



Defending Individual TILA Claims



**MBA's Legal Issues and Regulatory
Compliance Conference 2010**

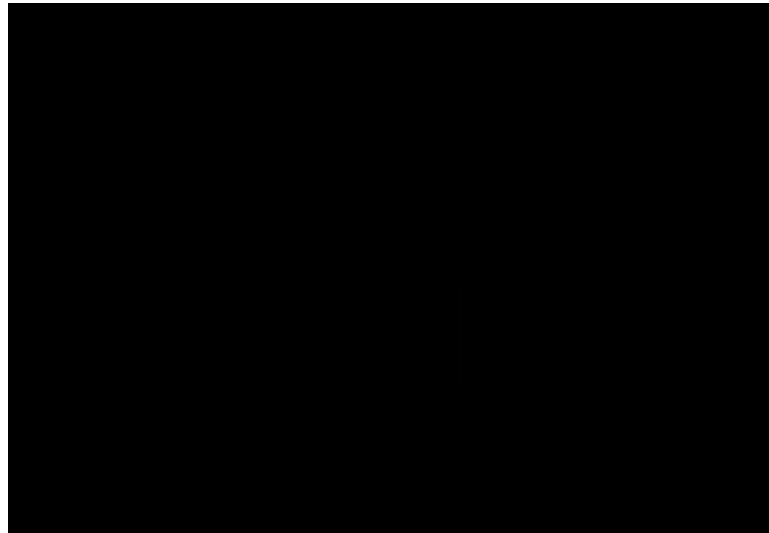
J. Matthew Goodin
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May 3, 2009
Coronado, CA

Why So Much Focus On TILA?

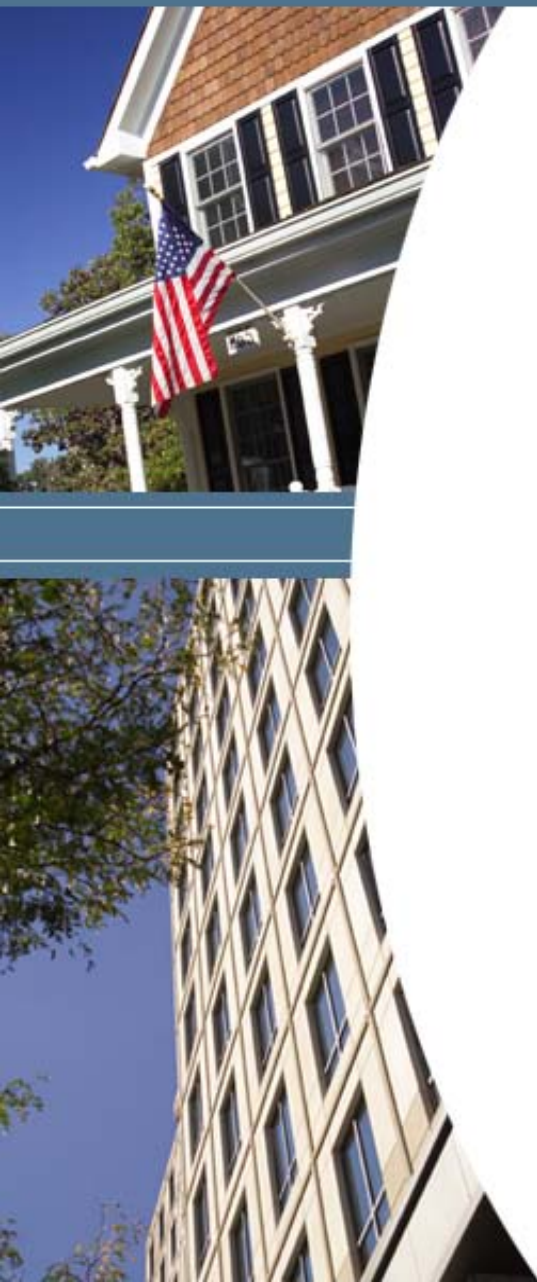
- **Attractive to Plaintiffs Because:**
 - » Complex and detailed disclosure requirements
 - Especially true for nontraditional products (e.g., payment option ARMs)
 - » Virtually strict liability
 - » Potential assignee liability
 - » Rescission remedy
 - » Basis for attorneys' fees

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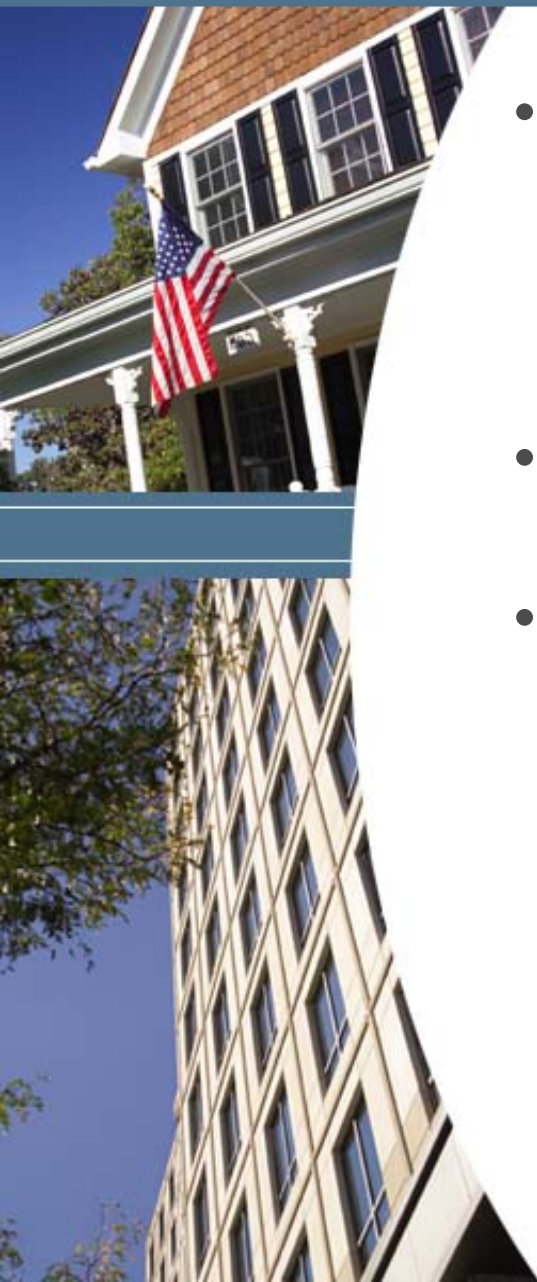
- So Much TILA Litigation Because:
 - » Hundreds of new “mortgage litigation” specialists (crisis = opportunity)



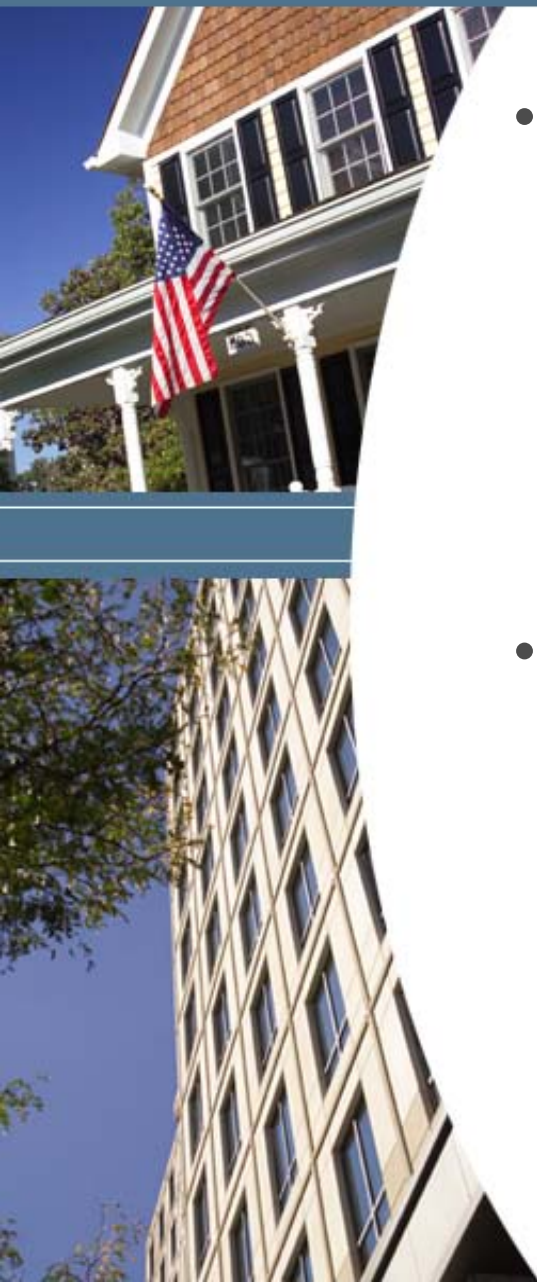
- » Internet: document repositories + borrowers in dire straits → litigation tsunami
- » New “specialists” simply following the leader



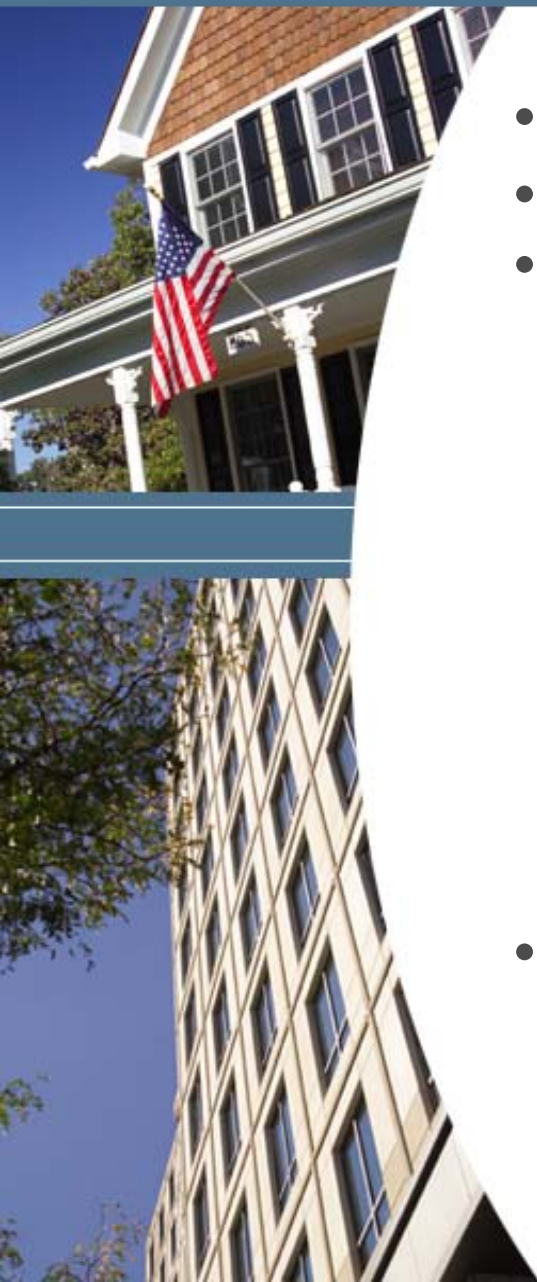
- **Payment Option ARM Class Actions**
 - » Started in California in late 2007;
 - » Spread to South Carolina, Maryland, Florida...;
 - » Still going, although becoming less about TILA and more about UDAP and aiding and abetting.
- **“Copycat” Individual Actions**
- **Counterclaims for Rescission in Foreclosures**



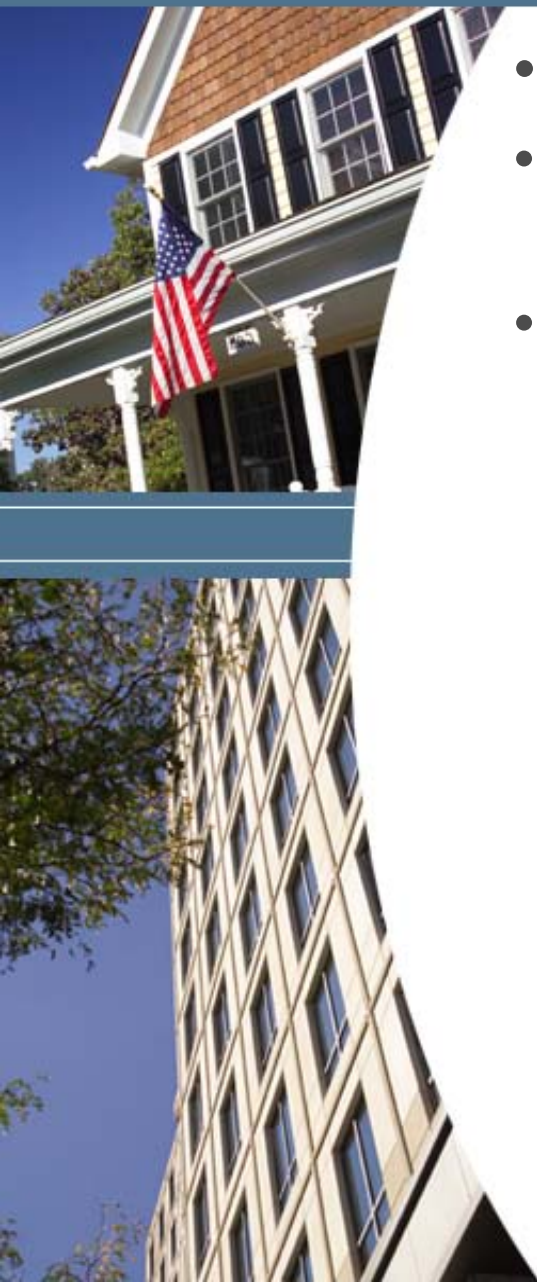
- **POA Cases Have Spawned Thousands of Copycat Individual Cases Around the Country.**
 - » Most prevalent in states with highest default and foreclosure rates (*i.e.*, CA, AZ, NV and FL), but the cases are everywhere.
- By lawyers who often do not even know what their allegations mean.
- Two categories:
 - » “True believers” who don’t understand who is who (servicer vs. lender vs. trustee) or that rescission ≠ debt forgiveness and free house; and
 - » “Serial filers” who just don’t care (*e.g.*, the Bander Law Firm).



- New breed of TILA claims are non-specific and/or highly complex, and costly to deal with in a motion to dismiss.
 - » Calculation of APR, payment schedule
 - » See, e.g., POA class actions – often hundreds of pages of dense briefing and courts are not dismissing all claims.
- **Strategy for Defending Individual TILA Claims – Start with the remedies and the parties against whom claims are directed rather than the substantive allegations**

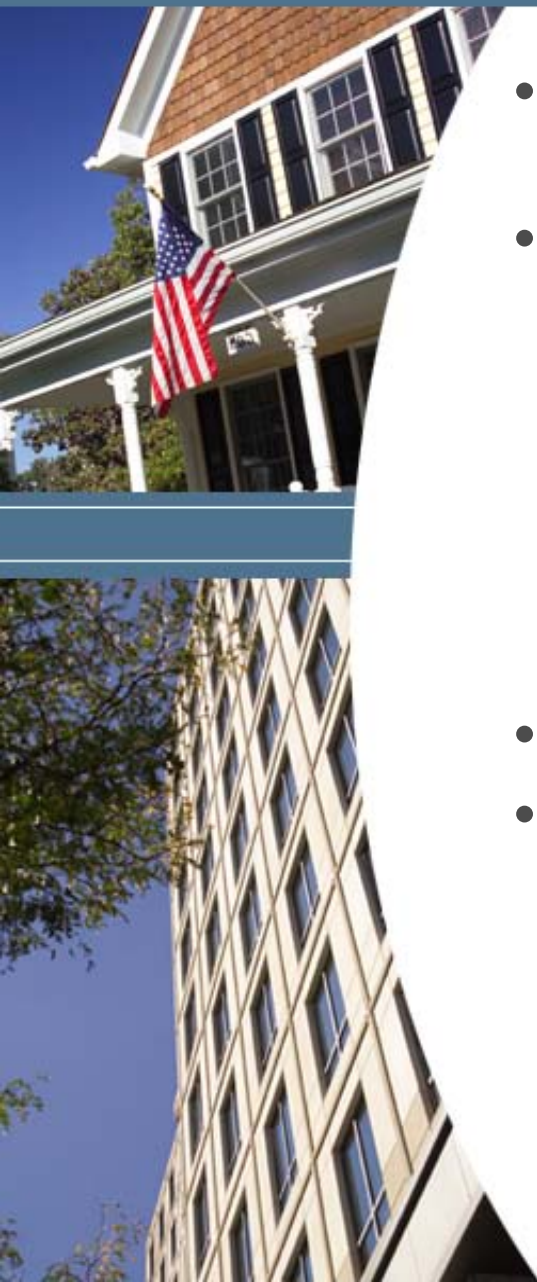


- **Damages Claims Under § 1640:**
- One-year statute of limitations (§ 1640(e)).
- Claims against assignees (§ 1641):
 - » Defects must be “apparent on the face of the disclosure statement” (§ 1641(a)).
 - » Argue tolling is impossible for claims against assignees – defects cannot be *both* concealed and “apparent on the face” of disclosures. See *Nichols v. Greenpoint*, No. 08-750 DOC, 2008 WL 3891126, *4 (C.D. Cal. Aug. 19, 2008) (that defect can be both fraudulently concealed and “apparent on the face ... is contrary to logic”).
- No liability for servicers (§ 1641(f)).

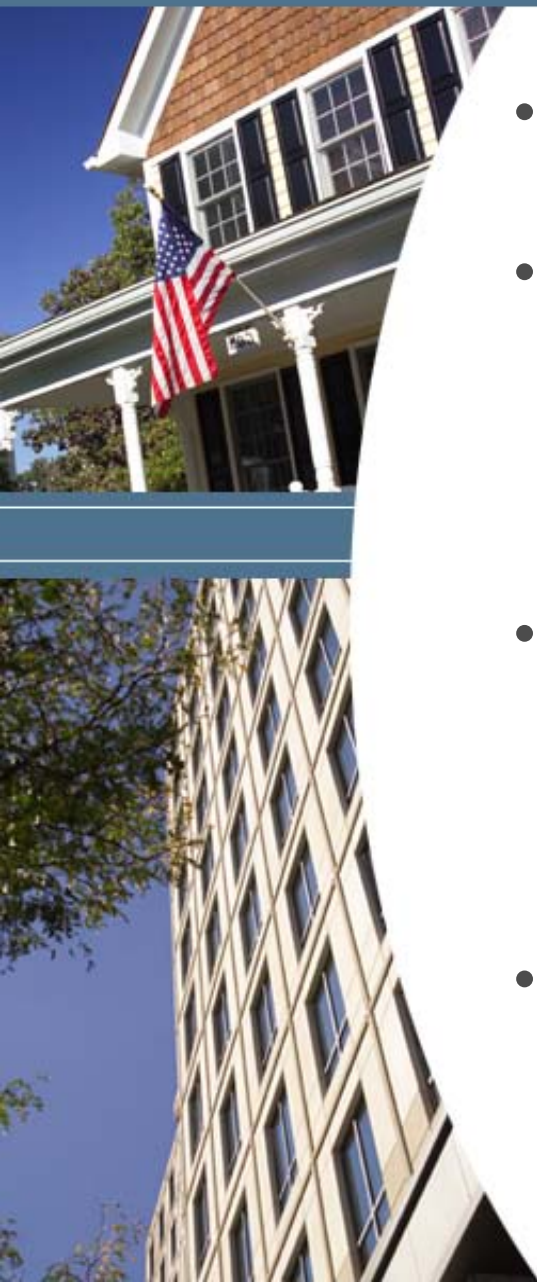
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- Rescission Claims Under § 1635:
 - Three-year statute of repose, no tolling. *Beach v. Ocwen Federal Bank*, 523 U.S. 410, 419 (1998).
 - No allegations of tender or ability to do so renders claim insufficient at the pleading stage.
 - » Judge-created pleading requirement based on *Yamamoto v. Bank of New York*, 339 F.3d 1167 (9th Cir. 2003) (must return to *status quo ante*).
 - » Has gained momentum in the Ninth Circuit, particularly California, but still hit and miss. See *Cook v. Wells Fargo*, No. 09-2757, 2010 WL 1289892, **4-5 (S.D. Cal. Mar. 26, 2010) (compiling California decisions on both sides and concluding “by far, the majority of Courts ... have required that borrowers allege an *ability* to tender the principal balance” to state a claim).

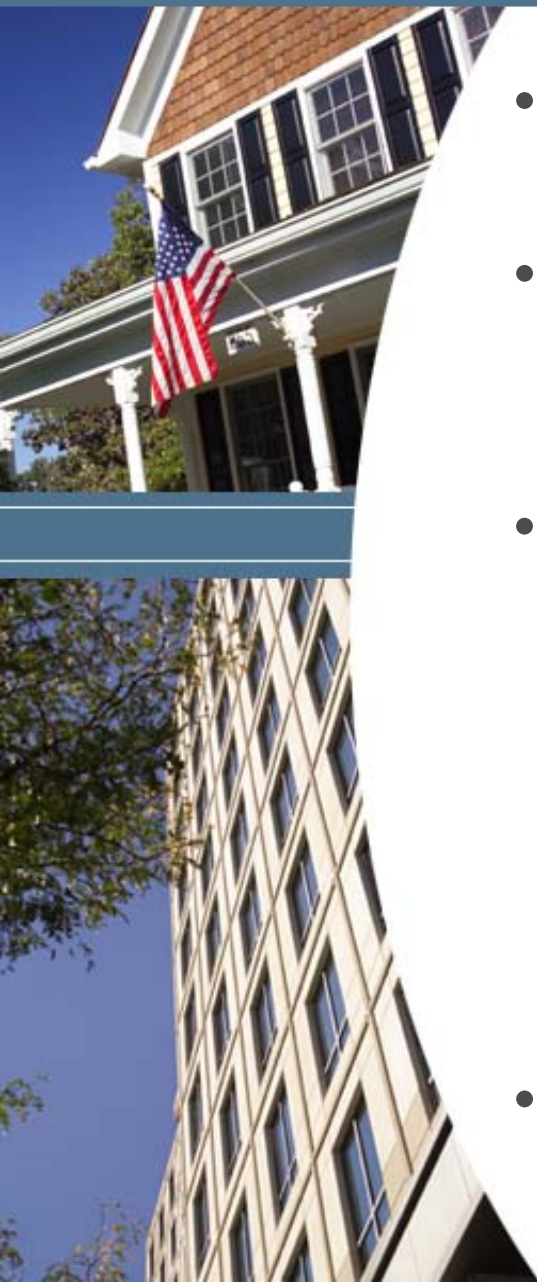
Attacking Rescission Claims (cont'd.)

- Has not gained traction everywhere. See *Moore v. Wells Fargo Bank*, 597 F.Supp.2d 612, 617 (E.D. Va. 2009) (rejecting ability to tender as a pleading requirement, believing that Rule 11 will preclude commencement of rescission claims where the plaintiff cannot perform).



- **When Presented With a Demand for Rescission – Consider Accepting.**
- Ideally within 20 days of receipt of letter or lawsuit, respond in writing, deny violation, conditionally agree to rescind, and communicate tender amount.
 - » Commentary says the lender must merely “begin the process” within 20 days. 12 C.F.R. pt. 226, Supp. I, cmt. 23(d)(2)-3.
 - » Courts say rescission is a private remedy that does not require court intervention.
- More palatable when loan is in default.
- If lawsuit follows, move to dismiss – no case or controversy. *See Nkengfack v. Homecomings Financial, LLC*, No. 08-2746, 2009 WL 1663533, *4 (D. Md. June 15, 2009); *Personius v. HomeAmerican Credit*, 234 F.Supp.2d 817, 819 (N.D. Ill. 2002).

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- **Not All Defects Trigger Statutory Damages or Extended Right of Rescission.**
 - Only a closed list of defects trigger statutory damages. See *Brown v. Payday Check Advance*, 202 F.3d 987, 991-92 (7th Cir. 2000).
 - » Disclosures regarding neg am and discounted initial rate are not among them.
 - Only defects in “material” disclosures trigger extended right of rescission.
 - » APR, total of payments, amount financed, finance charge, payment schedule, right to cancel.
 - Assess substance of the claims carefully.

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- **Still Conflict Over What is a Technical Defect and Whether to Excuse.**
 - Especially true for alleged defects in the notices of right to cancel (e.g., missing dates, insufficient copies) – a favorite of plaintiffs’ lawyers.
 - Compare *Hamm v. Ameriquest Mortgage Co.*, 506 F.3d 525 (7th Cir. 2007) (“when it comes to TILA, ‘hyper-technicality reigns’”) and *Melfi v. WMC Mortgage Corp.*, 568 F.3d 309 (1st Cir. 2009) (missing date on notice of right to cancel not sufficient to extend rescission period where reasonable consumer would know better).
 - Assess your precedent and your judge carefully.

THANKS

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