ORIGINAL

IN THE SUPREME COURT OF THE STATE OF FLORIDA

SUPREME COURT NO.: 87,835
4 DCA CASE NO. 94-1049

DAVID R. BEACH and
LINDA M. BEACH, his wife,

Petitioners,

v.

GREAT WESTERN BANK, a Federal Savings Bank, a United States Corporation, f/k/a GREAT WESTERN SAVINGS,

Respondents.
_____________________________/

FILED
SID J. WHITE
JUN 12 1996
CLERK, SUPREME COURT
By ____________
Chief Deputy Clerk

FILED
SID J. WHITE
JUN 25 1998
CLERK, SUPREME COURT
By ____________
Chief Deputy Clerk

ANSWER BRIEF OF RESPONDENT, GREAT WESTERN BANK

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Supreme Court No.: 87,835
4th DCA Case No. 94-1049
David R. Beach et al v. Great Western Bank

CERTIFICATE OF INTERESTED PERSONS

GREAT WESTERN BANK, Respondent, hereby files its Certificate of Interested Persons:

Pursuant to the rules of this court, Respondent, GREAT WESTERN BANK, certifies that the following individuals or entities may have an interest in the outcome of this appeal:

1. James A. Bonfiglio, P.A., attorney for Petitioners, the Beaches.
2. David R. Beach and Linda M. Beach, his wife, Petitioners.
3. Broad and Cassel, Reflections Centre, 400 Australian Avenue South, West Palm Beach, FL 33401, Law Firm for the Respondent, Great Western Bank.
4. Honorable John W. Dell, 4th DCA Judge.
5. Steven Ellison, Esquire, Reflections Centre, 400 Australian Avenue South, West Palm Beach, FL 33401, attorney for the Respondent, Great Western Bank.
6. Great Western Bank, Respondent.
7. Honorable Barbara Pariente, 4th DCA Judge.
8. The Honorable Thomas E. Sholts, Judge 15th Judicial Circuit.
9. Honorable Martha C. Warner, 4th DCA Judge

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PREFACE

The parties will be referred to as "Great Western" or "Respondent" for Respondent and "the Beaches" or "Petitioners" for Petitioners. R ___ will refer to the Record on Appeal. TT ____ will refer to the page of the trial transcript. PB- will refer to the Petitioners' Brief. App.___ will refer to any document contained in the appendix.

STATEMENT OF THE CASE AND FACTS

GREAT WESTERN disagrees with the Beaches' Statement of the Case and Facts to the extent set forth herein. GREAT WESTERN provided consumer credit to the Beaches by advancing the sum of $97,300.00 in exchange for a mortgage on the Beaches' principal residence (R-62). Proceeds of the loan were used to satisfy a preexisting construction loan for the Defendants' primary residence (R-62). The Beaches have not made a payment in accordance with the Promissory Note and Mortgage since October, 1991 (R-62).

GREAT WESTERN's employee, Joseph Greco, recalculated the annual percentage rate on the subject loan, discovering that the Truth-in-Lending Disclosure Statement given to the Beaches overstated the payment amount disclosed in the payment schedule by 58 cents for each of the payments after the first twelve months (TT at 50). The Beaches' assertion that the finance charge was understated by virtue of the original calculation is absolutely incorrect (PB at 3). The Court found that the $201.84 differential in the finance charge was an overstatement. (R-82)

Further, the trial court found that GREAT WESTERN had misdisclosed Florida's intangible tax, by excluding the $194.60 charge from the finance charge computation (R-88-90). As a result of the Court's findings, the finance charge disclosed to the Beaches was overstated by $7.24 (R-85, 88-90). The disclosure should have shown a finance charge of $176,511.97 rather than $176,519.21.

The Beaches' Initial Brief before the 4th District Court of Appeal sought a reversal of that portion of the lower court's opinion which determined that rescission was not available to the Beaches because of the expiration of the right to rescind and the exempt nature of the underlying transaction. Further, the Beaches sought additional actual and statutory damages based upon an alleged misstated variable rate feature (R-75-100). GREAT WESTERN did not seek review of the lower court's findings of violations entitling the Beaches to an award of statutory and actual damages.

The 4th District Court of Appeal held that the right to rescind the underlying transaction pursuant to 15 U.S.C. § 1635 had expired on August 15, 1989, pursuant to 15 U.S.C. § 1635(f). The 4th District Court of Appeal certified the following question to this Court as one of great public importance:

> Under Florida law, may an action for statutory right of rescission pursuant to the Truth-in-Lending Act, 15 U.S.C.A. § 1635 be revived as a defense in recoupment beyond the three year limit on the right of rescission set forth in §1635(f)?

The Court affirmed the Final Judgment with respect to the other points raised on appeal. The Beaches' opinion regarding the correct statement of the law and their request that this Court overrule the majority opinion are improperly contained in the Statement of the Case and Facts.

SUMMARY OF ARGUMENT

The Beaches' right of rescission under 15 U.S.C. § 1635(f) expired on August 15, 1989. The unambiguous language of 15 U.S.C. § 1635(f) focuses on the expiration of the right to rescind. Principles of statutory construction require the Court to determine legislative intent from the language of the statute before focusing on the alleged purpose of the act. The cases relied upon by the Beaches fail to focus on that basic concept.

The clarity of § 1635(f)'s language is amplified by the standard statute of limitation language contained in § 1640(e) and the specific statutory authority set forth therein to assert damage claims after the statute of limitation runs if raised as a matter of defense by recoupment or set-off. This Court should not judicially insert the recoupment provision provided in § 1640(e) into § 1635(f) where Congress specifically chose to omit that provision.

The Court below correctly recognized that the statute both created, and established an expiration for, the right to rescind. Florida precedent concerning recoupment does not focus on similar statutory circumstances. Clearly, when the right and the remedy are created by the same statute, the limitations of the remedy should be treated as limitations of the right. The language of § 1635(f) compels this finding.

The Beaches seek to impose the draconian remedies of TILA, including a forfeiture of a right to recover principal. Relief of that nature can only constitute a penalty. Clearly, no harm to the

Beaches has been evidenced below. Such harm would be impossible to prove in light of the $7.24 overstatement of the finance charge which is the end product of the trial court's findings and conclusions. Since the Beaches claim they are entitled to the same overwhelming remedy for these violations as they would have been if GREAT WESTERN had understated the finance charge by tens of thousands of dollars, it cannot be said that the recovery is in any way proportionate to the harm suffered. This Court should not extend this penalty beyond the timeframe established by Congress.

The Truth-in-Lending Act Amendments of 1995 did not create a right of recoupment and rescission. Congress did not embrace nor codify **Dawe v. Merchants Mortgage and Trust Corporation**, 683 P.2d 796 (Col. 1984) therein. The Beaches' misapplication of certain floor comments made at the time of passage of the amendments highlights the lack of any legislative history for their conclusion that Congress adopted **Dawe**.

Finally, the additional relief that the Beaches seek is not the subject of the question certified to this Court. Some of that relief was not requested below and has therefore been waived. The remainder should not be available to the Beaches, or at best, should be the subject of a remand only if this Court reverses the 4th District's opinion. Instead, this Court should affirm the decision of the 4th District by responding to the certified question in the negative.

ARGUMENT

I. THE BEACHES' RIGHT OF RESCISSION EXPIRED

A. The Unambiguous Language Of § 1635(f) Must Be Given Effect

15 U.S.C. § 1635(f) states: the "right of rescission shall expire three (3) years after the date of consummation of the transaction or upon the sale of the property, whichever occurs first, notwithstanding the fact that the information and forms required under this section or any other disclosures required under this chapter have not been delivered to the obligor, ..." The language specifically focuses on the expiration of the right to rescind. There is nothing ambiguous about that language.

Where a statute is clear and unambiguous, a court need not resort to rules of statutory interpretation and construction. **In re: Adoption of Baby E.A.W.**, 658 So.2d 961 (Fla. 1995), **Holly v. Auld**, 450 So. 2d 217 (Fla. 1984). Despite the lack of ambiguity, the Beaches seek to establish legislative intent by asserting the remedial nature of the Truth-in-Lending Act and a liberal construction of this unambiguous section of the statute. Preliminarily, however, legislative intent must be determined from the language of the statute. **Miele v. Prudential-Bache Securities, Inc.**, 656 So. 2d 470 (Fla. 1995).

Expiration is defined as: termination from mere lapse of time; coming to close; termination or end. Blacks Law Dictionary 519 (5th Ed. 1979). The mandatory expiration of the right after three (3) years is reiterated in 12 C.F.R. § 226.23(a)(3) and reinforced

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in paragraph 23(a)(3)-3 of the Official Staff Commentary which states:

> 3. Unexpired right of rescission. When the creditor has failed to take the action necessary to start the three (3) business day rescission period running, the right to rescind automatically lapses on the occurrence of the earliest of the following three events:
>
> - The expiration of three (3) years after consummation of the transaction. ...

(Emphasis added.) Lapse is defined as: "to become void through lack of attention." The New Lexicon Webster's Dictionary of the English Language (556 Encyclopedic Ed. 1987).

Like Florida's courts, the United States Supreme Court has recognized that a court "must give effect to the unambiguously expressed intent of Congress." **Chevron U.S.A. v. NRDC**, 467 U.S. 837 (1984). That intent is reemphasized by the language of Regulation Z and the Official Staff Commentary which is binding on the courts unless demonstrably irrational. **Ford Motor Credit Company v. Milhollin**, 444 U.S. 555 (1980). Nowhere in their Initial Brief do the Beaches recognize this basic principle of law, nor do they establish any ambiguity in the language chosen by Congress in establishing the expiration of the rescission right in 1974.

Instead, they rely upon **Dawe v. Merchants Mortgage and Trust Corporation**, 683 P.2d 796 (Col. 1984) and its progeny: **Federal Deposit Insurance Corporation v. Ablin**, 532 N.E. 2d 379 (Ill. App. 1988), **Community National Bank and Trust Company v. McClammy**, 525 N.Y.S. 2d 629 (App. Div. 1988) and **In re: Shaw**, 178 B.R. 380

(Bankr. D.N.J. 1994). In permitting rescission beyond the three (3) year period, the **Dawe** court reached the erroneous conclusion that Congress did not intend to limit to three (3) years, the existence of the substantive right to rescind. 683 P.2d at 799, fn.5. The court completely failed to recognize the basic precept that a clear and unambiguous statute should not be ignored. The **Dawe** court's treatment of the issue in a footnote, without analyzing the language chosen by Congress is simply unsupported by the language of § 1635(f) itself, the Regulation and Commentary and other provisions of the Act.

The language of § 1635(f) stands in stark contrast to the language of 15 U.S.C. § 1640(e) which states:

> Any 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. This subsection does not bar a person from asserting a violation of this title in an action to collect on the debt which was brought more than one year from the date of the occurrence of the violation as a matter of defense by recoupment or set-off in such action, except as otherwise provided by state law.

There are two significant distinctions to be drawn between § 1635(f) and § 1640(e). First, § 1640(e) focuses on the bringing of an action within one year. It is structured in the same manner as federal and state statutes of limitation concerning the vast majority of issues. Unlike § 1635(f), it does not speak of the expiration of a right, but instead focuses on the procedure of bringing an action. Secondly, it specifically provides, by virtue of the second sentence added as part of the Truth-in-Lending

Simplification and Reform Act, passed in 1980, that a truth-in-lending damage claim can be raised more than one year after the occurrence of a violation as a matter of defense by recoupment or set-off.

The Petitioners ask this Court to either judicially insert that same provision in § 1635(f) or alternatively, recognize the addition of that language to § 1640(e) as mere surplusage by arguing that claims raised defensively should never be barred. The first argument fails to recognize that when Congress includes particular language in one section of a statute and omits it in another section of the same act, it is generally presumed Congress acts intentionally and purposely in the disparate inclusion or exclusion. **Russello v. United States**, 464 U.S. 16 (1983). See also, **Leisure Resorts, Inc. v. Frank J. Rooney, Inc.**, 654 So. 2d 911 (Fla. 1995) (when the legislature has used a term, as it has here, in one section of the statute but omits it in another section of the same statute, we will not imply it where it has been excluded). Thus, both the United States Supreme Court and this Court have recognized the impropriety of utilizing language in one section of a statute to create greater rights than those given in another section of the same statute.[1]

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1 Even the dissenting opinion below recognized the reasonableness of the majority's interpretation of congressional intent by reading the provisions of TILA in pari materia based on a comparison of 15 U.S.C. § 1635(f) and 15 U.S.C. § 1640(e). The dissent's reliance, however, on the 1995 Amendment to the Truth-in-Lending Act was misplaced as will be more particularly discussed in Section I.F. of this brief, infra.

The second argument would essentially render the second sentence of § 1640(e) meaningless. It is inappropriate to interpret a statute in a manner which will make some of its terms superfluous. **Mackey v. Ranier Collection Agency**, 108 S. Ct. 2182, 2189 (1988). Clearly, Congress determined that it was necessary to statutorily provide for the right of recoupment and set-off concerning damage claims under § 1640 when it passed the Truth-in-Lending Simplification and Reform Act in 1980. Despite the Beaches' reference to legislative history, they have failed to cite the Committee Report, floor statements or other recognizable pieces of legislative history which reference that statutory addition as a codification of existing law or in any way states that recoupment is applicable generally to any claim raised defensively.

Thus, both the plain reading of § 1635(f) and the existence of the recoupment and set-off language in § 1640(e) necessitate a recognition that the right to rescind under 15 U.S.C. § 1635 is forever lost once three years have passed from the consummation of the transaction.[2] To hold otherwise, requires the court to ignore the plain language of § 1635(f) and to insert in one section of the statute, language which was omitted therefrom but inserted in a

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[2] The sole exception, clearly set forth in the statute, is if an agency empowered to enforce the Act institutes a proceeding to enforce the provisions of § 1635 within three (3) years, finds a violation and the borrower brings an action based in whole or in part on that proceeding within one year of the conclusion of that proceeding.

separate section of the same act. To do so, the court would necessarily violate long-standing rules of statutory construction.

The Beaches insist that imposing liability after three years furthers Congress' purpose to protect consumers and encourage accurate disclosure. Such a public policy argument should have been made to Congress before it established any expiration. They also argue that Congress only really intended that the expiration be applicable upon the sale of the subject property. In essence, according to the Beaches, Congress did not mean to impose a time period for the expiration of the right. Thus, the Beaches either wish this Court to judicially strike the three year period from § 1635(f) or alternatively, conclude that their rationale, which has equal if not greater applicability to a borrower who is not in default, justifies the legislative activism of the judiciary sought therein.

B. 15 U.S.C. § 1635(f) Is Not a Limitation On The Remedy, But An Expiration Of A Right

The federal decisions relied upon by the Beaches: **Reiter v. Cooper**, 113 S. Ct. 1213 (1993); **Bull v. United States**, 55 S. Ct. 695 (1935); **Distribution Services Ltd. v. Eddie Parker Interests, Inc.**, 897 F.2d 811 (5th Cir. 1990); and **In re: Smith**, 737 F.2d 1549 (11th Cir. 1984); each relate to statutes focused on the time an aggrieved party may bring an action. In **Smith**, the court was focused on the specific language of 15 U.S.C. § 1640(e) which, as the court recognized, requires that "any action under this section may be brought in any United States District Court, or in any other

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court of competent jurisdiction, within one year from the date of the occurrence of the violation ...". **Smith** at 1552, n.6. The Beaches (and the dissent's) heavy reliance on **Smith** is peculiar since the 11th Circuit therein specifically stated that it was neither necessary nor advisable, in the circumstances of that case, to decide whether a debtor generally may recoup TILA damages. Instead, the Court engaged in an academic analysis of whether the debtor could have satisfied the requirements set forth in **Bull v. United States**, 55 S.Ct. 695 (1935), if recoupment was applicable to her claim. In a footnote, the Court noted that Congress had already amended the statute to permit damage recoupment claims. Notwithstanding the new language, the Court steadfastly refused to even determine whether a damage claim, which arose prior to passage of the Simplification and Reform Act, for alleged TILA violations raised defensively, constituted a matter of set-off or recoupment. Nevertheless, the Beaches rely upon **Smith** for legal positions the Court refused to take and, as will be discussed below, argued that the propositions which **Smith** neither reached, nor was asked to reach, were adopted by the United States Supreme Court in **Reiter**.

In **Distribution Services**, the court was focused on Section 3(6) of the Carriage of Goods By Sea Act which discharged parties from liability unless suit is brought within one year after delivery of the goods or the date when the goods should have been delivered. **Distribution Services** at 812.[3] In **Bull**, the limitation

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[3] Preliminarily, the Court examined the language of Section 3(6) in determining that it did not preclude recoupment.

at issue "forbade the bringing of any action". **Bull** at 699. As the Court below recognized, the focus in **Bull** was to prevent an unjust result. Therein, the Supreme Court viewed the retention of the estate taxes paid to the government through mistake as tantamount to fraud and the government's retention of those tax payments was unjust and immoral. Finally, in **Reiter**, under 49 U.S.C. § 11706(c)(2), a shipper "must begin a civil action to recover damages under [Section 11705(b)(3)] within two years after the claim accrues,..." **Reiter** at 1217-18.[4] The Beaches' assertion that **Reiter**, **Smith** and the other federal cases upon which they rely, reject the notion that TILA rescission dies when the statute expires is baseless. There is no federal appellate level opinion which has specifically analyzed that question.

None of the above cases compared a limitation on the time to file an action with an expiration of a statutorily created right. While it did not specifically examine the issues involved herein, the decision in **King v. State**, 784 F.2d 910 (9th Cir. 1986) is more instructive. Therein, the court focused on both an attempt to rescind various transactions under 15 U.S.C. § 1635 and to recover damages under 15 U.S.C. § 1640. Initially, the court recognized that the limitation set out in 15 U.S.C. § 1635(f) was absolute.

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4 Despite the Beaches' assertions to the contrary, **Reiter** did not "adopt" or "embrace" **Smith**. The Court simply recognized that **Smith** and several other cases had understood that the case of **United States v. Western Pacific Co.**, 352 U.S. 59 (1956) provided a general principle of recoupment which was applicable beyond its narrow holding.

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Id. at 913. Additionally, in rejecting the "continuing violation" theory presented by the borrowers for both rescission and damage claims, the court emphasized that the one year limitation applies only to damage actions, while rescission is simply available for three (3) years. Id. at 914. It again reiterated that Congress placed a three (3) year absolute limit on rescission which demonstrated Congress' willingness to put a limit on those specific TILA claims. Id. Finally, the court's focus turned to whether the statute of limitations set forth in § 1640(e) could be subject to equitable tolling. It concluded that the limitations period of § 1640(e) is in fact subject to the doctrine of equitable tolling under appropriate circumstances including fraudulent concealment. The court would not give similar treatment to the extension of the right of rescission, however, since it had clearly established that three years means three years and that the right to rescind had absolutely expired.[5,6]

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5 Interestingly, the court in **In re: Shaw**, 178 B.R. 380 (Bkrptcy. D.N.J. 1994), found that equitable tolling could not be applied to § 1635(f) because of the plain and clear language of the statute. Despite that recognition, however, the court simply chose to rely upon the **Dawe** rationale in permitting rescission under a theory of recoupment.

6 An Illinois bankruptcy court, in **In re: Cox**, 162 B.R. 191 (Bkrptcy. C.D. Ill. 1993), refused to permit a rescission claim raised both by way of affirmative defense in a foreclosure action and in opposition to a claim in the **Cox**' Chapter 13 bankruptcy proceeding relying upon the rationale of **King**. The **Cox** court stated "[t]o the extent that [those cases] would otherwise permit a debtor to exercise a right of rescission after expiration of three years, this court is of the opinion they are incorrectly decided." **Cox** at 195.

C. **State Law Does Not Support The Application Of Recoupment To An Expired Right**

Like the federal precedent cited by the Beaches, the Florida cases they rely upon fail to address a circumstance like the one presented in this cause, where the statute speaks in terms of expiration. Rather than providing support for the Beaches, the decision in **Rybovich Boat Works v. Atkins**, 585 So. 2d 270 (Fla. 1991) supports the proposition that recoupment is not an absolute right simply because the claim is raised defensively.[7] As the Court below recognized, some of the same rationale for the non-application of recoupment in **Rybovich** is present in this cause. This is especially true where as here the statute clearly focuses on the right not the remedy.

Like **Rybovich**, the decisions in both **Allie v. Ionata**, 503 So.2d 1237 (Fla. 1989) and **Beekner v. L.P. Kaufman, Inc.**, 198 So.2d 794 (Fla. 1940) concerned general statutes of limitation which are now contained in Chapter 95, Florida Statutes. The focus in **Allie** was on the right to rescind certain real estate purchases. There was no statutory basis for the rescission claim and thus, the limitation could not have been contained in the same act which created the right. In **Beekner**, the question focused on a usury defense to a collection action. There is no limitation provision contained in the usury statute, nor was there one at the time that

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[7] **Reiter** also recognized that recoupment was "generally" applicable. 113 S.Ct. at 1218.

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Beekner was decided. Instead, the Court focused on the general limitation provision concerning statutory penalties.

The Beaches appear to argue that since usury can be raised as a matter of defense, TILA rescission should be treated in the same manner. Once again, however, they make that argument without recognizing the significant statutory language contained in 15 U.S.C. § 1635(f). The opinion below is completely consistent with the **Beekner** determination. Although a usury defense is a creature of statute, that statute did not, does not and never has contained its own expiration.

In contrast, this Court recognized in **Bowery v. Babbit**, 99 Fla. 1151, 128 So. 801 (Fla. 1930), the general rule of construction that:

> [W]here a statute confers a right and expressly fixes the period within which suit to enforce the right must be brought, such period is treated as the essence of the right to maintain the action, and that the plaintiff or complainant has the burden of affirmatively showing that his suit was commenced within the period provided. [citations omitted]. In other words, when the right and the remedy are created by the same statute, the limitations of the remedy are treated as limitations of the right.

Id. at 1163, 128 So. at 806. [citations omitted]. **See also**, **Fowler v. Matheny**, 184 So.2d 676 (Fla. 4th DCA 1966) (applying the same rationale to the Uniform Sale of Securities Law) and **Special Disability Trust Fund v. Southern Bell Telephone and Telegraph Company**, 551 So. 2d 575 (Fla. 1st DCA 1989). The specific language of expiration in § 1635(f) only strengthens the rationale for applying a similar test herein. The statute does not simply limit the remedy it extinguishes the right. This Court recognized in

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Allie that generally, statutes of limitation are rules of procedure, 503 So.2d at 1240-41. This can clearly be understood by a simple recognition that statutes of limitation focus on the time for bringing an action. In neither **Beekner** nor **Allie** did a statute exist which stated that the right at issue expired after some specified period.

D. Applying Recoupment To Extend The Expired Right Of Rescission Would Constitute a Penalty

The Beaches' attempt to equate usury with TILA violations also must fail. The existence of an excessive rate of interest will cause harm to a borrower. In contrast, since it is irrelevant whether a borrower relied upon or even read the truth-in-lending disclosures presented to it, **In re: Porter**, 961 F.2d 1066,1078 (3rd Cir. 1992), a misdisclosure in a TILA disclosure statement, cannot be equated with the injuries suffered by virtue of a usurious contract. TILA is a disclosure statute which is not impacted by the fairness of the lending contract between the parties.

Although the Beaches assert in their Initial Brief on a number of occasions that there exist numerous egregious TILA errors in this loan transaction, they can point to no matter of record to justify that assertion. In the Final Judgment entered by the trial court it was found that TILA had been violated by virtue of an incorrect calculation which lead to an overstatement of the finance charge, the misdisclosure of the intangible tax and the use of estimate symbols on the disclosure statement. The resulting $7.24 overstatement of the finance charge could not in any way, nor is there any record testimony that it did, cause the Beaches to default under the loan transaction. It is axiomatic, however, that the existence of a usurious rate of interest will be, in the overwhelming majority of situations in which a borrower faced with such a rate defaults, the cause of such default. In those circumstances where a borrower has suffered some provable harm by virtue of a TILA misdisclosure, the existence of the language in § 1640(e) permitting damage claims via recoupment, will permit that aggrieved borrower to recover for that harm. Congress has provided the appropriate remedy.

The Beaches assert that pursuant to the holding in **FDIC v. Hughes Development Company, Inc.**, 684 F.Supp. 616 (D. Minn. 1988) rescission is not a penalty. In reaching that conclusion, the Court examined three factors: (1) Whether the purpose of the action was to redress individual wrongs or wrongs to the public; (2) Whether the recovery ran to the individual or to the public; and (3) Whether the recovery was disproportionate to the harm suffered. The Court's conclusion from that analysis seems misplaced and inapplicable under these circumstances.

Clearly, the purpose for the rescission remedy is to redress both individual wrongs and wrongs to the public. The Beaches have argued on numerous occasions that the Act imposes a system of strict liability. **Shroder v. Suburban Coastal Corp.**, 729 F.2d 1371 (11th Cir. 1984). Relying on **In re: Porter**, 961 F.2d 1066,1078 (3rd Cir. 1992), the Beaches have asserted that the intent of the lender and the knowledge and reliance of the borrower on the

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disclosures are irrelevant in determining whether to permit the consumer to rescind. The Act contemplates the creation of a system of private attorneys general to avoid the need for a large enforcement bureaucracy. The statutory rescission remedy, which is far more costly than actual or statutory damages (particularly if post-expiration relief were permitted), is a part of that system and is designed to generate overall compliance by lenders.

While it is true that the recovery will run to the individual rather than the public, it is difficult to see how the recovery is anything but disproportionate to the harm suffered. Simply because one purpose of the remedy is to restore the parties to the status quo ante does not change the clear fact that the recovery is completely disproportionate to the harm suffered. In fact, proof of any harm is irrelevant. It in no way matters whether the disclosure error relates to the failure to include a material term (like "APR") on the disclosure statement, involves the miscalculation of the finance charge by as little as $10.01 (since the relevant tolerance for this case was $10.00) or millions of dollars, or alternatively, relates to the complete failure to provide any disclosures to the borrower. In each circumstance, the remedy is precisely the same. It does not matter whether the borrower was engaged in credit shopping or would have sought the loan from another lender if the disclosures were perfect. It does not matter whether the borrower has sought and recovered actual damages. The objective is to punish the lender to encourage future compliance by that lender and all others in the marketplace.

One need only to consider the facts of the instant case to determine that rescission is not remedial. The only violations found by the court below related to an incorrect calculation which led to an overstatement of the finance charge (which, in accordance with the 1995 amendments and **In re: Ramsey**, 176 B.R. 183 (9th Cir. BAP 1994) does not constitute a violation) and the alleged misdisclosure of the intangible tax, with the final result being that the finance charge was overstated by $7.24 in accordance with the trial court's findings. The Beaches cannot be heard to complain that had they credit shopped they would have chosen another lender once they knew the "true credit terms". Thus, there is no harm to the Beaches to be remedied by permitting rescission. Clearly, the intent, in a circumstance like the one existing in this case if the claim had been brought before the right to rescind had expired, would be to punish GREAT WESTERN, for not precisely calculating the figures which were disclosed, through a windfall being awarded to the Beaches as an enforcement tool to generally benefit the public.

The Beaches' assertions that TILA rescission does not constitute a penalty, run afoul of their second point raised in their Brief (which is not the subject of the certified question presented to this Court) wherein they seek to enforce implicit vesting of principal and deny GREAT WESTERN its right to recover said principal if rescission is permitted. They argue that the rescission process should not be modified and the Beaches, who have filed for bankruptcy (R-73-74), should have no obligation to pay

GREAT WESTERN its principal nor should any lien remain in place against the Beaches' property. Certainly, such treatment could only be considered a penalty.

The Beaches further ignore the language of the principal case upon which they rely, **Dawe v. Merchants Mortgage and Trust Corp.**, 683 P.2d 796 (Col. 1984). In **Dawe**, the Colorado court stated that: "If recoupment claims were barred by the relevant statute of limitations, lenders could avoid the penalties of the act by waiting, as here, three years or more, to sue on the borrowers' default, and thereby frustrate the fundamental policy of TILA..." (emphasis added).

In **FDIC vs. Ablin**, 532 N.E. 2d 379 (Ill. App.1 Dist. 1988), the court relied upon **Dawe** and specifically cited to the same language concerning avoidance of the penalties of the Truth-in-Lending Act. Additionally, it relied upon a prior Illinois appellate opinion relating to the one year statute of limitations provided in 15 U.S.C. § 1640(e) and discussed the overall purpose of the rights relating to civil actions under the Truth-in-Lending Act. It recognized that the placement of responsibility on consumers through the institution of civil actions, is key to the overall enforcement of the Act. It reiterated that consumers often are unknowledgeable and the focus is on penalizing violators of the Act. Id. at 381. (emphasis added).

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E. The Dawe Rationale Should Not Compel This Court To Permit Post-Expiration Rescission

In ignoring the clear language of the Act, Regulation and Commentary, **Dawe v. Merchants Mortgage and Trust Corporation**, 683 P.2d 796 (Col. 1984) and its progeny incorrectly focused on the unusual circumstance where a lender would intentionally delay in bringing a foreclosure action in order to avoid a borrower's TILA claim. The **Dawe** court explained:

> If recoupment claims were barred by the relevant statute of limitations, lenders could avoid the penalties of the Act by waiting, as here, three years or more to sue on the borrower's default, and thereby frustrate the fundamental policy of TILA. [citation omitted]. Further, it is likely that most borrowers will know nothing about the provisions of TILA until they consult an attorney after the statute of limitations has run. Allowing creditors to profit from a violation of TILA simply because three years has passed would not further the purposes of the Act.

Dawe at 801.

That rationale is contrary to the applicability of any expiration and directly challenges Congress' authority to limit the right to rescind. As the Court below recognized, modern banking regulations make it highly unlikely that a lender would hold a loan in default for two or three years without taking action to collect on the debt. The creditors' ability to foreclose is therefore entirely within the control of the borrower. If a defensive rescission claim could be brought after three years, a borrower, by using recoupment as a method of asserting rescission, could take advantage of the remedy throughout the entire life of the secured transaction, rendering the statutory expiration meaningless. **Beach v. Great Western Bank**, 21 Fla. L. Weekly D290, 291 (Fla. 4th DCA. January 31, 1996). Permitting post-expiration rescission may also result in harm to consumers. Individual consumers may be encouraged to default in an effort to obtain a long-term interest-free loan, or one who is in default but perhaps able to negotiate a reinstatement, may choose to remain in default in order to seek a full rescission remedy. If, as an example, those borrowers relied upon the findings of the 11th Circuit in **Rodash v. AIB Mortgage**, 16 F.3d 1142 (11th Cir. 1994), only to learn that Florida courts would find that the intangible tax was not a finance charge, **Pignato v. Great Western Bank**, 664 So.2d 1011 (Fla. App. 4 Dist. 1995), the additional indebtedness which mounted during the litigation would make reinstatement impossible and cause those consumers to lose their home if they could not prove a separate alleged violation. Encouraging borrowers to take such a risk does not constitute good public policy.

The **Dawe** rationale cited above was rejected by a Florida court on a related issue in **Devlin v. Aetna Finance Company**, 379 So.2d 972 (5th DCA 1979). The Beaches incorrectly argue that the court below relied upon **Devlin** in reaching their opinion. Instead, the Court simply found that the reasoning of **Devlin** (that it was Congress' province to enact damage limitations and, in this case, expirations of rights), was consistent with the majority's analysis. Since Congress did not see fit to add the type of recoupment language made a part of § 1640(e) in 1980 to § 1635, the court refused to engage in judicial legislation.

The only other case in Florida which dealt with time limitations on rights under the Truth-in-Lending Act, was even more restrictive than **Devlin** and the majority opinion below. In **Gillis v. Fisher Hardware Company**, 289 So.2d 451 (Fla. 1st DCA 1974), the court applied the one year statute of limitations of § 1640(e) (since Congress had not yet passed the three year expiration period) in agreeing to bar the appellants' affirmative defenses and counterclaim for rescission under TILA since more than one year had passed from the consummation of the transaction.

F. The Truth-in-Lending Act Amendments of 1995

Section 8 of the Truth-in-Lending Act Amendments of 1995 neither embraced nor was a codification of **Dawe** and its progeny. As the court below correctly recognized, the language of 15 U.S.C. § 1635(i)(3) neither states nor implies that the specific rescission rights created under 15 U.S.C. § 1635 are available to a defendant in a foreclosure action where more than three years have passed since the consummation of the closing transaction.

The Beaches apparently place great reliance on certain floor comments made in the House of Representatives and the Senate on September 27 and 28, 1995. They regularly interject matters not in the record before this Court in an attempt to explain the comments of certain congressmen and senators. Despite their best efforts to manipulate those comments, however, there is not a single reference made by any congressman or senator to **Dawe** or its progeny. The references cited by the Beaches in their Brief, to protecting the right of rescission, relate to efforts in the earlier bills to substantially reduce those transactions where that right would be permitted. The earlier bills presented would have eliminated the right to rescind for all first mortgage refinancing. See, Sec. 3 of the March 1995 proposed TILA amendments made a part of the Beaches' Appendix to their Initial Brief.

The language cited by the Beaches on page 26 of their Initial Brief relates specifically to the creation of § 1635(i)(1) and (i)(2). The Beaches' assertion that "[t]he only way the 1995 bill creates a right in a foreclosure context is if Congress intended consumers to rescind after three years . . ." is outrageous. The only rights created in § 1635(i) are those discussed in sub-paragraphs (1) and (2). Sub-paragraph (3) simply states that nothing in that subsection shall affect state law rights. There is nothing created thereby.

The interpretation given to 15 U.S.C. § 1635(i) by the lower court does not render the amendment meaningless. Rather, it recognizes the specific references therein to 15 U.S.C. § 1635 and a rational interpretation of the remaining portions of that subsection. It is the Beaches' interpretation which would render subsections (1) and (2) of the new § 1635(i) meaningless. If Congress intended to codify and/or embrace **Dawe**, it would not have made the rescission rights in foreclosure created in subsections (1) and (2) subject to the time limitations set forth in § 1635(f).

The only floor comments which address the three (3) year expiration issue were delivered by Congressman William McCollum (R-FL) and Senator Connie Mack (R.-FL.). Both recognized the absolute nature of the three year expiration. They both criticized court decisions which have allowed the absolute three (3) year rescission period to extend for as long as eight years after the loan was closed under the context of recoupment. Although the Beaches argue that Congressmen McCollum and Senator Mack were attempting to interpret congressional intent from 1974, it is clear that their intention was to explain that the clear language of the statute did not justify further amendment. Their recognition that there was no need to restate the clear existing statutory language is not countered by any of the floor comments cited by the Beaches. "Three years means three years and the time period shall not be extended except as explicitly provided in § 125(f)." 141 Cong. Rec. H9516 (Daily ed. Sept. 27, 1995) (Statement of Representative McCollum); 141 Cong. Rec. S.14568 (Daily ed. Sept. 28, 1995) (Statement of Senator Mack).

The addition of 15 U.S.C. § 1635(i)(3) concerning the right of recoupment under state law does nothing more than recognize that the amendments to §1635 do not impact common law rescission rights available under separate state laws. In the Committee Report describing the amendments, it was recognized that the "rescission rights in foreclosure" section provided consumers with three specific instances where they could seek to rescind the loan "within the three year time period established in § 125(f) of TILA

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as a defense, if the creditor brings an action to foreclose on the consumer's principal dwelling". In the last sentence of its analysis of that subsection, the committee recognized that any of the changes that were made by the statute were not intended to affect any equitable remedies that may be available under state or common law. (App.1). While the final bill may have been the product of compromise, it is far more reasonable to recognize that the language of §1635(i)(3) was simply a codification of the last sentence of the Committee Report. Alternatively, it should be recognized that many states have adopted state statutes concerning truth in lending. The language of § 1635(i)(3) would permit those states to allow rescission rights granted in those particular statutes to be raised defensively beyond three years. Florida has no statutory basis for such an extension.

A logical analysis of the amendments and floor comments leads to the inescapable conclusion that Congress did not support an extension of the time a defaulting borrower could utilize TILA rescission to defeat a legitimate foreclosure claim. "[TILA] was not designed, nor should it be used to thwart, the valid claims of creditors." **Basham v. Finance Am. Corp.**, 583 F.2d 918, 928 (7th Cir. 1978). If Congress intended to adopt the principles of **Dawe** and its progeny, it certainly had the power and the ability to clearly state that intention before passage of the Act. Instead of providing this Court with recognizable legislative history, the Beaches provide suppositions and manipulations of the floor comments made during the most recent amendments to the Truth-in-Lending Act.

II. THE BEACHES ARE NOT ENTITLED TO ADDITIONAL RELIEF

In the last section of their Brief, the Beaches seek "implicit vesting of principal", multiple statutory and actual damages, rescission based upon a misdisclosure of the variable rate feature and interest on the tender obligation. None of these questions were discussed by the Court below nor are they the subject of the certified question to this Court. The Beaches' Initial Brief before the Fourth District Court of Appeal contained a single reference (Beaches' Initial Brief at 51) to the argument that GREAT WESTERN should lose the right to collect principal. Although the issue was discussed more particularly in GREAT WESTERN's Answer Brief and in the Beaches' Reply, the discussion was couched in terms of remanding the case to the trial court to determine entitlement to equitable modification if rescission was appropriately awarded to the Beaches. Since that issue was not considered by the 4th District, GREAT WESTERN would ask this Court not to take jurisdiction over that question and permit the lower court to consider the issue only if this Court reverses the 4th District's opinion.

Additionally, there is no discussion in the briefs presented to the 4th District concerning the Beaches' alleged right to collect interest on the tender obligation. Nor is there anything in the record before the trial court requesting such relief. It is inappropriate for the Beaches to seek new relief in a petition to the Supreme Court.

A. **<u>Rescission And The Right To Collect Principal</u>**

The Beaches argue that GREAT WESTERN has lost the right to collect principal by virtue of their failure to cancel the security interest and return all the charges collected from the Beaches within twenty days of receipt of their request for rescission. As noted previously, GREAT WESTERN did not honor the rescission request because the Beaches did not assert a viable rescission claim. If this Court determines that rescission is appropriate, GREAT WESTERN would ask the Court to remand this action to the lower court to determine whether it is entitled to equitable modification of the rescission process pursuant to **<u>Williams v. Homestake Mortgage Company</u>**, 968 F.2d 1137 (11th Cir. 1992) and to also determine the appropriate calculations of what portion of the amounts paid by the Beaches should be considered in rescinding the transaction.

The Beaches' argument that GREAT WESTERN has lost the right to collect principal from them is based upon **<u>Yslas v. D.K. Gunther</u>**, 342 So.2d 859 (Fla. 2d DCA 1977). The **<u>Yslas</u>** decision is based in large part on holdings of the United States Court of Appeals for the 5th Circuit, including **<u>Gerasta v. Hibernia National Bank</u>**, 575 F.2d 580 (5th Cir. 1978). Both **<u>Yslas</u>** and **<u>Gerasta</u>** were decided prior to the passage by Congress of the Truth-in-Lending Simplification and Reform Act, Title VI of the Depository

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Institution's Deregulation and Monetary Control Act of 1980, Pub.L. 96-221. The relevant amendment added the last sentence to the present 15 U.S.C. § 1635(b) stating that "the procedures prescribed by this subsection shall apply except when otherwise ordered by a court." The procedures referenced therein are the method for accomplishing rescission. The Federal Reserve Board added subsection 4 to 12 C.F.R. § 226.23(d) in response to that amendment. Under 12 C.F.R. § 226.23(d)(4), a court may modify the procedures for truth-in-lending rescission.

This issue was directly focused upon in **Williams** wherein it was recognized that the 5th Circuit was the only circuit which did not permit judicial modification of the statutory rescission process prior to the act's amendment. The Court stated that "insofar as the **Harris** and **Gerasta** decisions restrict the Court's ability to modify the statutory procedures for effecting rescission, they are no longer valid in light of the changes that Congress has made to § 1635(b)." **Williams**, 968 F.2d at 1142, fn.8. In the same manner, the **Yslas** rationale, based upon 5th Circuit precedent, is no longer valid. Therefore, if rescission is appropriate, GREAT WESTERN should be given the opportunity to show the lower court why equitable modification is appropriate under the circumstances of this case.

B. <u>The Beaches Are Not Entitled To Multiple Statutory Damages Or New Limitations To Recreate A Right Of Rescission</u>

The Beaches are limited to a maximum $1,000.00 penalty of statutory damages in accordance with 15 U.S.C. § 1640(g).[8] TILA permits only one penalty per transaction regardless of the number of violations within the single transaction. **Zamarippa v. Cy's Car Sales, Inc.**, 674 F.2d 877 (11th Cir. 1982). The Beaches seek to increase their alleged statutory damages by claiming that the alleged violations regarding the disclosure of the variable rate feature of the loan make each rate change a new transaction subject to statutory damage penalties. For that proposition, they cite **Brown v. Marquette Savings and Loan**, 686 F.2d 608 (7th Cir. 1982) and **Nash v. First Financial**, 703 F.2d 233 (7th Cir. 1982). Neither of these cases are valid precedent under the Truth-in-Lending Simplification and Reform Act and Regulation Z and the Official Staff Commentary as they existed at the time the Beach loan was consummated.

In adopting the new Regulation Z, the Federal Reserve Board significantly modified the circumstances under which a change in terms shall constitute a "new transaction", requiring new disclosures. 12 C.F.R. § 226.20. The concept set forth in **Brown** and **Nash** has been severely restricted. New disclosures are now required only when a loan which had previously been fixed becomes variable, or when there is an increase in the variable rate when

[8] The amendment to § 1640 increasing the statutory damage award to $2,000.00 per violation was prospective in effect and does not apply to this transaction.

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such a feature was not disclosed. Under paragraph 20(a)-3 of the Official Staff Commentary, absent the cancellation of the old obligation and the substitution of a new one, a new transaction subject to new disclosures only results if the creditor increases the rate based on a variable rate feature that was not previously disclosed or adds a variable rate feature to the obligation. In their final comments to the Official Staff Commentary Amendments which were effective on September 17, 1982 (App.2, Page F-13), the associate secretary of the Board recognized that Comment 20(a)-3 was revised to clarify that the addition of the variable rate feature to a previously fixed rate transaction required new disclosures. It also discussed a variable rate transaction for which no variable rate disclosures were ever provided. The situation in the instant case involves neither of these circumstances. It is clear, that the Board chose to restrict the **Brown** and **Nash** holdings to very limited circumstances. The unquestionable disclosure of the variable rate feature in this transaction eliminates any possible requirement for new disclosures upon increases in the rate based upon that variable rate feature.

Even if **Brown** and **Nash** were still good law, the Beaches seek to expand the holdings of those cases by expanding alleged errors which would fall within the concept of a misdisclosed variable rate feature and asking that new disclosures be required at each rate change rather than at each increase in the interest rate. This effort has no basis in the statute, regulation, commentary or case law.

Finally, the Beaches' assertion that this Court need not decide the three year expiration issue because the Beaches timely rescinded from the last rate change, was neither raised below nor is there any valid basis to make such an argument. Under 15 U.S.C. § 1635(e) and 12 C.F.R. § 226.23(f), the right to rescind does not apply to a refinancing or consolidation by the same creditor of an extension of credit already secured by the consumer's principal dwelling when no new advances are made. Clearly, if rate changes could constitute new transactions, they would involve the original creditor with no new advances, thus creating an exempt transaction.

CONCLUSION

Based upon the foregoing, the decision of the 4th District Court of Appeal should be affirmed, the Court should respond to the certified question in the negative and the Court should specifically refuse to accept jurisdiction for any issues beyond that set forth in the certified question to this Court.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished via U.S. Mail this 12 day of June, 1996 to JAMES A. BONFIGLIO, P.A., P.O. Box 1489, Boynton Beach, Florida 33425.

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