In 1995, lenders sought relief from the potential liability resulting from widespread noncompliance, primarily among closed-end non-purchase-money mortgage lenders.

As in the years up to 1980, TILA played an important role in the effective representation of consumers by legal services and private attorneys. Unlike the earlier cycle, though, the stakes were larger for both borrowers and lenders. The combination of forces that led to the dramatic increased use of home equity lending as a primary credit tool in a deregulated environment meant that family homes were often at risk when financial trouble loomed. Moreover, deregulation had permitted some lenders to operate in a manner that actively encouraged unsustainable home equity debt.

It was in this environment that TILA’s extended rescission right, which is available when lenders violate certain of TILA’s most important provisions, became one of the more important defenses consumers had to protect themselves against the possibility of foreclosure. Where available, rescission is an effective defensive tool because it voids the security interest and eliminates any obligation on the part of the consumer to pay any finance charge (even if accrued) or any of the other costs incident to the loan. Indeed, an integral part of the approach taken by Congress in HOEPA to curb predatory lending was to bring most violations of that Act within the category of TILA violations triggering extended rescission rights.

Since the extended rescission right exists only when the lender violates one of a few of the most important of the Act’s requirements, it should have presented a limited threat to lenders. But lenders eager to increase market share often disregarded TILA’s mandates. A few practices in particular became commonplace, contrary to TILA’s goal of comprehensible disclosure of the costs of credit. One was the practice of “unbundling” the costs of originating loans, piece by piece, and passing them on separately (in addition to origination fees), and sometimes creating what came to be termed “junk fees” just for good measure. Arguably, it should have been obvious that these were “costs incident to or a condition of the extension of credit” and therefore should be factored into TILA’s price tag disclosures, but many lenders chose instead to exclude them from those disclosures.

The second was the industry’s increasing use of middlemen to obtain the business, do the preparatory work for a loan application, and close the loan. While many brokers and all third-party settlement agents functionally serve as the lender’s agent, here, too, lenders chose to pass the middlemen’s costs along without factoring them into the cost of the credit.

In the worst cases, unethical lenders and brokers deliberately padded loans with exorbitant fees in order to understate the cost of the loan and skim more equity (without commensurate value given) from the borrower’s home. Since the price tag disclosures are the most important of TILA’s disclosure requirements, they are among the violations triggering the extended rescission right. For a decade, rescission was used to address violations of these disclosure rules, without outcry. But in 1994 when the Eleventh Circuit, in Rodash v. AIB Mortgage Co., held that an expedited delivery fee and intangible taxes were finance charges, the case became a political hot button.

Though a $24 overcharge resulting in rescission in Steele v. Ford Motor Credit eight years earlier caused nary a peep, Rodash triggered a firestorm. The drop in mortgage interest rates in the early 1990s facilitated a wave of refinancings of non-recourseable purchase money mortgages into rescindable mortgage transactions. Most lenders had not treated intangible taxes as part of the credit cost. The use of expedited delivery fees had proliferated, in the wake of the outsourced application and closing functions, along with the generally more impatient pace of business and life. All the other “junk fees” or “legitimate costs” (depending on one’s perspective) were equally vulnerable, and equally prevalent. According to information the industry gave to Congress, there was “an onslaught of over 50 class action suits,” which threatened the solvency of the industry, many of which were reported to have sought class rescission as a remedy. In what some viewed to be considerable hyperbole, the industry pegged the stakes at the very future of the American housing finance system, with “potential liability that could reach into the billions.” All this occurred in the run up to the election of 1994, which voted in a Congress seeking relief from regulation.

An early order of business for the 104th Congress was enacting a six-month moratorium, during which courts were forbidden from certifying any TILA class involving “Rodash-type” issues. The breathing spell was used to hammer out a “Rodash fix,” as it was called. But while wishing to grant the industry its relief, Congress also recognized the valuable role rescission had played in protecting vulnerable homeowners from foreclosure.

The final Rodash fix, the Truth in Lending Amendments of 1995, consisted of four primary parts, with the focus on expanding the tolerances for noncompliance:
1.2.5 Truth in Lending Act Amendments of 1995

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• Retroactive relief from liability for the types of finance charge violations at issue in the post-
  Rodash litigation (and as long as the legislative branch was fixing troublesome judicial decisions, it offered immunity for violations at issue in a
couple of other cases, as well). The constitutionality of the retroactive application has been affirmed, despite
recognition that “retroactive legislation is generally unfavored.”

• Prospective amendment of the finance charge rules to specifically address certain of these charges at issue.

• An increase of Regulation Z’s existing $10 tolerance level for misdisclosed finance charge, creating an unfortunately
  complex, multi-tiered schedule of tolerances, which varies depending upon the type of transaction involved, the type of
  relief being sought by the consumer, and the posture of the case. The top tier considers as “accurate” in certain
  situations a misstatement of the finance charge and affected disclosures equal to one percent of the total amount of
  credit extended. The new tolerance levels were both prospective and retroactive.

• Special treatment for cases in which rescission is raised as a shield against threatened foreclosure. Some of the retroactive
  immunity rules for substantive violations of the finance charge disclosure do not apply when they are raised in this
defensive context, and this category has the lowest tolerance for misdisclosure of the finance charge, $35. These special
  rules apply both retroactively and prospectively.

It is important to note that while the 1995 amendments provided some additional leeway to creditors in making certain TILA
disclosures, the retention of the rescission remedy and the relatively low tolerance for defensive claims re-emphasized the
particular importance of TILA in providing a remedy for borrowers in foreclosure. Moreover, the scheme of tolerances itself
endorsesthe notion that, beyond those guidelines, creditors must provide price transparency to homeowners in the manner
specified by the statute. Thus, the Rodash fix is properly viewed as strengthening the argument that TILA is a strict liability
statute. More detailed discussion of the amendments and their effect on TILA law and practice is found throughout this
treatise in relevant subsections.

Footnotes

  (discussing deregulation of the residential mortgage market).

61 [61] See generally Ch. 10 [2], infra.

62 [62] See § 10.6 [3], infra.


64 [64] See § 3.2 [5], infra. See also §§ 3.6 [6], 3.9.5 [7], infra.

65 [65] See §§ 3.2 [5], 3.6 [6], infra.

66 [66] See § 4.2.4.6 [8], infra. The slide into greater inaccuracy in disclosure was particularly troublesome, since the
  policy justification for substantive deregulation of credit was that disclosure laws permit the market to take care of any
  problems. With little substantive regulation, and inaccurate and inadequate disclosure, it is less clear what is supposed
to take care of any problems.

67 [67] 16 F.3d 1142 (11th Cir. 1994).

68 [68] 783 F.2d 1016 (11th Cir. 1986). See § 3.7.2.3 [9], infra.
69 {69} Cong. Rec. S14567 (Sept. 28, 1995) (statement of Sen. D’Amato). (Never mind that the availability of the rescission remedy in class actions is itself the subject of contradictory judicial opinions; see § 10.9.9 [10], infra.)


71 {71} Pub. L. No. 104-12 (May 18, 1995), expired October 1, 1995. (A comparatively narrowly targeted bill had been offered in the waning days of the previous Congress, but was lost in the end-of-session legislative rush.)

72 {72} The HOEPA legislation which had passed the year earlier had bipartisan support; for example, both the Chair and Ranking Minority Member of that Senate Banking Committee, Senators Riegle and D’Amato were co-sponsors. Those members of both House and Senate Banking Committees who remained from the previous Congress brought to bear an institutional memory concerning the other side of the question. See also legislative history [11] available online as companion material to this treatise.

73 {73} The Truth in Lending Act Amendments of 1995, Pub. L. No. 104-29 (Sept. 30, 1995). See also legislative history [12] available online as companion material to this treatise.

74 {74} See § 6.4.4.9 [13], infra (discussing “fixing” In re Porter, 961 F.2d 1066 (3d Cir. 1992) (errors in the notice of right to cancel)); § 3.9.6.2.3 [14], infra (discussing “fixing” Brodo v. Bankers Trust Co., 847 F. Supp. 353 (E.D. Pa. 1994) (loan document preparation fees)).


76 {76} See § 5.4.3 [15], infra. One wonders what one’s banker would say if one decided to quit paying when one’s mortgage was 99% paid off. One suspects that “close enough” would not be the first words out of his or her mouth. Yet, this statutory change was viewed as saving creditors from “financial disaster” and from “facing overwhelming and ‘draconian’ liability (rescission) for relatively minor violations.” King v. Long Beach Mortgage Co. 672 F. Supp. 2d 238, 249 (D. Mass. 2009) (citing McKenna v. First Horizon Home Loan Corp. 475 F.3d 418 (1st Cir. 2007)).

77 {77} See § 10.4 [16], infra.

78 {78} See § 12.5.1 [17], infra.

79 {79} See §§ 1.5.2.3 [18], 12.5.1 [17], infra.

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