UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 312

SEPTEMBER TERM, 2001

STEVEN E. WILLIS, SR. ET UX.

v.

ALVIN E. FRIEDMAN ET AL.

Hollander,
Kenney,
Eyler, Deborah S.,

JJ.

Opinion by Kenney, J.

Filed: May 2, 2002

Appellants, Steven E. Willis, Sr. and Carole Willis, are appealing the decision of the Circuit Court for Frederick County denying their motion for a temporary restraining order and preliminary injunction against the substitute trustees under a deed of trust.[1] Appellants raise one question on appeal:

> Did the circuit court err or abuse its discretion in denying appellants' motion for a temporary restraining order and for an interlocutory injunction to stop a foreclosure sale to enforce a security interest which had been properly rescinded?

Because we hold that appellants can raise their Truth In Lending Act issues at the exceptions phase of the foreclosure proceeding, we find no error in the trial court's ruling on the injunction under the circumstances of this case.

FACTUAL BACKGROUND

Appellants bought real property identified as 13541 Catoctin Furnace Road, Thurmont, Maryland, in 1986. In both 1998 and 1999, appellants entered into loan agreements with Washington Mortgage Services, Inc. ("Washington Mortgage"). The first settled on or about January 15, 1998 (the "first loan"), and the second settled on or about January 26, 1999 (the "second loan"). It is the second loan that is at issue in this case.

The second loan was for $78,000, $11,000 of which was "new money." Appellants executed a note (the "Note") payable to Washington Mortgage. The Note was secured by a deed of trust,

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[1] Appellees are Alvin Friedman, Kenneth MacFadyn, James Loftus, and Daniel Menchel.

which was duly recorded. The Note was later assigned to ContiMortgage Corporation for value.

Appellants subsequently defaulted, and on February 29, 2000, appellees initiated foreclosure proceedings. The foreclosure was automatically stayed on March 29, 2000, when appellants filed for bankruptcy. On April 5, 2000, appellants' attorney notified ContiMortgage's attorney that appellants were exercising their right to rescind the transaction under the Truth in Lending Act, 15 U.S.C. §§ 1601 *et seq.* (2000) ("TILA").[2] The letter stated:

> I represent Steven and Carole Willis. You initiated a foreclosure action against their residence at 13541 Catoctin Furnace Road, Thurmont, MD 21788 on behalf of ContiMortgage Corporation ("Conti"). I am directing this notice to you since I cannot communicate directly to Conti.
>
> This is to advise that my clients hereby elect to rescind the loan transaction that was initially scheduled for December, 1998 and actually settled on or about January 26, 1999. This loan transaction was initially with Washington Mortgage Services, Inc. and is now held by Conti. The loan transaction included a security interest against my clients' residence at 13541 Catoctin Furnace Road, Thurmont, MD 21788. The grounds for rescission include, but is [sic] not limited to, the following:
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> 1. The total points and fees charged in connection with the loan was over 8% of the total loan amount as that term has been defined by rule. However, the disclosures required by 15 U.S.C. § 1639 were not provided in the time required by said statute.

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[2] As discussed *infra*, the right to rescind is contained in TILA § 1635.

2. The amount financed on the disclosure statement improperly included the following charges:

A. $275 for a release fee
B. $250 for title examination
C. $495 for a release fee
D. $395 for an abstract or title search

These charges, were in whole or in part, unreasonable and therefore should have been included in the finance charge. The finance charge was therefore, understated by more than $35.00.

My clients have filed for relief before the U.S. Bankruptcy Court for the District of Maryland. Their case number is 00-13320 PM. It is a proceeding under Chapter 13.

Later, on April 14, 2000, Mr. Willis wrote to ContiMortgage, advising that he was exercising his right to rescind the transaction:

You initiated a foreclosure action against my residence at 13541 Catoctin Furnace Road, Thurmont, MD 21788.

This is to advise that I hereby elect to rescind the loan transaction that was initially scheduled for December, 1998 and actually settled on or about January 26, 1999. This loan transaction was initially with Washington Mortgage Services, Inc. and is now held by you. The loan transaction included a security interest against my residence at 13541 Catoctin Furnace Road, Thurmont, MD 21788. My lawyer has previously sent your lawyer some of the grounds for rescission.[3]

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[3] Mr. Willis referred only to himself and was the only signatory to the letter, indicating that he was following up on his attorney's previous letter rescinding the transaction.

Appellants' bankruptcy case was dismissed on December 5, 2000, and the foreclosure proceedings resumed. Sale was scheduled for 12:35 p.m. on March 13, 2001. On March 12, 2001, appellants filed a motion for a temporary restraining order and preliminary injunction (the "motion for injunction"). Alleging that they properly exercised their right of rescission under TILA, appellants argued that the foreclosure sale should not proceed because their rescission automatically voided the deed of trust. The circuit court denied the motion for injunction on March 13, 2001,[4] and the foreclosure sale proceeded that same day. Also on March 13, 2000, appellants filed suit in the Circuit Court for Frederick County against Fairbanks Capital Corp., claiming violations of TILA.[5]

Appellants filed a timely notice of appeal on April 9, 2001. On April 24, 2001, they filed exceptions to the sale, claiming, *inter alia*, that the notice of the rescission under TILA had voided the deed of trust, and thereby had invalidated the sale. It is unclear whether appellees filed answers to the exceptions. It is clear, however, that the foreclosure sale has not been ratified.

DISCUSSION

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[4] The circuit court's denial of the motion for injunction was not entered by the clerk until March 15, 2001.

[5] Fairbanks Capital Corp. apparently purchased the Note from ContiMortgage. The case has been designated No. 01-0619.

Appellants argue that, because the security interest created by the defendant was void as a result of the rescission under TILA, the circuit court erred by denying their motion for injunction. Appellees argue that appellants failed to comply with Maryland Rule 14-209, and that they were not entitled to a temporary restraining order, because they faced no immediate, substantial, and irreparable harm.

Before we proceed further, a clarification is in order. No fact finding related to issues generated by an attempt to rescind under TILA is reflected by the circuit court decision. Nothing herein should be interpreted as appellate fact finding, binding on future evidentiary proceedings. The facts to be applied to the applicable law are yet to be determined. Any factual references that we are presumed to make are in the nature of observations based on arguments presented by the parties and are intended to facilitate our discussion.

A. The Truth in Lending Act

In discussing the substance of appellants' claims, we find it useful to discuss generally TILA, which was first enacted in 1968.

> The purpose of the Truth-in-Lending Act and the regulations promulgated under it by the Federal Reserve Board is "to assure a meaningful disclosure of credit terms so that the consumer will be able to compare more readily the various credit terms available to him and avoid the uninformed use of credit." 15 U.S.C.A. § 1601. See *Mourning v. Family Publications Service*, 411 U.S. 356, 93 S. Ct. 1652, 36 L.Ed.2d 318 (1973).

Peer v. First Federal Savings & Loan Asso., 273 Md. 610, 614, 331 A.2d 299 (1975). *See also Beach v. Ocwen Fed. Bank*, 523 U.S. 410, 412, 118 S. Ct. 1408, 140 L. Ed. 2d 566 (1998).

> The Act is a remedial statute and should be construed liberally in favor of the consumer in order to effectuate the congressional purpose. *Eby v. Reb Realty, Inc.*, 495 F.2d 646, 650 (9th Cir. 1974). It is not to be construed so liberally or loosely, however, as to lose sight of the balance which Congress sought to strike between borrowers and lenders. *Downey v. Whaley-Lamb Ford Sales, Inc.*, 607 F.2d 1093, 1095 (5th Cir. 1979).

Dorsey v. Beads, 288 Md. 161, 172, 416 A.2d 739 (1980). "[V]iolations of TILA cannot be explained away as merely 'technical' and, thus, *de minimis*." *Jenkins v. Landmark Mortgage Corp.*, 696 F.Supp. 1089, 1095 (W.D. Va. 1988) (citing *Mars v. Spartanburg Chrysler Plymouth*, 713 F.2d 65 (4th Cir. 1983); *Huff v. Stewart-Gwinn Furniture Co.*, 713 F.2d 67 (4th Cir. 1983)).

1. Exempt Transactions Under TILA

TILA contains a list of transactions that are exempt from the operation of the statute. Although the issue of the applicability of TILA to this case is not properly before us at this time,[6] if it were clear as a matter of law that the transaction is exempt from TILA, we need go no further in our discussion. TILA § 1635(e) states that

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[6] Although appellants raised this issue before the circuit court, it did not reach it. In addition, appellees did not address appellants' substantive TILA claims below, and they have never claimed that the loan is exempt from TILA.

> [t]his section does not apply to--
>
> (1) a residential mortgage transaction as defined in section 103(w) of this title [15 USCS § 1602(w)];
> (2) a transaction which constitutes a refinancing or consolidation (with no new advances) of the principal balance then due and any accrued and unpaid finance charges of an existing extension of credit by the same creditor secured by an interest in the same property;
> (3) a transaction in which an agency of a State is the creditor; or
> (4) advances under a preexisting open end credit plan if a security interest has already been retained or acquired and such advances are in accordance with a previously established credit limit for such plan.

The transactions at issue in this case neither involve the State as a creditor nor a preexisting open end credit plan.[7] A "residential mortgage transaction" is defined at TILA § 1602(w) as "a transaction in which a mortgage, deed of trust, purchase money security interest arising under an installment sales contract, or equivalent consensual security interest is created or retained against the consumer's dwelling to finance the acquisition or initial construction of such dwelling." The second loan does not fall into this category; rather, it appears to be a refinancing with an advance of new money.

Some refinancing transactions are excluded from the possibility of rescission pursuant to TILA § 1635(e)(2).

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[7] Credit card agreements are an example of an open end credit plan. *See* National Consumer Law Center, TRUTH IN LENDING §§ 3.1 *et seq.* (4th ed. 1999).

> The exemption has a rather simple rationale. Although in general consumer borrowers need a "cooling off" period to reconsider encumbering the title to their homes, a borrower who refinances has already had that time to rethink with respect to the old money. The borrower may want to reconsider further indebtedness, as that constitutes an additional risk of losing his or her home, but Congress evidently felt that it would be unfair to lenders if, simply by the expedient of seeking refinancing for the same amount, borrowers could gain the right to cancel the earlier loan. In short, although the general requirement of notification and opportunity to rescind protects borrowers, the statutory exemption for "refinancings" avoids overprotecting them at the expense of lenders.

In re Porter, 961 F.2d 1066, 1074 (3d Cir. 1992) (footnotes omitted). Thus, "[t]he right to rescind does not apply to a 'refinancing or consolidation by the same creditor of an extension of credit already secured by the consumer's principal dwelling.' 12 C.F.R. § 226.23(f)(2)." *Porter*, 961 F.2d at 1075. On the other hand, "the exemption from rescission for 'refinancings' **only applies if the refinancer and the original lender are the same**. See 15 U.S.C. § 1635(e)(2); 12 C.F.R. § 226.23(f). See also 51 Fed. Reg. 45296, 45297-98 (Dec 18, 1986) (Board retracts proposal to exempt "refinancings" by nonoriginal creditors)." *Porter*, 961 F.2d at 1078 n. 19 (emphasis supplied). In addition, the debtor in a refinancing has "the statutory right to rescind the new money portion of [the] loan, but not the old money portion." *Porter*, 961 F.2d at 1076.

Appellants state in their brief that they refinanced their house twice with Washington Mortgage, once on or about January 15, 1998, and then again on or about January 26, 1999. The second loan apparently involved $11,000 of "new money." As early as April 7, 1981, the Board of Governors of the Federal Reserve System held that "the right of rescission does apply to refinancings by a different creditor and to that part of a refinancing by the same creditor that is in excess of the existing debt." 46 Fed. Reg. 20,848 at § 226.23.

The parties did not develop the record or brief and argue the issue of exemption in the trial court, but we will assume for discussion purposes, without deciding, that appellants could have a statutory right to rescission because it appears clear that any "new money" in the second loan is covered by TILA.

2. The Right of Rescission

We now look specifically to the right of rescission as set forth at TILA § 1635:

> (a) *Disclosure of obligor's right to rescind.* Except as otherwise provided in this section, in the case of any consumer credit transaction (including opening or increasing the credit limit for an open end credit plan) in which a security interest, including any such interest arising by operation of law, is or will be retained or acquired in any property which is used as the principal dwelling of the person to whom credit is extended, the obligor shall have the right to rescind the transaction until midnight of the third business day following the consummation of the transaction or the delivery of the information and rescission forms required under this section together with a statement containing the material disclosures required

under this title, whichever is later, by notifying the creditor, in accordance with regulations of the Board, of his intention to do so. The creditor shall clearly and conspicuously disclose, in accordance with regulations of the Board, to any obligor in a transaction subject to this section the rights of the obligor under this section. The creditor shall also provide, in accordance with regulations of the Board, appropriate forms for the obligor to exercise his right to rescind any transaction subject to this section.

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(f) *Time Limit for Exercise of Right.* An obligor's right of rescission shall expire three years after the date of consummation of the transaction or upon the sale of the property, whichever occurs first, notwithstanding the fact that the information and forms required under this section or any other disclosures required under this chapter have not been delivered to the obligor, except that if (1) any agency empowered to enforce the provisions of this title institutes a proceeding to enforce the provisions of this section within three years after the date of consummation of the transaction, (2) such agency finds a violation of this section and (3) the obligor's right to rescind is based in whole or in part on any matter involved in such proceeding, then the obligor's right of rescission shall expire three years after the date of consummation of the transaction or upon the earlier sale of the property, or upon the expiration of one year following the conclusion of the proceeding, or any judicial review or period for judicial review thereof, whichever is later.

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(i) *Rescission rights in foreclosure.* (1) In general. Notwithstanding section 139 [15 U.S.C. § 1649], and subject to the time period provided in subsection (f), in addition to any other right of rescission available under this section for a transaction, after the initiation of any judicial or nonjudicial

> foreclosure process on the primary dwelling of an obligor securing an extension of credit, the obligor shall have a right to rescind the transaction equivalent to other rescission rights provided by this section, if--
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> (A) a mortgage broker fee is not included in the finance charge in accordance with the laws and regulations in effect at the time the consumer credit transaction was consummated; or
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> (B) the form of notice of rescission for the transaction is not the appropriate form of written notice published and adopted by the Board or a comparable written notice, and otherwise complied with all the requirements of this section regarding notice.
>
> (2) Tolerance for disclosures. Notwithstanding section 106(f) [15 U.S.C. § 1605(f)], and subject to the time period provided in subsection (f), for the purposes of exercising any rescission rights after the initiation of any judicial or nonjudicial foreclosure process on the principal dwelling of the obligor securing an extension of credit, the disclosure of the finance charge and other disclosures affected by any finance charge shall be treated as being accurate for purposes of this section if the amount disclosed as the finance charge does not vary from the actual finance charge by more than $35 or is greater than the amount required to be disclosed under this title.
>
> (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 the enactment of the Truth in Lending Act Amendments of 1995 [enacted Sept. 30, 1995].

The right of rescission must be disclosed to the consumer. *Dorsey*, 288 Md. at 172. We find no allegations that appellees initially failed to notify appellants of their right to rescind. Yet, there is no indication that appellants were, in fact, notified of their rescission rights. Appellees never answered appellants' motion for

injunction, and, because we have no record of the proceedings that took place in chambers prior to the ruling on the motion for injunction, we do not know whether appellees claimed below that the required disclosure had been made.[8] They do not make that claim in their brief, however. Therefore, we will assume, without deciding, that appellants may claim that appellees failed to notify them of their right to rescind the contract under TILA § 1635(a).

Because of its effect on the temporal limitations on the right to rescind the transaction, the importance of the disclosure of the right to rescind is clear. Rescission ordinarily must take place within three days under TILA § 1635(a).[9] If a creditor fails to disclose the § 1635(a) right to rescind, however, the right is

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[8] Appellants requested a transcript of the in-chambers proceeding, but the court reporter has advised that they were not recorded. At oral argument, both parties agreed that the in-chambers proceeding was of a perfunctory nature and primarily consisted of the court's ruling denying the injunction.

[9] It appears from the statute that, so long as the consumer is notified of the right to rescind, such rescission must take place within three days of "the consummation of the transaction or the delivery of the information" and forms required by TILA. 15 U.S.C. § 1635(a). TILA is to be construed in favor of consumers, and if lenders do not strictly comply with the notice requirements, the time for rescission will be suspended. *See Williams v. Empire Funding Corp.*, 109 F.Supp.2d 352, 357 (E.D. Pa. 2000). That case also suggests that, where the lender is in compliance, the three day rule will also be strictly construed . *Id.* at 356, 360. *See also Larson v. California Fed. Bank*, 1996 U.S. App. LEXIS 2650 at *8 (9th Cir. 1996).

tolled and the debtor has three years to rescind the contract.[10] *Dorsey*, 288 Md. at 172; TILA § 1635(f); 12 C.F.R. § 226.23(a)(3). The effect of a rescission is set forth in TILA § 1635(b):

> When an obligor exercises his right to rescind under subsection (a), he is not liable for any finance or other charge, and **any security interest given by the obligor, including any such interest arising by operation of law, becomes void upon such a rescission.** ... [Emphasis supplied.]

Regulation Z,[11] the implementing regulation to TILA, likewise states that, "[w]hen a consumer rescinds a transaction, the security interest giving rise to the right of rescission becomes void and the consumer shall not be liable for any amount, including any finance charge." 12 C.F.R. 226.23(d)(1).

"To exercise the right to rescind, the consumer shall notify the creditor of the rescission by mail, telegram or other means of

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[10] Congress imposed strict requirements for disclosure, and creditors must follow the letter of the law, except that

> [a]n 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, and otherwise complied with all other requirements of this section regarding notice.

TILA § 1635(h).

[11] Truth in Lending Regulations, known as Regulation Z, have been promulgated by the Board of Governors of the Federal Reserve System to implement the Truth in Lending Act. 12 C.F.R. § 226 *et seq.*

written communication. Notice is considered given when mailed, when filed for telegraphic transmission or, if sent by other means, when delivered to the creditor's designated place of business." 12 C.F.R. 226.23(a)(2). Therefore, in this case, rescission occurred, at the earliest, on April 5, 2000, when appellants' attorney wrote to ContiMortgage, or, at the latest, on April 14, 2000, when Steven Willis wrote to ContiMortgage.

The basis of appellants' rescission was the failure of the lender to include certain charges in the "amount financed" portion of the disclosure statement and a claim that some of the fees were unreasonable. These allegations may meet the standards set forth in TILA § 1635(i) concerning a debtor's rescission rights in foreclosure. Again, we do not decide this issue because it has not been fully argued and decided below, but we will assume, without deciding, that appellants presented, in a timely fashion, a prima facie right to rescind.

> When the consumer rescinds, the creditor's lien is automatically void. Therefore, the creditor does not have anything to foreclose. If the creditor throws caution to the wind and presses on with a foreclosure suit despite the consumer's rescission, the creditor may be subject to an injunction and later liability for ignoring the consumer's legitimate efforts to terminate the transaction.

Elwin Griffith, *Truth in Lending--the Right of Rescission, Disclosure of the Finance Charge, and Itemization of the Amount*

Financed in Closedend Transactions, 6 GEO. MASON L. REV. 191, 216 (1998).

> [R]escission is a complete defense to foreclosure. Since a valid rescission automatically voids the security interest, as well as eliminating the obligation to pay finance or other charges, the creditor is unsecured; it has no interest in the property on which to foreclose. Furthermore, the courts may enjoin a foreclosure sale of a home until the homeowner's rescission claim has been adjudicated.

National Consumer Law Center, TRUTH IN LENDING §§ 6.6.3.1, 363 (4th ed. 1999).

Upon a valid exercise of appellants' right to rescind, the deed of trust became void by operation of federal law. TILA § 1635(b); 12 C.F.R. 226.23(d). This is true notwithstanding the fact that appellees' security interest was perfected. *See* Griffith, 6 GEO. MASON L. REV. at 223. Therefore, as of April 2000, a colorable issue was generated as to whether there was a valid security interest for appellees to foreclose.

Both the Maryland Code and the Maryland Rules, discussed in more detail below, allow a creditor to foreclose a lien under certain circumstances. Neither expressly provides that rescission under TILA operates as a defense to a foreclosure action. In addition, the Rules allow the debtor to apply for an injunction, but a TILA rescission is not stated as a ground for the issuance of an injunction.

The Code allows foreclosure sales to proceed as follows:

> (a) *Power of sale or assent to decree for sale.* -- A provision may be inserted in a mortgage or deed of trust authorizing any natural person named in the instrument, including the secured party, to sell the property or declaring the borrower's assent to the passing of a decree for the sale of the property, on default in a condition on which the mortgage or deed of trust provides that a sale may be made. A sale made pursuant to this section or to the Maryland Rules, after final ratification by the court and grant of the property to the purchaser on payment of the purchase money, has the same effect as if the sale and grant were made under decree between the proper parties in relation to the mortgage or deed of trust and in the usual course of the court, and operates to pass all the title which the borrower had in the property at the time of the recording of the mortgage or deed of trust.

Md. Code (1974, 1996 Repl. Vol., 2001 Supp.), § 7-105 of the Real Property Article.

According to Rule 14-203(a)(1), the following are conditions precedent to foreclosure:

> (a) *Conditions precedent.* (1) Generally. An action to foreclose a lien may be filed after (A) the instrument creating or giving notice of the existence of the lien has been filed for the record, and (B) there has been a default in a condition upon which the lien instrument provides that a sale may be made or there is a default in the payment of the debt secured by a statutory lien.

Both the statute and the rule presuppose a valid security interest in the property subject to the foreclosure. That supposition, however, is directly impacted by TILA.

B. Preemption

The doctrine of preemption finds its roots in the Supremacy Clause of the U.S. Constitution: "This Constitution and the Laws

of the United States which shall be made in Pursuance thereof ... shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const. Art. VI, cl. 2.

> The reasoning of Judge Learned Hand in *Marsh v. United States*, [29 F.2d 172 (2d Cir. (1928)], which has been followed by numerous other courts, is fully applicable in Maryland. As Judge Hand pointed out, in light of the Supremacy Clause, an Act of Congress "is as valid a command within the borders of [a state] as one of its own statutes." 29 F.2d at 174. *See, e.g., Mondou v. New York, N.H. & H.R. Co.*, 223 U.S. 1, 57, 32 S. Ct. 169, 178, 56 L. Ed. 327, 349 (1912) ("When Congress . . . adopted [an] act, it spoke for all the people and all the states, and thereby established a policy for all. That policy is as much the policy of [the state] as if the act had emanated from its own legislature, and should be respected accordingly . . . ."); *Md.-Nat'l Cap. P. & P. Comm'n v. Crawford*, 307 Md. 1, 13-14, 511 A.2d 1079 (1986); *County Exec., Prince Geo's Co. v. Doe*, 300 Md. 445, 454, 479 A.2d 352, 357 (1984). This principle is underscored in Maryland by Article 2 of the Maryland Declaration of Rights, which mandates that federal law "shall be the Supreme Law of the State."

Dep't of Public Safety & Correctional Servs. v. Berg, 342 Md. 126, 138-39, 674 A.2d 513 (1996) (footnotes omitted).

In certain circumstances, therefore, federal law preempts state law.

> The Supreme Court has identified three situations in which federal law preempts state law. State law is preempted when Congress has explicitly defined the extent to which its enactment preempts state law. When there is no explicit statement of preemption, state law which seeks to regulate conduct in a field

> that Congress intended the federal government to occupy exclusively is preempted. State law is also preempted to the extent that it actually conflicts with federal law, as "when compliance with both federal and state regulations is a physical impossibility".

Washington Suburban Sanitary Comm'n v. CAE-Link Corp., 330 Md. 115, 132-33, 622 A.2d 745 (1993) (quoting *English v. General Electric Co.*, 496 U.S. 72, 78-79, 110 S. Ct. 2270, 2275, 110 L. Ed. 2d 65, 74 (1990)) (other citations omitted).

> The starting point for any preemption inquiry relies on the following presumption, "Preemption of state law by federal statute ... is not favored 'in the absence of persuasive reasons--either that the nature of the regulated subject matter permits no other conclusion, or that the Congress has unmistakably so ordained.'" *Chicago & N.W. Tr. Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311, 317, 67 L. Ed. 2d 258, 101 S. Ct. 1124 (1981) (quoting *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142, 10 L. Ed. 2d 248, 83 S. Ct. 1210 (1963)); *see also Maryland v. Louisiana*, 451 U.S. 725, 746, 68 L. Ed. 2d 576, 101 S. Ct. 2114 (1981) ("Consideration under the Supremacy Clause starts with the basic assumption that Congress did not intend to displace state law."); Lawrence Tribe, *American Constitutional Law* § 6.25, at 479 (2d ed. 1988) (stating that the Supreme Court's decisions display "an overriding reluctance to infer preemption in ambiguous cases").

Gaskins v. Marshall Craft Assocs., 110 Md. App. 705, 711, 678 A.2d 615 (1996).

In this case, Congress has expressly delineated areas in which TILA preempts state laws. The relevant preemption provision states:

> (d) *Contract or other obligations under State or Federal law.* **Except as specified in sections 125, 130, and 166 [15 U.S.C. §§ 1635, 1640, and 1666e]**, this title and the regulations issued thereunder do not affect the validity or enforceability of any contract or obligation under State or Federal law.

15 U.S.C. § 1610(d) (emphasis supplied).

The Court of Appeals has held that, "'[i]f the federal law expressly states a preemptive intent, that intent will govern.'" *Harrison v. Schwartz*, 319 Md. 360, 364, 572 A.2d 528 (1990) (quoting *Becker v. Litty*, 318 Md. 76, 86, 566 A.2d 1101 (1989) (citing *Hillsborough County v. Automated Medical Laboratories, Inc.*, 471 U.S. 707, 713, 105 S. Ct. 2371, 2375, 85 L. Ed. 2d 714, 721 (1985))). By excepting Section 1635, which includes the rescission provisions, from the provisions of the statute not affecting the validity and enforcement of a contract under state law, Congress has expressly preempted state law in this area. *See also Kocsis v. Pierce*, 192 Mich. App. 92, 480 N.W.2d 598 (1991) (recognizing that TILA § 1635 preempts state law provisions). Accordingly, the trial court, faced with the allegation of a rescission and the voiding of the security interest, should have inquired further into the issue to determine if an injunction was appropriate, rather than permit the sale to proceed under Rule 14-203(a)(1). To do so would have required the issuance of the temporary restraining order ("TRO") and a hearing on the preliminary injunction.

The determination that the TILA rescission provisions preempts state foreclosure law allows us easily to dispose of appellees' argument that because appellants failed to comply with Rule 14-209(b)(1), their requested injunction was properly denied. Rule 14-209(b)(1) provides:

> (b) *Injunction to Stay Foreclosure.* (1) Motion. The debtor, any party to the lien instrument, or any person who claims under the debtor a right to or interest in the property that is subordinate to the lien being foreclosed, may file a motion for an injunction to stay any sale or any proceedings after a sale under these rules. The motion shall not be granted unless the motion is supported by affidavit as to all facts asserted and contains: (1) a statement as to whether the moving party admits any amount of the debt to be due and payable as of the date the motion is filed, (2) if an amount is admitted, a statement that the moving party has paid the amount into court with the filing of the motion, and (3) a detailed statement of facts, showing that: (A) the debt and all interest due thereon have been fully paid, or (B) there is no default, or (C) fraud was used by the secured party, or with the secured party's knowledge, in obtaining the lien.

We agree with appellees that the affidavit filed with the motion for injunction does not meet the requirements under this Rule. The affidavit reads as follows:

> Carole Willis, being of lawful age, deposes and states:
>
> 1. She has personal knowledge of the facts set forth herein. She is one of the defendants in the above styled action.

> 2. She has read the motion for temporary restraining order, preliminary injunction and injunction against Fairbanks Capital Corp.
>
> 3. The facts[12] set forth in this motion are true and correct. If called to testify she could testify as to each fact asserted in the motion.
>
> 4. The documents attached as Exhibits B-E are true and correct copies of the documents that were received by them [sic] in connection with the refinances initiated by Washington Mortgage Services, Inc. against her home.

Nevertheless, if applicable, TILA creates an alternative basis for an injunction not set forth in Rule 14-209(b)(1).[13] This is

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[12] The pertinent facts from the motion are as follows:

> Absent from the finance charge was certain charges that should have been included. For instance, as set forth on the HUD Settlement Statement ... defendants were charged a release fee of $275.00. ... Any prior mortgagee had a statutory duty to provide a release. Nevertheless, the defendants were charged $275. The defendants were also charged $200.00 for state recordation tax. This was a refinance of a prior mortgage with a balance of $67,408.60. Therefore, at the most, the recordation would be limited to the difference between the new loan and the balance of the old loan or $10,591.40. The amount due for $11,000 would only be $77.00. Therefore the defendants were overcharged by at least $123 on this item alone. This overcharge was not set forth in the finance charge. Either of these omissions alone exceeds the tolerance allowed for misstatement of a finance charge. ...
>
> In addition to the above, there are other charges made to the defendants that do not qualify for any exclusion from the finance charges are unreasonable. ...
>
> [] Defendants sent ContiMortgage written notice of their rescission by letter dated April 5, 2000 to its counsel ... and directly to ContiMortgage by letter dated April 14, 2000.

[13] We note, as did appellees at oral argument, that injunctions may also be available under Rule 15-502(b), which provides that, "[s]ubject to the rules in this Chapter, the court, at any stage

(continued...)

because, once the transaction has been properly rescinded, the security interest becomes void and there is then nothing to foreclose. A TILA claim might not automatically require entry of an injunction, but when a party raises rescission pursuant to TILA, the better approach would appear to be the suspension of the foreclosure proceeding until the merits of the claim can be adjudicated.[14]

C. Denial of Injunction

Appellants' motion requested both a temporary restraining order ("TRO") and a preliminary injunction.

A TRO is "an injunction granted without opportunity for a full adversary hearing on the propriety of its issuance." Rule 15-501(c).

> A temporary restraining order may be granted only if it clearly appears from specific facts shown by affidavit or other statement under oath that immediate, substantial, and irreparable harm will result to the person seeking the order before a full adversary hearing can be held on the propriety of a preliminary or final injunction.

Rule 15-504(a).

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[13](...continued)
of an action and at the instance of any party or on its own initiative, may grant an injunction upon the terms and conditions justice may require." Rule 15-502(b) does not require the same information as Rule 14-209(b)(1).

[14] In the court's defense, we note that the issue was raised at the eleventh hour and that appellants' attorney was apparently not available to argue the case in chambers on the day of the sale. It is therefore not clear to what extent the court was advised of the importance of the rescission issue and the need for a hearing on the motion.

Hampered by the lack of a record, we do not know what factors were discussed when the court denied the TRO. We must assume, however, that the court found that appellants faced no "immediate, substantial, or irreparable harm." Appellees argue that this is the correct result, because appellants could continue to argue the applicability of TILA to their case by filing exceptions under Rule 14-305(d).[15] Consequently, they argue, appellants were not facing "immediate, substantial, and irreparable harm" if the foreclosure sale proceeded.

In their reply brief, appellants concede that "there may be merit" to appellees' argument, but that resolution turns on whether appellants' property rights terminated at the time of the sale or

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[15] Rule 14-305(d) reads:

> (d) *Exceptions to sale.*
>
> (1) *How taken.* A party, and, in an action to foreclose a lien, the holder of a subordinate interest in the property subject to the lien, may file exceptions to the sale. Exceptions shall be in writing, shall set forth the alleged irregularity with particularity, and shall be filed within 30 days after the date of a notice issued pursuant to section (c) of this Rule or the filing of the report of sale if no notice is issued. Any matter not specifically set forth in the exceptions is waived unless the court finds that justice requires otherwise.
>
> (2) *Ruling on exceptions; hearing.* The court shall determine whether to hold a hearing on the exceptions but it may not set aside a sale without a hearing. The court shall hold a hearing if a hearing is requested and the exceptions or any response clearly show a need to take evidence. The clerk shall send a notice of the hearing to all parties and, in an action to foreclose a lien, to all persons to whom notice of the sale was given pursuant to Rule 14-206 (b).

upon ratification of the sale. Indeed, appellees admitted at oral argument that, if they had reason to do so, they would argue during both the exceptions phase[16] and in the related lawsuit currently pending that, now that the sale has occurred, appellants' right to rescind is no longer valid. Both parties believe that the issue of when an owner's property rights terminate as a result of a foreclosure sale is unclear. We do not believe that resolution of this issue is necessary in this case, because of the sequence of events.

Again, appellants exercised their right to rescind on either April 2 or 14, 2000. The sale did not take place until almost one year later, on March 13, 2001. Accordingly, appellants had a property right, their right of redemption, at the time they exercised the right of rescission.[17] "[A]n obligor's right of rescission shall expire ... upon the sale of the property," TILA § 1635(f), but appellants had already exercised that right prior to the time of sale. Once the right to rescind is exercised, the security interest in the debtor's property is void *ab initio*. The sale, based on a void security interest, should not take place.

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[16] Appellants continued to exert their rights under TILA in their exceptions to sale, filed on April 24, 2001.

[17] The right of redemption is considered a property right in Maryland. *See LaValley v. Rock Point Aero Sport Club, Inc.*, 104 Md. App. 123, 128, 655 A.2d 60, *cert. denied*, 339 Md. 354, 663 A.2d 72 (1995) (in the tax lien context); *Dillow v. Magraw*, 341 Md. 492, 510, 671 A.2d 485 (1996) (in a complaint for foreclosure of a right of redemption).

Moreover, the cases we have found on this subject suggest that a valid rescission will remain in effect even if a sale takes place. *See Jones v. Saxon Mortgage, Inc.*, 1998 U.S. App. LEXIS 22101 at * 9 (4th Cir. 1998) (in case in which debtor filed suit but not for rescission, he "would have had to give proper notice of rescission **prior to the foreclosure sale** or his right of rescission would have expired on the date of the foreclosure sale.") (emphasis supplied); *Hefferman v. Bitton*, 882 F.2d 379, 384 (9th Cir. 1989) (holding that **the debtor "should have sent the notice [of rescission] before contracting to sell** her property). Although we have found no precedent on the issue, we believe that the 'sale' that § 1635(f) establishes as a deadline (whether for sending a notice or bringing a lawsuit) occurs at this time [the time of a contract for sale], and not at the time of the ultimate conveyance.") (emphasis supplied); *In re Walker*, 232 B.R. 725, 732 (Bankr. N.D. Ill. 1999) ("[A]lthough [the lender] had earlier obtained a state court Judgment of Foreclosure and Sale, **the foreclosure sale has not yet taken place and [the debtor] has not transferred her interest in the property or had it transferred through foreclosure**. Thus, under TILA, [the debtor's] right to rescind had not expired when the" adversary bankruptcy case claiming rescission was filed.) (emphasis supplied); and *Dailey v. Leshin*, 792 So.2d 527, 531 (Ct. App. Fl. 2001) (citing *Hefferman* and refusing to allow debtor to rescind when the property was under

contract for sale and TILA had not been alleged prior to the contract).

This does not fully answer the question before us, which is whether the trial court erred by denying the TRO. In other words, were appellants in danger of suffering "immediate, substantial, and irreparable harm" if the sale proceeded? A related question is whether the sale foreclosed appellants from raising TILA during the exceptions phase of the foreclosure process. If we decide that it can be raised during the exceptions phase, we do not perceive how appellants were in danger of suffering "immediate, substantial, and irreparable harm."

The right of the debtor to have the sale set aside is very limited. If a party to the sale perceives some irregularity in the sale itself, that party may file exceptions. Rule 14-305(d); *J. Ashley Corp. v. Burson*, 131 Md. App. 576, 582, 750 A.2d 618 (2000). The irregularities must affect the substantial rights of the parties, and a court will not set aside a sale "'merely because of harmless errors or irregularities.'" *Hurlock Food Processors Inv. Assocs. v. Mercantile-Safe Deposit and Trust Co.*, 98 Md. App. 314, 329, 633 A.2d 438 (1993), *cert. denied*, 334 Md. 211, 638 A.2d 752 (1994) (*quoting Bachrach v. Washington United Coop.*, 181 Md. 315, 324, 29 A.2d 822 (1943)).

Exceptions, therefore, tend to be technical in nature, and based on the sale conduct or the contract of sale, rather than on

issues related to the property itself. "The sale will be set aside upon proof of error, mistake, misunderstanding, or misrepresentation as to the terms or manner of sale; it must appear to be in all respects fair and proper, or it cannot receive the sanction of the Court." *Bolgiano v. Cooke*, 19 Md. 375, 391 (1863) (citing *Tomlinson v. McKaig*, 5 Gill. 256, 277 (1847)). A list of grounds for exceptions can be found in Alexander Gordon IV, GORDON ON MARYLAND FORECLOSURES, §§ 27.03 *et seq.* (3d ed. 1994), including but not limited to: adequacy of sale price; marketable title; mistake by mortgagor; mistake by mortgagee; fraud by third party; errors by auctioneer; laches by mortgagee to foreclose; standing; usury; place of sale; and forgery.

As set forth above, a valid security interest is a prerequisite to the foreclosure sale. Rule 14-203(a)(1). Thus, it would be proper for a debtor to claim invalidity of a mortgage or deed of trust during the exceptions phase. *See Wilson Bros. v. Cooey*, 251 Md. 350, 359-60, 247 A.2d 395 (1968) (if the debtor were to question the validity of the mortgage, he should have done so by filing exceptions to the sale); *Geisey v. Holberg*, 185 Md. 642, 654, 45 A.2d 735 (1946) (validity of assignment of the mortgage could be attacked by filing exceptions).

Other courts have invalidated foreclosure sales that have taken place when the debtor has rescinded the loan transaction. *Pearson v. Colonial Financial Service, Inc.*, 526 F.Supp. 470,474-75

(M.D. Ala. 1981) (where foreclosure action proceeded against a designated "co-buyor" on a home improvement contract, but where she was not a co-owner of the property securing the debt, her status as a signor of the mortgage allowed her to validly claim the right to rescind under TILA, and the foreclosure sale was invalidated); and *Summit Trust Co. v. Chichester*, 233 N.J. Super. 417, 559 A.2d 12, 425-26 (N.J. Super. Ct. App. Div. 1989) (where a final judgment of foreclosure was entered despite the debtors' valid rescission under TILA, the foreclosure was vacated).[18]

Accordingly, we hold that, so long as a lender is notified that the debtor is exercising his or her right to rescind under TILA prior to a foreclosure sale, as Mr. and Mrs. Willis did in this case, the debtor may raise the issue of rescission during the exceptions phase of the foreclosure proceedings. The right of rescission cannot be raised for the first time after a sale has already occurred. *See, e.g., In re Hall*, 188 B.R. 476, 484 (Bankr. D. Mass. 1995).

Nevertheless, when confronted with a TILA rescission claim and a request for injunctive relief, we believe it would be the better

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[18] In New Jersey, when a foreclosure proceeds to judgment uncontested, the lender can apply for a final judgment of foreclosure, which forecloses the debtor's right of redemption. N.J. Stat. § 2A:50-58 (2001). *See also Resolution Trust Corp. v. Lanzaro*, 140 N.J. 244, 249, 658 A.2d 282 (1995).

practice to enter a TRO and conduct a hearing on the merits of the TILA claim prior to a foreclosure sale.

JUDGMENT AFFIRMED.

COSTS TO BE PAID BY APPELLANTS.