OF CABBAGES AND *KING*: THE TIME HAS COME TO TALK ABOUT THE NINTH CIRCUIT'S VIEW OF THE EFFECT REFINANCING HAS ON TILA RESCISSION RIGHTS

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"The time has come," the Walrus said,
"To talk of many things:
Of shoes – and ships – and sealing wax –
Of cabbages[[1]] – and kings –
And why the sea is boiling hot –
And whether pigs have wings."[2]

I. INTRODUCTION

Much has changed in the more than twenty years since the Ninth Circuit Court of Appeals decided *King v. California*,[3] in which the circuit blithely drew a most common-sense conclusion: a borrower's rescission rights under the Truth in Lending Act ("TILA")[4] are cut off by refinancing,

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[1] Although there is no reason to believe Lewis Carroll used the word in its slang sense, "cabbage" is also a slang term for "cash" or "bank notes." *E.g.,* MERRIAM WEBSTER'S COLLEGIATE DICTIONARY 171 (11th ed. 2003).

[2] LEWIS CARROLL, *Through the Looking Glass and What Alice Found There*, *in* THE ANNOTATED ALICE, 167, 235 (Martin Gardner ed., Clarkson Potter, Inc. 1960) (1871).

[3] King v. California, 784 F.2d 910 (9th Cir. 1986).

[4] 15 U.S.C. § 1635(f) (2006) (stating that a borrower's right of rescission based on violations of TILA provisions "shall expire three years after the date of

because a loan that has been refinanced no longer exists.[5] The latest boom-and-bust cycle is not the least of the important developments of the last twenty-odd years in the real estate market,[6] and the western states that lie within the Ninth Circuit's appellate jurisdiction have been on the cutting edge of both the stunning expansion of the real estate bubble and the similarly startling economic downturn experienced as the bubble burst.[7] In light of the fact that all the district courts within the Ninth Circuit remain bound by *King* and, as such, are obliged to dispose of borrowers' TILA rescission claims at the pleading stage if the loan at issue has been refinanced,[8] the time has come for courts to reconsider *King*'s "common-

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consummation of the transaction or upon the sale of the property, whichever occurs first. . . .").

[5] *King*, 784 F.2d at 913 (explaining that a loan taken out in March 1981 and refinanced in November 1981 "cannot be rescinded, because there is nothing to rescind"). It is important to understand rescission rights as referred to throughout this Article:

> Rescission is a retroactive remedy and renders a contract unenforceable from the outset. The effect of rescission is to return the parties to their respective conditions as if no contract ever existed. Rescission abrogates the contract not partially but completely, for all purposes. Upon rescission, the parties give up both the benefits and the duties of the contract, as well as all rights arising under the contract, which are vitiated or invalidated.

17 C.J.S. *Contracts* § 492 (2009).

[6] A *Los Angeles Times* profile of former Federal Reserve Chairman Alan Greenspan provides the following concise summary of the boom and bust cycle:

> Congress in 1994 gave the Fed authority to curb excesses and abuses in the nonbank mortgage lending sector. But the Fed failed to intervene a few years ago when lenders began offering zero-down payment mortgages with super-low "teaser" rates and "no-doc" applications under which people could qualify for loans without proving they had the income to support them.
>
> The easy terms fueled speculation and encouraged people to stretch for mortgages they couldn't afford, thinking they could refinance later when home prices inevitably rose. As such dubious loans got packaged into securities that were eagerly snapped up here and abroad, the stage was set for a crisis.
>
> All it would take was a drop in housing prices or a rise in interest rates–and both things happened.

Thomas S. Mulligan, *Sour Notes for Maestro*, L.A. TIMES, Apr. 9, 2008, at C1 (reviewing Greenspan's role in the creation of the crisis and noting that Greenspan was "increasingly be[ing] tagged as 'Mr. Bubble'").

[7] *See, e.g.,* Alan Berube, *Hard Times? Depends on Where You Live*, L.A. TIMES, June 28, 2009, at A36 (noting an economic crash in areas of California, Nevada, and Arizona that coincided with the emergence of the subprime mortgage crisis); Peter Coy with Brian Burnsed, *Foreclosure Goes Upscale*, BUS. WK., June 15, 2009, at 26 (noting that the mortgage crisis in California, Arizona, and Nevada was a result of not only foreclosures on subprime loans, but it was also the result of foreclosures on prime fixed-rate loans).

[8] As Judge Otero of the United States District Court for the Central District of California so succinctly observed, the district courts over which the Ninth Circuit has appellate jurisdiction are bound by *King*:

sense" answer—and, in the case of the Ninth Circuit, the application of *stare decisis*—in applying TILA's protections to the economic realities that feature prominently in the flood of litigation that is following in the wake of the mortgage crisis.[9] The circuit split that has begun to emerge, as well as the thoughtful opinions issued by other courts in the years since *King* was decided, provide ample guidance on the issue.

This article considers the application of TILA's rescission provisions to cases involving loans that were refinanced or otherwise paid off before the borrowers attempted to rescind the original (pre-refinancing) transactions on the basis of the original lenders' alleged violation of TILA's disclosure requirements. Stated otherwise, the following discussion addresses the question of what effect, if any, refinancing should have on a borrower's ability to exercise the powerful rescission rights Congress included as part

> Plaintiffs urge the Court not to follow *King* because courts in other circuits have not followed *King*. The Court is not at liberty to do so, as courts in this circuit are bound to follow the precedent of the Ninth Circuit. *See* Zuniga v. United Can Co., 812 F.2d 443, 450 (9th Cir.1987) ("District courts are, of course, bound by the law of their own circuit, and are not to resolve splits between circuits no matter how egregiously in error they may feel their own circuit to be.") (internal quotation marks omitted).

Monaco v. Bear Stearns Residential Mortg. Corp., 554 F. Supp. 2d 1034, 1039 (C.D. Cal. 2008) (dismissing TILA rescission claims where the borrower has refinanced); *see also* Mijo v. Avco Fin. Servs. of Haw., Inc., 1991 WL 126660 at *1 (9th Cir. 1991) (citing *King* for the proposition that "[s]imply stated, the loan cannot be rescinded because there is nothing to rescind"); Plascencia v. Lending 1st Mortgage., 583 F. Supp. 2d 1090, 1096 (N.D. Cal. 2008) (following *King* and noting that "the Court is not free to disregard Ninth Circuit precedent").

[9] *See, e.g.,* Thomas J. Hall & Thomas J. McCormack, *Financial Meltdown Triggers Litigation Wave*, N.Y.L.J., Jan. 5, 2009, *available at* WL, 1/5/2009 N.Y.L.J. S2, (col. 1) (noting the "tremendous wave of litigation" that has arisen as a result of the subprime mortgage crisis and credit crunch and suggesting that these suits will "lead courts and litigants into uncharted legal territory"); Claude Solnik, *Mortgage Meltdown Spurs Lawsuits, Negotiations*, LONG ISL. BUS. NEWS, Jan. 11, 2008, *available at* http://libn.com/blog/2008/01/11/mortgage-meltdown-spurs-lawsuits-negotiations/ (explaining how nationwide, subprime meltdown has led consumers to "fight back, suing for predatory lending practices and violations of the Truth in Lending Act" on grounds that "brokers acted illegally, funneling them into inappropriate mortgages without full disclosure"); Press Release, Terry Nafisi, Dist. Ct. Exec. and Clerk of Ct., U.S. Dist. Ct., C.D. Cal., Statement of Chief Judge Audrey B. Collins on the Announced Resignation of Judge Stephen G. Larson at 4 (Sept. 15, 2009) *available at* http://www.cacd.uscourts.gov/CACD/Notices.nsf/5a76d63503298120882567cf0058efb4/57e2c810fcf6664588257632007a330f?OpenDocument (explaining that, as a result of "[t]he recent economic downturn" and resulting "unprecedented number of home foreclosures" in the first half of 2009, "foreclosure, other real property, and Truth-in-Lending filings were up 663%, and consumer credit filings were up 404%" in the Central District of California).

of TILA's consumer-protection scheme.[10] This article begins with a review of the relevant TILA provisions before taking a closer look at the Ninth Circuit's decision in *King,* and then examines appellate decisions from the Sixth and Seventh Circuits, as well as the California Court of Appeal, that appear to represent an emerging trend away from *King*'s conclusion that refinancing cuts off TILA rescission rights with respect to the refinanced loan.

II. OVERVIEW OF RELEVANT TILA PROVISIONS

Congress crafted TILA to promote an "informed use of credit" by consumers.[11] Specifically, Congress stated the purpose of the Truth in Lending Act as follows:

> The Congress finds that economic stabilization would be enhanced and the competition among the various financial institutions and other firms engaged in the extension of consumer credit would be strengthened by the informed use of credit. The informed use of credit results from an awareness of the cost thereof by consumers. It is the purpose of this subchapter 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, and to protect the consumer against inaccurate and unfair credit billing and credit card practices.[12]

As the Ninth Circuit explained, "Congress through TILA sought to protect consumers' choice through full disclosure and to guard against the divergent and at times fraudulent practices stemming from uninformed use of credit."[13] TILA aims to achieve these goals through disclosure require-

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[10] The related question of whether a borrower must tender the amount due or demonstrate the ability to tender the amount due in order to pursue rescission as a remedy is beyond the scope of this article. The Ninth Circuit appears to have left the determination of this issue to the trial courts:

> As rescission under § 1635(b) is an on-going process consisting of a number of steps, there is no reason why a court that may alter the sequence of procedures *after* deciding that rescission is warranted, may not do so *before* deciding that rescission is warranted when it finds that, assuming grounds for rescission exist, rescission still could not be enforced because the borrower cannot comply with the borrower's rescission obligations no matter what. Such a decision lies within the court's equitable discretion, taking into consideration all the circumstances including the nature of the violations and the borrower's ability to repay the proceeds.

Yamamoto v. Bank of N.Y., 329 F.3d 1167, 1173 (9th Cir. 2003).

[11] 15 U.S.C. § 1601(a) (2006).

[12] *Id.*

[13] King v. California, 784 F.2d 910, 915 (9th Cir. 1986) (quoting the Truth in Lending Act, Pub. L. 94-240, 90 Stat. 257 (1976) (current version at 15 U.S.C. § 1601(a)).

ments for lenders. Those requirements are set out in TILA and its implementing regulation, Federal Reserve Board Regulation Z ("Regulation Z").[14]

To give effect to the consumer-protection goals identified by Congress, TILA includes rescission provisions that give a borrower who has entered into a credit transaction secured by the borrower's primary residence a right to rescind the transaction if the lender failed to provide adequate notice of the right to rescind or failed to make the specified "material disclosures"[15] as required by the statute.[16] Generally, TILA's so-called "buyer's remorse" provision gives a borrower three business days to rescind, without penalty, a consumer loan that uses the borrower's principal dwelling as security.[17] However, if the lender fails to provide the borrower with the requisite material disclosures or notice of right to rescind, the borrower's right to rescind is extended from a three-day to a three-year period.[18] TILA provides that the extended rescission period "shall expire three years after the date of consummation of the transaction *or* upon the sale of the property, whichever occurs first."[19] This extension of the limita-

[14] *See* 12 C.F.R. § 226.1 (2009).

[15] The required "material disclosures" are "the required disclosures of the annual percentage rate, the finance charge, the amount financed, the total of payments, the payment schedule, and the disclosures and limitations referred to in §§ 226.32(c) and (d) and 226.35(b)(2)." 12 C.F.R. § 226.23(a)(3) n.48 (2009).

[16] The TILA rescission rights discussed in this article apply to transactions in which there is a non-purchase-money security interest in a consumer's principal residence, e.g., home improvement loans, home equity lines of credit, refinancing transactions with an entity other than the original lender. Stated otherwise, the plain language of the statute indicates that the rescission rights at issue in *King* do not apply to those residential mortgage transactions commonly known as "purchase money loans." *See* 12 C.F.R. § 226.23(f) (2009) (listing "residential mortgage transaction[s]" and "refinancing or consolidation by the same creditor of an extension of credit already secured by the consumer's principal dwelling" among the types of transactions to which the right to rescind does not apply).

[17] 15 U.S.C. § 1635(a)–(b) (2006); 12 C.F.R. § 226.23(a)(1)-(3) (2009).

[18] 15 U.S.C. § 1635(f) (2006); 12 C.F.R. § 226.23(a)(3) (2009); *see also* Beach v. Ocwen Federal Bank, 523 U.S. 410, 411 (1998) ([W]hen a loan made in a consumer credit transaction is secured by the borrower's principal dwelling, the borrower may rescind the loan agreement if the lender fails to deliver certain forms or to disclose important terms accurately. Under § 1635(f) of the statute, this right of rescission 'shall expire' in the usual case three years after the loan closes or upon the sale of the secured property, whichever date is earlier.") (internal citation omitted).

[19] 15 U.S.C. § 1635(f) (2006) (emphasis added). Foreclosure sales present an interesting related issue: whether a foreclosure sale does or should constitute a

tion period makes sense as a means to address the fact that a lender's failure to make the required disclosures effectively deprives a borrower of the opportunity to evaluate the terms of the transaction in the three days immediately after he enters into the transaction.

Upon the effective exercise of TILA rescission rights, a borrower has access to numerous forms of relief. First, rescission renders the borrower "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."[20] Additionally, once the borrower properly tenders notice of rescission, the lender has only twenty days within which to return to the borrower "any money or property given as earnest money, down payment, or otherwise,"[21] *and* the lender is obligated to take whatever further action is "necessary or appropriate to reflect the termination of any security interest created under the transaction."[22]

Upon the lender's performance, a rescinding borrower is obligated to return to the lender any money or property received as part of the transaction.[23] Of course, in cases where the borrower has already refinanced, the original lender has already been repaid and its security interest released.[24] Because neither TILA nor Regulation Z addresses whether refinancing precludes a claim for rescission, the Ninth Circuit confronted the question without specific agency or congressional guidance when the issue came before it in 1986, in *King*.

"sale" under § 1635(f) and, as such, cuts off TILA rescission rights. That question is beyond the scope of this article but could factor into an appeal that would bring *King*'s holding regarding the effect of refinancing back before the Ninth Circuit. *Cf.* Peter Y. Hong, *Southland Home Prices Looking Up*, L.A. TIMES, July 16, 2009, at A1 (reporting that, in June 2009, median values for southern California homes rose for the first time in two years, but also noting that "California is struggling with one of the highest unemployment rates in the nation and mortgage defaults are continuing to rise. A surge in new foreclosures could squelch any potential recovery in the housing market.").

[20] 15 U.S.C. § 1635(b) (2006) (emphasis added).

[21] *Id.*

[22] *Id.*

[23] *Id.*

[24] As is discussed in greater detail in Section IV *infra*, the release of a lender's security interest alone has no effect on finance charges or other fees already paid by the borrower.

III. THE NINTH CIRCUIT'S DECISION IN *KING*

Although it is only a few pages long, the Ninth Circuit's decision in *King v. California* manages to cover quite a bit of ground. The following discussion focuses on those aspects of the opinion that deal with TILA rights.

A. SUMMARY OF FACTUAL AND PROCEDURAL BACKGROUND

In *King*, *pro se* plaintiff Gwendolyn King appealed from the district court's dismissal of the TILA claims she had endeavored to assert in connection with a series of three loans,[25] each of which was secured by a deed of trust on King's home.[26] The first loan (the "June 1979 loan") was secured by a second trust deed, dated January 1, 1979;[27] the second loan (the "March 1981 loan") was secured by a third trust deed, dated March 27, 1981; and the third loan (the "November 1981 loan") was secured by a trust deed, "dated November 17, 1981 and superseding the March 27, 1981 trust deed," which secured the refinancing of the March 1981 loan.[28] King had obtained all three of the loans from third-party lenders through Integrity Home Loan ("Integrity"), a loan broker.[29]

After the corporate franchise of the trustee designated under each of the relevant trust deeds, R & T Financial Servicing Co., Inc. ("R & T"), was suspended, Integrity recorded a Substitution of Trustee substituting Integrity's president, P.D. McCarron, in place of R & T as the trustee under the deed.[30] Integrity then executed a reconveyance deed that eliminated the refinanced March 1981 loan.[31] In 1983, King's debts were discharged in bankruptcy, and title to her home remained vested in the bankruptcy trus-

[25] King initially brought the action as a putative class action on behalf of herself and "a class of borrowers who had dealt with Integrity [Home Loans]," the loan broker named as a defendant in the case. King v. California, 784 F.2d 910, 912 (9th Cir. 1986).

[26] *Id.* at 911.

[27] In light of the subsequent references to the first loan as the "June 1979 Loan," it is not clear whether the initial explanation that the first loan was secured by a second trust deed "dated January 1, 1979" was an error. *Compare id.* at 911 ("[A] second trust deed, dated January 1, 1979, secured the first loan . . . ."), *with id.* at 913 (discussing the *loan* dated *June* 1979 and referring to it as the first loan and "the June 1979 loan").

[28] *Id.*

[29] *Id.*

[30] *Id.*

[31] *Id.*

tee.[32] On September 14, 1983, King filed suit in the United States District Court for the Central District of California, asserting claims under TILA and the Civil Rights Act against Integrity, the State of California, various state officials, and the third-party lenders.[33] The gravamen of King's TILA claims, as characterized by the Ninth Circuit, was Integrity's alleged failure "to disclose the identity of the third party lenders who had loaned money to her secured by deeds of trust on her home."[34]

The district court identified three alternative bases for its dismissal of King's claims: (1) King's failure to file a timely opposition to defendants' motions to dismiss, (2) King's failure to appear at the hearing on the motions to dismiss, and (3) King's failure to state a claim upon which relief could be granted.[35] King's appeal followed.[36]

Reviewing the trial court's granting of a motion to dismiss King's TILA claims,[37] the Ninth Circuit explained that King had asserted two "sets" of TILA claims: one for rescission and one for damages in connection with each of the three loans at issue.[38] The court proceeded to address each "set" of claims in turn.[39]

B. RESCISSION CLAIMS

To borrow a term of art familiar to those with some experience wagering on horse races, the plaintiff in *King* "hit the trifecta"[40] of impediments to the exercise of TILA rescission rights. The Ninth Circuit needed just three short paragraphs to affirm the dismissal of each of King's three rescission claims.

Regarding the June 1979 loan, the circuit concluded that rescission rights were not available because the applicable three-year limitations pe-

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32 *Id.* at 912.
33 *Id.* at 911–12.
34 *Id.* at 911.
35 *Id.*
36 *Id.*
37 FED. R. CIV. P. 12(b)(6) (providing that a motion to dismiss is the proper procedural device for presenting a defense of "failure to state a claim upon which relief can be granted").
38 *King*, 784 F.2d at 912.
39 *Id.* at 913.
40 For those unfamiliar with the term, "trifecta" refers to "a system of betting in which the bettor must pick the first three winners in the correct sequence. WEBSTER'S II NEW COLLEGE DICTIONARY 1206 (3d ed. 2005).

riod had run.[41] King had obtained the loan in June 1979, and did not file suit until September 1983.[42] Because TILA's "absolute" three-year limitations period for rescission claims "begin[s] at the 'consummation of the transaction or upon the sale of the property, whichever occurs first,'" the court concluded that the period had run more than a year before King filed suit in district court.[43]

The court also found that the third loan, the November 1981 loan, could not be rescinded because amendments to TILA and Regulation Z that went into effect on April 1, 1981, eliminated King's claim that the failure to disclose all third-party lenders constituted a failure to make the required "material disclosures."[44]

The court made particularly short work of King's claim for rescission of the March 1981 loan, which had been refinanced in November 1981.[45] As to that loan, the court concluded that, because King had refinanced prior to exercising her rescission rights, she could not rescind. The following constitutes the entirety of the Ninth Circuit's analysis of the matter: "The loan of March 1981 cannot be rescinded, because there is nothing to rescind. King refinanced that loan in November 1981, and the deed of trust underlying the March 1981 loan has been superseded."[46] The court cited no legal authority for its conclusion and provided no further clues as to the legal or policy goals served by the conclusion that refinancing necessarily cuts off TILA rescission rights. However, a portion of the court's

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[41] *King*, 784 F.2d at 913.

[42] *Id.*

[43] *Id.* (quoting Pub. L. No. 93-495, 88 Stat. 1517 (1974) (codified as amended at 15 U.S.C. § 1635(f) (2006))).

[44] *Id.* The court explained the nature and effect of the April 1981 amendments as follows:

> Congress amended the TILA and Regulation Z, effective April 1, 1981, in such a way as to eliminate [King's] cause of action for material nondisclosure. King contends that failure to disclose all third-party lenders was material nondisclosure. The amended Regulation Z did not include a general disclosure provision, but classified the disclosure requirement according to whether the credit transaction was "open-end" or "closed-end." The transaction here would qualify as closed-end, because it does not fit any of the definitions of an open-end credit transaction. *See* 12 C.F.R. § 226.2(20) (1985). In closed-end transactions when there are multiple creditors, only the creditor making the disclosures need be identified on the disclosure statement. *Id.* § 226.18(a). In addition, the new Regulation Z defines the term "material disclosures" as "the required disclosures of annual percentage rate, the finance charge, the amount financed, the total of payments and the payment schedule." *Id.* § 226.23 n.48. Under the new regulations, therefore, the identity of each creditor in a multiple creditor transaction is not a "material disclosure."

Id.

[45] *See id.* at 913.

[46] *Id.*

ensuing discussion of King's claims for damages pursuant to TILA is of interest for its analysis of the language and purpose of TILA.

C. DAMAGES CLAIMS

After affirming the district court's dismissal of King's three rescission claims, the circuit turned to the district court's dismissal of King's claims for damages on the basis of Integrity's failure to disclose the identities of the third-party lenders.[47] The district court had also dismissed those damages claims, and the question before the circuit was whether TILA's one-year limitations period for damages claims cut off King's claim for damages in connection with the June 1979 and March 1981 loans.[48]

The court observed that although TILA provides that "'[a]ny action under this section may be brought within one year from the date of the occurrence of the violation,'"[49] the Ninth Circuit had not yet determined what event or events constituted the "occurrence of the violation" that started the running of the one-year limitations period.[50] Reviewing decisions by some of its sister circuits, the court identified three theories that had been used to trigger the running of the statutory clock:

> (1) when the credit contract is executed; (2) when the disclosures are actually made (a "continuing violation" theory); (3) when the contract is executed, subject to the doctrines of equitable tolling and fraudulent concealment (limitations period runs from the date on which the borrower discovers or should reasonably have discovered the violation).[51]

Beginning its analysis of the "occurrence of the violation" question, the court indicated that its decision would be guided by an effort to identify the approach that would be consistent with the language and purpose of TILA.[52] Although the Ninth Circuit rejected the "continuing violation" theory "as unrealistically open-ended," in reaching that conclusion, the court acknowledged the competing interests reflected in TILA's consumer-

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[47] *Id.*

[48] *Id.* (noting that the April 1981 amendments to TILA and Regulation Z eliminated *any* claim—whether for rescission or damages—with respect to the November 1981 loan).

[49] *Id.* (quoting Pub. L. 94-240, 90 Stat. 260 (1976) (codified as amended at 15 U.S.C. § 1640(e) (2006))).

[50] *Id.*

[51] *Id.* at 913–14 (collecting cases).

[52] *See id.* at 914 ("There are thus at least three ways to interpret Section 1640(e) so as to implement the purposes underlying TILA.").

protection goals.[53] The court also acknowledged that the statutory language seemed to indicate that Congress intended to craft the damages limitation period as to afford lenders some measure of certainty regarding the duration of their potential exposure to TILA claims for damages.[54] Regarding TILA's consumer-protection goals, the court noted:

> Because borrowers may not discover the TILA violations until more than one year after the execution of the original contract, the "continuing violation" theory argues that it is inconsistent with the remedial and consumer-protection goals of the statute to bar suit when there is no reasonable way for the borrower to discover the wrong within the limitations period.[55]

Additionally, the court rejected "an inflexible rule that bars suit one year after consummation" of the credit contract because such a rule was "equally inconsistent with legislative intent," explaining that "[a]lthough the Act may impute to borrowers knowledge of their rights as consumers of credit, there may be situations in which a borrower consummates his loan and passes a year without knowing of his lender's fraud or nondisclosures."[56]

The Ninth Circuit ultimately reversed and remanded the district court's dismissal of King's damages claims in connection with the June 1979 and March 1981 loans on the ground that the "equitable tolling" doctrine should be applied to determine whether the claims were time-barred.[57] In so doing, the court elected to follow the Sixth Circuit's decision that "equitable tolling might be appropriate in certain circumstances"[58] and explained that the basic inquiry under this framework "is whether tolling the

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[53] *See id.* (discussing the desire to balance the twin goals of preventing unpredictable and unreliable liability while still recognizing that borrowers might not know of a lender's fraud or nondisclosures within one year).

[54] *See id.*

[55] *Id.* (citing Postow v. OBA Fed. Sav. & Loan Ass'n, 627 F.2d 1370, 1380 (D.C. Cir. 1980)); *but see also id.* (noting that "those who favor a limitations period running from the execution of the contract contend that . . . the TILA regulations[] and the legislative history evince a congressional intent to terminate liability one year after consummation of the loan contract").

[56] *Id.*

[57] *Id.* at 915.

[58] *Id.* (discussing Burnett v. N.Y. Cent. R.R. Co., 380 U.S. 424 (U.S. 1965), *rev'g*, 332 F.2d 529 (6th Cir. 1964)).

statute in certain situations will effectuate the congressional purpose of the Truth-in-Lending Act."[59]

Quoting the statutory purpose as it is set out in section 1601(a) of TILA as codified,[60] the court observed that "Congress through TILA sought to protect consumers' choice through full disclosure and to guard against the divergent and at times fraudulent practices stemming from uniformed use of credit."[61] In light of case law establishing that TILA is to be interpreted liberally in favor of consumers, the Ninth Circuit concluded that the limitations period for TILA damages claims "runs from the date of the consummation of the transaction but that the doctrine of equitable tolling may, in the appropriate circumstances, suspend the limitations period until the borrower discovers or had reasonable opportunity to discover the fraud or nondisclosures that form the basis of the TILA action."[62] Accordingly, the court remanded King's surviving damages claims to the district court for fact-finding related to the issues of fraudulent concealment and equitable tolling.[63]

D. *KING*'S STAYING POWER

In light of the court's efforts to ensure that King's damages claims were handled in a manner consistent with Congress' intent and a liberal construction of TILA's consumer-protection and remedial goals, it is particularly tempting to think that the Ninth Circuit's conclusion that refinancing cuts off a borrower's rescission rights might be open for further exploration or reconsideration under other circumstances. Additionally, it seems possible that the court did not engage in a similarly careful analysis of the rescission claims at least in part because *pro se* plaintiff, King, failed to introduce the necessary convincing arguments. However, the unpublished

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[59] *Id.* at 915 (citing *Burnett*, 380 U.S. at 427, and going on to explain that "[t]he Supreme Court has repeatedly applied equitable tolling to statutes of limitations to prevent unjust results or to maintain the integrity of a statute" (citing cases)).

[60] *See* Pub. L. 94-240, 90 Stat. 260 (1976) (entitled "Congressional findings and declaration of purpose") (codified as amended at 15 U.S.C. § 1640(a) (2006))).

[61] *King*, 784 F.2d at 915. (citing Pub. L. 94-240, 90 Stat. 260 (1976) (codified as amended at 15 U.S.C. § 1640(e) (2006))).

[62] *Id.*

[63] *Id.* (explaining that, although the limitations period generally commences at the consummation of the transaction, "[t]he district courts . . . can evaluate specific claims of fraudulent concealment and equitable tolling to determine if the general rule would be unjust or frustrate the purpose of the Act and adjust the limitations period accordingly").

decision in *Mijo v. AVCO Financial Services of Hawaii, Inc.*, demonstrates that, at least as of 1991, the court did not believe the matter warranted reconsideration.[64] Citing *King*, the Ninth Circuit, in *Mijo,* reiterated that "[s]imply stated, [a refinanced] loan cannot be rescinded because there is nothing to rescind."[65]

IV. APPELLATE COURTS TRENDING AWAY FROM *KING*

Since the Ninth Circuit decided *King* in 1986, a number of influential courts have charted a different course.[66] The remainder of this article reviews three decisions rendered since relatively recent developments in the housing market and related industries have afforded society an opportunity to reexamine widely held views on topics as diverse as homeownership, mortgage underwriting practices, and the regulation of financial institutions.[67] Three cases—*Barrett v. JP Morgan Chase Bank, N.A.*;[68] *Handy v. Anchor Mortgage Corporation*;[69] and *Pacific Shore Funding v. Lozo*[70]—

[64] *See* Mijo v. AVCO Fin. Serv's of Haw., Inc., No. 90-166688, 1991 WL 126660, at *1 (D. Haw. July 1, 1991); *see also* discussion of *Mijo*, *supra* note 8.

[65] *Id.* (citing *King*, 784 F.2d at 913).

[66] For a helpful discussion of district and bankruptcy court decisions in the wake of *King*, see James L. Thompson & Jill Hutchison, *Rescinding a Mortgage Transaction under TILA after Refinancing the Loan*, REAL EST. FIN., Aug. 2006, at 5-6.

[67] *See, e.g.,* James Oliphant, *New Checks, Balances Coming to Banks*, L.A. TIMES, Feb. 23, 2009 at C4 (reviewing ideas voiced in the early days of the Obama administration for an overhaul of the insurance industry, new legislation to set minimum underwriting standards for mortgages, and efforts to regulate practices related to the valuation of the assets of financial institutions which "[s]ome critics believe . . . triggered fire sales of mortgage-related assets and helped spark Wall Street's meltdown"); Edmund L. Andrews & Stephen Labaton, *Split is Forming Over Regulation of Wall Street*, N.Y. TIMES, Mar. 23, 2008, at A1 (discussing the effects of "decades of deregulation" and noting that practices that "aggravated the housing and mortgage meltdowns" included "abusive loans by independent mortgage brokers; risky and opaque transactions by financial institutions; credit-rating decisions that turned out to be wildly optimistic; and the underwriting of loans by mortgage brokers that were often based on fraudulent or inaccurate information.").

[68] 445 F.3d 874 (6th Cir. 2006).

[69] 464 F.3d 760 (7th Cir. 2006).

[70] 42 Cal. Rptr. 3d 283 (Ct. App. 2006). Although it does not include a detailed analysis of the issue, the D.C. Circuit decision in Duren v. First Government Mortgage and Investors Corp., No. 99-7026, 2000 WL 816042 (D.C. Cir. June 7, 2000), merits note for its rejection of the conclusion reached in *King*. Remanding the issue of the borrower's right to rescind pursuant to TILA, the D.C. Circuit provided the following guidance for the district court: "[W]e disagree with First Gov-

clearly reflect an appreciation of the fundamental changes that are emerging in the wake of the mortgage crisis and represent the beginnings of a trend away from the conclusion that refinancing cuts off TILA rescission rights. Additionally, these three decisions identify sound legal and policy reasons for rejecting the conclusion reached in *King*.

A. *BARRETT V. JP MORGAN CHASE BANK, N.A.*[71]

The Sixth Circuit Court of Appeals' decision in *Barrett v. JP Morgan Chase Bank, N.A.* represents the first and most detailed analysis since *King* of the question of rescission after refinancing. Reversing the district court's grant of summary judgment in favor of the lender on the ground that the plaintiff borrowers' TILA rescission claims were barred by refinancing, the Sixth Circuit held, as a matter of first impression in that circuit, that refinancing does not cut off borrowers' access to TILA rescission rights and the concomitant right to recover closing costs and fees.[72]

The Sixth Circuit explained that "[s]eeking to benefit from declining interest rates, [plaintiffs] William and Sandra Barrett refinanced a mortgage on their home several times in 2000 and 2001."[73] On two separate occasions, in May 2000 and in January 2001, the plaintiffs refinanced their home loan with Bank One.[74] Then, in May 2001, plaintiffs refinanced those Bank One loans with a loan from a different lender, ABN AMRO Mortgage Group, Inc., "prompting Bank One to release its security interest in the Barretts' home."[75] Approximately two years after they had refinanced with the new lender, the plaintiffs sought to rescind the May 2000 and January 2001 transactions with Bank One on the ground that Bank One had violated TILA's disclosure requirements in connection with those transactions.[76] Bank One refused on the ground that "both loans had been refinanced and . . . both security interests had been removed, leaving nothing for the bank to rescind."[77] On January 22, 2003, the Barretts filed suit

ernment's contention that the refinancing of the 1994 loan rendered unavailable TILA's statutory rescission remedy, notwithstanding the Ninth Circuit's terse suggestion to the contrary in King v. State of California,784 F.2d 910, 913 (9th Cir.1986)." *Duren*, 2000 WL 816042, at *2.

[71] 445 F.3d 874 (6th Cir. 2006).

[72] *See id.* at 878–82.

[73] *Id.* at 876.

[74] *Id.* The opinion notes that Bank One subsequently became JP Morgan Chase, the named defendant in the litigation. *Id.*

[75] *Id.*

[76] *Id.*

[77] *Id.*

in the United States District Court for the Eastern District of Kentucky, asserting TILA and state law claims.[78] Following the Ninth Circuit's decision in *King*, the district court granted summary judgment in favor of the bank, holding that the plaintiffs' "right to rescind was extinguished by the refinancing of all of the Bank One loans, leaving no security interest on their home for the bank to rescind."[79] The Sixth Circuit characterized the plaintiffs' argument on appeal as follows:

> The Barretts respond that rescinding a loan transaction requires unwinding the transaction in its entirety and thus requires returning the borrowers to the position they occupied prior to the loan agreement, which can be accomplished only by voiding the security interest *and* returning "prepayment penalties . . . , mortgage filing fees, loan transaction fees, appraisal fees, and closing costs."[80]

Reversing the district court's ruling in favor of the defendant bank, the Sixth Circuit identified and discussed two bases for its determination that TILA rescission rights survive refinancing:

> [N]othing in the legislation or its implementing regulations says that the act of refinancing extinguishes a borrower's unexpired right to rescind a loan transaction and . . . the right to rescind a transaction under the Act not only gives consumers the right to release the security interest in their home but also gives them the right to recover certain fees incurred in the transaction.[81]

However, as the following summary of the court's analysis demonstrates, the Sixth Circuit found additional support for its conclusion beyond these two stated bases.

1. Absence of Language in Statute and Regulation Z to Prohibit Rescission after Refinancing

The court looked to the language of the statute and to Regulation Z for guidance on the issue of whether refinancing can or should cut off a borrower's TILA rescission right.[82] Noting that Regulation Z specifies three events that may mark the expiration of the right to rescind: (1) the passage of three years from the date of consummation; (2) the "transfer of all of the

[78] *Id.* at 877.
[79] *Id.*
[80] *Id.* at 877–78 (quoting Final First Brief of Plaintiffs-Appellants/Cross-Appellees at 10-11, Barret v. JP Morgan Chase Bank, N.A., Nos 05-5035, 05-4146 (6th Cir. July 8, 2005).
[81] *Id.* at 876.
[82] *Id.* at 878.

consumer's interest in the property"; and (3) the "sale of the property,"[83] the court reasoned that it follows that the absence of any clear expression of congressional intent counsels in favor of the conclusion that refinancing should not cut off the right of rescission:

> Nowhere do the legislation or regulations add that the act of refinancing an existing loan transaction by itself cuts off the right of rescission. Given that "the sale of the property" cuts off the right to rescind, it seems particularly noteworthy that neither Congress nor the [Federal Reserve Board] provided that an analogous event—the refinancing of the loan—would cut off the right to rescind. *See* Cavanaugh v. Cardinal Local Sch. Dist., 409 F.3d 753, 756 (6th Cir. 2005) (noting "that the mention of one thing implies the exclusion of another").[84]

2. Scope of Rescission Rights

The Sixth Circuit also discussed the fact that TILA, by its terms, "gives the borrower who rescinds an eligible loan transaction the right to void the security interest *and* the right to recover statutorily identified finance charges incurred in the transaction."[85] After explaining that nothing in the lay or legal definition of the term "rescission" restricts it to refer to only the removal or extinguishment of a security interest, the court noted that the potential for a broader view of the meaning of "rescission" is reflected in the fact that both TILA and Regulation Z "refer to a 'right to rescind the *transaction*,' not just a right to rescind the security interest."[86] The court emphasized that the provisions of TILA not only permit the borrower to void the security interest, but also require the lender to return "'any money or property given as earnest money, down payment, or otherwise.'"[87] Later in the opinion, the Court further elaborates:

> No doubt, the imposition of a security interest as part of the loan transaction is necessary for the right of rescission to attach to a transaction—what in the words of the regulations gives rise to the right. But neither the Act nor the regulations say that the right persists only as long

[83] *Id.* (quoting 73 Fed. Reg. 44601 (current version at 12 C.F.R. § 226.23 (2009), which, as the court notes, provides that the right to rescind expires upon the occurrence of the first of three listed events).

[84] *Id.* at 878–79.

[85] *Id.* at 878.

[86] *Id.* (quoting and adding emphasis to Pub. L. 104-29, 109 Stat. 274 (1995) (current version at 15 U.S.C. § 1635(a) (2006)) and citing related provision in Regulation Z, 73 Fed. Reg. 44601 (current version at 12 C.F.R. § 226.23), which similarly refers to the right to rescind "the transaction").

[87] *Id.* (quoting Pub. L. 104-29, 109 Stat. 274 (1995) (current version at 15 U.S.C. § 1635(a) (2006))).

> as the security interest does, and of course the right applies to the transaction, not just the security interest.[88]

Accordingly, the breadth and function of the rescission mechanism which, as set out in TILA and Regulation Z, both involves and requires *more* than just the removal of the security interest on the borrower's home, support the court's conclusion that an extinguishment of the right to rescind does not necessarily follow from a lender's release, upon refinancing, of whatever security interest it had in the underlying property.

3. TILA's Stated Purpose

Beyond its examination of the specifics of the relevant statutory and regulatory provisions, the court considered the "statutorily identified purpose of the Act" and found that it bolstered the determination that the right to rescind ought to survive refinancing:

> The preservation of the right prevents a refinancing, even a refinancing prompted by the inadequately disclosed terms of an earlier loan or by the refusal of the bank to rescind the earlier loan, from insulating lenders from responsibility for their noncompliance. Echoing the point, the Act does not lightly allow even the borrower to waive the right to rescind. And while the release of the security interest from the initial loan removes one harm to the borrower, it does not account for another harm to the borrower (the fees and other charges paid by a consumer to the lender) that arises from the bank's failure to facilitate the borrower's compar[ison of] . . . the various credit terms available.[89]

In a related vein, the court went on to note that it is "difficult to understand why," on the one hand, TILA's "buyer's remorse" provision would afford a borrower a three-day period in which to "'study and investigate the contemplated seriousness of the obligations'"[90] he has undertaken while, on the other hand, "the same [rescission] right should not cover those same transaction charges when it is exercised within three years of the loan, whether a refinancing has intervened or not."[91] The court reasoned: "In both settings, the borrower's right to 'reconsider' the transaction encompasses a right to return to the status quo that existed before the loan."[92] Accordingly, the Sixth Circuit's consideration of a combination of policy considerations and

[88] *Id.* at 880 (citations omitted) (internal quotations omitted).

[89] *Id.* at 879 (emphases added) (internal quotation omitted) (citation omitted).

[90] *Id.* at 880

[91] *Id.* (quoting S. Rep. No. 96-73, at 14 (1979), *reprinted in* 1980 U.S.C.C.A.N. 280, 292).

[92] *Id.*

common sense lends support to the conclusion that refinancing not only does not—but it also should not—cut off the right to rescind.

4. Review of the Ninth Circuit's Decision in *King* and Other Practical Considerations

Acknowledging that the Ninth Circuit had considered the issue and come to a contrary conclusion, the Sixth Circuit rejected *King*, both on the ground that *King* is not binding on its sister circuits, and because "it does not address the provisions of the Truth in Lending Act that undermine its conclusion."[93] The Sixth Circuit also observed that, although some district courts had followed *King*, "most" had not.[94]

Finally, the court addressed the defendant bank's concern that permitting the right to rescind to survive refinancing would allow borrowers to evade the statutory limitations period by waiting any length of time before manufacturing allegations sufficient to articulate a colorable claim of nondisclosure or inadequate disclosure by a lender.[95] As a result, lenders would be subjected to a potentially indefinite period of exposure to borrower claims.[96] In response, the court remarked that "the same is already true if the borrower chooses *not* to refinance the loan."[97] The court continued that "[t]o the extent banks wish to avoid a three-year window for bringing rescission claims, the Act offers them a fail-safe way for doing so—satisfy the disclosure requirements."[98] With that guidance in place, the court reversed the judgment in favor of the defendant bank and remanded the matter to the district court for consideration on the merits.[99]

B. *HANDY V. ANCHOR MORTGAGE CORPORATION*[100]

Just a few months after the Sixth Circuit decided *Barrett*, the Seventh Circuit considered the closely related question of whether the right to rescind remains available after the loan at issue has been paid in full. In *Handy v. Anchor Mortgage Corporation*, the Seventh Circuit was confronted with a TILA rescission claim brought within the three-year limitation period that governed the borrower's claim that the notice of the right to

[93] *Id.*
[94] *Id.* at 881 (collecting cases).
[95] *Id.*
[96] *Id.*
[97] *Id.*
[98] *Id.* at 881–82.
[99] *Id.* at 882–83.
[100] 464 F.3d 760 (7th Cir. 2006).

rescind provided by the lender was defective.[101] Neither the timeliness of the claim nor a refinancing of the subject loan was before the court. Nevertheless, the opinion is worth noting for the fact that it expressly rejects *King* and follows *Barrett* on the question of whether the right to rescind survives the release of the underlying security interest.[102]

In 2000, the borrower in *Handy* had refinanced and paid off her existing home loan with a fifteen-year fixed-rate loan she obtained from defendant Anchor Mortgage Corporation ("Anchor").[103] She did not rescind the Anchor loan within the three-day rescission period; rather, two years later, the borrower filed suit in the United States District Court for the Northern District of Illinois. The borrower alleged that, because Anchor had provided her with multiple copies of two different forms that contained inconsistent information about the right to rescind, the notice did not satisfy the notice requirements set out in TILA.[104]

While the case was pending in the district court, the original borrower died, and the court permitted the borrower's son, the administrator of the borrower's estate, to substitute in as plaintiff.[105] At the conclusion of a bench trial, the district court found in favor of the lender on the ground that the information contained in the forms was sufficient to put the borrower on notice of her right to rescind.[106] The borrower's son appealed.[107]

On appeal, the Seventh Circuit pointed out that the failure to provide the proper notice extends the rescission period to three years and subjects the lender to claims for statutory damages.[108] Considering Anchor's argument that the absence of evidence that the borrower experienced actual confusion supported the judgment for Anchor, the circuit determined that the argument "misse[d] the point" and explained, "[w]hether a particular disclosure is clear for purposes of TILA is a question of law that 'depends on the contents of the form, not on how it affects any particular reader.'"[109] Accordingly, the court reversed the district court's judgment and concluded

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[101] *Id.* at 762.
[102] *Id.* at 765–66.
[103] *Id* at 762.
[104] *Id.* at 760–62.
[105] *Id.* at 762.
[106] *Id.*
[107] *Id.*
[108] *Id.* at 763.
[109] *Id.* at 764 (quoting Smith v. Check-N-Go of Ill., Inc., 200 F.3d 511, 515 (7th Cir. 1999).

that the "simultaneous provision" of the two sets of forms "did not meet TILA's clear and conspicuous disclosure requirement."[110]

Because the appellate court found a violation of TILA's disclosure requirements, it turned to the issue of remedies. On appeal, Anchor contended that rescission was "an inappropriate—maybe even impossible—remedy" because the borrower's estate had recently paid off the Anchor loan.[111] In response, the borrower's son argued that rescission was warranted because, "although Anchor's security interest [was] no longer at issue, money and property can just as easily be returned to the borrower after the loan has been paid off as before."[112] Additionally, the appellant posited that "[a]n opposite rule . . . would encourage creditors to delay for as long as possible the resolution of a borrower's rescission request in the hope that the borrower will pay off the subject loan and relieve the creditor of at least some of its liability under TILA."[113] Clearly, this reasoning extends to the notion that the rule Anchor sought to have the court adopt would likewise encourage lenders to delay in the hopes that a borrower would refinance a disputed or otherwise problematic loan, cutting off the right to rescind by extinguishing the lender's underlying security interest in the subject property.

Addressing the viability of the borrower's rescission claim, the Seventh Circuit quoted extensively from the Sixth Circuit's opinion in *Barrett*,[114] and it agreed with the Sixth Circuit's conclusion that the Ninth Circuit's decision in *King* "is unpersuasive because 'it does not address the provisions of the Truth in Lending Act that undermine its conclusion.'"[115] Accordingly, the court held that "the remedies associated with rescission remain available even after the subject loan has been paid off and, more generally, that the right to rescission 'encompasses a right to return to the

[110] *Id.* at 764.
[111] *Id.* at 765.
[112] *Id.* (internal quotations omitted).
[113] *Id.* (internal quotations omitted).
[114] *Id.* (referencing the Sixth Circuit's analysis of the language in TILA and Regulation Z pertaining to the rescission of "the transaction" and not just the security interest; as well as the circuit's determinations that (a) Congress' failure to include refinancing among the events that may extinguish the right to rescind was "particularly noteworthy"; and (b) the preservation of the right to rescind, prevent the refinancing of a loan issued in violation of TILA's protections "from insulating lenders from responsibility for their noncompliance") (quoting Barrett v. JP Morgan Chase Bank, N.A., 445 F.3d 874, 877–79 (6th Cir. 2006)).
[115] *Id.* (quoting *Barrett*, 445 F.3d at 880).

status quo that existed before the loan.'"[116] The court remanded the matter to the district court for a determination of the appropriate remedies.[117]

C. *PACIFIC SHORE FUNDING V. LOZO*[118]

Within two weeks of the Sixth Circuit's decision in *Barrett*, in *Pacific Shore Funding v. Lozo*, the California Court of Appeal also had occasion to find that borrowers who had refinanced were not precluded from exercising their TILA rescission rights. In *Lozo*, the borrowers, Zoran and Monika Lozo, originally obtained from Pacific Shore Funding ("Pacific Shore") a non-purchase-money mortgage loan (the "first loan"), secured by a deed of trust on the Lozos' home.[119] Approximately two years later, the Lozos obtained a second loan from Pacific Shore, and the Lozos used a portion of that 2002 loan to pay off the outstanding balance on the first loan they had taken out with Pacific Shore.[120]

In 2003, the Lozos tendered to Pacific Shore their notice of rescission of the first loan. Pacific Shore rejected the rescission demand and filed suit in Los Angeles Superior Court, seeking a judicial declaration that the Lozos were not entitled to rescind the first loan because they had refinanced. The Lozos filed a cross-complaint asserting that the first loan was subject to, and violative of, TILA disclosure requirements.[121] Citing *King*'s holding that a refinanced loan cannot be rescinded under TILA "because there is nothing to rescind," the trial court granted summary judgment in favor of Pacific Shore.[122]

The California Court of Appeal introduced its decision on the Lozos' appeal as follows:

> In the published portion of this opinion, we decline to follow *King*, and are instead persuaded by the reasoning of myriad federal courts from other circuits. We hold that borrowers are not precluded from rescinding a consumer credit transaction that is secured by their residence and subject to TILA merely because they have already refinanced that loan.[123]

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[116] *Id.* at 765–66 (quoting *Barrett*, 445 F.3d at 880)).

[117] *Id.* at 766.

[118] 42 Cal. Rptr. 3d 283 (Ct. App. 2006).

[119] *Id.* at 285.

[120] *Id.*

[121] *Id.* at 285.

[122] *Id.* at 288-89 (quoting King v. California, 784 F.2d 910, 913 (9th Cir. 1986)).

[123] *Id.* at 285.

After determining that the Lozos' attempt to exercise their rescission right was timely in light of the fact that the undisputed facts established that Pacific Shore failed to comply with certain TILA disclosure requirements,[124] the court turned to the trial court's reliance on *King* in granting summary judgment for Pacific Shore.[125]

The Court of Appeal explained that its decision not to follow the Ninth Circuit's opinion in *King* was permissible under California Supreme Court precedents providing both that "'[d]ecisions of lower federal courts interpreting federal law are not binding on state courts'"[126] and that "state courts must necessarily make an independent determination of federal law" when lower federal court precedents are "'divided or lacking.'"[127] Thus, the court concluded, "[w]e may independently resolve the question before us because federal courts are split on the question of whether, under TILA, a borrower has a right to rescind a qualifying loan after it has been paid off."[128] The court went on to observe, as the Seventh Circuit had in *Handy*, that although some lower courts had followed *King*, most had not.[129]

The court then turned to its discussion of two reasons supporting its decision not to follow *King*: (1) the language of TILA and Regulation Z does not support the Ninth Circuit's conclusion; and (2) the facts before the court of appeal in *Lozo* were distinguishable from those before the Ninth Circuit in *King*, because the Lozos continued to hold title to their home at the time they sought to rescind.[130] After discussing those reasons, the court considered the practical effect of its decision not to follow *King*.[131]

1. Language of TILA and Regulation Z

After noting the "conspicuous lack of analysis in *King*,"[132] the court of appeal looked, as the Sixth Circuit had in *Barrett*, to the language of TILA and Regulation Z to determine whether it provided support for the Ninth Circuit's conclusion that refinancing cuts off the right to rescind. The court

[124] *Id.* at 288 (determining that TILA's three-year limitations period applied to the Lozos' rescission claim).
[125] *Id.* at 288–89.
[126] *Id.* at 289 (quoting People v. Williams, 940 P.2d 710, 736 (Cal. 1997)).
[127] *Id.* (quoting Etcheverry v. Tri-Ag Serv., Inc., 993 P.2d 366, 368 (Cal. 2000)).
[128] *Id.* at 289.
[129] *Id.* (collecting cases).
[130] *Id.* at 289–90.
[131] *Id*. at 291.
[132] *Id.* at 289.

found that it did not.[133] The court noted that neither the statute nor the regulation provides that refinancing triggers the expiration of the right to rescind.[134] Additionally, the court concluded that the outcome in *King* was inconsistent with a construction that would give effect to TILA's consumer-protection purpose:

> Because TILA is to be construed liberally to effect its remedial purpose of protecting consumers who are inherently at a disadvantage in loan and credit transactions by assuring that they will not be easily misled about the costs of financing, we are adverse to reading into the statute an implicit basis for terminating consumers' remedies that would only benefit lenders at the expense of borrowers.[135]

2. Effect of Borrowers Retaining Title

On the facts of the case before it, the court of appeal also found that *King* did not apply to cut off rescission rights. The court explained: "*King* is really distinguishable. Title to the borrower's residence in *King* remained vested in the bankruptcy trustee, whereas here, the Lozos continue to hold title. Were we to follow *King* we would be overlooking the fact that something does remain to be rescinded in this case."[136] In support of this view, the court contrasted the effect of TILA rescission, which is "'a remedy that restores the *status quo ante*'" and wholly voids the transaction,[137] with refinancing, which is "'[t]he discharge of an obligation with funds acquired through the creation of a new debt . . . .'"[138] Based on the foregoing, the court of appeal concluded that because refinancing does not return borrowers to the *status quo ante*:

> Here, after the refinance, there *did* remain something to rescind, namely, the interest, fees, penalties, and charges that the Lozos paid under the first loan. A holding that after a refinance there remains nothing to rescind in this case, would provide unscrupulous lenders with a means of laundering their TILA violations in the initial loan by refinancing it with

133 *Id.* at 289–90.

134 *Id.* (citing, *inter alia*, 73 Fed. Reg. 44601 (current version at 12 C.F.R. § 226.23 (2009)), and Pub. L. 104-29, 109 Stat. 274 (1995) (current version at 15 U.S.C. § 1635(a) (2006))).

135 *Id.* at 290 (internal citations omitted).

136 *Id.* (internal citations omitted).

137 *Id.* at 290 (quoting Quenzer v. Advanta Mortgage. Corp. USA, 288 B.R. 884, 888 (D. Kan. 2003)).

138 *Id.* at 291 (quoting BLACK'S LAW DICTIONARY 1281 (6th ed. 1990)).

> a second loan, while forever preventing borrowers from recouping their wrongfully paid finance charges, downpayments, and other fees.[139]

3. Concern Regarding Forum Shopping

It is difficult to ignore the fact that the practical effect of *King* and *Lozo* coexisting in California is that California litigants pursuing claims to rescind refinanced loans are assured of a different outcome depending on whether their case is decided in state court or federal court—with the clear advantage to lenders in federal court and to borrowers in state court. This fact was not lost on the California Court of Appeal. The court disagreed with arguments advanced by Pacific Shore and its amicus that the decision not to follow *King* would necessarily "create forum shopping opportunities."[140] The court also reasoned that the federal courts disagree about whether to follow *King*, and it was persuaded that those declining to follow *King* were in the right. In the end, the California Court of Appeal concluded that the harm threatened by following the Ninth Circuit's decision in *King* clearly outweighed the potential harm threatened by *not* following it: "In any event, we decline to follow *King* merely to avoid the potential for forum shopping where the holding of *King* has the effect of undermining TILA and the purposes for which TILA was enacted."[141]

V. CONCLUSION

As the foregoing demonstrates, the existing circuit split and conflicting state law precedent necessitate a renewed examination of the Ninth Circuit's unsubstantiated conclusion in *King* that, once refinanced, a loan secured by the borrower's residence "cannot be rescinded, because there is nothing to rescind."[142] With no immediate end to the mortgage meltdown in sight,[143] the issue is pressing. To date, no other federal court of appeals has elected to follow *King*. As long as *King* stands, the determination that no right to rescind survives refinancing not only cuts off access to the remedy of voiding a loan made in violation of TILA's notice requirements, but also deprives borrowers of the full range of related relief afforded by TILA, *i.e.*, the right to recover any down-payment, fees, and finance charges paid in connection with the original loan. This is so *even if* the lender failed to

[139] *Id.*
[140] *Id.*
[141] *Id.*
[142] King v. California, 784 F.2d 910, 913 (9th Cir. 1986).
[143] *See* Coy, *supra* note 7, at 26; and Hong, *supra* note 19, at 1, for discussion of the ongoing nature of the mortgage crisis.

comply with TILA's disclosure requirements. As a result, potentially meritorious TILA rescission claims evade review in the Ninth Circuit. Whether the Ninth Circuit overrules itself on the issue or elects to undertake an analysis that will substantiate its holding in *King*, it is clear that the time has come to provide both litigants and the lower courts in the Circuit with a reasoned opinion that applies both the letter and spirit of the statute to the question of what effect refinancing has on TILA rescission rights.