

# Illinois Supreme Court Holds Trustee of Land Trust is Entitled to Rescind Reverse Mortgage For Failure to Comply With TILA

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The *Illinois Supreme Court* held in *Financial Freedom Acquisition v. Standard Bank & Trust Co. et al.*, 2015 IL 117950 (2015) that a trustee of a land trust qualified as a consumer under the *Truth in Lending Act (TILA)* and had the statutory right to rescind a reverse mortgage transaction and obtain damages if it did not receive TILA disclosures. Although the trustee had no independent liability in the transaction, the trustee fell within TILA's definition of a consumer as the legal and equitable owner of the mortgaged property. The decision serves as a reminder that careful loan documentation and delivery of all disclosures are critical to protecting creditors' rights and limiting exposure to lender liability claims.

## Background

In *Financial Freedom*, an individual borrower obtained a reverse mortgage on her condominium, which was held in a land trust. The transaction was evidenced by a mortgage granted by the corporate trustee of the land trust, and a note signed by both the individual and the trustee. The land trustee had no personal liability under the note, and the lender's only recourse was to foreclose its security interest on the property.

The individual borrower received the required TILA disclosures, but they were not delivered to the trustee. The loan became immediately due upon the individual borrower's death, and the lender filed suit against the trustee and other potential claimants to foreclose its mortgage. After the foreclosure complaint was filed, the trustee served notice of its intent to rescind the transaction on the lender because it was not given the required TILA disclosures and filed a counterclaim seeking both rescission and statutory damages under TILA. During the foreclosure, the trustee paid off the loan, terminated the trust, and deeded its interest in the property to a third party. The lender then voluntarily dismissed the foreclosure and also moved to dismiss the trustee's counterclaim. The trial court dismissed the counterclaim, and the appellate court affirmed, holding that the trustee had no right of rescission because it had no liability under the note, and thus only the individual borrower was an obligor entitled to rescission. The Illinois Supreme Court reversed the appellate court, finding that the trustee stated a viable counterclaim under TILA.

TILA provides that “in the case of any consumer credit transaction ... in which a security interest ... is or will be retained or acquired in 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 ...” 15 U.S.C. § 1635(a) (2006). In such transactions, the lender must provide certain disclosure statements to the borrower, including a notice that the borrower has a right to rescind the transaction until midnight of the third business day following the transaction. Interpreting the statute and Regulation Z, the Illinois Supreme Court reasoned that an “obligor” is not necessarily the “person to whom credit is extended.” Deferring to the Federal Reserve Board’s interpretation of TILA, the Court determined that such a reading comports with the realities of a reverse mortgage, in which there is no personal liability and the lender’s only recourse is against the property. As the legal and equitable owner of the property, the trustee’s ownership in the property was subject to the lender’s interest. Thus, the trustee was entitled to TILA disclosures and having not been provided any, it had the right to rescind the transaction.

The Court also held that the trustee’s subsequent sale of the property and payment of the outstanding debt did not terminate its right to rescind the transaction and to pursue statutory damages, which could include costs of prosecuting the counterclaim along with reasonable attorneys’ fees. The case was remanded back to the trial court for further proceedings on the trustee’s damages claim.

### Takeaways

TILA violations are frequently raised both as counterclaims in foreclosure actions and in consumer class action lawsuits. The Illinois Supreme Court’s decision in *Financial Freedom* reinforces the importance of providing TILA disclosures to all persons whose ownership interest in mortgaged property may be subject to the lender’s security interest. Careful documentation and maintenance of borrowers’ written acknowledgements of their timely receipt of disclosures is critical to overcoming this potential claim and enabling lenders to efficiently enforce their rights.

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