the First Circuit with the strict liability test but also uphold the goals of TILA.

---

[103] *Melfi*, 568 F.3d at 312.
[104] *Id.* at 310.
[105] *Id.* at 313.
[106] *See id.*

The First Circuit was addressing a very real problem in its move from the traditional strict liability standard to a new reasonable person test. It recognized that in some cases, consumers did know when their rescission period expired and that those consumers may be trying to take advantage of a loophole years later to rid themselves of disadvantageous mortgages.[107] The strict liability approach grants the extended rescission period for any technical TILA violation[108] and thus does not distinguish between borrowers who did not understand their rescission forms and borrowers who clearly understood when the three-day rescission period expired in spite of the lender's failure explicitly to provide that date. Moreover, the strict liability approach goes beyond Congress's purpose in creating TILA by establishing lender liability over what is, in the grand scheme of things, a relatively minor omission.

The purpose of TILA is to protect consumers and allow them to make informed credit choices. The senators who supported creating TILA were mainly concerned with "the costs of credit to the borrower," specifically the details of the finance charge associated with a particular transaction.[109] When Congress was formulating TILA, however, they were concerned mainly with fraud and very serious abuses by lenders. Congress's intent was to protect borrowers from "fraudulent, deceitful, or grossly misleading information, advertising, labeling, or other practices."[110] The ultimate motivation behind the creation of TILA was the belief that borrowers were "entitled to know the truth about credit rates and charges."[111] To punish lenders for failing to include the expiration date of the rescission period in

[107] *See id.* at 312 The court explained that the consumer must have known when the three-day rescission period expired because the consumer was given all of the appropriate forms on the closing date of the loan, that date was stamped on the paperwork, and "it is easy enough to count three days." *Id.* Thus, no reasonable consumer could have been misled by the omission of the expiration date. *Id.*

[108] *See* Semar v. Platte Valley Fed. Sav. & Loan Ass'n, 791 F.2d 699, 704 (9th Cir. 1986) ("Technical or minor violations of TILA or Reg Z, as well as major violations, impose liability on the creditor and entitle the borrower to rescind.").

[109] 109 CONG. REC. 2027 (1963).

[110] *Id.* at 2029.

[111] *Id.*

the transaction paperwork would be to go beyond Congress's intent in creating TILA, which was to protect borrowers against much more serious fraud.[112]

The First Circuit was cognizant of the fact that there are sophisticated consumers who enter into mortgage agreements fully able to understand the rescission notice, and they should not be allowed to use a minor infraction on the part of the lender to rescind a loan after the three business days are up.[113] The First Circuit is correct that we should be hesitant to allow any and all consumers to take advantage of an extended rescission period for such a small error and that there are some situations where the consumer who invokes TILA simply does not need its protection.[114]

Nevertheless, the reasonable person test promulgated by the First Circuit as a solution to this problem will create an unfair result when applied to cases where a consumer is seeking to rescind a subprime mortgage. The essence of this problem springs from the basic predatory lending practices that, in many cases, have overlapped with subprime lending over the past few years.[115] Lenders targeted potential borrowers that they thought they could convince to take on a subprime loan—people who were relatively unsophisticated and uneducated, who were unlikely to read and understand the paperwork accompanying the

---

[112] *See id.* at 2028 ("Our objective is merely to strip away the disguises which frequently hide or distort the true price of credit.").

[113] *See* Melfi v. WMC Mortg. Corp., 568 F.3d 309, 310 (1st Cir. 2009), *cert. denied*, 130 S. Ct. 1058 (2010). The court's statement that there may be significant incentives for a borrower to attempt to rescind a loan transaction when certain conditions exist is a strong indication that this is what the court had in mind when it made this ruling. In essence, the court does not want to allow a borrower who understood that he only had three days to rescind his transaction to use the lender's minor mistake as a loophole to attempt to get out of the transaction at a much later date and for some other reason.

[114] For an example of this type of situation, see *Burke v. Yingling*, 666 A.2d 288, 290 (Pa. Super. Ct. 1995) (finding that a consumer was not entitled to the protection of the Unfair Trade Practices and Consumer Protection Law ("UTPCPL") because he was a sophisticated consumer who had initiated the transaction and had negotiated the terms of the contract himself and thus, fell outside of the purview of the UTPCPL).

[115] *See* Maman, *supra* note 14, at 204 (noting that "the characteristics of subprime mortgage lending, with its borrowers' demographics and higher rates and fees, makes it fertile ground for lending abuse where predatory lending is unfortunately prevalent").

transaction, and who would not understand enough about subprime loans to realize that they simply could not afford to take on that kind of financial risk.[116]

When analyzed in that context, the First Circuit's approach creates two problems. First, it fails to take into account the realities of the subprime mortgage market and the underlying predatory lending that occurred in that market. Most significantly, it applies a reasonable person standard to consumers that predatory lenders expected *not* to be reasonable. Given the nature of predatory lending, it is no longer appropriate to "evaluate the adequacy of TILA disclosures from the vantage point of a hypothetical average consumer . . . who is neither particularly sophisticated nor particularly dense."[117] Predatory lenders were not targeting "average consumers" or "any reasonable person."[118] They targeted consumers that they thought they could coerce into taking on subprime loans so that the lender, and individual mortgage brokers, could make more money.[119] It is unfair to impose a reasonable person standard on consumers who are trying to rescind their subprime loans when so often they entered into those loans because they were targeted and victimized by predatory lenders because of some perceived disadvantage or vulnerability. Thus, the reasonable person test fails to uphold to the primary tenet of TILA: to protect vulnerable consumers.[120] It leaves members of those communities who are exploited by predatory lenders with one less remedy to protect themselves.

Second, the reasonable person test imposes a burden on the consumer that TILA does not contemplate. The purpose of TILA was to impose a burden on the lender to provide adequate

[116] *See* Stolly, *supra* note 13, at 294–95 (explaining that subprime lending crosses over into predatory lending when lenders purposefully and systematically target vulnerable consumers in communities that were traditionally disadvantaged when it came to obtaining credit).

[117] Palmer v. Champion Mortg., 465 F.3d 24, 28 (1st Cir. 2006).

[118] *See, e.g.*, Stolly, *supra* note 13, at 296 (explaining that oftentimes predatory lenders target the elderly because they "may lack an adequate understanding of the complexities of financial transactions . . . or understand their credit-worthiness" and because "they may never have been involved with financial affairs").

[119] *See supra* text accompanying notes 29–31.

[120] *See* Peterson, *supra* note 45, at 884 ("Disclosure regulations provide consumers with an important opportunity to protect themselves from credit bargains that are not truly in their own best interests.").

disclosures to consumers.[121] The reasonable person test, however, imposes a burden on the consumer to determine based on the face of the rescission notice the date when the rescission period expires if the lender has not followed his statutory duty to include that date in the notice.[122] If the First Circuit's hypothetical "reasonable person" could have determined from the face of that notice when the three-day rescission period expired, then the consumer is out of luck and cannot rescind the transaction on the basis of the lender's failure to include the expiration date of the rescission period.

A test is needed, therefore, that will address the specific problem of predatory lending in the subprime market and that also will ensure that the burden remains on the lender rather than imposing a new one on the consumer. A more fair methodology would be to create a rebuttable presumption that, absent the lender's insertion of the expiration date of the rescission period, the borrower was unaware of when that expiration date would occur and therefore is entitled to the three-year rescission period. The lender assumes the burden of proof to rebut this presumption by proving that the borrower did understand when the rescission period expired. In marshalling its argument, the lender may rely on a number of factors, including but not limited to: whether the date the transaction was consummated was included conspicuously elsewhere in the rescission notice, if the borrower was notified in some other way—perhaps in person or over the phone—about when the rescission period would expire, and the borrower's sophistication and ability to understand the rescission notice.[123] Essentially, the lender will have the burden of proving that all of its actions were, although careless, not intentionally deceptive and that the borrower was able to ascertain the expiration date despite the lender's omission.

---

[121] *See supra* text accompanying notes 35–38.

[122] Melfi v. WMC Mortg. Corp., 568 F.3d 309, 312 (1st Cir. 2009) (stating that "technical deficiencies do not matter if the borrower receives a notice that effectively gives him notice as to the final date for rescission"), *cert. denied*, 130 S. Ct. 1058 (2010).

[123] For an argument that the borrower's ability to understand the notice should not be a consideration, see *Palmer v. Champion Mortgage*, 465 F.3d 24, 28 (1st Cir. 2006) (announcing that in TILA cases, courts have "focused the lens of [their inquiries] on the text of the disclosures themselves rather than on plaintiffs' descriptions of their subjective understandings").

Another benefit of the rebuttable presumption is that, like the strict liability test, it provides an incentive for the lender to make sure to include the expiration date of the rescission period in the notice of the borrower's right to rescind. It costs the lender essentially nothing to calculate the three days and ensure that the date is included where it is supposed to be in the paperwork. On the other hand, if the lender fails to do this, it will be forced to go to court to explain why that failure should not entitle the borrower to the extended rescission period. This will entail extensive discovery—in many cases discovery of personal information about the borrower that is in the borrower's particular control. When weighing the cost of such a proceeding against the cost of simply stamping the expiration date in the rescission notice, it is clear that paying attention to detail will result in the lender potentially saving a great deal of money.

Most importantly, the rebuttable presumption will result in a much more fair result, both for borrowers and lenders. For example, in *Williamson v. Lafferty*, the borrower, Eloise Williamson, was "a divorced 43-year-old mother of seven children, three of whom she still support[ed] with her earnings as a cook."[124] Ms. Williamson owned a home and had a mortgage.[125] A representative of the lender contacted Ms. Williamson and solicited from her a contract to add a garage on to her home and to put an addition on her home.[126] Ms. Williamson signed the contract, and as part of the transaction, she executed a deed of trust security interest in her home.[127]

In applying the rebuttable presumption methodology, when this case came before the court, the court would assume that because the lender failed to include the expiration date, Ms. Williamson did not know when her rescission period ended and that therefore she would be entitled to the longer rescission period. The lender, however, would have the option of attempting to rebut this presumption by arguing that Ms. Williamson did know when the rescission period ended, despite its failure to include that date in the paperwork. The lender's primary argument would be that the date of the transaction was included elsewhere in the paperwork, so it would have been

[124] Williamson v. Lafferty, 698 F.2d 767, 768 (5th Cir. 1983).
[125] *Id.*
[126] *Id.*
[127] *Id.*

simple for Ms. Williamson to read the rescission provision and calculate for herself when her three-day rescission period expired.[128] The lender's argument would likely not be strong enough to rebut the presumption against it, however, because even though the date of the transaction was included elsewhere in the paperwork, Ms. Williamson seems to have been a relatively unsophisticated consumer who was not likely to have read the paperwork accompanying the transaction. Moreover, the lender did not even complete one of the forms, the deed of trust to Ms. Williamson's property, until after Ms. Williamson had signed the document.[129] This demonstrates a general lack of honesty and transparency by the lender and thus resembles the fraudulent and deceitful practices with which Congress was concerned when it began drafting TILA.[130]

In *Melfi*, discussed above,[131] however, the lender would most likely have a much better chance at rebutting the presumption against it. In that case, the notice of rescission that Mr. Melfi received from the lender was very clear. It explained:

> You have a legal right under federal law to cancel this transaction, without cost, within **THREE BUSINESS DAYS** from whichever of the following events occurs **LAST:** (1) The date of the transaction, which is __________; or (2) The date you receive your Truth in Lending Act disclosures; or (3) The date you received this notice of your right to cancel.[132]

The lender could argue that even though the blank for the date of the transaction was not filled in, the form did have the date of the transaction stamped at the top of the notice.[133] The lender could also argue that because the date of the transaction was included conspicuously on the notice, Mr. Melfi needed only to turn to the rescission provision for guidance on how to calculate the three days based on that date.

The lender in *Semar* would have the strongest argument, however, because in that case, although the lender had failed to include the actual expiration date of the rescission period, the notice very clearly indicated that the rescission right would

---

[128] *See id.* at 769 n.3.
[129] *Id.* at 768.
[130] *See supra* text accompanying notes 106–07.
[131] *See supra* notes 91–105 and accompanying text.
[132] Melfi v. WMC Mortg. Corp., 568 F.3d 309, 311 (1st Cir. 2009), *cert. denied*, 130 S. Ct. 1058 (2010).
[133] *See id.*

expire three business days after July 16.[134] Thus, to rebut the presumption in favor of the borrower, the lender could argue that the expiration date of the rescission period was constructively included in the notice, even if the expiration date itself was not exactly where it was supposed to be or stated as explicitly as it should have been.

CONCLUSION

As a result of the collapse of the housing market, fueled by the proliferation of subprime mortgages and predatory lending practices, foreclosure proceedings have risen dramatically, and consumers are looking for any and all defenses to those proceedings, including using the lender's technical TILA violations essentially as loopholes. Our society has an interest in protecting its members who were victimized by predatory lenders, while at the same time not rewarding those consumers who understood their rescission notices and are using the lender's oversight as a loophole to get out of transactions that are no longer favorable, as the First Circuit recognized. Rejecting the First Circuit's reasonable person test in favor of a rebuttable presumption to determine whether a consumer should be granted an extended rescission period fulfills the goal of protecting those who need protection while preventing others from taking advantage of a minor technical defect at the expense of lenders. As a result, courts will strike a balance between upholding the goals of TILA—protecting consumers and forcing lenders to be forthright in their dealings—and basic fairness in preventing borrowers from using a loophole to get out a bad mortgage by taking advantage of a lender's minor mistake.

[134] *See* Semar v. Platte Valley Fed. Sav. & Loan Ass'n, 791 F.2d 699, 702 (9th Cir. 1986).