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Rescissions under the Truth in Lending Act

December 20, 2013 - Connecticut

The Truth in Lending Act (TILA) 15 U.S.C. 1601 et seq., was enacted on May 29, 1968, as Title I of the Consumer Credit Protection Act (Pub. L. 90-321). TILA, was then implemented by Regulation Z (12 CFR 1026), and became effective July 1, 1969. In 2010, the Dodd-Frank Wall Street Reform and Consumer Protection Act (the Dodd-Frank Act) amended the Real Estate Settlement Procedures Act (RESPA) of 1974, which triggered necessary updates to TILA and Regulation Z regarding the servicing of certain residential mortgage loans. By January 2013, the Consumer Financial Protection Bureau ("CFPB") issued new rules to implement the Dodd-Frank Act amendments to RESPA and TILA.

In recent months, the CFPB issued final rules regarding Regulation Z as related to mortgage loan servicing. The latest revisions to Regulation Z will take effect on January 10, 2014. The final rule will impact the scope, timing, content, and format of disclosures to consumers regarding the interest rate adjustments of their variable-rate transactions.

At present, TILA provides that for certain transactions secured by the borrower's primary residence, a borrower has three business days after becoming obligated on the debt to rescind the transaction - if the lender has made the necessary disclosures. Regulation Z provides that if the required notice or material disclosures are not delivered by a lender, the borrower will have three years to rescind. A rescission voids a lender's security interest if the lender does not contest the rescission or when the court finds in favor of the borrower. Transactions that are currently exempt from the right of rescission include residential mortgage transactions (under 15 U.S.C. Â§1026.2(a)(24)), refinancing, or consolidations with the original creditor - provided that no additional funds are advanced by the lender. If a transaction is rescindable, borrowers must be given a notice explaining that the creditor has a security interest in the borrower's home, that the borrower may rescind, how the borrower may rescind, the effects of rescission, and the date the rescission period expires.

Despite a seemingly straightforward statutory framework, rescissions under TILA have faced substantial judicial disagreement. Federal circuit courts remain split on whether a lawsuit to enforce the right of rescission under TILA must be filed within three years of the date of the transaction, or whether nothing more than notice from the debtor is required. The Eighth Circuit recently joined the ongoing conflict, and weighed in on the side of lenders. In *Keiran v. Home Capital, Inc.*, the court held that a plaintiff seeking rescission had to file a lawsuit (as opposed to merely giving the creditor notice) within three years in order to preserve the plaintiff's right to rescind.

Accordingly, the proposed amendments to Regulation Z are intended to halt inconsistent judicial treatment, by establishing a clear and comprehensive regulatory baseline. The amendments will require new TILA disclosures when parties to an existing closed-end loan that is secured by real property, agree to modify key loan terms without reference to state contract law. New disclosures will also be required if the parties agree to change the interest rate or monthly payment, advance

new money, or add an adjustable rate or other risky feature such as a prepayment penalty. However, certain beneficial modifications, such as "no cost" rates and payment decreases, will be exempt from the new disclosure requirement.

Additionally, as consistent with current rules, no new disclosures will be required for modifications reached in a court proceeding or modifications completed for borrowers in default or delinquency - unless the loan amount or interest rate is increased, or a fee is imposed on the consumer.

Overall, these amendments seek to improve issues related to: (1) lender's Notice of the Right to Rescind to borrowers at closing; (2) the list of "material disclosures" that can trigger the extended right to rescind period; and (3) the parties' obligations when the extended right to rescind is asserted by, hopefully, reducing uncertainty and litigation costs. However, whether these amendments will have their intended consequences, or merely result in increased confusion surrounding disclosures and the right to rescind, remains to be seen.

Footnote:

1 Keiran v. Home Capital Inc., 720 F.3d 721 (8th Cir. 2013).

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New England Real Estate Journal - 17 Accord Park Drive #207, Norwell MA 02061 - (781) 878-4540