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,

vs.

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

Respondents.
_____/

INITIAL BRIEF OF PETITIONERS
DAVID R. BEACH and LINDA M. BEACH

JAMES A. BONFIGLIO, ESQ.
Fla. Bar No. 288055
P.O. Box 1489
Boynton Beach, Fla. 33425
(407) 734-4503, 734-1872 (fax)

Attorney for Petitioners
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LINDA M. BEACH,

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CERTIFICATE OF INTERESTED PERSONS

Counsel for the Petitioner DAVID R. BEACH and LINDA M. BEACH, his wife, certifies that the following persons and entities have or may have an interest in the outcome of this case.

1. James A. Bonfiglio, attorney for Petitioners.
2. Broad and Cassel, 400 Australian Ave. S., Fifth Floor, W. Palm Beach, FL 33401, Law Firm for Respondent Great Western Bank.
4. Hon. John W. Dell, 4th DCA Judge
5. Steven Ellison, Esq., Broad and Cassel, 400 Australian Ave. S., Fifth Floor, West Palm Beach, FL
6. Great Western Bank, Respondent/Appellee
7. Hon. Barbara Pariente, 4th DCA Judge
8. Hon. Thomas E. Sholts, Judge 15th Judicial Circuit
9. Hon. Martha C. Warner, 4th DCA Judge

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PREFACE

This is a petition to review a certified question from the Fourth District Court of Appeals issued January 31, 1996, rehearing denied April 15, 1996. The Lower Court certified the following question to the Supreme Court:

> UNDER FLORIDA LAW, MAY AN ACTION FOR STATUTORY RIGHT OF RESCISSION PURSUANT TO THE TRUTH IN LENDING ACT, 15 U.S.C. 1635 BE REVIVED AS A DEFENSE IN RECOUPMENT BEYOND THE THREE YEAR LIMIT ON THE RIGHT OF RESCISSION SET FORTH IN SECTION 1635(f)?

The parties will be referred to as "the Beaches" for all of the Appellees, and "GW" for appellant.

ABBREVIATIONS USED

The Beaches will use the following abbreviations in the brief;

ROA___ ... Record on Appeal, where applicable

TT 1 p. __ l. __ Trial Transcript of February 13, 1995

TILA.....15 U.S.C. 1601, et. seq., commonly referred to as the Federal Truth In Lending Act

old TILA.....Pre-1980 15 U.S.C. 1601, et seq.

new TILA.....TILA after the Simplification and Reform Act of 1980

FRB.....The Federal Reserve Board

Reg Z.....12 C.F.R. 226.01,

O.S.C.....Official Staff Commentary to Reg. Z issued by the FRB

APR.....Annual Percentage Rate of Interest under 15 U.S.C. 1606 & 1638(a)(4)

FC.....Finance Charge under 15 U.S.C.1605 & 1638(a)(3)

AF.....Amount Financed under 15 U.S.C.1638(a)(2)(A)

IAF.....Itemization of Amount Financed under 15 U.S.C.1638 (a)(2)(B)

DS .....Disclosure Statement required under TILA

GW.....Great Western, the Respondent

STATEMENT OF THE BASIS OF APPELLATE JURISDICTION

The Florida Supreme Court has discretionary jurisdiction to review a decision of a District Court of Appeal that passes on and is certified as a question of great public importance. Art. V Sect. 3(b)(3), Fla. Const.; and Fla.R. App. Pro. 9.030(a)(2)(A)(v).

STATEMENT OF FACTS AND CASE

The Beaches bought a vacant lot at 5870 Set N Sun Jupiter, Florida on June 22, 1981 (TT 41 L13-17, TT 39 Def. Ex.#1). They built a home with a Fidelity Federal construction loan (TT 41 L 16-25, TT 39-40 Def.Ex.#2,3,&4) and closed on December 4, 1985 (TT 39-40 Def.Ex.#2,3&4). The Fidelity construction loan modified a 30 year mortgage and incorporated a permanent loan secured by the home in 1 document (TT 39-40 Def.Ex.#2,3&4). Fidelity modified the initial disbursal by a construction draw, and required interest payments only during construction. The note automatically converted to a standard home loan amortized over 30 years on completion of the draws, beginning June 1, 1985 (TT 39-40 Def.Ex.#2,3&4). The Fidelity TILA DS, settlement statement, construction modification and draw agreement, good faith estimate, and other normal closing documents (TT 39-40 Def.Ex.#2,3&4) never mentioned GW. The Fidelity loan never involved GW. No one ever contacted or involved GW in the construction loan. GW never advanced funds for construction.

The Beaches completed the home, moved in, and made at least one mortgage payment to Fidelity before they applied to GW to refinance the loan (TT 41 L17-25, TT 40 Def.Ex.#6,7&8). GW refused the original credit application but approved a counteroffer for a $97,300.00 variable rate loan on July 28, 1985 (TT 40 Def.Ex.#8) and gave a written commitment which included a 3-day right of rescission (TT 36 Pl.Ex.#8,12). The Beaches accepted GW's commitment with the rescission right requirement (TT 43 L 15-18).

GW closed the Beach loan on August 15, 1986 (TT 36 Pl.Ex.#1,2)

after the Beaches completed construction, moved in, and made at least two mortgage payments to Fidelity (TT 39-40 Def.Ex. # 2,3,4,6 &9). GW provided a TILA DS, closing statement, a 3 day notice of right to cancel, and other closing documents (TT 36 Pl.Ex.#3,4,5,6, 7,13,14). GW charged the Beaches $200.00 application fee, $358.15 filing fees, including $194.16 intangible tax, and $1,813.65 in prepaid finance charges. GW took the face amount of the loan ($97,300.00) and deducted the disclosed prepaid finance charges ($1,813.65) to arrive at the DS AF of $95,486.35 (TT 36 Pl.Ex.#3,4, 5,6,7,13,14). The DS disclosed the payment schedule as 12 at $765.46 and 348 at $755.23 (TT 36 Pl.Ex.#3).

GW placed an asterisk (*) immediately following the disclosed figures in the APR, FC, AF, TOP, and Payment Schedule 348. The asterisk referred to "*MEANS ESTIMATE" at the lower right hand corner of the payment schedule box (TT 36 Pl.Ex.#3,). GW placed "++" in front of the 8.75% APR and immediately below that referred to "++YOUR INITIAL CONTRACT RATE IS 8.75%." (TT 36 Pl.Ex.#3). GW's manual instructed closers to place asterisks after all figures except the AF and told the closers to place an asterisk next to the payment amount in the payment schedule. The manual also told the closers to place pluses next to the APR and refer to the initial contract rate. (TT 36 Pl. Ex.#9,10,11, TT Def.Ex#10).

GW presented the testimony of Mr. Greco. He recalculated the correct APR to 8.785%, not the DS APR of 8.82% (TT 50 L1-6). He recalculated because of a $.58 error in the payment amount for the 348 payments (TT 50 L 21-23). The payment should have been $754.65,

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not $755.23. This makes the FC understated by $201.84 (TT 50 L 9-20). The TILA DS FC should have been $176,317.37, not $176,519.21 (TT 50 L 9-20) and the DS TOP erred by the same amount $271,803.72, vs. $272,005.56 (TT 52 L 3-8).

GW's payment history showed an index change every 6 months with a payment change every 12 months. The index record shows 10 changes, 6 increases and 4 decreases before default; original 10/86 8.75%, 4/87 8.35%, 10/87 8.85%, 4/88 8.71%, 10/88 9.21%, 4/89 9.71%, 10/89 10.21%, 4/90 10.27%, 10/90 10.32%, 4/91 9.82%, 10/91 9.32%. The payments changed as follows; original $765.46, 10/87 $756.46, 10/88 $736.88, 10/89 $764.17, 10/90 $821.48, 10/91 $882.34. The Beaches paid $52,376.71 in payments and late charges to the date of default.

GW sued to foreclose their mortgage (ROA1-12). The Beaches answered and raised TILA rescission and damage claims as an affirmative defense (ROA 14-20). The matter went to trial (ROA 47-50. The court found and ordered: TILA governed the loan; GW made material disclosure errors with respect to the intangible tax, and the payment schedule; the loan was not one subject to rescission, and even if rescission appropriate, the limitation period expired; debt offset by statutory and actual damages; and a positive attorney fee to the Beaches attorney.

The Beaches asked the 4th DCA to review the portion of the order that; rejected rescission and refused to assess actual and statutory damages by the misstated variable feature. (ROA 75-100). GW did not seek review of the lower court's finding of material

TILA errors leading to the award of statutory and actual damages and fees to the Beaches.

The 4th DCA's divided opinion held rescission available under 15 U.S.C.1635 for the Beaches, but they could not rescind to defend a foreclosure after 15 U.S.C. 1635(f)'s 3 year limit and certified the question to this Court. The Beaches submit the dissent states the correct law. This Court should overrule the majority opinion, adopt the dissent, and allow a consumer sued for foreclosure after 15 U.S.C. 1635(f)'s 3 year limit to rescind under 15 U.S.C. 1635(b) and Reg Z 226.23 as a defense in recoupment after the 3 year limit.

SUMMARY OF ARGUMENT

I. OVERVIEW OF TILA

Congress passed TILA to remedy false practices in disclosing true costs of consumer credit, assure meaningful disclosure of credit terms, ease comparison credit shopping, and balance the scales weighted in favor of lenders, achieving its remedial goal by imposing strict liability.

II. TILA DOES NOT LIMIT THE RIGHT TO THREE YEARS

The unanimous cases reject the notion that the 3 year limit absolutely bars recoupment. Federal case law, State case law and the recent 1995 TILA Amendments show Congress rejects the Lower Court's divided majority opinion. The U.S. Supreme Court would allow the claim, adopting a 3 prong test for TILA recoupment claims after 3 years expires. Beach overlooked critical portions of TILA's history and the applicable cases in its contrary ruling.

TILA rescission as an equitable remedy, and not a penalty is

consistent with the purpose of disclosure. It is equitable to allow consumers to rescind in light of the TILA rescission remedy, when the consumer still has title. Congress limited the right to rescind to 3 years in 1974 only to prevent title clouds by ending post sale rescission. Congress did not address post-limit damage recoupment in 1974 because no split of cases existed.

Congress originally passed an unlimited right to rescind in 1968 and therefore originally examined and rejected a post 3 year limit as inequitable. Congress added the 3 year limit in 1974 because they were concerned with title clouds, not the monetary result of a post 3 year rescission on a lender. Congress would decidedly approve the monetary result of a post 3 year rescission after 1974 as long as the result does not cloud titles. Lenders get windfalls if the court lets them collect several years of mortgage payments, foreclose and dispossess Consumers and avoid rescission despite major serious TILA errors.

The 1995 amendments support rescission recoupment. The House Banking Committee's first TILA amendments made the 3 year limit an absolute bar to rescission and superseded any state law in the area. Congress refused, added recoupment as a compromise to the original TILA bill and intended to allow defensive rescission.

The legislative history shows Congress rejected the artificial "statutorily created right" doctrine and adopted the cases allowing post 1 year limit damages by set off or recoupment in 1980 which disapproves Beach. Congress in 1995 treated rescission limitation issue in the same way it treated damage limitation; by adopting

those cases that allow it and rejecting those cases that give any weight to the "statutorily created right" doctrine.

Congress passed the first meaningful TILA amendments in 1974 to deal with cases such that order rescission after sale as a cloud on the title to property after the sale. Title clouds occur because 15 U.S.C.1635(b) and Reg Z 226.23(d) reorder common law rescission when it returns the parties to the status quo. A return to the status quo requires the lender to get his old mortgage back, impossible if the consumer sold the property to a new buyer who put a new mortgage on the same property.

Florida is as expansive as Federal Law in allowing time barred defensive recoupment claims. Florida does not recognize distinction between a statutorily created right versus a common law right when the defendant raises his time barred statutory claim as a defense to a foreclosure suit. Modern banking rules would prevent a lender from holding a usury infected loan past 4 years to avoid the usury claim. The borrower charged with usurious interest also controls whether the lender can foreclose by not paying the loan.

These policy concerns did not prevent the Supreme Court from allowing a defensive time barred usury claim. The Court did not protect lenders based on these concerns but expanded liability after the limit runs by giving consumers affirmative recovery.

III. IMPOSITION OF THE RESCISSION REMEDY

A. A CONSUMER CAN ENFORCE IMPLICIT VESTING OF PRINCIPAL WHEN HE CORRECTLY RESCINDS UNDER 15 U.S.C. 1635 AND THE LENDER REFUSES TO HONOR HIS RESCISSION REQUEST.

TILA's rescissory scheme requires that the GW mortgage was

void, and GW had to return charges within 20 days from when they received the Beaches affirmative defenses. GW at trial did not present any evidence to support a finding that they were entitled to equitably modify rescission by cancellation of the mortgage on return of the net debt owed, or offset GW's duty to return charges against the Beaches' return of principal. GW's failure to timely honor the rescission request and do the acts necessary to effect rescission results in the Beaches right to retain the principal.

B. THE CORRECT MEASURE OF TILA ACTUAL AND STATUTORY DAMAGES FOR A MISSTATED VARIABLE FEATURE EQUAL $1,000.00 AT EACH RATE CHANGE, AND THE AMOUNT OF INTEREST COLLECTED WHEN THE RATE CHANGES ABOVE THE DISCLOSED RATE.

TILA allows a Court to award statutory and actual damages under 15 U.S.C.1640(a) for disclosure errors in connection with all consumer credit transactions and damages for refusal to rescind. A consumer can receive actual and statutory damages and fees under 15 U.S.C. 1640(a) for initial disclosure errors, enforce his right to rescind under 15 U.S.C. 1635 for the same errors, and receive actual and statutory damages and fees for failure to properly respond to a consumer's request to rescind.

The rescission affirmative defense triggered GW's obligation to rescind in 20 days. 15 U.S.C.1635(b). The Beaches had a right to GW's TILA tender obligation on the 21st day after they delivered the TILA rescission affirmative defenses on GW's attorney. The sum was liquidated as of that date and the Beaches can collect interest on that amount.

ARGUMENT AND CITATIONS OF AUTHORITY

I. OVERVIEW OF TILA

Congress passed TILA to remedy false practices in disclosing true costs of consumer credit, assure meaningful disclosure of credit terms, ease comparison credit shopping, and balance the lending scales weighted in favor of lenders. 15 U.S.C. 1601(a), Johnson v. McCrackin-Sturman Ford, Inc., 527 F2d 257,262 (3rd Cir. 1975), Smith v. Fidelity Consumer Discount Co., 892 F2d 896,898 (3rd Cir. 1990), Smith v. Chapman 614 F.2nd 968 (5th Cir. 1980), Rodash v. AIB Mortgage, 16 F3d 1142,1144 (11th Cir. 1994), In Re Porter, 961 F2d 1066 (3rd Cir. 1992), Semar v. Platte Valley Fed. Sav. & Loan, 791 F2d 699 (9th Cir 1986) Smith v Wells Fargo Credit 713 F.Supp. 354,355-356 (D.Ariz.1989).

Since TILA is remedial, courts expansively and broadly apply and interpret 15 U.S.C. 1635 to allow rescission, and narrowly interpret those parts of 15 U.S.C.1635 that limit rescission. James v. Home Const. Co. of Mobile, Inc., 621 F2d 727,729 (5th Cir 1980), Sellers v. Wollman, 510 F2d 119 (5th Cir. 1975), In Re: Underwood, 66 B.R.656 (Bkr.W.D. Va. 1986), Porter, Semar.

TILA rescission gives consumers time outside closing pressures to weigh the credit terms and quietly reflect on whether they want to expose their homes to foreclosure based on the TILA disclosures. When lenders give wrong disclosures, consumers could never evaluate whether to risk foreclosure and loss based on the correct terms because the consumer never knew the correct terms. Given TILA's remedial purpose, the equities protect consumers from foreclosure

based on wrong terms rather than protect lenders from TILA errors. Porter, 1073, Semar, 704 Smith, French v. Wilson, 446 F.Supp 216, 219-220 (D.C. R.I. 1978).

Imposing liability after 3 years furthers Congress' purpose to protect consumers and encourage accurate disclosure. Post 3 year rescission liability forces lenders to: give correct disclosures; create 15 U.S.C. 1640(c) procedures to examine loans for accurate TILA disclosure; follow 15 U.S.C.1640(b) after finding violations. This furthers compliance and allows consumers to make informed credit decisions, ultimately protecting consumers.

Shielding lenders after 3 years frustrates TILA's purpose, encourages lenders to avoid correcting errors under 15 U.S.C. 1640 (b) after finding errors by holding mortgages for 3 years, then suing on default. Consumers would borrow from violative lenders who understate APRs and FCs and deter lenders from 15 U.S.C. 1640(c) compliance. A compliant lender could not compete with non-compliant lenders because his loan would be more expensive, which frustrates TILA's stated purpose, leading to misdisclosure, wrong information about true credit costs, and TILA non-compliance.

Beach refused to follow this Court's opinions that allow defendants to raise time barred statutory claims by recoupment after a statute of limitation expires. Beekner v. L.P. Kaufman, Inc., 198 So 794 (Fla. 1940), Allie v. Ionata, 503 So.2d 1237,1240 (Fla. 1989), Rybovich Boat Works v. Atkins 585 So.2d 270, 272 (Fla. 1991). Beach refused to follow the unanimous Federal opinions that allow defendants to raise time barred Federal statutory claims by

way of recoupment after a statute of limitation expires. Reiter v. Cooper, 113 S.Ct. 1213, 1218 (1993), Bull v. United States, 55 S. Ct. 695 (1935), Distribution Services Ltd. v. Eddie Parker Ints. Inc., 897 F.2d 811,812 (5th Cir. 1990), In Re Smith, 737 F.2d 1549 (11th Cir. 1984), Matter of Coxson 43 F3d 189,193-194 (5th Cir 1995), Silverman v. Eastrich Multiple Investor Fund, L.P., 51 F3d 28,31-33 (3rd Cir. 1995), F.D.I.C v. Medmark, 897 F.Supp. 511,514 (D.Kan.1995). [the Reiter cases].

Beach conflicts with Mobile Oil Corp. v. Shevin, 354 So2d 372, 375 fn9 (Fla.1977), Roberts v. American Nat. Bank, 115 So.261,263 (Fla.1927), Cadieux v Cadieux, 75 So2d 700,702 (Fla.1954), Ratner v. Arrington, 111 So.2d 82,84-85 (Fla. 3d DCA 1959), because it refused to follow unanimous Federal cases that allow post-limit recoupment of a Federal statutory cause of action. TILA rescission is an issue of Federal Law James p. 729, absent an express contrary intent by Congress. N.L.R.B. v. Natural Gas Util. Dist.Of Hawkins Co.,Tenn., 91 S.Ct. 1746, 402 U.S. 600, (1971), Smith v. No.2 Galesburg Crown Finance Corp., 615 F.2d 407,413 (7th Cir. 1980), Bowles v. Farmers National Bank of Lebanon, Ky., 147 F.2d 425 (6th Cir 1945), Heikkila v. Barber, 308 F.2d 558 (9th Cir. 1962). Cf. Wright and Miller, Fed. Practice and Procedure Sect. 1952 at 642.

The 1995 TILA amendments added 15 U.S.C. 1635(i)(3) (see Beach fn 1): "Nothing in this subsection affects a consumer's right of recoupment under State law." The amendment does not limit post-3 year recoupment to state law, but: 1) evidences Congress' intent not to bar recoupment; and 2) preserves post limit recoupment for

a consumer when raised as a defense to foreclosure in state court. Beach's majority refused to accept Congress in 1995 approved of recoupment in defense of foreclosure after the 3 year limit when Congress passed 15 U.S.C.1635(i)(3)[1995].

II. TILA DOES NOT LIMIT THE RIGHT TO THREE YEARS

A. THE OVERWHELMING CASE LAW REJECTS THE BEACH ANALYSIS

Beach grows more isolated as the overwhelming case law rejects the notion the 3 year limit absolutely bars recoupment. The TILA opinions expressly on the subject contrary to Beach are: Dawe v. Merchants & Mrtg. Trust Corp 683 P.2d 796 (Colo. 1984), FDIC v. Ablin, 532 NE2d 379 (Ill.App. 1988), Community Nat'l Bank & Trust Company v. McClammy 525 N.Y.S. 2d 629 (App.Div. 1988), In Re Shaw, 178 BR 380 (Bkr.N.J. 1994). After Beach, another appeal court wrote an opinion supporting Dawe and disapproving Beach: Westbank v. Maurer LEXIS 973 (App. Ill. Dec. 22, 1995). [The Dawe cases].

The divided Beach panel overlooked the fact every TILA case expressly on point expansively interpreted rescission and narrowly interpreted 15 U.S.C.1635(f) to allow recoupment after 3 years. The Dawe cases expressly allow the claim. The Supreme Court would allow the claim in Reiter, p.1218 adopting Smith's 3 prong test for TILA recoupment after 3 years, as would the 5th Circuit in Distribution Services Ltd.,p.812, and Coxson p.193-194, the 11th Circuit in In Re Smith, the 3rd Circuit in Silverman, p.31-33, and Medmark, p.514 regardless of the claim's statutory or common law creation.

Beach rejected the Dawe cases and Reiter cases, relying on the legislative history of 15 U.S.C. 1635(f) compared to 15 U.S.C. 1640

(e)[1980] overlooking critical portions of TILA's history and cases examined and considered in the Dawe case and Reiter cases.

B. HISTORY OF TILA LIMITATIONS

Congress imposed a 1 year limit for damages in 15 U.S.C.1640 (e)[1968]). Congress did not expressly allow post-limit recoupment for damages. 15 U.S.C.1635[1968] rescission had no time limit and thus did not need a post-limit recoupment provision.

Congress passed the first TILA amendments in 1974 to deal with cases like Sosa v. Fite, 498 F2d 114 (5th Cir 1974) [rescission after sale]. Congress added the limit only because of title clouds on land. TILA rescission reorders common law rescission when it returns the parties to the status quo. The lender cancels the mortgage and returns charges to the consumer. The consumer then returns the principal. Williams v. Homestake Mrtg. Co., 968 F2d 1137,1140-1142 (11th Cir.1992). The parties can never return to the status quo if a consumer sells the home before he rescinds, more so when the same lender refinances the same debt and lends more money. see Porter. p.1075-1076. The status quo would require a lender to get his old mortgage back, impossible if the consumer sold the home to a new buyer who put a new mortgage on the same property.

In response to the now obvious title problems, 2 reports to Congress recommended a limit on rescission for the sole purpose to clear property titles. Congress added 15 U.S.C. 1635(f) in 1974 as a technical adjustment only to prevent clouds on title. see James, p.729 and Beach dissent. 1974 Congress did not address post-limit damages because no post-limit damage cases existed. Congress did

not need to address a problem that did not exist in 1974.

Since Congress passed the 3 year rescission limit to prevent title clouds, permitting defensive rescission after 3 years when the consumer still has title is consistent with TILA's express purposes in general, rescission in particular, and the 1974 3 year limit amendment; when the consumer still owns title, no title cloud exists for post 3 year rescission. Rescission can still protect consumers and return the parties to the status quo before the lien consistent with TILA and rescission's stated purpose.

Beach's treatment of the 1974 amendment as a statue of repose is inconsistent with the above history, the Dawe, cases, and the Reiter cases. Every TILA case on the issue interprets the limit as a statute of limitation not a statute of repose: Moore v. Travelers Ins. Co., 784 F2d. 632,633 (5th Cir 1986); Felt v. Fed. Land Bank Ass'n, 760 F2d. 209,210 (8th Cir 1985); Rudisell v. Fifth Third Bank, 622 F2d 243,246-248, (6th Cir 1980); Stone v. Mehlberg, 728 F.Supp. 1341, 1347 (W.D. Mich 1989). [the Moore cases].

Congress and the cases unanimously and soundly reject Beach's notion that TILA rescission is a penalty and not an equitable right to remedy wrong disclosure. Beach's dissent cites Williams, p.1140, correctly pointing out TILA adopted common law rescission to remedy wrong disclosure and only reorders common law rescission. Williams p. 1140-1142 cited some TILA opinions that equitably apply 1635 and held New TILA expressly adopted TILA rescission as an equitable remedy not a penalty [Beach dissent, p. 20-21].

FDIC v Hughes Development, 684 F.Supp. 616, 622-623 (D.Minn.

1988), rejects the notion 15 U.S.C 1635 rescission is a penalty:

> "Under this analysis, the right to rescission under §1635 is not a civil penalty and, therefore, is a remedy outside of the scope of §1612(b). This conclusion is consistent with the general policy of the Act 'to insure a meaningful disclosure of credit terms'. 15 U.S.C. 1601(a)." Id. p. 622.
>
> "The right of rescission, if validly invoked, is not a civil penalty and can be enforced against the FDIC." Id.

TILA rescission as an equitable remedy, and not a penalty is consistent with the purpose of disclosure. French p.219 and Porter p.1074 state TILA rescission gives consumers time outside closing to weigh the credit terms and think about risking their homes to foreclosure based on the terms disclosed. It is equitable to allow rescission if lenders give wrong disclosures. Consumers could not evaluate whether to expose their homes to foreclosure loss based on the correct terms because the lender never gave them the correct terms. Conversely, lenders should not have a loan secured by a mortgage on the consumer's home and force the consumer to pay or lose his home based on terms the consumer did not know or agree to when the lender violated TILA by misleading the consumer with wrong and inaccurate disclosure of the loan terms before closing.

It is even more equitable to allow consumers to rescind in light of the TILA rescission remedy, especially when the consumer still has title. TILA rescission returns the parties to the status quo before the closing occurs. The consumer gets back his costs and the lender gets back his principal. [The lender will suffer adverse consequences only if he wrongly refuses to timely rescind]. The consumer is no longer saddled with the consequences of a mortgage and credit terms that he never agreed to. He can then renew his

credit search to find the best terms available. Even though the lender cannot collect any charges from the consumer, he will still get back his original principal, despite material TILA errors.

TILA rescission after 3 years is consistent with Congress' express purpose and equitable for both parties, especially when the consumer is faced with a foreclosure and the lose of his home: 1.) The consumer will not lose his home based on terms the consumer thought he had, but did not, because the lender never clearly and conspicuously disclosed the correct terms under TILA; 2.) The consumer will get back only the charges imposed on him by the lender in connection with the loan; 3.) The lender will get back all of the principal he originally lent to the consumer; 4.) The lender will be encouraged to discontinue his loan practices that led to the extended right to rescind. Porter,p.1074 Williams,1140-1142, French,p.219, Hughes,p.622-623, Semar, Dawe and Reiter cases.

The undisputed legislative history of rescission and damages through 1974 shows Congress originally authorized TILA rescission not as a penalty, but solely as an equitable remedy, consistent with its policy to encourage clear and conspicuous disclosure of true terms of credit, put consumers on equal footing with lenders, discourage false credit practices and to encourage credit shopping, especially when the consumer exposes and risks his home to loss by foreclosure based on the terms disclosed. Congress limited the right to rescind to 3 years in 1974 only to prevent title clouds by ending post sale rescission. Congress did not address post-limit damage or recoupment in 1974 because no split of cases existed.

Imposing post 3 year liability furthers Congress' purpose to protect consumers, encourage accurate disclosure forcing lenders to give correct disclosures, establish 1640(c) procedures to examine loans for accurate TILA disclosure, and follow 15 U.S.C. 1640(b) after finding violations fostering compliance and informed consumer credit decisions, ultimately protecting consumers. Dawe cases.

Shielding lenders after 3 years frustrates TILA's purpose, encourages lenders to avoid correcting errors under 15 U.S.C. 1640 (b) after finding errors by holding loans for 3 years, then suing on default. Consumers would borrow from violative lenders who understate APRs and FCs and deter lenders from following 15 U.S.C. 1640(c). Compliant lenders could not compete with non-compliant lenders because his loan would be more expensive, leading to TILA misdisclosure, misinformation about true costs of credit and frustrating TILA's stated purpose. Dawe cases.

C. TILA RECOUPMENT IS NEVER TERMINATED BY TILA'S STATUTES OF LIMITATION

The post-1974 legislative history of 15 U.S.C.1640(e) supports post-limit defensive rescission. Congress overruled Devlin v. Aetna Finance Co. 379 So.2d 972 (Fla. 5 DCA 1979),cert.den.389 So.2d 1108 (Fla.1980) as wrongly decided in 1980. Beach's divided panel relied on an overruled portion of Devlin, a TILA damage case, then ignored the only part of Devlin still alive in 1995:

> "We are convinced that the remedy of the petitioners/ debtors herein is by a change in the statute." Id., 973-974. [emphasis added].

Devlin did not even deal with rescission. It examined the pre-1980 split of cases that dealt with defensive damages after the 1

year 15 U.S.C.1640(e) limit expired. Devlin adopted the cases that refused to allow post-limit damages and deferred exclusively to Congress, noting Congress would allow defensive damages in 1980. Congress' 1980 15 U.S.C. 1640(e) amendment adopted the Devlin-rejected cases, allowed post-limit damages defensively, spurned the cases refusing to allow defensive damages, including Devlin, and disclaimed any intent to limit defensive damages after 1 year.

The courts that originally disallowed post-limit 1640 damages generally analyzed the issue based on the artificial distinction between a common law right, a statute of limitation and a statute creating a new substantive right, [the "statutorily created right" doctrine rejected by James] using the same analysis as the Beach majority. see for example Ken Lu Enterprises v. Neal, 223 S.E.2d 831,833-835 (App.N. C.1976),cert.den. 225 S.E.2d 829 (N.C.1976), cert.den. 97 S.Ct. 533, 429 U.S. 1002 (1976), Heulett v. John Blue, 344 So.2d 505,507-508 (App.Ala.1976), Public Loan v. Hyde, 390 NYS 2d 971,973-974 (1977).

Devlin, p.973, noted the split and followed the cases that did not allow defensive time barred damage claims. Devlin said Congress would overrule its opinion in the 1980 Act but deferred to Congress to allow claims after the limit expired absent express statutory authority to allow the claim Id. 973,fn 1. Congress adopted the cases allowing post-limit defensive damages relied on in the Dawe cases, and James, and rejected Devlin. Congress disapproved of Devlin in 1980 TILA and therefore disapproves of Beach's opinion.

The history of 15 U.S.C.1640(e) as amended in 1980 thus shows

Congress did not originally address defensive damage claims in 1968 or 1974. A split developed after 1974 over whether the right to damages was a right created by statute and ended when the statute expired, or one that would survive by recoupment. Congress dealt with the split by allowing defensive damage claims in 1980, thus adopting James and killing the "statutorily created right" doctrine for TILA. Although Congress did not address defensive rescission in 1980, Beach's divided panel overlooked the fact Congress did not need to address defensive rescission in 1980, just as they had no need to address defensive damages in 1974, because no split of cases existed on either issue when Congress amended the statute.

Congress did not show an intent to bar post-limit defensive rescission in 1980. Congress treated post-limit rescission in 1980 in the same way they treated post-limit damages in 1974. Congress simply did not address a non-existent problem. Congress did not need to resolve a split of authority on damages in 1974 when they added 15 U.S.C.1635(f) and did not need to resolve a split of authority on rescission in 1980 when they added 15 U.S.C. 1640(e) to allow post-limitation damages defensively. see Ablin.

Beach's majority overlooked this legislative history in its analysis, then relied on pre-1980 TILA 15 U.S.C.1640(e) damage cases using the "statutorily created right" doctrine Congress and the unanimous case law rejected as wrong to support its opinion. Congress reconciled conflicts on post-limit 15 U.S.C.1640(e) damage cases by rejecting Devlin and allowing not barring claims in 1980. James rejected the same lender attempts to apply the Devlin cases

to rescission. Smith in 1984, Dawe p.800 in 1984 and Ablin in 1988 p.381-382 looked at the same pre-1980 1640(e) damage cases Devlin p.973 cited. All rejected Devlin, and used the reasoning in the cases Congress approved of in 1980 when they rejected Devlin.

Reiter, p.1218, Smith p.1553, and Coxson p.193-194 apply the Beach dissent's 3 prong test to determine if the consumer could bring a time barred TILA claim. All reject the "statutorily created right" doctrine as dead. James in 1980, Smith and Dawe in 1984, and Ablin in 1988 looked at the pre-1980 damage cases and correctly reasoned that Congress killed the artificial "statutorily created right" doctrine in 1980 for TILA cases. James, Smith and the Dawe cases embraced the opinions Congress embraced in 1980 when Congress ended all debate on the subject by rejecting the Beach "statutorily created right" doctrine.

D. EQUITABLE NATURE OF RECOUPMENT

GW may cry inequity by applying the rescission remedy, arguing it is unfair to offset the principal by past collected interest, loss of post-default accrued interest, and pay the Beaches' costs and fees. The argument has a number of flaws, notwithstanding the fact that Rudisell, p.248 already considered and rejected a similar lender argument.

Congress originally passed an unlimited right to rescind in 1968. Therefore, Congress already examined and accepted the result of rescission on lenders after 3 years in 1968 when they passed TILA's unlimited rescission right. Congress originally would allow consumers to rescind on default after 29 years and 11 months of a

30 year mortgage if the lender erred under TILA despite the result to the lender. Congress would sanction and applaud the Beach post limit result to GW had the Beaches defaulted after 359 payments.

The report of January 3, 1972 Annual Report to Congress on TILA by the Board of Governors of the Federal Reserve System, and December 1972 Report of the National Commission on Consumer Finance proposed the rescission limit, but not to deal with the monetary result of rescission on lenders after 29 years 11 months. Both the FRB Governors and Nat. Commission were concerned that rescission after a sale would cloud titles. Neither report nor Congress cited a concern over the monetary result of a 359 month rescission on a lender as a reason for the 3 year limit. Congress passed the 3 year limit for the sole purpose to clear title to property:

> "As a result, the titles to many residential real estate properties may become clouded by uncertainty regarding these rights of rescission. The Board recommends that Congress amend the Act to provide a limitation on the time the right of rescission may run." January 3, 1972 Annual Report to Congress on TILA by the Board of Governors of the Federal Reserve System, p.19.

> "The FRB pointed out in two previous reports that the rescission period runs indefinitely unless required disclosures have been made and notice of rescission provided. This clouds the title to many residential properties and injures consumers in the long run. **The Commission supports the recommendation of the Board of Governors of the Federal Reserve System that Congress amend the [TILA] to limit the time the right of rescission may run where the creditor has failed to give proper disclosures.** The period recommended by the FRB (three years or until the property is sold, whichever is shorter) appears reasonable." December 1972 Report of the National Commission on Consumer Finance, p. 189-190.

The legislative history of 15 U.S.C. 1635 shows Congress was not concerned with the monetary result of a post 3 year rescission on a lender when they passed 15 U.S.C. 1635 in 1968 and was not

concerned with the result on the lender when they passed 15 U.S.C. 1635(f). Congress amended rescission in 1974 only to prevent title clouds, not to remedy the monetary results of rescission on lenders after 29 years 11 months. If post 3 year rescission does not cloud title, Congress would decidedly approve the monetary result on GW, who does not, and cannot cite the result on a lender as a basis to add the 1974 3 year limit. [This belies the floor comments of Rep. McCollum and Sen. Mack. [see Brief Point II E].

Since Congress passed the 3 year rescission limit to prevent title clouds, permitting defensive rescission after 3 years when the consumer still has title is consistent with TILA's express purposes in general, rescission in particular, and the 1974 3 year limit amendment despite the result on a lender; that is, when the consumer still owns title, no title cloud exists after 3 years. Rescission will still protect consumers and return the parties to the status quo before closing, consistent with TILA rescission's stated purpose, despite the result on the lender.

GW's "inequity argument" implies the Beaches are defaulting unsympathetic consumers, the TILA violation is not related to the default, and the Beaches will get a windfall if the court allows a post limit rescission. Congress intended consumer windfalls when it passed 15 U.S.C. 1635[1968]. Griggs v Provident Cons Disc. Co., 680 F2d 927,933 (3rd Cir1982). Congress was not concerned with consumer windfalls when it passed the 1974 3 year limit. No real windfall exists. GW gets their principal and the Beaches get the charges. TILA does not require GW to pay interest until the Beaches demand

rescission. GW used the Beach's money for 8 years, did not disclose the correct terms or paying for the use, which is a windfall to GW.

GW gets a windfall if the Court lets them collect the mortgage payments, foreclose the Beach home, dispossess the Beaches and avoid TILA rescission despite major serious TILA errors. [GW does not contest the original errors and committed another separate TILA error by refusing a valid rescission request. Shepard v. Quality Window Siding 730 F.Supp 1295,fn 8 (D.Del.1990)]. Porter, p.1078 and Semar, fn1 701-702,704,705 reject the notion TILA only protects unsophisticated consumers who read and relied on inaccurate TILA information unrelated to the consumer's default.

Dawe balanced the equities for consumers and ruled Congress wants a consumer to defend foreclosure by rescission rather than encourage lenders to avoid TILA liability by waiting more than 3 years to sue. Allowing creditors to profit from TILA errors because 3 years passed would not further TILA's purposes. The Dawe cases and Reiter cases reject GW's cry of consumer windfall when a consumer in default can rescind after several years.

Dawe holds inequity exists by letting lenders avoid rescission after 3 years when a consumer gives a lien and loses his home based on wrong TILA information. Congress' concern, articulated in the Dawe cases, are inequity to consumers not lenders and furthering Congress's purpose to protect consumers. Given TILA's remedial purpose, equities protect consumers from foreclosure based on wrong terms rather than protect lenders from TILA errors after 3 years.

Lenders protect themselves by properly disclosing and putting

in place procedures to catch and correct errors under 15 U.S.C. 1640(c). Lenders protect themselves after closing by informing consumers of the error, giving correct disclosures, and adjusting the account under 15 U.S.C. 1640(b). Imposing liability after 3 years furthers Congress' purpose to protect consumers and encourage accurate disclosure by forcing lenders to: give correct initial disclosures; examine loans post-closing for accurate disclosure; follow 15 U.S.C. 1640(b) after finding violations. This furthers compliance, allows consumers to make informed credit decisions and protects consumers. Shielding lenders from liability frustrates TILA's purpose and encourages lenders to avoid correcting errors after finding an error by holding mortgages for 3 years then suing on default rather than comply with 15 U.S.C. 1640(b).

Consumers would borrow from violative lenders who understate APRs and FCs making uninformed credit decisions. Compliant lenders could not compete with non-compliant lenders because his loan would be more expensive, leading to TILA violations, misinformation about true costs of credit, and frustrating TILA's stated purpose.

E. 1995 TILA AMENDMENTS

GW may wrongly rely on the 1995 amendments to claim Congress rejected rather than embraced defensive post-3 year rescission recoupment. The legislative history does not support GW.

The House Banking Committee's first TILA amendments in March, 1995, made the 3 year limit an absolute bar to rescission and superseded any state law in the area. The Committee asked Congress to overrule the Dawe cases. The full Congress not only refused to

overrule Dawe, but embraced Dawe in 15 U.S.C. 1635(i)[1995] as a compromise to the original TILA bill. Congress clearly intended to allow defensive rescission since they were asked to, but refused to pass an absolute bar to TILA rescission. T.I.M.E. Inc. v. United States, 97 S.Ct.904,912, 359 U.S.464,478 (1959).

Congress ended debate about recoupment rescission. The first March Committee draft asked to absolutely bar rescission after 3 years. The last Committee draft in June 1995 deleted the absolute bar and was silent on the subject. However, the September 30, 1995 bill Pres. Clinton signed was a compromise that added the post-3 year recoupment language found at 15 U.S.C. 1635(i)(3)[1995].

Rep. McCollum's March, 1995 bill was a part of a larger bill that Pres. Clinton threatened to veto. The lending lobby and their legislators like Reps. McCollum, and Sen. Mack had an extraordinary problem. They had to get the 1995 TILA Bill passed by September 30, 1995 or the six month moratorium on Rodash class certification would expire. Failing that, they would not pass the TILA amendments before 1996 in the face of Pres. Clinton's veto. Many Rodash class actions would be certified, exposing lenders to class rescission and defeating the purpose of the 1995 amendments. Rep. Leach said:

> "This bill was considered as one section of the regulatory burden relief bill that was reported favorably out of the Committee on Banking and Financial Services this past June. The reason for moving this section independently from [the act] is that the moratorium on class action lawsuits which was passed earlier this Congress (H.R. 1380) expires on October 1, 1995." Cong. Rec. H. 9514 Sept. 27, 1995].

In order to remove the Amendments from the larger bill, the lender's legislators could only remove it by regular vote [which

would require new hearings into 1996] or by acclamation [100% approval by both the House and Senate]. Acclamation would move the bill before October 1, 1995, but anti-consumer legislators could not get acclamation without changing certain provisions to protect consumers, as insisted on by pro-consumer legislators.

Congress compromised by grandfathering in existing Rodash suits for consumers and embracing the Dawe cases by allowing post limit defensive rescission by recoupment in 15 U.S.C. 1635(i). [see March and June 1995 bill and final bill]. The final bill approved by compromise in the full House and Senate varied from the versions approved by any committee. Rep. Leach said:

> "In committee consideration the provisions of this bill received widespread support on both sides of the aisle. In addition in an inverted process manner, extensive negotiations have taken place with the other body and several modifications to the House Banking Committee have been made." [emph. added. Cong. Rec. H. 9514 Sept. 27, 1995].

Senator Sarbanes said:

> "The House Banking Committee included a response to the Rodash problem in a larger banking bill reported out of committee earlier this year. That bill, in my view went beyond fixing the Rodash problem. If passed it would have weakened the TILA and undermined critical consumer protections.
>
> "[to] enact a solution to [Rodash] before the moratorium expires, agreement was reached to try to move the Rodash package as a separate bill. Negotiations were undertaken between the House and Senate and a compromise was reached which is contained in H.R. 2399. The House passed H.R. 2399 on Wednesday by unanimous consent. The Senate will do so today.
>
> "The bill before the Senate today improves significantly the measure passed by the House Banking Committee." [emph. added. Remarks of Sen. Sarbanes, Cong. Rec. S. 14567 Sept. 28, 1995].

The compromise preserved the consumer's right to rescind after 3 years by adopting the Dawe recoupment cases. Rep. Gonzalez said:

"I commend the authors of this legislation .... for their efforts to give the mortgage industry relief without unduly trampling consumer rights .... Second I want to emphasize that the bill is a compromise....In crafting this legislation pains were taken to ensure that important consumer safeguards were not dismantled. The right of rescission is an extraordinary [consumer safeguard]. I am pleased that this right was largely preserved and that the consumer [can rescind] in particular circumstances against foreclosure" remarks of Rep. Gonzalez 9/27/95 H 9515 Cong. Rec.].

Senator D'Amato said:

"H.R. 2399 also contains substantive protection for consumers. It retains the 3 day right of rescission and creates a right of rescission in the mortgage foreclosure context." Remarks of Sen. D'Amato Cong. Rec. S 14567 Sept. 28, 1995,

Sen. Sarbanes said:

"The Bill today improves significantly the measure passed by the House Banking Committee. Under the original House bill, consumers would have lost the right of rescission for a whole class of loans even if the most egregious [TILA errors] were committed....Moreover, the bill protects the most vulnerable citizens from abusive lenders. It provides consumers with [TILA] protection when faced with foreclosure." Remarks of Sen. Sarbanes Cong. Rec. S 14567 Sept. 28, 1995.

It makes no sense to say Congress passed 15 U.S.C. 1635(i) to preserve consumer rescission recoupment as a foreclosure defense before 3 years because consumers could always rescind to defend a foreclosure before 3 years without the amendment. Imputing Beach's majority interpretation to 15 U.S.C.1635(i)[1995] would render the amendment meaningless. The Supreme Court does not allow giving a meaningless interpretation to a statute. Mackey v Lanier Collection Agency, 108 S.Ct.2182,2189,486 U.S.825,837 (1988), Jarecki v. G.D. Searle & Co., 81 S.Ct. 1579,1582, 367 U.S. 303,306 (1961).

In light of the comments by: Sen. Sarbanes; Congress improved McCollum's bill by preserving rescission especially to protect the most vulnerable citizens from abusive lenders when faced with

foreclosure: Rep. Gonzalez; rescission is an extraordinary consumer safeguard which the 1995 Act preserved in particular circumstances against foreclosure: ultra conservative Sen. D'Amato [N.Y.]; the bill keeps substantive protection for consumers and creates a right of rescission in the mortgage foreclosure context. The only way the 1995 bill creates a right in a foreclosure context is if Congress intended consumers to rescind after 3 years because consumers could always rescind to defend foreclosure before 3 years.

GW may rely on certain comments of some legislators and what they claim are portions of a committee report. The argument is somewhat disingenuous and confusing, especially since GW's lawyer helped the lender lobby push the 1995 changes through Congress. The final version, approved by compromise in the full House and Senate, varied from the versions approved by any committee as noted in Rep. Leach's and Sen. Sarbanes' comments above. No committee report on the final bill as passed exists because the full Congress engaged in extensive negotiations and modified the last bill to come out of Committee. Negotiations and changes occurred within 48 hours of the September, 27 and 28, 1995 votes which preclude any possibility of a Committee Report on the final bill President Clinton signed.

GW cannot rely on legislator's comments about Congress' intent of the 1974 1635(f) amendment. Post-enactment floor statements by individual legislators purporting to construe an earlier statute have little if any weight in judicial construction of a statute. Quern v. Mandley, 436U.S.725,736,n.10,98 S.Ct.2068, 2075. Giving any weight to legislator's comments is particularly unjustified

when the legislator was not a member of Congress when the law was enacted. United States v. Mine Workers, 330 U.S. 258, 281-282, 67 S.Ct. 677, 690 (1958).

If this were the case, then individual legislators who wanted courts to apply their interpretation of a bill would only have to get up in Congress and recite their version of the law into the Congressional Record. One legislative body cannot presume to know what a previous legislative body intended when the previous session gave no indication of their intent. Heckler v. Turner, 470 U.S. 184,209 (1985), Russello v. United States, 464 U.S. 16 (1983). Rep. McCollum and Sen. Mack are really trying to give their spin on 1974 TILA and impose their [the lending lobby's] intent onto a previous legislative body when they put terms like "three years means three years" in the Congressional Record. The history of 1635(f) as shown above belies the claim that Congress intended an absolute limit.

Congress originally passed TILA in 1968 and the 3 year limit in 1974. Rep. McCollum, and Sens. Mack were not members of the 1968 Congress that passed the original 15 U.S.C. 1635, nor 1974 Congress that passed the 3 year limit of 15 U.S.C. 1635(f). The Court, under U.S. Supreme Court precedent, cannot give any weight to either Mack or McCollum's statements. It does not even appear that Sen Mack or Rep. McCollum presented them live but rather inserted them in the record because the statements are identical. They are merely trying to give their spin on a 1968 and 1974 Act of Congress to which they did not belong. The comments have no value in assisting the Court with the issues presented.

F. THE LEGISLATIVE HISTORY SUPPORTS RESCISSION RECOUPMENT

The legislative history shows Congress rejected the Jamerson v. Miles 421 F.Supp. 107 (W.D. Tex. 1976) statutory created right doctrine, adopted James, and reconciled the split on 15 U.S.C. 1640 (e) defensive damages by approving the cases relied on in James, Smith, Dawe p.800 and Ablin p.381, and overruling the cases and statutorily created right doctrine relied on by Devlin p.973 when they amended 15 U.S.C. 1640(e) to allow time barred damage claims. The history of 15 U.S.C.1640(e) through 1980 examined in light of the reported cases, overlooked in Beach, leads to 7 inescapable conclusions: 1) In 1968, Congress created a statutory right to damages for TILA violations and ended the right after 1 year in 1640(e); 2) The post-1974 cases split as to whether consumers could collect damages defensively after 1 year expired. The cases that disallowed damages generally supported their opinion by using the artificial "statutorily created right" doctrine; 3) Congress soundly rejected the "statutorily created right" doctrine, and adopted the cases allowing post 1 year limit damages by set off or recoupment in 1980; 4) Congress' 1980 1640(e) amendment approved the reasoning of the damage cases Dawe relied on to support its opinion and hence approved Dawe, Ablin, McClammy, Shaw, James, and rejected Jamerson and Devlin; 5) Congress' 1980 1640(e) amendment overturned Devlin and the cases relied on in Devlin; 6) Congress in 1980 rejected the notion a TILA claim dies with the expiration of the time to bring a TILA action, and rejected the divided Beach opinion to the extent it relies on Devlin and the "statutorily

created right" doctrine; 7) Congress in 1995 treated the rescission limit issue in the same way it treated the damage limit by adopting those cases that allow it and rejecting those cases that give any weight to the "statutorily created right" doctrine.

Devlin held the authority to allow post-limit damage claims defensively rested solely with Congress: "We are convinced that the remedy of the petitioners/debtors herein is by a change in the statute." Id., 973-974. [emphasis added]. The only Devlin holding still alive in 1995 in light of 15 U.S.C. 1640(e) [1980] is that Florida will defer to Congress to change the 15 U.S.C.1635(f) 3 year limit, as Devlin did with the one year limit of 15 U.S.C.1640 (e). Congress' 1995 amendment disclaimed any intent to bar post-limit defensive rescission after 3 years. If the Court relies on Devlin, the Court can only allow, not bar, defensive rescission claims under Devlin, in light of 15 U.S.C.1635(i)(3)&(4) [1995].

Congress had no need to amend 15 U.S.C. 1635 in 1980 because no split of authority existed. Dawe, the first case on the subject, was still at the trial level when Congress passed the 1980 1640(e) amendment. Id p.798. Beach,fn.2, cites a split of authority on post limit rescission. Conspicuous by their absence from Beach are cites to the contrary cases. GW can only cite one potentially contrary case, In Re Cox, 162 BR 191 (Bkr.C.D. Ill.1993). It is at a minimum wishful thinking to hope that Cox's reference to "to the extent that **they**" actually refers to the Dawe cases.

Dawe issued the first opinion allowing post-limit rescission in 1984, 4 years after Congress amended 15 U.S.C. 1640(e). Ablin

and McClammy adopted the Dawe reasoning in 1988, and Shaw adopted Judge Gross' Dean opinion, 4th DCA Case #94-01072. The unanimous reported opinions as of 1993 allowed post limit TILA rescission.

Congress passed many TILA amendments after Dawe, Ablin, and McClammy: 15 U.S.C. 1607 & 1608 as amended Oct. 4, 1984 (98 Stat. 1708), Aug 9, 1989 (103 Stat 183), and Dec. 19, 1991 (105 Stat. 2236); 15 U.S.C. 1609, 1632, & 1637 as amended Nov. 3, 1988 (102 Stat. 2960, 2966, 2967, 2968, 4731). Congress added 2 new sections in 1988 and a new section in 1992. see: 15 U.S.C. 1637a [Open ended Home Secured Loans] as added by an act of Nov. 23, 1988 (102 Stat. 4725); 15 U.S.C. 1647 [Home Equity Plans] as added by an act of Nov. 23, 1988 (102 Stat. 4731); 15 U.S.C. 1615 [Prohibition of Rule of 78s Loans] as added by an act of Oct. 28, 1992 [106 Stat. 3891]. The complete history of TILA, overlooked by Beach, shows Congress passed several TILA amendments after Dawe to McClammy, but Congress never amended rescission to overturn the Dawe cases. Congress' refusal to overturn Dawe from 1984 to 1993 shows Congress adopted Dawe. Blau v. Lehman, 82 S.Ct. 451,456-457, 368 U.S. 403,413(1962).

Congress embraced the Dawe cases again by rejecting The House Banking Committee's first March, 1995 TILA amendments. The rejected March 1995 bill made the 3 year limit an absolute bar to rescission and superseded any state law in the area. Since Congress was asked to overrule the Dawe cases in 1995, and as a full body, not only refused, but embraced Dawe in 15 U.S.C.1635(i)[1995], Congress clearly intended to allow post-limit rescission defensively by recoupment. T.I.M.E. p.912.

The December 1993 Cox trial opinion [the only cited case that creates a "split" on the issue] revived the once dead "statutorily created right" doctrine. Congress swiftly addressed rescission recoupment within 21 months of Cox, adopted the Dawe cases again and rejected Cox in 15 U.S.C. 1635(i)[1995]. Congress dealt with rescission recoupment in 1995 in exactly the same manner [but faster than] Congress dealt with damage/recoupment in 1980; by slaying the "statutorily created right" doctrine a second time.

Congress rejected Devlin and allowed post limit damage claims defensively. 15 U.S.C. 1640(e) [1980] states:

> "This subsection does not bar a person from asserting a violation of this title in an action to collect the debt which was brought more than 1 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 in state law."

Congress rejected Cox and adopted the Dawe cases in the Sept. 30, 1995 TILA Amendment by allowing post limit rescission claims. The new subsection, 15 U.S.C. 1635(i)(3)&(4) used virtually the same language as 15 U.S.C. 1640(e) [1980]:

> "(3) **Right of recoupment under state law:** Nothing in this subsection affects a consumer's right of rescission in recoupment under State Law."
>
> "(4) **Applicability:** This subsection shall apply to all consumer credit transactions in existence or consummated on or after the date of [this amendment]."

The legislative history of 15 U.S.C. 1635 and 1640(e) when examined with the reported opinions supports defensive post-limit rescission by recoupment because the history of the two TILA sub-sections is identical:

Legislative History of 15 U.S.C. 1640(e)

1968 Congress created a right to TILA damages but imposed a 1 year limit. Congress did not write a post-limit defensive damage provision. Congress addressed rescission in 1974, but did not deal with post limit damages because no split of cases existed. A split of cases developed over a consumer's right to post 1 year defensive damages after Congress' 1974 TILA amendment. The cases to disallow damages used the "statutorily created right" doctrine to disallow recoupment. Congress addressed the split in 1980, rejected the cases that refused to allow post limit damages [including Devlin], rejected the "statutorily created right" doctrine and adopted the cases that allowed post-limit damages. Congress did not address post limit rescission in 1980 because no split of cases existed.

Legislative History of 15 U.S.C. 1635(f)

Congress created an unlimited right to rescind in 1968 and passed a 3 year limit in 1974. Congress did not have a post limit defensive provision. Congress amended TILA in 1980 to address a split of cases and allow damages, but did not amend rescission after 3 years because no split existed. Congress addressed the Beach split of cases in 1995, rejected the cases that refused to allow post limit rescission [Cox], rejected the "statutorily created right" doctrine again and adopted the Dawe cases allowing post-limit rescission in the same language as post limitation 15 U.S.C. 1640(e) damage claims.

If the Court uses the Devlin reasoning, the Court must defer to Congress to change 15 U.S.C. 1635. 1995 Congress amended 15 U.S.C. 1635, addressed the split of rescission recoupment cases,

adopted the Dawe cases, killed the "statutorily created right" doctrine, and, under 15 U.S.C. 1635(i)(4), applied the change to all existing TILA loans, including the Beaches.

G. FEDERAL LAW ALLOWS POST LIMIT DEFENSIVE RESCISSION

Beach's divided opinion treated the 3 year limit of 15 U.S.C. 1635(f) as a statute that limited a substantive statutorily created right. Congress [and the Supreme Court in Reiter and Bull] rejected Beach's artificial distinction for TILA cases twice, in 1980 when they amended 1640(e) [adopting James and rejecting Jamerson and Devlin] and in 1995 when they rejected the Committees' first draft and added 1635(i). The overwhelming unanimous authority on the issue, from 1995 Congress to the U.S. Supreme Court in Reiter p.1218 to the 11th Circuit in Smith, to the 5th Circuit in James and Coxson, to the 3rd Circuit in Silverman, to Colorado in Dawe, to New York in McClammy, to Illinois in Ablin and Westbank, to Pennsylvania in Shaw, reject the notion TILA rescission dies when the statute expires.

James p. 729 severely criticized and rejected Jamerson in the context of whether rescission survived the obligor's death. James applies to defensive rescission, as noted by Dawe and adopted by Congress twice, in 1980 and 1995, and the Supreme Court. Reiter and James, 728-729,fn 2, reject Jamerson and do not distinguish between statutorily created TILA rights versus those rights that exist at common law for TILA's statute of limitations for recoupment. In fact, recoupment is much broader. No common law right existed to collect a tax refund. However, Bull, p. 700 refused to distinguish

whether the right to the refund arose by statute or common law:

> "An action will lie whenever the defendant has received money which is the property of the plaintiff and which the defendant is obliged by natural justice and equity to refund. The form of the indebtedness is immaterial....A claim for recovery of money so held may not only be the subject of a suit in the Court of Claims, as shown by the authority referred to, but may be used by way of recoupment and credit in an action by the United States arising out of the same transaction."Id.

Federal law supports the Dawe cases which allow post 3 year rescission, adopted by Judge Pariente but rejected by the majority. Dawe refused to determine if it had to apply state or federal law to recoupment but both would allow the claim. Id. fn 8 pg 800. Dawe cites Bull: "For example, federal courts permit recoupment for all matters arising out of the same transaction as the Plaintiff's claim." Id. fn 8 p. 900 [emph. added]. The divided Beach panel overlooked the fact that Bull is not limited to its facts, but allows recoupment for all matters.

Dawe states the U.S. Supreme Court ruled as early as 1935 that a Defendant [a U.S. taxpayer] could raise a time barred claim [a claim for a tax refund] even though the claim [for a tax refund] was a statutorily created right [the right to sue the IRS never existed at common law]. The Supreme Court from Bull to Reiter does not distinguish between a statutorily created Federal right [the right to sue the IRS for a refund] and a common law right for purposes of defensive recoupment claims.

In Reiter, no right to recover damages under 49 U.S.C.11701(a) for the difference between a tariff rate and the reasonable ICC rate under ICC Sect. 11705(b)(3) existed under common law. Id. p. 1217. Congress statutorily created the right and placed a 2 year

limit on the right to recover under 49 U.S.C.11706(c)(2). Id.1217-1218. Reiter rejects the idea that a Plaintiff can wait for a limit to run then sue to avoid a time barred compulsory counter claim that would offset the debt, even if the counter claim is created by statute. Id. 1218. The U.S. Supreme Court embraced the concept of defensive post-limitation TILA 15 U.S.C. 1635 rescission in Reiter:

> "Courts of Appeals have understood [United States v. Western Pacific R. Co., 352 U.S.59, 71, 77 S.Ct. 161,169 (1956)] as expressing not just a narrow holding based on the United States set-off statute, but a general principal of recoupment applicable in other contexts. See Distribution Services Ltd. v. Eddie Parker Interests, Inc., 897 F.2d 811,813 (CA5 1990); in re Smith, 737 F2d 1549, 1554 (CA11 1984); 118 East 60th Owners Inc. v. Bonner Properties, Inc., 677 F.2d 200,203 (CA 1982); Luckenbach S.S. Co. v. United States, 312 F.2d 545, 549, n.3 (CA2 1963). Id. p. 1218.

Judge Pariente's dissent, p.20. cites the correct and broader concept in Smith [cited as Smith v. American Financial Systems, 737 F.2d 1549,1552 (5th Cir 1990)], embraced by the U.S. Supreme Court in Reiter, p.1218: a TILA defendant can raise a time barred claim by way of recoupment. 4 compelling Supreme Court principles emerge from Bull and Reiter: 1) defensive recoupment is not as narrow as Beach holds, but is extremely broad to cover all matters; 2) the Supreme Court expressly adopted Smith's concept of TILA recoupment after the limitation in Reiter p. 1218; 3) the Supreme Court, by adopting Smith in Reiter after Congress amended 15 U.S.C.1640(e), rejected the "statutorily created right" doctrine; 4) the Supreme Court by adopting Smith in Reiter after Congress amended 15 U.S.C. 1640(e), embraced the 3 prong test of Smith for a TILA claim after the limitation expires.

Judge Pariente correctly noted all 3 prongs of the Smith test

[p. 1552] apply here: 1) the TILA violation and the Beaches's debt arose from the same transaction; 2) the Beaches asserts the claim as a defense; and 3) the GW claim is timely. The Supreme Court from Bull to Reiter rejects artificial distinctions between common law and statutorily created Federal Rights. In Crossett Lumber Co. v. United States, 87 F.2d 930 (8th Cir 1937), no common law right to a tax refund existed. In Pennsylvania R.Co. v. Miller, 124 F.2d 160 (5th Cir 1942), no common law right to damages under an ICC Bill of Lading existed. In Distribution Services, no common law right to damages under COGSA existed.

H. FLORIDA LAW ALLOWS POST LIMIT DEFENSIVE RESCISSION

This Court in Allie, and Rybovich, tells us Florida is as expansive as Federal Law and allows time barred recoupment claims defensively. Beach's divided opinion overlooked this Court does not recognize a distinction between a statutorily created right versus a common law right when the defendant raises his time barred statutory claim as a defense to a foreclosure suit.

Beekner, allowed a defendant to raise a time barred usury claim by recoupment. The defense of usury never existed at common law and has always been a right created by statute. see Coe v. Muller, 74 Fla. 399, 77 So. 88 (Fla. 1917), Matlack Properties v. Citizens & Southern Nat. Bank, 120 Fla. 77, 162 So 148 (Fla. 1935), Sodi, Inc. v. Salitan, 68 So.2d 882 (Fla. 1953).

Beach held that modern banking practices prevent a lender from holding a TILA violative loan past 3 years to avoid rescission. A borrower controls whether the lender can foreclose by not paying

the mortgage, and thus by defaulting several years after the loan, could take advantage of the creditor by strategically defaulting [opinion p.8-9]. This analysis overlooks two facts: the creditor originally took advantage of the consumer by giving him false TILA information about the loan thus exposing his home to loss based on inaccurate terms; the same principles apply to a loan infected with a statutorily created usurious interest rate.

Florida's usury laws recognize that the consumer was at the mercy of the lender and subject to his utmost exactations and avaricious demands unless protected by law. Usury shields consumers from the lender's grasp and saves consumers from the injurious consequences of his own weakness and inability. Pushee v. Johnson, 123 Fla.305, 166 So.847 (Fla. 1936). Usury's humanitarian purpose protects needy borrowers from unconscionable money lenders. First Mortgage Corp. of Vero Beach v. Stellmon, 170 So.2d 302, (Fla. 2 DCA 1965), cert.den.174 So.2d 32. Hence, Florida's usury laws and Federal TILA are 2 parallel consumer protection statutes providing their own respective remedies for their own violations. Williams v. Public Finance Corp., 598 F2d 349,359 (5th Cir 1979).

Beekner looked at the purpose of Florida usury law, identical to TILA, and the same policy concerns Beach used to repudiate post-limit defensive rescission. Modern banking rules would prevent a lender from holding a usury infected loan past 4 years to avoid the usury claim. The borrower charged with usurious interest can also control whether the lender forecloses by not paying the loan. By defaulting several years after the loan, he could take advantage of

the creditor by strategically defaulting. The effects of usury are more severe than TILA violations: forfeiture of all interest, Fla. Stat. 687.04; an inability to enforce the debt, Fla.Stat. 687.071 (7); criminal sanctions, Fla.Stat. 687.071 (2)-(4); loss of the mortgage, Indianapolis Morris Plan Corp. v. Portela, 364 So.2d 840(Fla. 3DCA 1978); and a court cannot modify the usury penalty, as a court can with TILA rescission.

These policy concerns did not prevent Beekner from allowing a defensive time barred usury claim. Beekner did not concern itself with the effect of post limit liability for usury on lenders but decided to protect consumers from loss to usury infected loans rather than protect lenders from the usury penalty merely because of the passage of time.

This Court did not protect lenders based on these concerns in Allie, which specifically allowed a post limit contract rescission. Allie adopted Beekner and expanded liability after a limit runs by giving consumers affirmative recovery. Hence, this Court rejects the notion that a consumer cannot raise a statutorily created but time barred TILA rescission claim past the limitation period as a defense to a foreclosure, despite the result on a lender. No distinction exists between allowing a defendant to seek recoupment by his time barred statutorily created usury claim as a defense to a foreclosure [Beekner] or allowing him to collect an affirmative recovery on a time barred rescission claim [Allie], and allowing him to recoup his time barred statutorily created TILA rescission claim as a defense to foreclosure, especially when: 1) the purpose,

to protect consumers are identical; 2) policy concerns of post limit usury claims and TILA rescission are identical; 3) results on lenders are more severe for usury than TILA rescission [forfeiture of all interest, an inability to enforce the debt, criminal sanctions, loss of the mortgage, and no modified usury penalty]. Hence, the divided Beach opinion expressly and directly conflicts with Beekner and Allie.

Rybovich discussed title problems if it allowed post limit specific performance. Rybovich notes post limit rescission of a contract for sale of a home does not present the same title problem as post limit specific performance. Rybovich would allow post limit rescission for TILA when rescission presents no title problem, such as here were the Beaches have not sold the home:

> "[O]ther remedies that remain available to buyers can include rescission, liquidated damages, out of pocket expenses, or the value of the bargain, wherever appropriate." Id. p. 272.

Rybovich recognizes that there are no title problems to post limit rescission. Beekner is not concerned with rescission on a lender post 3 years. Hence, Florida allows, and does not bar post limit TILA rescission, despite the result to a lender.

III. IMPOSITION OF THE RESCISSION REMEDY

A. A CONSUMER CAN ENFORCE IMPLICIT VESTING OF PRINCIPAL WHEN HE CORRECTLY RESCINDS UNDER 15 U.S.C. 1635 AND THE LENDER REFUSES TO HONOR HIS RESCISSION REQUEST.

TILA's 3 step rescission process is triggered by the consumer delivering the rescission notice to the lender. 15 U.S.C. 1635(b), Reg. Z 226.23 (d)(1), OSC 226.23(d)(1)-1. When the lender receives the notice, the lien is automatically void as a matter of law. 15

U.S.C. 1635(b), Reg. Z 226.23(d)(1). Gill v. Mid Penn Consumer Discount 671 FSupp 1021 (E.D. Pa. 1987), Aff'd 853 F2d 917 (3rd Cir. 1988), Williams 968 F2d. The affirmative defense sent to GW's attorney triggers the consumer's rescission right. Elliott v. ITT Corp., 764 F.Supp. 102 (N.D.Ill. 1991), O.S.C.226.2(a)(22)-2.

The creditor must return any money charged to the consumer, 15 U.S.C. 1635(b), Reg. Z 226.23(d)(2), and take the action necessary or appropriate to terminate the lien. Reg.Z 226.23(d)(2), O.S.C. 226.23(d)(1),(2),(3). Williams, Gill, supra; Sosa, Yslas v. D.K. Gunther, 342 So.2d 859 (2 DCA 1977), fn. 2, In Re: Brown, 106 B.R. 852,862 (Bkr.E.D.Pa. 1989); In Re: Tucker, 74 B.R. 923,933 (Bkr.E. D.Pa. 1987); In Re: Gurst 79 B.R. 969,979, app.dis.88-2092 (E.D.Pa. 1988), aff'd 866 F2d 1410 (3rd Cir.1988).

If the lender fails to rescind and do the acts necessary to effect rescission, the right to retain the principal vests in the borrower. 15 U.S.C.1635(b):

> "If a creditor does not take possession of the property within 20 days after tender by the obligor, ownership of the property [the principal debt] vests in the obligor without any obligation on his part to pay for it."

The FRB expressly provides for vesting. Reg Z 226.23(d)(3):

> "if the creditor has delivered any money or property, the consumer may retain possession until the creditor has met its obligation under paragraph (d)(2)...If the creditor does not take possession of the money or property within 20 calendar days after the consumer's tender the consumer may keep it without further obligation."

TILA treats the lender harshly when he fails to rescind; a consumer can enforce rescission, but he has no obligation to return the principal. Gill, Yslas, Sosa, Gurst. Vesting relieves consumers

from the obligation to return the debt borrowed to the creditor. A lender's "carrot" for compliance is collecting the principal. The "stick" for non-compliance is vesting principal in the consumer.

GW refused to cancel during and after trial and lost the right to collect principal. The Court cannot rely on Williams to modify rescission, offset debt, and condition cancellation of the mortgage on return of the net debt. Williams operates against modification in this case. Williams does not even control in light of Pignato v. Great Western 20 FLW D 2388 (Fla.4 DCA 1995), in the face of the 2nd District opinion in Yslas.

Williams ignored the rescission, which resulted in the suit. The lender agreed to rescind in response to summary judgment, then deducted the rescission amount, and asked the court to condition rescission on return of the net debt owed. (p.1138, fn3). The court felt he had no discretion and refused to consider. (p. 1139).

Williams examined rescission's history and purpose, the cases authorizing equitable conditioning (p.1140), and New TILA (p.1141-1142), concluding it could impose conditions during rescission to insure the consumer meets his duty after the creditor performs only under circumstances that are just to both parties. The court should always try to restore the parties to the status quo, "rescission must also maintain its vitality as an enforcement tool." (p. 1142). Williams did not overrule Gill, Sosa, Yslas, or Gurst, but 2 cases holding a court could never consider equity to enforce rescission.

GW presented no evidence Williams characterized as maintaining rescission's vitality as an enforcement tool. They never partially

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performed, acknowledged the error, computed the net debt due, or offered to perform, any one of which maintains TILA's vitality as an enforcement tool. Williams factors are:

Severity of Violation - Several major TILA DS violations and rescission notice errors occurred, unappealed by GW. GW misstated the AF and FC by a number of prepaid finance charges that GW does not dispute on appeal. Response to rescission - Despite numerous major TILA errors GW seeks to defeat rescission after trial and on appeal. Even though GW agrees to the errors they refuse to follow Williams, fought the summary judgment, adamantly refused to rescind and interposed every defense imaginable. They did not take one step to trigger any authority to impose equitable conditions consistent with keeping TILA's vitality as an enforcement tool.

GW could have given their tender amount to the court registry or an interest bearing account, asked for declaratory relief, and given a satisfaction to the court for future recording within 20 days of the affirmative defenses. Aquino v. Pubic Finance, 606 FSupp 504,509 (E.D.Pa.1985).

Rescission's vitality as an enforcement tool-Congress imposed a self enforcing rescission scheme, automatically canceling the security interest, and relieving the consumer of any obligation to pay a charge. Semar. Approving GW's response guts TILA's rescissory scheme, encourages lenders to refuse valid rescission requests, removes consumer leverage over lenders, eliminates TILA rescission as an enforcement tool and lets lenders, not courts, unilaterally impose the lender's concept of equitable conditions in rescission.

If consumers discover errors and send a delayed rescission requests, lenders will fare better in court than if they followed TILA's scheme. The compliant lender would return the FCs and cancel the loan. In contrast, GW, who interposed every defense imaginable through trial, after trial, and on appeal, and agrees to TILA errors still holds the original lien on the home. This result guts TILA's rescissory scheme and encourages lenders to refuse valid rescission requests.

The non-compliant lender when faced with a delayed rescission can refuse to cancel with impunity. If the consumer sues to enforce rescission, the lender can interpose every defense possible, roll the judicial dice and hope to convince a judge no error occurred. If the lender loses, he will still hold a mortgage to the extent the consumer owes a net debt despite numerous egregious violations. The consumer loses his leverage to force a non-judicial rescission.

Had GW voided the mortgage the Beaches could return principal because they could refinance by offering the home as collateral to a new lender. Default does not show an unwillingness to repay. Williams, fn. 10. No evidence exists that the Beaches ever refused to rescind. GW refused to rescind and unilaterally imposed their own rescissory scheme on the Beaches.

B. THE CORRECT MEASURE OF TILA ACTUAL AND STATUTORY DAMAGES FOR A MISSTATED VARIABLE FEATURE EQUAL $1,000.00 AT EACH RATE CHANGE, AND THE AMOUNT OF INTEREST COLLECTED WHEN THE RATE CHANGES ABOVE THE DISCLOSED RATE.

GW over stated the payment amount for the variable payment schedule. They disclosed the payment schedule, the APR, FC, AF, and TOP as estimates. They intermingled the initial contract rate with

the blended APR for a discounted variable note. This misstates the variable feature in violation of 15 U.S.C. 1638(a)(6) and Reg. Z 226.18(g) and gives rise to actual damages, statutory damages and attorney fees. 15 U.S.C. 1640(a)(3). TILA treats errors in the variable disclosure material for continuing rescission rights. O.S.C. 226.23(a)(3)-2.

A lender cannot disclose figures as estimates when he knows the actual figures at closing. Smith 615 F2nd 407, 417-418, In Re Mitchell, 75 BR 593 (E.D.Pa. 1987), O.S.C. 226.17(c)(1)-9. Smith, supra, does not allow a lender to disclose figures as estimates because of the variable feature. A lender must disclose based on the terms at consummation. GW used estimated incorrect figures and referred to the initial contract rate when disclosing the APR. They gave variable rate disclosures that had the capacity to confuse or mislead a borrower. This violates the variable rate disclosure requirement.

TILA treats the rate change resulting from a misstated variable feature as a new transaction. Brown v. Marquette Savings & Loan 686 F.2d 608 (7th cir. 1982), Nash v. First Financial 703 F.2d 233 (7th Cir. 1982). Both Nash, supra and Brown supra apply to Official Board Interpretation 226.810 and old Reg. Z 226.8(b). These are Pre Simplification cases. The new Act takes the same position of old Official Board Interpretation 226.810 and old Reg. Z 226.8(b). Hubbard v. Fidelity Federal Bank, 824 FSupp 909,917, 919, 921 (C.D. Cal. 1993) holds New TILA treats a rate change based on an initially misstated variable feature as a new transaction

giving rise to a new limitation period and new claim for damages at each rate change, noting New O.S.C. 226.20(a)-3 uses identical language as Old TILA relied on in Brown and Nash.

TILA treats each rate change as a new transaction, giving rise to a new TILA disclosure obligation. Brown, Nash. The rate change triggers a new statute of limitations to bring an action. A lender must send a new TILA DS and a new rescission notice at each rate change. Smith 713 F Supp. 354. If the Court finds GW misstated the variable feature, GW would have to send a new rescission notice at each rate change under Smith. Since GW changed the rate within 3 years of the Beaches affirmative defenses, the court need not decide the 3 year limit issue because the Beaches timely rescinded from the last rate change.

1. Rescission and Actual Damages Both Available to Debtor

TILA allows a Court to award statutory and actual damages in addition to rescission. 15 U.S.C.1635(g), 15 U.S.C.1640(g), Sellers p. 122, 123, Geresta v. Hibernia National Bank 575 F.2d 580,583 (5th Cir. 1978), Gill.

2. Rescission

GW must return all charges and payments made whether received by GW, or third persons. GW charged the Beaches $200.00 application fee, $358.15 filing fees, including $194.16 intangible tax, and $1,813.65 in prepaid finance charges. The Beaches paid $52,376.71 to the date of default. Under the Semar rescission formula, the court should order return of the closing charges and all payments collected by GW. The court should give the Beaches $2,000.00

statutory damages for the initial errors, and $2,000.00 statutory damages each for 10 rate change. [15 U.S.C. 1640(a) [1995] raised statutory damages from $1,000.00 to $2,000.00]

The Semar formula takes the face amount of the $97,300.00 note deducts the application fee and closing charges [$2,371.80] the $52,376.71 payments and 10 $2,000.00 statutory damages for each rate change. Under Yslas, GW loses the right to collect principal. The Court should order that the Beaches can rescind, and order the rescission remedy. In addition, the Court should order a positive attorney fee recovery irrespective of any obligation to return principal to GW and without any offsets. Plant v. Blazer Financial Services, Inc., 598 F.2d 1357 (5th Cir. 1979).

3. Actual Damages under **Preston v First Bank of Marietta**

Preston v First Bank of Marietta, 473 NE 2d 1211 (Ohio App. 1983) discussed the measure of damages under TILA for a misstated variable note. The court noted that the measure of actual damages under TILA would be the amount of excess interest collected over the initial contract rate. p. 1215-1216. The Beaches respectfully submit that the trial court erred in refusing to award the interest over the initial interest rate as actual damages.

4. INTEREST ON TENDER OBLIGATION

The rescission affirmative defense triggered GW's obligation to rescind in 20 days and the Beaches need not return principal until GW performs. 15 U.S.C. 1635(b) Williams, Gill. The Beaches had a right to the 15 U.S.C. 1635 tender obligation on the 21st day after delivery of the TILA rescission affirmative defenses on GW's

attorney. Elliot, O.S.C. 226.2(a)(22)-2. The sum was liquidated as of that date, and the Beaches can collect interest on that amount. Gerasta, p.583 specifically held "In accordance with Sect. 1635, the district court entered a judgment recognizing the Gerastas' rescission of the loan agreement and recognizing their right to a complete refund of the money they had already paid to the bank, plus interest." [emph added]. see also Reid v. Prudential Ins. Co. of Am. 755 FSupp 372 (M.D.Fla.1990) [interest on Federal ERISA claim], Shaw v. R. Jennings Mfg. Co, Inc, 573 So2d 1041 (Fla 3DCA 1991), Taylor v New Hampshire Ins Co, 489 So2d 207 (Fla 2DCA 1988), Cooper v. Aetna Cas, 485 So2d 1367 (Fla. 2 DCA 1986), Biscayne Supermarket v. Travelers, 485 So2d 861 (Fla. 3 DCA 1986) as an element of the actual damages for GW's failure to rescind.

CONCLUSION

The Beaches respectfully urge this Court reverse the opinion of the 4th District Court of Appeal and the foreclosure judgment, order entry of judgment in favor of the Beaches, order that GW rescind the mortgage and note under 15 U.S.C. 1635 and Reg Z 226.23, order return of all closing costs, and other charges under the Semar formula, award $2,000.00 statutory damages for initial disclosure errors, and $2,000.00 for the refusal to rescind under 15 U.S.C. 1640, $2,000.00 statutory damages at each rate change, actual damages; prejudgment interest, pay costs and fees to the Beaches under 15 U.S.C. 1640(a)(3), and order GW lost the right to collect principal.

Respectfully Submitted,

JAMES A. BONFIGLIO, ESQ.
Mail to: P.O. Box 1489
Boynton Beach, FL 33425
(407) 734-4503

JAMES A. BONFIGLIO, ESQ.
Fla. Bar No. 288055

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished, by U.S. Mail, to: Steve Ellison, Esq., Broad and Cassel, 400 Australian Ave. S., Fifth Floor, West Palm Beach, FL 33401 this 20th day of May, 1996.

BY: _____

JAMES A. BONFIGLIO, ESQ.
Florida Bar Member No.: 288055
Mailing address: P.O. Box 1489
Boynton Beach FL 33425
(407) 734-4503 or 734-1872(fax)

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,

vs.

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

Respondents.
_____/

APPENDIX TO
INITIAL BRIEF OF PETITIONERS
DAVID R. BEACH and LINDA M. BEACH

1. March, 1995 Proposed TILA Amendments

2. June, 1995 Proposed TILA Amendments

JAMES A. BONFIGLIO, ESQ.
Fla. Bar No. 288055
P.O. Box 1489
Boynton Beach, Fla. 33425
(407) 734-4503, 734-1872 (fax)

Attorney for Petitioners
DAVID R. BEACH and
LINDA M. BEACH,

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1. March, 1995 Proposed TILA Amendments

JAMES A. BONFIGLIO, ESQ.
Fla. Bar No. 288055
P.O. Box 1489
Boynton Beach, Fla. 33425
(407) 734-4503, 734-1872 (fax)

Attorney for Petitioners
DAVID R. BEACH and
LINDA M. BEACH,

104TH CONGRESS
1ST SESSION

H. R. _____

IN THE HOUSE OF REPRESENTATIVES

Mr. MCCOLLUM introduced the following bill; which was referred to the Committee on _____

A BILL

To amend the Truth in Lending Act to clarify the intent of such Act and to reduce burdensome regulatory requirements on creditors.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Truth in Lending Act Amendments of 1995".

SEC. 2. TREATMENT OF CERTAIN CHARGES.

(a) 3D PARTY FEES.—Section 106(a) of the Truth in Lending Act (15 U.S.C. 1605(a)) is amended by adding after the 2d sentence the following new sentence: "The

finance charge shall not include fees and amounts imposed by third parties not affiliated with the creditor (including settlement agents, attorneys, and escrow and title companies) if the creditor does not expressly require the imposition of the charges and does not retain the charges.".

(b) TAXES ON SECURITY INSTRUMENTS OR EVIDENCES OF INDEBTEDNESS.—Section 106(d) of the Truth in Lending Act (15 U.S.C. 1605(d)) is amended by adding at the end the following new paragraph:

"(3) Any tax levied on security instruments or on documents evidencing indebtedness if the payment of such taxes is a precondition for recording the instrument securing the evidence of indebtedness.".

(c) PREPARATION OF LOAN DOCUMENTS.—Section 106(e)(2) of the Truth in Lending Act (15 U.S.C. 1605(e)(2)) is amended to read as follows:

"(2) Fees for preparation of loan-related documents and attending or conducting settlement.".

(d) FEES RELATING TO PEST INFESTATIONS, INSPECTIONS, AND HAZARDS.—Section 106(e)(5) of the Truth in Lending Act (15 U.S.C. 1605(e)(5)) is amended by inserting ", including fees related to pest infestations, premises and structural inspections, and flood hazards" before the period.

SEC. 3. EXEMPTIONS FROM RESCISSION.

(a) CERTAIN REFINANCINGS.—Section 125(e) of the Truth in Lending Act (15 U.S.C. 1635(e)) is amended—

(1) by striking "or" at the end of paragraph (3);

(2) by striking the period at the end of paragraph (4) and inserting "; or"; and

(3) by adding at the end the following new paragraph:

"(5) a transaction, other than a mortgage referred to in section 103(aa), which—

"(A) is secured by a first lien, in any amount; and

"(B) constitutes a refinancing or consolidation of an existing extension of credit.".

(b) TECHNICAL AND CONFORMING AMENDMENT.—Section 125(e)(2) of the Truth in Lending Act (15 U.S.C. 1635(e)(2)) is amended by inserting ", other than a transaction described in subsection (e)(5)," after "a refinancing or consolidation (with no new advances)".

SEC. 4. TOLERANCES; BASIS OF DISCLOSURES.

(a) TOLERANCES FOR ACCURACY.—Section 106 of the Truth in Lending Act (15 U.S.C. 1605) is amended by adding at the end the following new subsection:

"(f) TOLERANCE FOR ACCURACY.—In connection with credit transactions not under an open end credit plan

that are secured by real property or a dwelling, the disclosure of the finance charge and other disclosures affected by any finance charge shall be treated as being accurate for purposes of this title if the amount disclosed as the finance charge does not vary from the actual finance charge by more than an amount equal to ½ of the numerical tolerance corresponding to, and generated by, the tolerance provided by section 107(c) with respect to the annual percentage rate.".

(b) BASIS OF DISCLOSURE FOR PER DIEM INTEREST.—Section 121(c) of the Truth in Lending Act (15 U.S.C. 1631(c)) is amended by adding at the end the following new sentence: "In the case of any consumer credit transaction a portion of the interest on which is determined on a per diem basis and is to be collected upon the consummation of such transaction, any disclosure with respect to such portion of interest shall be deemed to be accurate for purposes of this title if the disclosure is based on information actually known to the creditor at the time that the disclosure documents are being prepared for the consummation of the transaction.".

SEC. 5. LIMITATION ON LIABILITY.

(a) IN GENERAL.—Chapter 2 of the Truth in Lending Act (15 U.S.C. 1631 et seq.) is amended by adding at the end the following new section:

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"SEC. 130. CERTAIN LIMITATIONS ON LIABILITY.

"(a) LIMITATIONS ON LIABILITY FOR DISCLOSURES RELATING TO CERTAIN FEES AND CHARGES OTHER THAN FINANCE CHARGES.—

"(1) IN GENERAL.—For transactions consummated before the date of the enactment of the Truth in Lending Act Amendments of 1995, a creditor or any assignee of a creditor shall have no civil, administrative, or criminal liability under this title for, and a consumer shall have no extended rescission rights under section 125(f) with respect to, the creditor's treatment, for disclosure purposes, of—

"(A) taxes described in section 106(d)(3);

"(B) fees and amounts described in section 106(e)(2) and (5) and third party fees and amounts described in section 106(a); and

"(C) delivery charges imposed by a creditor.

"(2) EXCEPTIONS.—Subsection (a) shall not apply to—

"(A) any individual action or counterclaim brought under this title—

"(i) which was filed before October 1, 1994; and

"(ii) the pleadings in which (as filed before such date) allege improper disclo-

sure of charges described in paragraph (1), (2), or (3) of subsection (a);

"(B) any class action brought under this title—

"(i) for which a class was certified before October 1, 1994; and

"(ii) the pleadings in which (as filed before such date) allege improper disclosure of charges described in paragraph (1), (2), or (3) of subsection (a);

"(C) the named individual plaintiffs in any class action brought under this title—

"(i) which was filed before October 1, 1994; and

"(ii) the pleadings in which (as filed before such date) allege improper disclosure of charges described in paragraph (1), (2), or (3) of subsection (a); or

"(D) any consumer credit transaction with respect to which a timely notice of rescission was sent to the creditor before October 1, 1994.

"(b) EXEMPTION FROM LIABILITY FOR FINANCE CHARGE DISCLOSURES WITHIN TOLERANCE LIMITS.—

"(1) IN GENERAL.—In the case of any consumer credit transaction subject to this title, in-

cluding a transaction consummated before the date of the enactment of the Truth in Lending Act Amendments of 1995, no creditor or assignee with respect to such transaction shall have any civil, administrative, or criminal liability under this title for, and no consumer shall have extended rescission rights under section 125 by reason of, any disclosure relating to the finance charge imposed with respect to such transaction if the amount or percentage actually disclosed—

"(A) may be treated as accurate pursuant to section 106(f), or

"(B) is greater than the amount or percentage required to be disclosed under this title.

"(2) EXCEPTIONS.—Paragraph (1) shall not apply to—

"(A) any individual action or counterclaim brought under this title which was filed before October 1, 1994;

"(B) any class action brought under this title for which a class was certified before October 1, 1994;

"(C) the named individual plaintiffs in any class action brought under this title which was filed before October 1, 1994; or

"(D) any consumer credit transaction with respect to which a timely notice of rescission was sent to the creditor before October 1, 1994.".

(b) CLERICAL AMENDMENT.—The table of sections for chapter 2 of the Truth in Lending Act is amended by inserting after the item relating to section 138 the following new item:

"Sec. 139. Certain limitations on liability.".

SEC. 6. APPLICABILITY.

Except as otherwise provided in section 5, the amendments made by this Act shall apply to all consumer credit transactions consummated on or after the date of enactment of this Act, except that the amendments made by subsections (a) and (b) of section 3 shall apply to all extensions of credit with respect to which rescission rights have not been asserted as of January 1, 1995.

SEC. 7. LIMITATION ON RESCISSION PERIOD.

Section 125(f) of the Truth in Lending Act (15 U.S.C. 1635(f)) is amended by adding at the end the following sentence: "The expiration of the right of rescission pursuant to this subsection shall be absolute and no consumer may assert rescission, affirmatively or as a defense, in any action in any State or Federal court after the earlier of the end of the 3-year period beginning on the date of the consummation of the transaction or the

1 sale of the property securing the loan or other extension
2 of credit, except as otherwise provided in the preceding
3 sentence. This subsection shall supersede any State law
4 which is inconsistent with any provision of this sub-
5 section.".

6 SEC. 8. CALCULATION OF ACTUAL DAMAGES.

7 Paragraph (1) of section 130(a) of the Truth in
8 Lending Act (15 U.S.C. 1640(a)) is amended to read as
9 follows:

10 "(1) Any actual damages sustained by such
11 person as a result of the failure (to the extent the
12 person demonstrates reliance on the inaccurate dis-
13 closure which prevented the person from accepting
14 better credit terms actually available to the person
15 from another creditor) and the amount of such dam-
16 ages shall be the difference between the finance
17 charges actually paid and the finance charges that
18 would have been paid over the same period under
19 credit terms applicable with respect to credit actu-
20 ally available to the person from another creditor.".

21 SEC. 9. ASSIGNEE LIABILITY.

22 (a) VIOLATIONS APPARENT ON THE FACE OF TRANS-
23 ACTION DOCUMENTS.—Section 131(a) of the Truth in
24 Lending Act (15 U.S.C. 1641(a)) is amended to read as
25 follows:

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"(a) LIABILITY OF ASSIGNEE FOR APPARENT VIOLATIONS.—

"(1) IN GENERAL.—Except as otherwise specifically provided in this title, any civil action against a creditor for a violation of this title, and any proceeding under section 108 against a creditor, with respect to a consumer credit transaction may be maintained against any assignee of such creditor only if—

"(A) the violation for which such action or proceeding is brought is apparent on the face of the disclosure statement provided in connection with such transaction purmant to this title; and

"(B) the assignment to the assignee was voluntary.

"(2) VIOLATION APPARENT ON THE FACE OF THE DISCLOSURE DESCRIBED.—For the purpose of this section, a violation is apparent on the face of the disclosure statement if—

"(A) the disclosure can be determined to be incomplete or inaccurate from the face of the disclosure statement; or

"(B) the disclosure does not use the terms or format required to be used by this title.".

(b) SERVICER NOT TREATED AS ASSIGNEE.—Section 131 of the Truth in Lending Act (15 U.S.C. 1641) is amended by adding at the end the following new subsection:

"(d) TREATMENT OF SERVICER.—

"(1) IN GENERAL.—A servicer of a consumer obligation arising from a consumer credit transaction shall not be treated as an assignee of such obligation for purposes of this section unless the servicer is the owner of the obligation.

"(2) SERVICER NOT TREATED AS OWNER ON BASIS OF ASSIGNMENT FOR ADMINISTRATIVE CONVENIENCE.—A servicer of a consumer obligation arising from a consumer credit transaction shall not be treated as the owner of the obligation for purposes of this section on the basis of an assignment of the obligation from the creditor or another assignee to the servicer solely for the administrative convenience of the servicer in servicing the obligation.

"(3) SERVICER DEFINED.—For purposes of this subsection, the term 'servicer' has the same meaning as in section 6(i)(2) of the Real Estate Settlement Procedures Act of 1974.".

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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,

vs.

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

Respondents.
_____/

APPENDIX TO
INITIAL BRIEF OF PETITIONERS
DAVID R. BEACH and LINDA M. BEACH

2. June, 1995 Proposed TILA Amendments

JAMES A. BONFIGLIO, ESQ.
Fla. Bar No. 288055
P.O. Box 1489
Boynton Beach, Fla. 33425
(407) 734-4503, 734-1872 (fax)

Attorney for Petitioners
DAVID R. BEACH and
LINDA M. BEACH,

104TH CONGRESS
1ST SESSION

H. R. _____

IN THE HOUSE OF REPRESENTATIVES

(for himself and Mr. Leach, Mrs. Roukema

Mr. McCOLLUM introduced the following bill; which was referred to the Committee on _____

A BILL

To amend the Truth in Lending Act to clarify the intent of such Act and to reduce burdensome regulatory requirements on creditors.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Truth in Lending Act Amendments of 1995".

SEC. 2. CERTAIN CHARGES.

(a) THIRD PARTY FEES.—Section 106(a) of the Truth in Lending Act (15 U.S.C. 1605(a)) is amended by adding after the 2d sentence the following new sen-

text: "The finance charge shall not include fees and amounts imposed by third party closing agents (including settlement agents, attorneys, and escrow and title companies) if the creditor does not require the imposition of the charges or the services provided and does not retain the charges.".

(b) BORROWER-PAID MORTGAGE BROKER FEES.—

(1) INCLUSION IN FINANCE CHARGE.—Section 106(a) of the Truth in Lending Act (15 U.S.C. 1605(a)) is amended by adding at the end the following new paragraph:

"(6) Borrower-paid mortgage broker fees, including fees paid directly to the broker or the lender (for delivery to the broker) whether such fees are paid in cash or financed.".

(2) EFFECTIVE DATE.—The amendment made by paragraph (1) shall take effect on the earlier of—

(A) 60 days after the date on which the Board of Governors of the Federal Reserve System issues final regulations under paragraph (3); or

(B) the date that is 12 months after the date of the enactment of this Act.

(3) REGULATIONS IMPLEMENTING BORROWER-PAID MORTGAGE BROKER FEES.—The Board of Gov-

orders of the Federal Reserve System shall promulgate regulations implementing the amendment made by paragraph (1) by no later than 6 months after the date of the enactment of this Act.

(c) TAXES ON SECURITY INSTRUMENTS OR EVIDENCES OF INDEBTEDNESS.—Section 106(d) of the Truth in Lending Act (15 U.S.C. 1605(d)) is amended by adding at the end the following new paragraph:

"(3) Any tax levied on security instruments or on documents evidencing indebtedness if the payment of such taxes is a precondition for recording the instrument securing the evidence of indebtedness.".

(d) PREPARATION OF LOAN DOCUMENTS.—Section 106(e)(2) of the Truth in Lending Act (15 U.S.C. 1605(e)(2)) is amended to read as follows:

"(2) Fees for preparation of loan-related documents.".

(e) FEES RELATING TO PEST INFESTATIONS, INSPECTIONS, AND HAZARDS.—Section 106(e)(5) of the Truth in Lending Act (15 U.S.C. 1605(e)(5)) is amended by inserting ", including fees related to any pest infestation or flood hazard inspections conducted prior to closing" before the period.

(f) ENSURING FINANCE CHARGES REFLECT COST OF CREDIT.—

(1) REPORT.—

(A) IN GENERAL.—Not later than 6 months after the date of the enactment of this Act, the Board of Governors of the Federal Reserve System shall submit to the Congress a report containing recommendations on any regulatory or statutory changes necessary—

(i) to ensure that finance charges imposed in connection with consumer credit transactions more accurately reflect the cost of providing credit; and

(ii) to address abusive refinancing practices engaged in for the purpose of avoiding rescission.

(B) REPORT REQUIREMENTS.—In preparing the report under this paragraph, the Board shall—

(i) consider the extent to which it is feasible to include in finance charges all charges payable directly or indirectly by the consumer to whom credit is extended, and imposed directly or indirectly by the creditor as an incident to the extension of

credit (especially those charges excluded from finance charges under section 106 of the Truth in Lending Act as of the date of the enactment of this Act), excepting only those charges which are payable in a comparable cash transaction; and

(ii) consult with and consider the views of affected industries and consumer groups.

(2) REGULATIONS.—The Board of Governors of the Federal Reserve System shall prescribe any appropriate regulation in order to effect any change included in the report under paragraph (1), and shall publish the regulation in the Federal Register before the end of the 1-year period beginning on the date of enactment of this Act.

SEC. 3. TOLERANCES; BASIS OF DISCLOSURES.

(a) TOLERANCES FOR ACCURACY.—Section 106 of the Truth in Lending Act (15 U.S.C. 1605) is amended by adding at the end the following new subsection:

"(f) TOLERANCES FOR ACCURACY.—In connection with credit transactions not under an open end credit plan that are secured by real property or a dwelling, the disclosure of the finance charge and other disclosures affected by any finance charge—

"(1) shall be treated as being accurate for purposes of this title if the amount disclosed as the finance charge—

"(A) does not vary from the actual finance charge by more than $100; or

"(B) is greater than the amount required to be disclosed under this title; and

"(2) shall be treated as being accurate for purposes of section 125 if—

"(A) except as provided in subparagraph (B), the amount disclosed as the finance charge does not vary from the actual finance charge by more than an amount equal to one-half of one percent of the total amount of credit extended; or

"(B) in the case of a transaction, other than a mortgage referred to in section 103(aa), which—

"(i) is a refinancing of the principal balance then due and any accrued and unpaid finance charges of a residential mortgage transaction as defined in section 103(w), or is any subsequent refinancing of such a transaction; and

"(ii) does not provide any new consolidation or new advance;

if the amount disclosed as the finance charge does not vary from the actual finance charge by more than an amount equal to one percent of the total amount of credit extended.".

(b) BASIS OF DISCLOSURES FOR PER DIEM INTEREST.—Section 121(c) of the Truth in Lending Act (15 U.S.C. 1631(c)) is amended by adding at the end the following new sentence: "In the case of any consumer credit transaction a portion of the interest on which is determined on a per diem basis and is to be collected upon the consummation of such transaction, any disclosure with respect to such portion of interest shall be deemed to be accurate for purposes of this title if the disclosure is based on information actually known to the creditor at the time that the disclosure documents are being prepared for the consummation of the transaction.".

SEC. 4. LIMITATION ON LIABILITY.

(a) IN GENERAL.—Chapter 2 of the Truth in Lending Act (15 U.S.C. 1631 et seq.) is amended by adding at the end the following new section:

"SEC. 130. CERTAIN LIMITATIONS ON LIABILITY.

"(a) LIMITATIONS ON LIABILITY.—For any consumer credit transaction subject to this title that is

1 consummated before the date of the enactment of the
2 Truth in Lending Act Amendments of 1995, a creditor
3 or any assignee of a creditor shall have no civil, adminis-
4 trative, or criminal liability under this title for, and a
5 consumer shall have no extended rescission rights under
6 section 125(f) with respect to—
7 "(1) the creditor's treatment, for disclosure
8 purposes, of—
9 "(A) taxes described in section 106(d)(3);
10 "(B) fees described in section 106(d)(2)
11 and (5);
12 "(C) fees and amounts referred to in the
13 3rd sentence of section 106(a); or
14 "(D) borrower-paid mortgage broker fees
15 referred to in section 106(a)(6);
16 "(2) the form of written notice used by the
17 creditor to inform the obligor of the rights of the ob-
18 ligor under section 125 if the creditor provided the
19 obligor with a properly dated form of written notice
20 published and adopted by the Board or a comparable
21 written notice; or
22 "(3) any disclosure relating to the finance
23 charge imposed with respect to the transaction if the
24 amount or percentage actually disclosed—

"(A) may be treated as accurate for purposes of this title if the amount disclosed as the finance charge does not vary from the actual finance charge by more than $200;

"(B) may, under section 106(f)(2), be treated as accurate for purposes of section 125; or

"(C) is greater than the amount or percentage required to be disclosed under this title.

"(b) EXCEPTIONS.—Subsection (a) shall not apply to—

"(1) any individual action or counterclaim brought under this title which was filed before June 1, 1995;

"(2) any class action brought under this title for which a final order certifying a class was entered before January 1, 1995;

"(3) the named individual plaintiffs in any class action brought under this title which was filed before June 1, 1995; or

"(4) any consumer credit transaction with respect to which a timely notice of rescission was sent to the creditor before June 1, 1995.".

(b) CLERICAL AMENDMENT.—The table of sections for chapter 2 of the Truth in Lending Act is amended

by inserting after the item relating to section 138 the following new item:

"138. Certain limitations on liability.".

SEC. 5. LIMITATION ON RESCISSION LIABILITY.

Section 125 of the Truth in Lending Act (15 U.S.C. 1635) is further amended by adding at the end the following new subsection:

"(h) LIMITATION ON RESCISSION.—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. This subsection shall not affect a creditor's liability for any violation of this title that is unrelated to such a notice.".

SEC. 6. CALCULATION OF DAMAGES.

Section 130(a)(2)(A) of the Truth in Lending Act (15 U.S.C. 1640(a)(2)(A)) is amended—

(1) by striking "or (ii)" and inserting "(ii)"; and

(2) by inserting before the semicolon at the end the following: ", or (iii) in the case of an individual action relating to a credit transaction not under an open end credit plan that is secured by real property

or a dwelling, not less than $200 or greater than $2,000".

SEC. 7. ASSIGNEE LIABILITY.

(a) VIOLATIONS APPARENT ON THE FACE OF TRANSACTION DOCUMENTS.—Section 131 of the Truth in Lending Act (15 U.S.C. 1641) is amended by adding at the end the following new subsection:

"(g) LIABILITY OF ASSIGNEE FOR CONSUMER CREDIT TRANSACTIONS SECURED BY REAL PROPERTY.—

"(1) IN GENERAL.—Except as otherwise specifically provided in this title, any civil action against a creditor for a violation of this title, and any proceeding under section 108 against a creditor, with respect to a consumer credit transaction secured by real property may be maintained against any assignee of such creditor only if—

"(A) the violation for which such action or proceeding is brought is apparent on the face of the disclosure statement provided in connection with such transaction pursuant to this title; and

"(B) the assignment to the assignee was voluntary.

"(2) VIOLATION APPARENT ON THE FACE OF THE DISCLOSURE DESCRIBED.—For the purpose of

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this section, a violation is apparent on the face of the disclosure statement if—

"(A) the disclosure can be determined to be incomplete or inaccurate by a comparison of the disclosure statement, any itemization of the amount financed, the note, or any other disclosure or disbursement; or

"(B) the disclosure statement does not use the terms or format required to be used by this title.".

(b) SERVICER NOT TREATED AS ASSIGNEE.—Section 131 of the Truth in Lending Act (15 U.S.C. 1641) is further amended by adding after subsection (e) (as added by subsection (a) of this section) the following new subsection:

"(f) TREATMENT OF SERVICER.—

"(1) IN GENERAL.—A servicer of a consumer obligation arising from a consumer credit transaction shall not be treated as an assignee of such obligation for purposes of this section, unless the servicer is or was the owner of the obligation.

"(2) SERVICER NOT TREATED AS OWNER ON BASIS OF ASSIGNMENT FOR ADMINISTRATIVE CONVENIENCE.—A servicer of a consumer obligation arising from a consumer credit transaction shall not