



Slamming the Door in the Consumer's Face: Courts' Inadequate Enforcement of TILA Disclosure Violations and the False Hope of a Foreclosure Defense

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I. INTRODUCTION

Do you remember *not* remembering the word *foreclosure*? The late 1990s to early 2000s was certainly a wonderful time to be a homeowner.¹ Everyone and their neighbor² seemed flush, and few envisioned the debilitating darkness at the end of the tunnel.

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1. See, e.g., MAJORITY STAFF OF THE JOINT ECON. COMM., 110TH CONG., THE SUBPRIME LENDING CRISIS: THE ECONOMIC IMPACT ON WEALTH, PROPERTY VALUES AND TAX REVENUES, AND HOW WE GOT HERE 2 (Comm. Print 2007), available at <http://jec.senate.gov> (follow "Reports" hyperlink, then search for Report title) (stating that between 1997 and 2006, U.S. home prices increased by over 80 percent).

2. This phrase calls to mind Harry S. Truman's quip "it's a recession when your neighbor loses his job; it's a depression when you lose yours." *Sayings of the Week*, THE OBSERVER (London), Apr. 13, 1958, at 6. But the witty remark seems far less humorous in today's tumultuous economy.

Since late 2005, the residential real estate market has been progressively deteriorating.³ Homeowners in some areas have watched the value of their homes drop to less than half of what they paid only five years ago.⁴ Meanwhile, the clock has struck midnight on all those adjustable rate mortgages that had two-to-five-year teaser rates.⁵ And the mortgage brokers who manufactured all those dreams of homeownership are of no help—most are either out of business⁶ or unwilling to refinance without proof of significant cash reserves.⁷ All of this has come together to create one of the worst home foreclosure crises in U.S. history.⁸

The economic and social costs associated with home foreclosures are numerous.⁹ Widespread foreclosures tend to have a devastating effect on home values,¹⁰ which in turn negatively impacts the national economy as a whole.¹¹ On a more individual level, a home foreclosure is an involuntary removal of a person's shelter, and can equate to homelessness for an entire family.¹² The Truth-In-Lending Act ("TILA" or "the Act") has proven to be one way that federal law addresses the incidence of home foreclosures.¹³

3. See MAJORITY STAFF OF THE JOINT ECON. COMM., *supra* note 1, at 2; see generally *Current Trends in Foreclosure and What More Can Be Done to Prevent Them: Hearing Before the J. Economic Comm.*, 111th Cong. (2009) [hereinafter *Foreclosure Prevention Hearings*], available at <http://jec.senate.gov> (follow "Hearings" hyperlink, then search for Hearing title) (statement of Dr. William Shear, Director, Financial Markets & Community Investment, GAO).

4. See, e.g., David Streitfeld & Jack Healy, *Phoenix Leads the Way Down in Home Prices, Falling 50% From a June 2006 Peak*, N.Y. TIMES, Apr. 29, 2009, at B1.

5. See MAJORITY STAFF OF THE JOINT ECON. COMM., *supra* note 1, at 2.

6. ROBERT B. AVERY ET AL., *The 2008 HMDA Data: The Mortgage Market During a Turbulent Year*, 95 Federal Reserve Bulletin, at 27-28 n.48 (2009), available at <http://www.federalreserve.gov/pubs/bulletin/2009/pdf/hmda08draft2.pdf>.

7. See *id.* at 3.

8. See, e.g., *Foreclosure Prevention Hearings*, *supra* note 3, at 2 (statement of Dr. Susan M. Wachter, Professor of Financial Management, The Wharton School) ("[T]he foreclosure rate is . . . the highest it has ever been since the Great Depression."); CONG. OVERSIGHT PANEL, 111TH CONG., FORECLOSURE CRISIS: WORKING TOWARDS A SOLUTION 1, 5 (Comm. Print 2009), available at <http://cop.senate.gov/documents/cop-030609-report.pdf> (stating that foreclosure rates are three times their historic rates, and that as of 2008, approximately 1 in 10 residential homeowners were either facing foreclosure or had fallen behind on their mortgage payments).

9. See, e.g., CONG. OVERSIGHT PANEL, *supra* note 8, at 9-11.

10. See MAJORITY STAFF OF THE JOINT ECON. COMM., *supra* note 1, at 7-9.

11. See AVERY ET AL., *supra* note 6, at 3.

12. See, e.g., Donna St. George, *The \$698,000 Mistake*, THE WASHINGTON POST, Nov. 27, 2009, at A1 (discussing the story of a single mother and her three children who were forced to seek refuge at a homeless shelter after their home was lost to foreclosure).

13. Truth in Lending Act, 15 U.S.C. §§ 1601-1666j (2006). Although the statute itself provides the basic letter of TILA, much of TILA law is found in Regulation Z. See generally 12 C.F.R. Part 226 (2009). Regulation Z is a set of rules that was promulgated by the Federal Reserve Board (FRB) at the request of Congress to "effectuate the purposes" of TILA. 15 U.S.C. § 1640(a). Regulation Z has been considered to be

TILA was enacted by Congress in 1968 as a means of ensuring that individuals could make informed choices about consumer loans.¹⁴ One of the ways Congress added bite to TILA was through the extended right of rescission provision.¹⁵ Under this provision, a consumer who has not been provided certain statutorily-required loan disclosures may rescind a home refinance loan for up to *three years* from the consummation of the loan, and is entitled to be refunded all interest payments and finance charges that were paid on the loan.¹⁶ TILA was written as a strict liability statute,¹⁷ so if a lender fails to provide even one required disclosure to a borrower, the Act dictates that the loan is rescindable at the borrower's option.¹⁸

Because TILA gives a borrower three years to cancel a loan for a lender's disclosure violations, borrowers may choose to invoke the extended right of rescission when facing home foreclosure.¹⁹ Indeed, TILA's extended right of rescission provision has become known among consumer advocates as a "defense to foreclosure."²⁰ The prophylactic effect of TILA's extended right of rescission for borrowers facing foreclosure is just another example of the importance Congress placed on

virtually binding law since at least the Supreme Court's statement that Regulation Z is "dispositive" in interpreting TILA unless the interpretation would be "demonstrably irrational." *Ford Motor Credit Co. v. Milhollin*, 444 U.S. 555, 565 (1980).

14. See 15 U.S.C. § 1601(a); ELIZABETH RENUART ET AL., *TRUTH IN LENDING* 1-3 (6th ed. 2007). This treatise will be frequently cited for background material throughout this Comment, as it is considered to be one of the leading sources for current TILA interpretation and law, and has been cited in numerous court opinions and law review articles. See, e.g., *Muro v. Target Corp.*, 250 F.R.D. 350, 354-55 (N.D. Ill. 2007). The book's authors have also produced a number of scholarly articles on the topic of TILA. See, e.g., Elizabeth Renuart & Diane E. Thompson, *The Truth, the Whole Truth, and Nothing But the Truth: Fulfilling the Promise of Truth in Lending*, 25 *YALE J. ON REG.* 181 (2008).

15. 15 U.S.C. § 1635(f); 12 C.F.R. §§ 226.15(a)(3), 226.23(a)(3).

16. 15 U.S.C. § 1635(b); 12 C.F.R. § 226.23(d)(1).

17. See *infra* Part II.D.

18. 15 U.S.C. § 1635(b); 12 C.F.R. § 226.23(d)(1).

19. See, e.g., *Randall v. Bank One Nat'l Assoc. (In re Randall)*, 358 B.R. 145, 158 (Bankr. E.D. Pa. 2006) ("A mortgage foreclosure action is dependent upon the existence of a valid mortgage . . . [and rescission] under section 1635 of TILA has the effect of invalidating the mortgage."); see also Elwin Griffith, *Truth in Lending—The Right of Rescission, Disclosure of the Finance Charge, and Itemization of the Amount Financed in Closed-End Transactions*, 6 *GEO. MASON L. REV.* 191, 216-17 (1998).

20. See, e.g., RENUART ET AL., *supra* note 14, at 383, 479; cf. THE PA. BAR INST., THE FEDERAL & PENNSYLVANIA RESPONSE TO THE CREDIT CRISIS, 315-16 (THE PA. BAR INST. 2009) (indicating that borrowers' use of TILA-based counterclaims to challenge foreclosure actions is an effective defense to foreclosure).

“protect[ing] the consumer against inaccurate and unfair credit . . . practices.”²¹

Despite the plain language and clear purpose of TILA, over the years many courts have effectively abrogated some of the Act’s consumer protections. Specifically, a number of courts have deemed TILA’s extended right of rescission to impose an overly harsh effect on lenders.²² In response, these courts apply a less-than-strict liability standard to lenders’ disclosure violations.²³ As a result, consumers are finding it far more difficult to invoke TILA’s extended right of rescission, which can effectively leave borrowers powerless against a statutorily-culpable lender’s foreclosure proceedings.²⁴

This Comment will discuss courts’ use of a less-than-strict liability enforcement standard for TILA disclosure violations associated with home refinance loans, whether this standard is appropriate based on various considerations, and how this enforcement standard affects the efficacy of the extended right of rescission as a defense to foreclosure. Part II of this Comment will begin by discussing TILA’s extended right of rescission, its practical mechanics, and its goal of returning the borrower and lender to the *status quo ante*. Part III will discuss the relatively recent trend among courts applying a less-than-strict liability enforcement standard to TILA disclosure violations, and will explain why this is the wrong approach from a historical, practical, and policy standpoint. Part IV will conclude by summarizing the reasons why courts should apply a strict liability enforcement standard to TILA disclosure violations.

II. BACKGROUND

A. *Purpose of TILA*

The primary purpose of TILA is to require lenders to provide prospective borrowers with a uniform disclosure of the true cost and terms associated with a loan so that borrowers can make informed credit

21. 15 U.S.C. § 1601(a); *cf.* 15 U.S.C. § 1635(i); (identifying specific “[r]escission rights in foreclosure”); 12 C.F.R. § 226.23(h) (identifying specific “[s]pecial rules for foreclosures”).

22. *See generally infra* Part III. This Comment focuses on the way courts handle TILA rescission claims, and obviously assumes a jurisdiction that utilizes judicial foreclosure.

23. *See infra* Part III.A.

24. *See infra* Part III.E.1.

decisions.²⁵ Prior to the enactment of TILA, creditors used various means of calculating interest rates and disclosing contractual terms for consumer loans.²⁶ As a result, prospective borrowers were unable to truly compare the cost and terms of different loans from different lenders.²⁷ Congress hoped that TILA would provide consumers with a clear apples-to-apples comparison of different loan options.²⁸

B. *Lender Requirements*

The precise requirements of TILA vary depending on what type of loan is being considered. Home refinance loans fall under the category commonly known as “closed-end” credit transactions.²⁹ TILA and its regulatory counterpart, Regulation Z,³⁰ identify certain “material disclosures”³¹ that a borrower must receive in connection with a mortgage refinancing. The lender’s failure to satisfy these disclosure requirements will trigger a borrower’s right to rescind the loan.³²

C. *Right of Rescission*

TILA gives a borrower the right to rescind a loan only if certain criteria are met. First, the loan must be deemed a consumer credit

25. 15 U.S.C. § 1601(a); 12 C.F.R. § 226.1(b); *see generally* Mourning v. Family Publ’n Serv., Inc., 411 U.S. 356, 360-70 (1973) (discussing the purpose of TILA); RENUART ET AL., *supra* note 14, at 1-3.

26. Griffith, *supra* note 19, at 192. Professor Griffith has written a number of other scholarly articles on historical and modern TILA jurisprudence. *See, e.g.*, Elwin Griffith, *Lenders and Consumers Continue the Search for the Truth in Lending under the Truth in Lending Act and Regulation Z*, 44 SAN DIEGO L. REV. 611 (2007).

27. Griffith, *supra* note 19, at 192; *cf.* Ford Motor Credit Co. v. Milhollin 444 U.S. 555, 559, (1980) (stating that TILA’s goal of promoting “the informed use of credit” by consumers is a difficult task due to the “complexity and variety” of credit transactions).

28. *See* 15 U.S.C. § 1601(a); Thomka v. A. Z. Chevrolet, Inc., 619 F.2d 246, 248 (3d Cir. 1980); Griffith, *supra* note 19, at 192; *see also* Mourning, 411 U.S. at 377 (“The Truth in Lending Act reflects a transition in congressional policy from a philosophy of ‘Let the buyer beware’ to one of ‘Let the seller disclose.’ By erecting a barrier between the seller and the prospective purchaser in the form of hard facts, Congress expressly sought ‘to . . . avoid the uninformed use of credit.’”) (citations omitted).

29. *See* 12 C.F.R. § 226.32(a). Technically, “closed-end” is the term used in Regulation Z. TILA uses the phrase “transactions under an other than open end credit plan.” *Compare* 12 C.F.R. § 226.2(a)(10), *with* 15 U.S.C. § 1638(a). These descriptions refer to a fixed term loan that does not involve an open line of credit or allow for “repeated transactions.” *See* 15 U.S.C. § 1638(i); 12 C.F.R. § 226.2(a)(10).

30. *See supra* note 13.

31. The material disclosures include the loan’s annual percentage rate (APR), finance charge, amount financed, payment schedule, the total of the payments, and a few other disclosures and limitations referenced in other portions of the Act and Regulation Z. *See* 12 C.F.R. § 226.23(a)(3) n.48.

32. 15 U.S.C. § 1635(a); 12 C.F.R. §§ 226.15(a)(3), 226.23(a)(3).

transaction.³³ Second, the loan must create a security interest in the borrower's principal dwelling.³⁴ Finally, the loan cannot be for the construction or purchase of a home,³⁵ rather, the loan must be either a loan refinance, or a similar non-purchase loan or line of credit.³⁶ Thus, borrowers who refinance their home's mortgage with a new lender have a right to rescind the loan under TILA.³⁷

The provisions of TILA allow a borrower to rescind a home refinance loan³⁸ for any reason during the first three days after the loan is consummated, as is frequently provided for in consumer contracts.³⁹ Additionally, a borrower may rescind the loan for up to three years from the loan's consummation date if the borrower did not receive both a copy of all the required material disclosures *and* two copies of a notice identifying the borrower's right to rescind the loan.⁴⁰ The extended right of rescission will only terminate upon the occurrence of one of the following events: (1) the sale of the home securing the refinance loan; (2) the borrower's transfer of all interest in the home; (3) the lender's eventual delivery to the borrower of any previously undelivered material disclosures or copies of the Notice of Right to Rescind; or (4) the three-

33. 15 U.S.C. § 1635(a). A "consumer credit transaction" is defined as a transaction in which credit is "offered or extended to a natural person . . . for personal, family, or household purposes." 15 U.S.C. § 1602(h).

34. 15 U.S.C. § 1635(a).

35. 15 U.S.C. § 1638(e)(1); 12 C.F.R. § 226.23(f)(1). Both the Act and Regulation exempt the right of rescission for a "residential mortgage transaction," which is defined as a transaction in which a mortgage, deed of trust, or equivalent security agreement is "created or retained against the consumer's dwelling to finance *the acquisition or initial construction* of such dwelling." 15 U.S.C. § 1602(w) (emphasis added).

36. *See* 15 U.S.C. § 1635(e)(1); 12 C.F.R. § 226.23(f)(1); *see also* 15 U.S.C. § 1638(e)(2); 12 C.F.R. § 226.23(f)(2); *cf.* 12 C.F.R. Pt. 226, Supp. I, 23(f)(4) (Official Staff Commentary) (stating that the right of rescission is only applicable to loan refinancings with the original creditor for the portion of the refinancing that is a new advancement of money).

37. *See* Griffith, *supra* note 19, at 205-06.

38. For the remainder of this Comment, the terms "loan," "borrower," and "lender" will be in reference to a rescindable home refinance loan unless otherwise indicated.

39. *See* 15 U.S.C. § 1635(a).

40. *Id.* (identifying the three year extended right of rescission); 12 C.F.R. § 226.23(a)(3) n.48 (explaining that the lender's failure to deliver to the borrower the notices of right to rescind *or* material disclosures will trigger the three year extended right of rescission); 12 C.F.R. § 226.15(b) (noting that two copies of the notice of right to rescind must be delivered to the borrower); 15 U.S.C. § 1602(u); 12 C.F.R. § 226.15(a) n.36 (identifying which disclosures are "material disclosures"); 12 C.F.R. Pt. 226, Supp. I, 15(b)(1)-1 to 5, 23(b)(1)-1 to 5 (Official Staff Commentary) (detailing the requirements for proper delivery of the notices of right to rescind). For the remainder of this Comment, the term "Notice of Right to Rescind" will be used to describe the disclosure form that explains the borrower's rescission rights, as required by section 226.15(b) of Regulation Z.

year anniversary of the consummation of the refinance loan.⁴¹ Thus, if the lender fails to deliver⁴² to the borrower even one of the material disclosures or copies of the Notice of Right to Rescind, then the borrower has three full years to rescind the loan, assuming the borrower does not sell or otherwise transfer interest in the home.

D. Strict Liability Enforcement

The consumer-friendly nature of the extended right of rescission was originally bolstered by the fact that TILA was designed to be a strict liability statute.⁴³ Numerous courts have held that minor, technical violations of TILA's disclosure requirements are grounds for rescission, even if the violation played no role in the borrower's decision to consummate the loan,⁴⁴ the borrower suffered no financial harm,⁴⁵ or the borrower could not have even understood the disclosure due to a lack of English proficiency.⁴⁶ This rigorous application of TILA's statutory requirements reflects Congress's decision to impose liability on "any creditor who fails to comply with *any* [disclosure] requirement."⁴⁷ Although the text, history, and purpose of TILA indicate that the Act is a strict liability statute,⁴⁸ some courts have gradually been requiring more

41. 15 U.S.C. § 1635(f); 12 C.F.R. §§ 226.15(a)(3), 226.23(a)(3).

42. The failure to deliver a material disclosure should not be confused with TILA's requirement that disclosures be made "clearly and conspicuously." 15 U.S.C. § 1632(a); 12 C.F.R. § 226.17(a). Courts have interpreted TILA's clear and conspicuous requirement to mean that the disclosures must be objectively understandable "from the vantage point of a hypothetical average consumer." *Palmer v. Champion Mortgage*, 465 F.3d 24, 28 (1st Cir. 2006). But a lender's failure to disclose materials clearly and conspicuously does not necessarily equate to a failure to disclose altogether. *Malfa v. Household Bank, F.S.B.*, 825 F.Supp. 1018, 1020-21 (S.D. Fla. 1993). This distinction is important because a lender's failure to disclose clearly and conspicuously may entitle a borrower to damages, whereas a lender's failure to make a material disclosure entitles a borrower to rescind the loan. *Compare* 15 U.S.C. § 1640(a)(1), and 15 U.S.C. § 1632(a), *with* 15 U.S.C. § 1640(a)(3), and 15 U.S.C. § 1635(a). *But see* *Handy v. Anchor Mortgage Corp.*, 464 F.3d 760 (7th Cir. 2006) (holding that the borrower's receipt of two slightly different versions of the Notice of Right to Rescind failed to satisfy the clear and conspicuous requirement of TILA, and thus entitled the borrower to exercise the extended right of rescission).

43. *See, e.g.*, *Hamm v. Ameriquest Mortgage Co.*, 506 F.3d 525, 529 (7th Cir. 2007); *see generally* RENUART ET AL., *supra* note 14, at 534-37 (explaining that recent amendments to TILA reemphasize Congress's intent to make so-called technical violations of the Act grounds for a borrower to exercise the right of rescission).

44. *See, e.g.*, *Hamm*, 506 F.3d at 529; *Briscoe v. Deutsche Bank Nat. Trust Co.*, No. 08 C 1279, 2008 WL 4852977, at *2 (N.D. Ill. 2008).

45. *See, e.g.*, *Brown v. Marquette Sav. and Loan Ass'n*, 686 F.2d 608, 614 (7th Cir. 1982).

46. *Zamarippa v. Cy's Car Sales, Inc.*, 674 F.2d 877, 879 (11th Cir. 1982).

47. 15 U.S.C. § 1640(a) (emphasis added).

48. *See infra* Parts III.B and III.D.

than so-called “technical violations” before permitting a borrower to invoke the extended right of rescission.⁴⁹ As discussed later, a court’s decision to apply a less-than-strict liability standard to TILA’s disclosure requirements can place an undue burden on a borrower facing foreclosure who wishes to exercise the extended right of rescission.⁵⁰

E. Mechanics of Rescission

A borrower who exercises⁵¹ the right to rescind a loan will set into play a three-step process defined by TILA and Regulation Z.⁵² First, the security interest in the borrower’s home is automatically voided and the borrower is no longer liable to make further payments toward the loan.⁵³ Second, the creditor has twenty days to refund the borrower any payments the borrower has paid in connection with the loan, and to reflect the termination of the security interest.⁵⁴ Third, upon the creditor’s compliance with the second step, the borrower must tender back to the creditor the original loan proceeds.⁵⁵ The goal of this three step process is to return both the borrower and the lender to the *status quo ante*—the parties’ positions prior to the loan transaction.⁵⁶

49. See *infra* Part III.A.

50. See *infra* Part III.E.

51. To exercise the right of rescission, a borrower must notify the creditor in writing. 12 C.F.R. §§ 226.15(a)(3), 226.23(a)(3) (2009).

52. For a detailed discussion of each of the three steps, see RENUART ET AL., *supra* note 14, at 435-52.

53. 15 U.S.C. § 1635(b) (2006); 12 C.F.R. §§ 226.15(d)(1), 226.23(d)(1); 12 C.F.R. Pt. 226, Supp. I, 15(d)(1)-1 (Official Staff Commentary) (“Any security interest giving rise to the right of rescission becomes void when the consumer exercises the right of rescission . . . [and] is automatically negated regardless of . . . whether or not it was recorded or perfected.”).

54. 15 U.S.C. § 1635(b); 12 C.F.R. §§ 226.15(d)(2), 226.23(d)(2). The creditor is obligated to refund the borrower any amounts paid by the borrower in connection with the rescinded loan, whether they were paid to the creditor or a third party; refunds will include any monthly payments, finance charges, brokers’ fees, title search or appraisal fees, and the like. 12 C.F.R. Pt. 226, Supp. I, 15(d)(2)-1 (Official Staff Commentary). The creditor is also obligated to begin taking steps to reflect the termination of the security interest, such as cancelling the documents that created the lien on the home, and filing release or termination documents in the county courthouse or other place of public record. 12 C.F.R. Pt. 226, Supp. I, 15(d)(2)-3 (Official Staff Commentary).

55. 15 U.S.C. § 1635(b); 12 C.F.R. §§ 226.15(d)(3), 226.23(d)(3).

56. See *Handy v. Anchor Mortgage Corp.*, 464 F.3d 760, 765-66, (7th Cir. 2006) (citing *Barrett v. JP Morgan Chase Bank, N.A.*, 445 F.3d 874, 880 (6th Cir. 2006)); *Moore v. Wells Fargo Bank, N.A.*, 597 F.Supp.2d 612, 617 (E.D. Va. 2009) (quoting *McKenna v. First Horizon Home Loan Corp.*, 475 F.3d 418, 421 (1st Cir. 2007)); see also 12 C.F.R. Pt. 226, Supp. I, 23(f)(4) (Official Staff Commentary) (stating that the reason that a creditor must return to the borrower all monies paid by the borrower is because “the consumer must be placed in the same position as he or she was in prior to entering into the new credit transaction”).

Although this three-step process is clearly laid out in the Act and Regulation Z, courts do have a limited right to modify the second and third steps.⁵⁷ But the extent to which courts may modify these rights is debatable, and can have a dramatic effect on a borrower's ability to exercise the right of rescission as a defense to foreclosure.⁵⁸

F. A Defense to Foreclosure

TILA's extended right of rescission can be an excellent tool for borrowers facing foreclosure. When a borrower properly exercises the right of rescission, the creditor's security interest is automatically voided.⁵⁹ The creditor cannot foreclose because there is nothing to foreclose on.⁶⁰ Instead, the formerly secured creditor becomes a mere unsecured creditor with limited remedies against the borrower's default.⁶¹ Thus, the borrower's rescission has the effect of halting the creditor's foreclosure proceedings.⁶² Additionally, recent TILA amendments reflect Congress's intent to make the extended right of rescission available as a defense to foreclosure.⁶³

In 1995, Congress amended portions of TILA that affect the extended right of rescission.⁶⁴ In one amendment, Congress modified certain provisions of TILA to make the lender's disclosure requirements stricter when a borrower is facing foreclosure than when a borrower is not.⁶⁵ For example, Congress allows certain tolerances for a lender's disclosure errors.⁶⁶ Under normal circumstances a lender can underestimate the finance charge, a material disclosure, by \$100 and still

57. 15 U.S.C. § 1635(b); 12 C.F.R. §§ 226.15(d)(4), 226.23(d)(4); 12 C.F.R. Pt. 226, Supp. I, 15(d)(4)-1 (Official Staff Commentary) ("The procedures outlined in § 226.23(d)(2) and (3) may be modified by a court.").

58. See *infra* Part III.E.1.

59. See *supra* Part II.E.

60. Griffith, *supra* note 19, at 216; see RENUART ET AL., *supra* note 14, at 480.

61. RENUART ET AL., *supra* note 14, at 480; see also *In re Piercy*, 18 B.R. 1004, 1007 (Bankr. Ky. 1982) (discussing the likelihood that once the debtor rescinds under TILA, and the security interest is voided, the debtor's subsequent obligation to tender back the loan proceeds would be "discharge[able] in bankruptcy"). But see *American Mortg. Network, Inc. v. Shelton*, 486 F.3d 815, 820-21 (4th Cir. 2007) (stating that "it was not the intent of Congress to reduce the mortgage company to an unsecured creditor" through the use of the right of rescission); see also *infra* Part III.C.2 (discussing courts' imposition of conditional rescission).

62. Of course, a court's decision to exercise its equitable powers can have a significant impact on the effectiveness of the extended right of rescission as a defense to foreclosure. See *infra* Part III.C.2.

63. See 15 U.S.C. § 1635(i)(1) (2006).

64. See 15 U.S.C. § 1635 (Supp. I 1995) (amending 15 U.S.C. § 1635 (1994)).

65. Compare 15 U.S.C. § 1605(f) (2006), with 15 U.S.C. § 1635(i) (Supp. I 1995).

66. See 15 U.S.C. § 1605(f) (2006).

be considered in compliance with the Act's disclosure requirements.⁶⁷ But if the borrower is facing foreclosure, then the Act only permits a lender to underestimate the finance charge by \$35.⁶⁸ As a result, a lender who has initiated foreclosure proceedings against a borrower is held to a higher standard for compliance with the disclosure requirements, and can be deemed non-compliant for even minor errors. The obvious effect is that a borrower can invoke the extended right of rescission more easily when facing foreclosure proceedings.

Congress's targeted decision to tighten TILA's already strict standards in the foreclosure context suggests that Congress intended to provide full access to the extended right of rescission to borrowers facing foreclosure.⁶⁹ Additionally, the mere fact that Congress has carved out an entire provision titled "[r]escission rights in foreclosure" in addition to the standard rescission provisions, at least signifies congressional awareness of the importance of the extended right of rescission provision for borrowers facing foreclosure.⁷⁰ Nevertheless, borrowers are finding it more difficult than ever to receive the statutory benefits of the extended right of rescission when facing foreclosure.

III. DISCUSSION

TILA has traditionally been considered a strict liability statute. Early TILA cases followed the letter of the Act,⁷¹ and many recent cases have continued to enforce the increasingly strict, technical, post-1995-amendment requirements of TILA.⁷² Nevertheless, some courts apply a

67. 15 U.S.C. § 1605(f)(1)(A).

68. 15 U.S.C. § 1635(i)(2).

69. See Griffith, *supra* note 19, at 216-17; see also RENUART ET AL., *supra* note 14, at 383 ("The TIL[A] rescission provisions reflect Congress's desire to keep homeowners from placing their homes in jeopardy without a clear understanding of the risks and benefits of the transaction").

70. See 15 U.S.C. § 1635(i)(1) (stating that the rescission rights available to a borrower facing foreclosure are "in addition to any other right of rescission available under this section").

71. See, e.g., Grant v. Imperial Motors, 539 F.2d 506, 510-11, (5th Cir. 1976) ("[O]nce the court finds a [TILA] violation, no matter how technical, it has no discretion with respect to the imposition of liability."); Thomka v. A. Z. Chevrolet, Inc., 619 F.2d 246, 248 (3d Cir. 1980) ("Enforcement [of TILA] is achieved in part by a system of strict liability in favor of consumers.").

72. See, e.g., Hamm v. Ameriquest Mortgage Co., 506 F.3d 525, 529 (7th Cir. 2007). In *Hamm*, the lender provided a disclosure form to the borrower which stated that the borrower's amortized loan payments would consist of 359 payments of \$541.92 beginning on 03/01/2002, with a final payment of \$536.01 due on 02/01/2032. *Id.* at 527. The court held that this was a rescindable violation because the disclosure did not explicitly state that the borrower would be required to make 360 monthly payments over thirty years, with payments due at the beginning of each month. *Id.* at 530. The court recognized that the borrower was not likely misled by the disclosure, but reasoned that under TILA, "the borrower should not have to make any assumptions." *Id.* at 531. The

less-than-strict liability standard to certain TILA violations, including certain disclosure violations that would trigger the extended right of rescission.⁷³

The courts applying this standard believe that the extended right of rescission imposes an overly harsh and inequitable result on lenders; thus, they conclude that the provision should only be used in certain limited circumstances.⁷⁴ As discussed below, these courts are misapplying TILA law by misconstruing the purpose of the Act's 1995 amendments,⁷⁵ overlooking the various built-in statutory protections for lenders,⁷⁶ and ignoring the underlying policy goals of the Act.⁷⁷ The application of a less-than-strict liability standard to TILA disclosure violations creates a potentially insurmountable barrier to borrowers who wish to invoke the extended right of rescission as a defense to foreclosure.⁷⁸ This result violates both the letter and spirit of TILA.

This discussion will begin by comparing two Circuits' differing approaches to common, technical TILA violations. The comparison of these two cases will illustrate the opposing views of the appropriate enforcement standard for TILA disclosure violations.

A. *Highly Technical TILA Violations: A Case Comparison*

Lenders' violations of TILA's more specific, technical requirements can provide an excellent illustration of the different ways courts enforce the Act. The circuits are split as to how strictly to enforce the requirements associated with the Notice of Right to Rescind, a mandated disclosure that has some highly technical requirements that can easily trip up an unwary lender.⁷⁹ Recall that every borrower must receive two identical copies of the Notice of Right to Rescind.⁸⁰ The purpose of this

Hamm decision came out of the Seventh Circuit, which arguably applies the strictest enforcement standards to TILA violations. *See, e.g., id.*; *Handy v. Anchor Mortgage Corp.*, 464 F.3d 760 (7th Cir. 2006). *See* Part III.A.1 for a detailed discussion of *Handy*. For a more extensive listing of courts that continue to apply a strict liability standard to TILA violations, *see* RENUART ET AL., *supra* note 14, at 535 n.457 (listing cases from the Third, Sixth, Seventh, Ninth, and Eleventh Circuits, as well as dozens of District Court cases, in which the courts emphasized the strict liability nature of TILA in assessing violations).

73. *See, e.g.,* *Melfi v. WMC Mortgage Corp.*, 568 F.3d 309, 312-13 (1st Cir. 2009); *Santos-Rodriguez v. Doral Mortg. Corp.*, 485 F.3d 12, 17 (1st Cir. 2007).

74. *See infra* Part III.A-B.

75. *See infra* Part III.B.

76. *See infra* Part III.C.

77. *See infra* Part III.D.

78. *See infra* Part III.E.

79. *See* 12 C.F.R. § 226.15(b)(1)-(5) (2009) (listing the required elements of a proper Notice of Right to Rescind disclosure).

80. *See generally supra* note 40 and accompanying text.

disclosure, among other things, is to inform borrowers of their right to rescind the loan, how that right may be exercised, and when the right will expire.⁸¹

Because the requirements for the Notice of Right to Rescind are so specific, even a lender committed to compliance can commit a serious violation. For example, a lender is permitted to use boilerplate notice forms that have blank spaces where the date of the transaction and expiration date of the right of rescission can be inserted.⁸² But in the lender's rush to finalize loan documents, two slightly different versions of the model notice form might be given to the borrower, the expiration date of the right of rescission might not get filled in, or the lender might commit some other violation. Nevertheless, Regulation Z states that a lender's failure to satisfy the specific requirements for the Notice of Right to Rescind will entitle the borrower to the three-year extended right of rescission.⁸³ Despite the seemingly plain language of Regulation Z, the First and Seventh Circuits have applied completely different enforcement standards to technical violations related to the Notice of Right to Rescind.

In the First Circuit case, *Melfi v. WMC Mortgage Corporation*,⁸⁴ the lender for a home refinance loan provided the borrower with copies of the Notice of Right to Rescind at the loan closing.⁸⁵ Approximately twenty months later, the borrower sought to exercise the extended right of rescission based on the lender's failure to identify the date of the transaction and the expiration date of the right of rescission on the notice.⁸⁶ In rejecting the borrower's attempt to rescind the loan, the court

81. 12 C.F.R. § 226.15(b).

82. A lender is permitted and encouraged to use model forms provided in the Appendix of Regulation Z which have blank spaces where the appropriate dates can be inserted by the lender. See 12 C.F.R. § 226.23(b)(2). The model forms are provided "to help creditors comply with TILA. . . ." *Handy v. Anchor Mortgage Corp.*, 464 F.3d 760, 763 (7th Cir. 2006).

83. 12 C.F.R. § 226.15(a)(3), 226.23(a)(3) ("The consumer may exercise the right to rescind until . . . delivery of the notice required by [this section] . . . [and] the right to rescind shall expire 3 years after consummation.") (footnotes omitted). See 12 C.F.R. §§ 226.15(b), 226.23(b)(1)-(2) (identifying the Regulation's requirements for the Notice of Right to Rescind, including the requirement that the Notice "clearly and conspicuously disclose . . . [t]he date the rescission period expires").

84. *Melfi v. WMC Mortgage Corp.*, 568 F.3d 309 (1st Cir. 2009).

85. *Id.* at 310.

86. *Id.* In *Melfi*, the lender's Notice of Right to Rescind stated:

You have a legal right under federal law to cancel this transaction, without cost, within THREE BUSINESS DAYS from whichever of the following events occurs LAST:

- (1) The date of the transaction, which is _____; or
- (2) The date you receive your Truth in Lending disclosures; or
- (3) The date you received this notice of your right to cancel.

....

noted that “technical deficiencies do not matter if the borrower receives a notice that effectively gives him notice” of the required dates.⁸⁷ The court interpreted TILA’s clear and conspicuous requirement to be satisfied when a court deems the disclosure to be objectively understandable.⁸⁸ The court concluded that this borrower surely knew the date he closed on the loan, thus excusing the lender’s failure to include the date of the loan closing on the notice, and that “[f]rom that date, it is easy enough to count three days,” thus satisfying the lender’s failure to include the expiration date of the borrower’s right of rescission.⁸⁹ Accordingly, the court affirmed the District Court’s decision⁹⁰ that the lender’s “technical violations” of TILA did not permit the borrower to exercise the extended right of rescission to rescind the loan.⁹¹

Conversely, in the Seventh Circuit case, *Handy v. Anchor Mortgage Corporation*,⁹² the court applied a very different enforcement standard for a technical TILA violation.⁹³ In *Handy*, the borrower sought to rescind her loan two years after the loan consummation based on the lender’s failure to provide the proper version of the model Notice of Right to Rescind form.⁹⁴ The lender had provided a total of five copies of the notice to the borrower.⁹⁵ But only one copy was the particular model form that was to be used for this borrower’s transaction type—a refinance with a new lender.⁹⁶ The other four copies were model forms that were to be used for refinances with the original lender.⁹⁷ The court conceded that the language of the five forms was so similar that the

If you cancel by mail or telegram, you must send the notice no later than
MIDNIGHT of _____(or MIDNIGHT of the THIRD BUSINESS DAY
following the latest of the three events listed above).

Id. at 311 (emphasis in original). The court noted that the lender had stamped the date of the transaction at the top of the Notice, but that the spaces shown above where dates could be inserted for the date of the transaction and the recession deadline were left blank. *Id.*

87. *Id.* at 312.

88. *Id.* (“Our test is whether any reasonable person, in reading the form provided in this case, would so understand it.”).

89. *Id.* at 311.

90. *Melfi v. WMC Mortgage Corp.*, No. 08-024ML, 2009 WL 64338 (D.R.I. Jan. 9, 2009).

91. *Melfi*, 568 F.3d at 311-13.

92. *Handy v. Anchor Mortgage Corp.*, 464 F.3d 760 (7th Cir. 2006).

93. The court noted that “TILA does not easily forgive technical errors” and that “hypertechnicality reigns in TILA cases.” *Id.* at 764 (citing *Cowen v. Bank United of Tex.*, FSB, 70 F.3d 937, 941 (7th Cir. 1995)) (internal quotation marks omitted).

94. *Id.* at 761-62.

95. *Id.* at 762.

96. *Id.* at 762-64.

97. *Id.*

borrower was not likely confused as to her rescission rights.⁹⁸ Nevertheless, the court held that a lender's failure to provide the precise type of model notice form is a violation that is sufficient to trigger a borrower's extended right of rescission.⁹⁹ The court reasoned that whether a disclosure is clear and conspicuous for purposes of TILA "depends on the contents of the form, not on how it affects any particular reader."¹⁰⁰

On the surface, this split in authority seems to stem from the definition of TILA's "clear and conspicuous" requirement for disclosures.¹⁰¹ The *Melfi* court stated that the sufficiency of a disclosure should be considered from an objective standpoint—that is, whether a reasonable person would be misled by the language of the disclosure.¹⁰² On the other hand, the *Handy* court noted that whether a borrower could have been confused by a disclosure "misses the point" of the specific requirements provided by TILA.¹⁰³

Part of the reason courts like *Melfi* are comfortable ignoring certain TILA violations is based on these courts' interpretation of the language and purpose of the 1995 amendments to TILA. Thus, an examination of the language and congressional intent behind these amendments will shed some light on which court's approach is the better one.

B. *Guidance from the 1995 Amendments*

In 1995, Congress amended various portions of TILA including certain disclosure requirements and the extended right of rescission provision.¹⁰⁴ These amendments were meant to serve a number of

98. *Id.*

99. *Id.* at 764-65.

100. *Id.* at 764 (quoting *Smith v. Check-N-Go of Ill., Inc.*, 200 F.3d 511, 515 (7th Cir. 1999)).

101. See 15 U.S.C. § 1635(a) (2006); 12 C.F.R. § 226.23(b)(3) (2009).

102. *Melfi v. WMC Mortgage Corp.*, 568 F.3d 309, 312 (1st Cir. 2009). For a case that is a bit more factually similar to *Handy*, but adopts the "objectively reasonable" standard for disclosure sufficiency, see *Santos-Rodriguez v. Doral Mortgage Corp.*, 485 F.3d 12 (1st Cir. 2007). In *Santos-Rodriguez*, the lender had provided the borrowers with the wrong version of a Notice of Right to Rescind form, whereas in *Handy*, the lender provided both proper and improper versions of the model form to the plaintiffs. Compare *Handy*, 464 F.3d at 764, with *Santos-Rodriguez*, 485 F.3d at 16. In rejecting the *Handy* court's reasoning for allowing the borrowers to rescind the loan, the *Santos-Rodriguez* court reasoned that just because Regulation Z identifies the applicable model form for a particular transaction that "could be used in such a transaction does not mean that use of that form is required." *Santos-Rodriguez*, 485 F.3d at 18 n.7 (emphasis in original).

103. *Handy*, 464 F.3d at 764.

104. See The Truth in Lending Act Amendments of 1995, Pub. L. No. 104-29, 109 Stat. 271 (1995). See Part II.F for a more detailed discussion of some of the 1995 amendments' key changes to TILA and specifically to the extended right of rescission provisions.

purposes, but two primary objectives were to clarify TILA's disclosure requirements and to respond to a controversial Eleventh Circuit case.¹⁰⁵ The 1994 case of *Rodash v. AIB Mortgage Co.*¹⁰⁶ "triggered a firestorm" within the lending industry and served as a "political hot button" that greatly motivated Congress's decision to amend TILA.¹⁰⁷

In *Rodash*, the borrower had obtained a home equity mortgage from AIB Mortgage Company.¹⁰⁸ The lender provided a TILA disclosure statement to the borrower, but failed to include \$226 worth of settlement fees and taxes under the "finance charge" figure as required by TILA.¹⁰⁹ Instead, the lender improperly included these amounts in the mutually exclusive "amount financed" itemization.¹¹⁰ As a result, the borrower invoked her extended right of rescission approximately five months after the loan was consummated.¹¹¹ The court held that the lender's error was within the scope of TILA's prohibitions that allow a borrower to exercise the extended right of rescission.¹¹²

After the *Rodash* decision was announced, dozens of class action lawsuits were filed in which thousands of plaintiffs sought to rescind their mortgages for TILA violations that were considered by some to be "mere technical errors."¹¹³ In response to this avalanche of mortgage rescissions, representatives from the lending industry appeared before Congress to testify that these class action suits "threatened the solvency of the industry."¹¹⁴ This threat of "wholesale rescissions" prompted Congress to quickly enact a moratorium on any class action lawsuits that sought relief for certain TILA violations.¹¹⁵ Then, in 1995, Congress chose to amend TILA in several ways.

Although Congress made various amendments to TILA in 1995, two are most relevant for this discussion. First, Congress granted lenders retroactive relief from the types of minor finance charge violations that

105. See generally 141 CONG. REC. S5614-02, (daily ed. Apr. 24, 1995), available at 1995 WL 236489; accord *McKenna v. First Horizon Home Loan Corp.*, 475 F.3d 418, 424 (1st Cir. 2007); RENUART ET AL., *supra* note 14, at 8-9 (discussing the 1995 amendments and congressional intent behind the amendments).

106. *Rodash v. AIB Mortgage Co.*, 16 F.3d 1142 (11th Cir. 1994).

107. RENUART ET AL., *supra* note 14, at 8.

108. *Rodash*, 16 F.3d at 1143.

109. *Id.* at 1147.

110. *Id.*

111. *Id.* at 1144.

112. *Id.* at 1148-49.

113. *McKenna v. First Horizon Home Loan Corp.*, 475 F.3d 418, 424 (1st Cir. 2007); see 141 CONG. REC. S5614-02, (daily ed. Apr. 24, 1995), available at 1995 WL 236489; RENUART ET AL., *supra* note 14, at 8-9.

114. RENUART ET AL., *supra* note 14, at 9 (citations omitted); see Griffith, *supra* note 19, at 195.

115. See Truth in Lending Class Action Relief Act of 1995, Pub. L. No. 104-12, § 1, 109 Stat. 161 (1995); *McKenna*, 475 F.3d at 424.

were present in *Rodash*.¹¹⁶ Second, Congress adjusted the tolerances for TILA disclosure violations and provided the ultra-low tolerance level for TILA violations suffered by borrowers facing foreclosure.¹¹⁷ These amendments were meant to not only allay the lending industry's fears of the potential crushing liability that might result from widespread TILA class action suits, but also to give lenders more leeway for disclosure violations that Congress viewed as "honest mistakes" by lenders.¹¹⁸

This historical backdrop has prompted some courts to apply a less-than-strict liability standard to TILA disclosure violations.¹¹⁹ In support of this standard, the *Melfi* court stated in a cursory manner that pre-1995 amendment cases that applied a strict liability standard to TILA violations "were decided under an earlier version of TILA."¹²⁰ The court went on to say that the 1995 amendments have "*perhaps* weakened the present force of older case law," although the court never actually addressed the precise implications of the 1995 amendments on prior case law.¹²¹ This reasoning is troubling because the 1995 amendments did not broadly eliminate existing TILA requirements, but rather, they merely increased the statutory tolerances for certain lender disclosure errors and granted retroactive immunity for certain lender disclosure violations.¹²²

Although the 1995 amendments had the effect of benefitting the lending industry by lessening the risk of lender liability, the reach of these lender-friendly alterations was limited to specific, narrowly-defined areas. Nothing in the 1995 amendments suggests that courts have the right to deem clearly defined TILA disclosure violations as too minor or technical to be actionable.¹²³ In fact, a court's decision to ignore a TILA disclosure violation when a borrower is facing foreclosure would contradict another underlying theme of the 1995 amendments: the special attention and ultra-low disclosure tolerances afforded borrowers facing foreclosure.¹²⁴ Courts like the *Melfi* court appear to be supplanting Congress's decision to narrowly address the risk of widespread class action rescission lawsuits with some supposed intent to soften the entire Act.

116. See 15 U.S.C. § 1635(a) (2006); *Barry v. Mortgage Servicing Acquisition Corp.*, 941 F.Supp. 278, 283-84 (D.R.I. 1996); *RENUART ET AL.*, *supra* note 14, at 9.

117. See *supra* Part II.F.

118. *McKenna*, 475 F.3d at 424-25.

119. See, e.g., *id.* at 418.

120. *Melfi v. WMC Mortgage Corp.*, 568 F.3d 309, 313 (1st Cir. 2009).

121. *Id.* at 313 (emphasis added).

122. *RENUART ET AL.*, *supra* note 14, at 13.

123. See *Brown v. Credithrift of Am. Consumer Disc. Co. (In re Brown)*, 106 B.R. 852, 853 (Bankr. E.D. Pa. 1989) ("These amendments were apparently all that were considered necessary by Congress to remedy any inequities in favor of consumers arising from litigation under the TILA as originally enacted.")

124. See *supra* Part II.F.

Courts should not overlook the fact that the 1995 amendments were meant to address the specific fear that washed ashore in the wake of *Rodash*—the risk of crushing liability from TILA class action lawsuits.¹²⁵ Courts applying a less-than-strict liability standard recognize that TILA no longer appears to provide a clear avenue for class action lawsuits seeking class-wide loan rescissions,¹²⁶ and that plaintiffs must now individually pursue the “highly personal” rescission remedy.¹²⁷ Nevertheless, these courts continue to rely on the 1995 amendments as a means of empowering themselves to pick-and-choose which TILA violations they deem to be legally sufficient. This approach ignores the underlying purpose of the 1995 amendments.

As one court noted, “[i]t is nose-on-the-face plain that unrestricted class action availability for rescission claims” would pose an excessive risk for the lending industry considering the highly technical nature of TILA’s disclosure requirements and the powerful effect of the extended right of rescission.¹²⁸ But this is not to say that the same risk is present simply because individual borrowers still have the right to invoke the extended right of rescission for an individual, statutorily-defined violation of TILA. If this were the case, Congress would likely have either dramatically reduced the disclosure requirements for lenders or deleted the extended right of rescission altogether when it enacted the 1995 amendments in response to the *Rodash* decision. Yet Congress did not choose to eliminate the technical nature of TILA’s disclosure requirements; it simply gave lenders a bit more leeway with certain disclosure mandates.¹²⁹ Nor did Congress choose to eliminate the extended right of rescission from the Act; in fact, it highlighted the importance of this remedy for borrowers facing foreclosure.¹³⁰ Courts should realize that the impact of the 1995 amendments was limited to specific areas, and that “it is incumbent upon courts to preserve the concept which has been well-established since the enactment” of TILA by offering consumers the “full remedies” of TILA, even for so-called technical violations.¹³¹

125. See *supra* text accompanying notes 113-15.

126. *McKenna v. First Horizon Home Loan Corp.*, 475 F.3d 418, 423, 425 (1st Cir. 2007). The statute permits class action lawsuits for certain violations, but places a cap on damages. See 15 U.S.C. § 1640(a)(2)(B) (2006). However, precisely which types of class action lawsuits may be brought under TILA is debatable. See *Andrews v. Chevy Chase Bank, FSB*, 474 F.Supp.2d 1006, 1007-08 (E.D. Wis. 2007) (discussing the availability of TILA class action suits to plaintiffs).

127. *McKenna*, 475 F.3d at 423-26.

128. *Id.* at 424.

129. See generally *supra* note 116 and accompanying text.

130. See *supra* Part II.F. and text accompanying note 117.

131. *Brown v. Credithrift of Am. Consumer Disc. Co.* (*In re Brown*), 106 B.R. 852, 853 (Bankr. E.D. Pa. 1989).

C. *TILA's Built-In Lender Protections*

The courts that fear that the extended right of rescission can have an overly harsh effect on the lending industry, often overlook some of TILA's built-in lender protections. There are at least two significant ways in which the Act provides protections to lenders from the possible inequities associated with the extended right of rescission: (1) lenders' statutory defenses to disclosure violations; and (2) courts' statutory authority to utilize conditional rescission. Both of these protections mitigate the potentially harsh effect that can result from the combination of the Act's highly technical requirements and the powerful remedy of rescission.

1. Lender Defenses

TILA provides a number of defenses to lenders who have committed a disclosure violation,¹³² but one defense is specifically designed to address the effects of the extended right of rescission. Section 1640(c) of the Act protects creditors from a borrower's rescission right if the lender's mis-disclosure was an "unintentional violation."¹³³ More specifically, this safe harbor provision states that a creditor will not be held liable for certain unintentional disclosure violations so long as the violation "resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid any such error."¹³⁴

In one case, the court discussed how the lender-defendant had satisfied the preventative measures necessary for a section 1640(c) defense to a disclosure violation. In the case of *In re Gordon*,¹³⁵ the creditor failed to disclose in writing the annual percentage rate for the borrower's loan.¹³⁶ The court relied on the creditor's in-house procedures for completing a borrower's loan documents to test whether the lender had a defense to its disclosure violation.¹³⁷ The court noted that the creditor employed trained individuals to complete the loan documents, that the creditor's employees reviewed completed documents with borrowers, and that a supervisor reviewed finalized documents for

132. For an excellent discussion of the various statutory defenses available to lenders for TILA disclosure violations, *see generally* RENUART ET AL., *supra* note 14, at 517-34.

133. 15 U.S.C. § 1640(c) (2006).

134. *Id.*

135. *Gordon v. Hendricks-Patton Co. (In re Gordon)*, 389 B.R. 243 (Bankr. N.D. Ala. 2008).

136. *Id.* at 245.

137. *Id.* at 249.

errors.¹³⁸ The court stated that the creditor had satisfied the section 1640(c) defense because the disclosure error was most likely an unintentional oversight, and because the creditor had procedures in place that were “reasonably adapted to avoid the errors.”¹³⁹

The *In re Gordon* case illustrates that the requirements for a lender to invoke a section 1640(c) defense are not terribly onerous. In fact, many honest lenders who simply employ a closing agent with a reasonable set of procedures in place for proofreading a loan's closing documents will satisfy the elements of the defense.¹⁴⁰ This defense is just one example of the many ways in which Congress has taken steps to balance the lender's interests with the Act's underlying goal of empowering borrowers to make informed credit decisions.

2. Conditional Rescission

Another way that Congress has provided protective measures for lenders is by statutorily authorizing courts to condition loan rescission on the borrower's tender of the loan principal. Recall that TILA and Regulation Z provide for a three-step process to occur when a borrower exercises the right of rescission.¹⁴¹ Under this process, once a borrower rescinds the loan, the security interest in the borrower's home is voided.¹⁴² After this initial step, the lender has twenty days to refund any monies paid by the borrower and to reflect the termination of the underlying security interest in the home.¹⁴³ The third and final step calls for the borrower to tender back to the lender the loan principal.¹⁴⁴ As written, this process creates a situation in which a borrower can effectively void the security interest underlying a mortgage, and then

138. *Id.*

139. *Id.*

140. *See, e.g.,* Groat v. Carlson (*In re Groat*), 369 B.R. 413 (B.A.P. 8th Cir. 2007). In the case of *In re Groat*, the lender's closing agent had inserted the wrong expiration date of the borrower's rescission right on the Notice of Right to Rescind. *Id.* at 417. The court's decision indicated that even if the borrower had successfully invoked the extended right of rescission, the lender would not be liable for the alleged disclosure violation due to TILA's section 1640(c) defense. *Id.* at 418-19. The court relied on the lender's attorney's procedures for loan closings as evidence of the bona fide error. *Id.* at 418. The court noted that the attorney's trained assistant would prepare loan documents, the attorney himself would then proofread the completed documents, and then either the attorney or his assistant would review the documents with the borrower. *Id.* The court noted that the lender had satisfied the section 1640(c) defense because the error was most likely an unintentional oversight, and because the lender's attorney had procedures in place that “were reasonably adapted to avoid the error.” *Id.*

141. *See supra* Part II.E.

142. 15 U.S.C. § 1635(b) (2006); 12 C.F.R. §§ 226.15(d)(1), 226.23(d)(1) (2009).

143. 15 U.S.C. § 1635(b); 12 C.F.R. §§ 226.15(d)(2), 226.23(d)(2).

144. 15 U.S.C. § 1635(b); 12 C.F.R. §§ 226.15(d)(3), 226.23(d)(3).

walk away from the obligation to tender the loan proceeds back to the lender.¹⁴⁵ Obviously this can create a significant risk to the lender who, now essentially an unsecured creditor, would have little chance of collecting its loan proceeds from a borrower who then files for bankruptcy after rescinding the loan.¹⁴⁶ To address this potentially inequitable situation, Regulation Z authorizes a court to alter the mechanics of the rescission process as a means of balancing the equities of the case.¹⁴⁷

Courts frequently invoke this equitable power to condition a borrower's loan rescission on the borrower's tender of the loan proceeds back to the lender.¹⁴⁸ That is, the court will not recognize the voiding of the creditor's security interest until the borrower has paid back the loan principal to the creditor. These courts reason that the goal of returning the parties to the *status quo ante*¹⁴⁹ demands that a borrower not receive a windfall at the expense of imposing an inequitably harsh result on the lender.¹⁵⁰ Accordingly, the majority of courts today will not recognize a borrower's exercise of the extended right of rescission unless and until the borrower pays the loan proceeds back to the lender or shows proof of the ability to do so.¹⁵¹

While there is considerable debate as to whether or not courts are overstepping their statutory authority when they utilize this conditional rescission procedure,¹⁵² the fact remains that this judicial trend provides creditors with significant protection from the potential inequities associated with TILA rescission. Because a court has the right to scrutinize each TILA rescission case to ensure that the lender is repaid its loan principal, lenders are not likely to receive an overly harsh result.¹⁵³ In fact, this judicial imposition ensures that, in the end, rescission will create the precise result that Congress intended: a culpable-lender will

145. See *Powers v. Sims & Levin*, 542 F.2d 1216, 1221 (4th Cir. 1976).

146. Cf. *Ramirez v. Household Fin. Corp. III (In re Ramirez)*, 329 B.R. 727, 740 (D. Kan. 2005); *Yamamoto v. Bank of N.Y.*, 329 F.3d 1167, 1172 (9th Cir. 2003).

147. 12 C.F.R. §§ 226.15(d)(4), 226.23(d)(4).

148. See generally *Yamamoto*, 329 F.3d at 1171-73.

149. See *supra* note 56 and accompanying text.

150. See, e.g., *American Mortgage Network, Inc. v. Shelton*, 486 F.3d 815, 820 (4th Cir. 2007).

151. *In re Ramirez*, 329 B.R. at 740.

152. See generally Griffith, *supra* note 19, at 226-232; RENUART ET AL., *supra* note 14, at 452-59. Many consumer advocates might scoff at the idea of conceding that courts have the equitable authority to mandate conditional rescission. But the issue is moot if the borrower cannot get his or her foot in the door by surviving summary judgment for a so-called technical violation. Overcoming this initial obstacle requires a strict liability enforcement standard. See *infra* note 187.

153. See *Yamamoto*, 329 F.3d at 1173 (“Whether the call [for conditional rescission] is correct must be determined on a case-by-case basis, in light of the record adduced.”).

lose all the interest and fees associated with a noncompliant loan, but will not lose its entire investment.¹⁵⁴ This result provides lenders with a powerful incentive to comply with the Act, but does not create the kind of significant threat to the lending industry that TILA's various amendments were meant to address.¹⁵⁵ Conditional rescission is another example of the many steps Congress has taken to balance the lender's interests with TILA's consumer protection goals.

D. TILA Policy: Implied Means and Explicit Ends

Even if one were to presume that the purpose and reach of the 1995 amendments to TILA were ambiguous, and that TILA's various lender defenses did not provide adequate protection to lenders, TILA's policy underpinnings and enforcement framework provide ample guidance on how courts should handle disclosure violations. As discussed, the underlying goal of TILA is to allow borrowers to make informed credit decisions, and Congress chose to effectuate this goal by requiring that lenders provide borrowers with specific, uniform loan disclosures.¹⁵⁶ Additionally, Congress created a specific enforcement structure to carry out the goals of the Act. For example, under TILA, consumer-borrowers are empowered to act as "private attorneys general" to enforce the Act's provisions.¹⁵⁷ Moreover, TILA not only provides monetary damages to those borrowers who prove a lender's violation, it also avails borrowers with the powerful remedy of rescission for certain violations.¹⁵⁸ This enforcement framework shows that a lender's only incentive to comply with TILA's disclosure provisions is avoidance of the statutory penalties for noncompliance.¹⁵⁹ Thus, Congress has shown that *deterrence* is the

154. See *Quenzer v. Advanta Mortgage Corp. USA*, 288 B.R. 884, 889 (D. Kan. 2003); see generally *supra* Part II.E-F.

155. See *Quenzer*, 288 B.R. at 889.

156. See 15 U.S.C. § 1601(a) (2006); 12 C.F.R. § 226.1(b) (2009); see generally *Mourning v. Family Publ'n Serv., Inc.*, 411 U.S. 356, 360-70 (1973) (discussing the purpose of TILA); *RENUART ET AL.*, *supra* note 14, at 1-3.

157. See, e.g., *Perrone v. General Motors Acceptance Corp.*, 232 F.3d 433, 436 (5th Cir. 2000) ("The caselaw confirms that statutory damages may be imposed as a means to encourage private attorneys general to police disclosure compliance even where no actual damages exist."); *Jones v. TransOhio Sav. Ass'n*, 747 F.2d 1037, 1040 (11th Cir. 1984). However, TILA also grants enforcement authority to certain federal agencies. See 15 U.S.C. § 1607(a).

158. See generally *supra* note 40 and accompanying text.

159. See *McKenna v. First Horizon Home Loan Corp.*, 475 F.3d 418, 426 (1st Cir. 2007); cf. *Griffith*, *supra* note 19, at 232 (discussing the importance of courts' strict application of TILA's provisions, as "any coddling of creditors removes the incentive for creditors to respond to statutory demands").

implied means for ensuring lender compliance.¹⁶⁰ This use of compelled lender compliance in turn effectuates TILA's underlying goal of empowering borrowers to make informed credit decisions through the standardization of loan disclosures.¹⁶¹

Congress likely chose this combination of consumer oversight and lender deterrence as the enforcement framework for TILA because of the disparities that exist between most consumers and their lenders. Consider the obvious disadvantages that the average consumer-borrower encounters when sitting across the settlement table from a sophisticated lender or mortgage broker. At a typical home-refinance closing a borrower will receive dozens, and possibly hundreds, of documents throughout a proceeding that may only last an hour.¹⁶² During this brief period of time, the borrower is expected to sign or acknowledge a number of documents, including the various TILA disclosures.¹⁶³ Although the TILA disclosures are designed to be readily understandable, they are "notorious for confusing people."¹⁶⁴ When an unsophisticated and trusting borrower is thrust into the rushed atmosphere of a typical real estate loan refinance closing, it is easy to imagine how the essential terms of the loan can get lost in a sea of paper.¹⁶⁵

160. See, e.g., *Williams v. Pub. Fin. Corp.*, 598 F.2d 349, 356 (5th Cir. 1979) ("The remedial scheme in the TIL[A] Act is designed to deter generally illegalities . . . and not just to compensate borrowers for their actual injuries in any particular case."); see also *Watkins v. Simmons & Clark, Inc.*, 618 F.2d 398, 399 (6th Cir. 1980) ("The clear purpose of this statutorily mandated minimum recovery was to encourage lawsuits by individual consumers as a means of enforcing creditor compliance with the Act.").

161. See, e.g., *Smith v. Chapman*, 614 F.2d 968, 971 (5th Cir. 1980) ("Only adherence to a strict compliance standard will promote the standardization of terms which will permit consumers readily to make meaningful comparisons of available credit alternatives.").

162. See, e.g., Bob Tedeschi, *Simplification: A Complex Job*, N.Y. TIMES, July 8, 2007, at RE11; Jay Romano, *Paper, Paper And Even More Paper*, N.Y. TIMES, July 1, 2001, at RE5; see also, HomeBanc Mortgage Corporation Case Study, available at <http://www.onbase.com/English/IndustrySolutions/FinancialServices/CaseStudies/HomeBanc> (last visited January 1, 2010) (stating that HomeBanc's average loan file for a residential mortgage is approximately 300 pages).

163. See Tedeschi, *supra* note 162. One court noted that a mortgage closing "requires a strong wrist and a good pen to sign a bevy of forms and documents." *Handy v. Anchor Mortgage Corp.*, 464 F.3d 760, 761 (7th Cir. 2006).

164. Tedeschi, *supra* note 162; see Cathy Lesser Mansfield, *The Road to Subprime "HEL" Was Paved with Good Congressional Intentions: Usury Deregulation and the Subprime Home Equity Market*, 51 S.C. L. REV. 473, 544 (2000) (stating that the information contained in the TILA disclosures is "complex and probably incomprehensible to most subprime borrowers").

165. See Interview by Neil Cavuto with Michael Shea, Executive Director, Acorn Housing Corp., on Fox News' *Your World with Neil Cavuto* (Oct. 13, 2008), available at 2008 WLNR 19503519 (stating that the vast majority of borrowers do not read the documents they sign during a mortgage closing).

Congress decided that, under the circumstances, the best way to communicate to a borrower the most basic aspects of a loan transaction is to require lenders to provide a short list of important disclosures.¹⁶⁶ Moreover, Congress took painstaking efforts to identify the precise requirements associated with these disclosures, including what information is to be included and in what form the information is to be documented.¹⁶⁷ Although these disclosures surely do not guarantee the borrower fully understands the nature and extent of the prospective credit decision, they at least increase the *probability* of an informed decision.¹⁶⁸ Also, Congress most likely recognized that the “burdens imposed on creditors are minimal, especially when compared to the harms that are avoided.”¹⁶⁹ So when a court decides that the absence or misstatement of these statutorily-required, basic details of the loan transaction seem too technical to be a violation, the court is truly placing the borrower on “unequal footing”¹⁷⁰ with a far more experienced, knowledgeable lender.¹⁷¹ Over time, the use of a less-than-strict liability standard for enforcing TILA violations can have negative practical implications for both consumers and for the effectiveness of the Act as a consumer protection statute.

E. Practical Consequences

A court's lax enforcement of TILA's disclosure requirements can create a number of practical negative consequences. The most obvious effect is that the application of a less-than-strict liability standard weakens the extended right of rescission as a defense to foreclosure. But there are other, related consequences of a soft judicial enforcement regime.

166. See generally *supra* notes 31, 40 and accompanying text.

167. See generally *supra* notes 31, 40.

168. See 15 U.S.C. § 1601(a) (2006). *But see*, Mansfield, *supra* note 164, at 544 (stating that the TILA disclosures do not benefit most borrowers in making an informed credit decision because “the information is not given to the borrower until the loan closing”).

169. Rodash v. AIB Mortgage Co., 16 F.3d 1142, 1149 (11th Cir. 1994).

170. Taylor v. United Mgmt., Inc., 51 F.Supp.2d 1212, 1215 (D.N.M. 1999).

171. See Jackson v. Grant, 890 F.2d 118, 122 (9th Cir. 1989) (quoting Semar v. Platte Valley Fed. Sav. & Loan Ass'n, 791 F.2d 699, 705 (9th Cir. 1986)) (noting that Congress, in enacting TILA, recognized that consumers are “inherently at a disadvantage in loan and credit transactions”); Bizier v. Globe Fin. Serv., Inc. 654 F.2d 1, 3 (C.A. Mass. 1981) (noting that TILA was “intended to balance scales thought to be weighed in favor of lenders”).

1. Weakening the Foreclosure Defense

The application of a less-than-strict liability standard for TILA violations weakens the potency of the Act's extended right of rescission as a defense to foreclosure. As discussed, Congress's strategic adjustment of TILA's tolerance standards in the 1995 amendments highlighted Congress's desire to make the extended right of rescission particularly accessible to borrowers facing foreclosure.¹⁷² Congress most likely recognized that some borrowers may attempt to exploit minor, accidental mistakes by honest lenders as a means of renegeing on a loan.¹⁷³ Accordingly, TILA provides various lender-defenses for certain disclosure violations.¹⁷⁴ But if a lender has no defense for its violation, a court is expected to honor the borrower's statutory right to raise the extended right of rescission as a shield against a noncompliant lender's foreclosure proceedings. To do otherwise weakens the Act's ability to deter lender noncompliance, which is the foundation of TILA's enforcement framework.¹⁷⁵

If the deterrent effect of the extended right of rescission becomes impotent due to courts' lax enforcement regimes, then borrowers may find that they are unable to pursue their claims in court. Rather, borrowers might find out through a cursory summary judgment that their lenders' disclosure violations were not severe enough to allow them to invoke their statutorily-defined rights.¹⁷⁶ The end result is that borrowers will find it increasingly difficult to raise the extended right to rescission as a defense to foreclosure.

2. Invitation for Predatory Lending

Weak enforcement of TILA disclosure requirements can also create an invitation for purposeful noncompliance and predatory lending practices. The contribution of predatory lending to the subprime credit crisis is well-documented,¹⁷⁷ as is the manner in which unscrupulous

172. See *supra* Part II.F.

173. In support of the initial moratorium on TILA class action suits, Sen. Mack stated that in the state of Florida banners had been hung encouraging borrowers to rescind their loans and that attorneys were amassing large numbers of plaintiffs in response to the *Rodash* decision. 141 CONG. REC. S5614-02, (daily ed. Apr. 24, 1995), available at 1995 WL 236489; see also *McKenna v. First Horizon Home Loan Corp.*, 475 F.3d 418, 426 (1st Cir. 2007) (noting that some attorneys actively recruit potential TILA plaintiffs by creating advertisements that hold out the prospect of recoveries, and that this can create "a powerful incentive" for certain debtors).

174. See *supra* Part III.C.

175. See *supra* Part III.D.

176. See, e.g., *Melfi v. WMC Mortgage Corp.*, 568 F.3d 309, 313 (1st Cir. 2009).

177. See generally MAJORITY STAFF OF THE JOINT ECON. COMM., *supra* note 1, *passim*.

lenders cheated borrowers by obfuscating the true interest rate, monthly payments, and other terms of home-refinance loans.¹⁷⁸ TILA's disclosure requirements can be a weapon to combat the incidence of predatory lending, as they force lenders to disclose enough information about a loan to give the borrower one last opportunity before loan consummation to assess the affordability of loan payments.¹⁷⁹

When courts apply a less-than-strict liability standard to TILA disclosure violations, however, they announce to the entire lending industry that lenders can get away with a bit of fudging of TILA's disclosures, so long as the violation is deemed sufficiently technical and occurs in the right Circuit. This blurring of TILA law creates confusion among honest lenders who seek guidance for complying with the Act, while also alerting unscrupulous lenders to new ways to take advantage of borrowers while escaping liability.¹⁸⁰ This obviously increases the risk that borrowers can be tricked into loans that they cannot afford, which recent history has proven is an excellent recipe for widespread loan defaults and accompanying home foreclosures.

3. Discouragement of Private Settlements

A court's application of a less-than-strict liability standard to TILA violations has the effect of discouraging private negotiations between noncompliant lenders and their borrowers. TILA's extended right of rescission is meant to be a private remedy that encourages disclosure violations to be "worked out between creditor and debtor without the intervention of the courts."¹⁸¹ Obviously a lender has an incentive to settle a valid rescission claim through either a loan refinance or loan modification, as this will likely result in a less costly outcome than if the lender is subject to loan rescission.

This incentive becomes less obvious, however, when lenders see that borrowers who attempt rescission are unable to survive summary judgment for anything less than flagrant TILA violations.¹⁸² Under these circumstances, a lender will likely feel less compelled to negotiate a mutually-beneficial settlement with a borrower who has threatened to

178. See generally *id. passim*.

179. Cf. 15 U.S.C. § 1601(a) (2006) (stating that the purpose of TILA is to "avoid the uninformed use of credit, and to protect the consumer against inaccurate and unfair credit . . . practices").

180. But whether honest or unscrupulous, most lenders will only disclose the minimal amount of information necessary to avoid a lawsuit. See Elwin Griffith, *Searching for the Truth in Lending: Identifying Some Problems in the Truth and Lending Act and Regulation Z*, 52 BAYLOR L. REV. 265, 351 (2000).

181. *Belini v. Wash. Mut. Bank, FA*, 412 F.3d 17, 25 (1st Cir. 2005).

182. See *supra* Part III.A.

rescind. In fact, when lenders consider certain courts' lax enforcement standards, coupled with the widespread judicial use of conditional rescission,¹⁸³ they typically take the position of either ignoring a borrower's rescission notice, denying a violation ever occurred, or both.¹⁸⁴

Conversely, the application of a traditional strict liability standard to TILA violations has the effect of encouraging private settlements, while still allowing courts to prevent inequitable outcomes. The use of a strict liability judicial enforcement regime will give notice to lenders that the only thing standing between a disclosure violation and a court-imposed interest-free loan is the ability of a borrower to tender the loan principal. Lenders will have a clear incentive to not only avoid disclosure violations, but also to find a non-rescission solution when a violation occurs. Of course, in the event that the borrower's asserted rescission is not based on a true violation, the lender can rely on the courts to ensure a fair outcome. Thus, even if courts apply strict liability to TILA violations, lenders need not fear the potential inequitable outcome associated with a borrower's attempt at a rescission-bankruptcy two-step.¹⁸⁵

In the end, lenders will face the threat of the precise punishment intended by Congress: the loss of interest income on a noncompliant loan.¹⁸⁶ This threat is harsh enough to ensure compliance by encouraging the standardization of loan disclosures, but is not harsh enough to threaten the solvency of the lending industry.¹⁸⁷ This outcome deters

183. *See supra* Part III.C.

184. RENUART ET AL., *supra* note 14, at 452.

185. *See supra* text accompanying notes 146-47.

186. *See supra* text accompanying note 154; *see also* Part II.E.

187. *See supra* text accompanying note 155. The lending industry should not be concerned about the prospect of widespread loan rescissions accompanying strict liability enforcement of TILA. Even if a strict liability enforcement regime were to cause an avalanche of rescission claims, many borrowers would not be able to comply with the tender requirements for conditional rescission. Most borrowers in default would likely encounter great difficulty in acquiring the funds necessary to tender the loan principal back to the lender, as a borrower in default presumably has little savings and poor credit resulting from the default. While this results in a terribly unfortunate outcome for many borrowers, the fact remains that lenders need not fear that the use of a strict liability standard will pose a serious threat to the lending industry. However, a strict liability standard *will* force lenders to decide if they are willing to take a chance on a particular rescission claim being brought by a borrower who does in fact have the means to tender, in which case the lender will be subject to the full consequences of rescission. Thus, the use of strict liability will, at the very least, place borrowers in a stronger position to negotiate than they are now. Moreover, borrowers who choose to pursue their rescission claims in court can avoid being subject to a quick summary judgment decision for a so-called technical violation.

lender noncompliance, promotes the informed use of credit, and ensures equitable results. This is the outcome Congress desired.

IV. CONCLUSION

TILA has traditionally been considered a strict liability statute. Those courts that apply a less-than-strict liability standard to TILA disclosure violations reason that the extended right of rescission imposes an overly harsh, inequitable result on lenders, and therefore this remedy should not be permitted for so-called technical violations of the Act's disclosure requirements. These courts misconstrue the language and purpose of TILA's 1995 amendments, which were meant to address the risk of a particular type of class action rescission suit, and to emphasize the importance of the extended right of rescission for borrowers facing foreclosure. Additionally, these courts overlook TILA's built-in lender protections, including various statutory lender defenses and the courts' statutory authority to condition rescission on a borrower's ability to pay the lender back the loan principal.

Lax judicial enforcement of TILA disclosure violations threatens the efficacy of the Act as a consumer protection statute. Congress decided that the best way to increase borrowers' informed use of credit is by requiring lenders to uniformly supply borrowers with the most basic details of a loan's terms and costs. Congress took painstaking efforts to identify the precise details required for each loan disclosure and gave borrowers the power of private enforcement. Thus, when courts take it upon themselves to allow lenders to escape liability for disclosure violations, they are threatening the foundation of the Act's enforcement framework.

Without the powerful combination of strict liability enforcement and the extended right of rescission remedy, lenders have far less incentive to comply with the Act. This can serve as an invitation for predatory lending, which in turn increases the risk of loan defaults and foreclosures. Moreover, a less-than-strict liability enforcement standard discourages private settlements between lenders and borrowers, as lenders have far less incentive to negotiate with a borrower when they know that a court will simply ignore certain disclosure violations. When courts apply a soft enforcement standard to TILA disclosure violations, borrowers also frequently find that they are unable to survive summary judgment for a claim against their statutorily-culpable lender. Consequently, many borrowers are unable to invoke the extended right of rescission when facing home foreclosure, even though Congress made special efforts to increase access to this remedy for this unfortunate group of consumers.

In a dire economic atmosphere where predatory lending has contributed to widespread home foreclosures, courts should not take it upon themselves to speculate on alternative theories of congressional intent, especially when the purpose, history, and letter of the law are so clear. The application of a less-than-strict liability standard to TILA disclosure violations undermines the foundation of the Act, which is meant to empower consumer-borrowers to see that lenders comply with TILA's disclosure mandates, which in turn allows borrowers to make informed credit decisions. Strict enforcement of TILA's disclosure mandates is the best way to ensure that gradual, but widespread lender noncompliance will be avoided.

Put another way, when Congress enacted TILA, it made a conscious decision to effectuate the goals of the Act by offering lenders all-stick-and-no-carrot. Thus, the sting of the stick must remain fierce.