

OFFICIAL TRANSCRIPT  
PROCEEDINGS BEFORE  
**THE SUPREME COURT**  
**OF THE**  
**UNITED STATES**

CAPTION: DAVID R. BEACH, ET UX., Petitioners v. OCWEN  
FEDERAL BANK

CASE NO: 97-5310

PLACE: Washington, D.C.

DATE: Monday, March 2, 1998

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1                   IN THE SUPREME COURT OF THE UNITED STATES

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3   DAVID R. BEACH, ET UX.,                   :

4                   Petitioners                   :

5                   v.                   :   No. 97-5310

6   OCWEN FEDERAL BANK                   :

7   - - - - -X

8                                   Washington, D.C.

9                                   Monday, March 2, 1998

10                   The above-entitled matter came on for oral  
11   argument before the Supreme Court of the United States at  
12   10:04 a.m.

13   APPEARANCES:

14   BRUCE S. ROGOW, ESQ., Fort Lauderdale, Florida; on behalf  
15                   of the Petitioners.

16   CARTER G. PHILLIPS, ESQ., Washington, D.C.; on behalf of  
17                   the Respondent.

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1 P R O C E E D I N G S

2 (10:04 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument  
4 now in Number 97-5310, David R. Beach v. the Ocwen Federal  
5 Bank.

6 Mr. Rogow.

7 ORAL ARGUMENT OF BRUCE S. ROGOW

8 ON BEHALF OF THE PETITIONERS

9 MR. ROGOW: Mr. Chief Justice, and may it please  
10 the Court:

11 Ocwen Bank agrees that there is a right of  
12 rescission in recoupment after 3 years. Ocwen, however,  
13 says that that right in recoupment is a State safety net,  
14 that one can rescind in recoupment only if there is fraud  
15 or duress or coercion under State law principles.

16 QUESTION: Is right of rescission in recoupment,  
17 is that a term peculiar to Florida law, or is that how we  
18 speak of it generally? I always thought it -- recoupment  
19 as simply being offset to damages, but rescission is an  
20 action of an equitable nature.

21 I don't -- and your brief talks in the same way.  
22 You seem to conflate the two terms.

23 MR. ROGOW: Justice Kennedy, rescission in this  
24 situation is statutory rescission, and I think it's  
25 important to note, too, that the right to rescind within

1 3 years is not an action in rescission under the truth-  
2 in-lending law. It is merely sending a notice of  
3 rescission within the 3 years.

4 QUESTION: Well, can't we say that without  
5 coupling it with the term of recoupment, or does that  
6 somehow help your case to talk about recoupment?

7 MR. ROGOW: It helps our case to talk about  
8 recoupment and, indeed, 1635(i)(3) talks about rescission  
9 in recoupment, a statute that the supreme court of Florida  
10 absolutely ignored in this analysis.

11 QUESTION: The statute itself talks about  
12 rescission in recoupment?

13 MR. ROGOW: Under State law, but the caption of  
14 (i)(3) is the right to recoupment under State law, and  
15 then the statute says, nothing in this section shall  
16 affect the right to rescission in recoupment under State  
17 law.

18 Ocwen suggests that that only means State law  
19 rescission for fraud, duress, or coercion, and our  
20 position is, is it means more than that. It means the  
21 Federal Truth-in-Lending Act right to rescission, and  
22 several reasons support our position.

23 The first is the notion that, when one looks at  
24 this statute, the word rescission used throughout the  
25 statute is Federal TILA rescission, and this Court's

1 decision last week in National Credit Union reasserted a  
2 principle that, when one looks at statutes and the same  
3 words are used throughout the statute, then the word has  
4 the same meaning, and here the word rescission is used  
5 throughout section 1635 and it is referring to TILA  
6 rescission, Truth-in-Lending Act rescission, so under  
7 that --

8 QUESTION: Mr. Rogow, under the statute I guess,  
9 regardless of the timing of the discovery of a failure to  
10 comply with TILA, that the homeowner, your client, in  
11 effect, could in any event obtain damages that result from  
12 whatever failure to disclose was involved, is that right?

13 MR. ROGOW: That is --

14 QUESTION: Without any time limit on that. You  
15 can get actual damages.

16 MR. ROGOW: You can get actual damages, Justice  
17 O'Connor, and statutory --

18 QUESTION: And also twice the amount of any  
19 finance charge.

20 MR. ROGOW: A statutory penalty with a  
21 maximum -- in this case it was \$1,000, and there was  
22 \$1,000, in effect a penalty under 1640, plus the  
23 overcharge, and plus another amount of --

24 QUESTION: So that's available without time  
25 limit.

1 MR. ROGOW: That is available.

2 QUESTION: But your client asserts in addition a  
3 right to rescind and recover all of the interest paid for  
4 the period of time that the mortgage was in effect and  
5 payments were made on it, is that right?

6 MR. ROGOW: That is right, Justice O'Connor,  
7 recover the interest paid, on the other hand have to pay  
8 back the principal. The rescission --

9 QUESTION: Yes. I mean, it could have been 20  
10 years of payment under the mortgage, presumably --

11 MR. ROGOW: It could be --

12 QUESTION: -- when you discover there's some \$7  
13 deficiency here.

14 MR. ROGOW: Well, a \$7 deficiency --

15 QUESTION: I mean, that would be enough,  
16 wouldn't it --

17 MR. ROGOW: No, it would not --

18 QUESTION: -- under your theory?

19 MR. ROGOW: It wouldn't be enough, Justice  
20 O'Connor, because under Congress' construct it would have  
21 to be more, but I think the answer to this is -- because I  
22 understand --

23 QUESTION: Well, no matter how small the  
24 failing, and this was pretty small, and no matter how much  
25 time has elapsed, it's your position that there's this

1 indefinite right of rescission to get back all of the  
2 interest paid, in addition to the damages and in addition  
3 to the statutory penalty, right?

4 MR. ROGOW: Yes, Justice O'Connor, because  
5 Congress has said that is right, because the remedy --

6 QUESTION: Well, that's what we're here to  
7 decide. I'm not a bit sure that's what they said, but  
8 that's your position.

9 MR. ROGOW: That is our position, Justice  
10 O'Connor, but we think it's informed by how one construes  
11 these statutes. Beginning with the first point that I  
12 make, Congress certainly has said rescission in  
13 recoupment, nothing in this section, which would be --

14 QUESTION: Mr. Rogow, can I ask just one other  
15 detailed practical question? You do have to tender back  
16 the amount of the loan to principal, don't you?

17 MR. ROGOW: Yes.

18 QUESTION: And your client is here in forma  
19 pauperis, as I understand it.

20 MR. ROGOW: Yes.

21 QUESTION: Does he have the money to do that?

22 MR. ROGOW: Well, at this moment, of course, he  
23 doesn't have the money to do that and what happens in  
24 these cases generally is, is that if the right to  
25 rescission is invoked, then the borrower is entitled to



1 the return of the interest, but the borrower has to pay  
2 the principal back.

3 QUESTION: Right.

4 MR. ROGOW: And in some situations, indeed, if  
5 one's house has appreciated in value, you can then  
6 refinance your house and pay back the principal.

7 But I think the important thing here, Justice  
8 Stevens, is is that whatever the remedy is, is a remedy  
9 that Congress has constructed not as a penalty to the  
10 lender, but to force the lender to conform to the truth-  
11 in-lending law. The truth-in-lending law, its purpose is  
12 to protect consumers.

13 QUESTION: Mr. Rogow, you are so stressing the  
14 word rescission -- you say that's used over repeatedly,  
15 and yet Congress used such distinctly different language  
16 in dealing with the 1-year time limit for damages. It  
17 says no action should be brought, traditional statute of  
18 limitations.

19 Here, it talks about the right to rescind shall  
20 expire. One sounds like it's simply a typical statute of  
21 limitations and you can raise -- and defensively you can  
22 recoup.

23 The other, it sounds like expire, dead, over,  
24 after 3 years it's gone, and you make -- how do you  
25 explain that Congress picked this word expire to describe

1 the right of rescission, and then talking about the 1-  
2 year limitation, used traditional statute of limitations  
3 language?

4 MR. ROGOW: Two ways, Justice Ginsburg. The  
5 first is the right that expires is the right to  
6 affirmatively rescind. That right that they're talking  
7 about is the right within 3 years to say to the lender, I  
8 am rescinding this transaction. That is the right that  
9 expires.

10 QUESTION: Well, you say so, but what is there  
11 in the statute that indicates that, and anything that  
12 indicates that it's only -- the same thing -- what you're  
13 saying is, it is the same thing as the extension of the  
14 statute of limitations, which doesn't count if you're  
15 seeking only to recoup.

16 MR. ROGOW: Justice Ginsburg, (i)(3) says the  
17 right to rescission in recoupment shall not be affected  
18 and is available under State law, so even if one looks at  
19 1635(f), the shall expire language, that is revived by  
20 (i)(3).

21 QUESTION: Mr. Rogow, can I ask you about that?  
22 Do you want us to determine what Florida law says?

23 I mean, let's assume we agree with you as to the  
24 meaning of (i)(3), should we determine that there is such  
25 a right of rescission in recoupment under Florida law?

1 MR. ROGOW: No, Justice Scalia.

2 QUESTION: You would want us to remand --

3 MR. ROGOW: Yes.

4 QUESTION: -- to let the Florida supreme court  
5 decide that?

6 MR. ROGOW: Yes, because --

7 QUESTION: So is that the most you're asking  
8 for?

9 MR. ROGOW: It is.

10 QUESTION: A right to remand to let the Florida  
11 court decide whether, under Florida law, there is such a  
12 right?

13 MR. ROGOW: To let the Florida court decide  
14 whether or not, under Florida law properly applying  
15 Federal law.

16 The difficulty with the supreme court of Florida  
17 decision was --

18 QUESTION: Well, wait, wait, wait. That's not  
19 what it says. It says, under State law, affects a  
20 consumer's right of rescission and recoupment under State  
21 law.

22 MR. ROGOW: It says the right to -- the caption  
23 of it says, the right to recoupment under State law. The  
24 question then becomes whether or not Florida permits  
25 recoupment under State law and whether or not it would

1 permit rescission. Florida, in --

2 QUESTION: But I mean, Florida may decide that  
3 this is a peculiar sort of an action, this rescission  
4 action, for which it will not allow recoupment. Is that  
5 not within the realm of permissibility?

6 MR. ROGOW: It is not if it misapplies Federal  
7 law. The supreme court of Florida --

8 QUESTION: Well, why would it say under State  
9 law, then?

10 MR. ROGOW: Well, because --

11 QUESTION: I mean, if it's a matter of Federal  
12 law they could have left out the phrase in (i)(3)  
13 nothing -- it could have just said, nothing in this  
14 subsection affects a consumer's right of rescission and  
15 recoupment, period.

16 MR. ROGOW: In (i)(3), the caption, I come back,  
17 that says the right of recoupment under State law --

18 QUESTION: I don't care about the caption. I'm  
19 talking about the text. We don't go by captions. We go  
20 by the text.

21 MR. ROGOW: And the right of rescission, Justice  
22 Scalia, is the right of rescission -- TILA rescission and  
23 State law rescission.

24 What Ocwen is -- Ocwen agrees there is a right  
25 of rescission. They're claiming that that right of

1     rescission is strictly a State law right of rescission,  
2     and when one reads a supreme court of Florida opinion, it  
3     is driven by its view that Congress has said that there  
4     shall be no right of rescission under Federal law. That's  
5     the heart of our argument, that was a mistake.

6             QUESTION: I understand that. They say that  
7     under Federal law there can be no State law of -- right of  
8     rescission, and you say that's wrong, but can't we -- if  
9     we send it back, couldn't they still find that under State  
10    law, regardless of what the Federal law said, we don't  
11    think this is the kind of matter on which there should be  
12    recoupment?

13            MR. ROGOW: Not if they applied neutral  
14    principles of Florida law, because Florida law permits  
15    rescission in recoupment, okay.

16            QUESTION: Mr. Rogow --

17            QUESTION: But it's a question of Florida law.

18            MR. ROGOW: It's an ultimate question of Florida  
19    law applying --

20            QUESTION: And what you say is neutral  
21    principles of Florida law may not be what the Florida  
22    supreme court thinks are neutral principles.

23            MR. ROGOW: And they would not be if the Florida  
24    supreme court properly addressed 1635(f). By  
25    misconstruing 1635(f) and 1635(i)(3) the supreme court of



1 Florida came to the conclusion really on two foundations,  
2 1) that 1635(f) is a statute of repose. The right shall  
3 expire.

4 It failed to address -- indeed, it said that  
5 (i)(3) is not even relevant to this inquiry, and  
6 clearly --

7 QUESTION: May I clarify one thing, Mr. Rogow,  
8 because I think we lost a piece of this that's essential.  
9 I think -- you said at the very beginning that the bank  
10 agrees there is a right to rescission in recoupment,  
11 whatever you --

12 MR. ROGOW: Yes.

13 QUESTION: But solely under State law. That is,  
14 as Justice Scalia asked the question, the -- there is a  
15 concession, whatever, that whatever Florida law would be  
16 apart from TILA, TILA doesn't exist, if there's a right to  
17 rescission under State law that would apply here, but I  
18 think you're urging the double -- the two things. That  
19 is, you must get TILA into it, otherwise there's no  
20 difference in your position.

21 MR. ROGOW: That is exactly right. Our position  
22 is, is that 1635(i)(3) embraces TILA rescission and State  
23 law rescission. It leaves the door open --

24 QUESTION: But if you're right about TILA having  
25 this right of rescission in recoupment, then why do you

1 need the provision that talks about State law?

2 You've got -- you say that under TILA in 3 years  
3 or 10 years, it doesn't matter, you can rescind if you're  
4 sued.

5 Now, what extra does this add? If you have your  
6 right under Federal law, then what does the addition of  
7 the State law --

8 MR. ROGOW: It makes it clear that Federal law  
9 is not preempting the field, but rescission in recoupment  
10 under State law would also be available for fraud, duress,  
11 or coercion.

12 QUESTION: It's not a matter of preemption.  
13 It's a matter of ultimate source. You're saying, I think,  
14 that the obligation to make these disclosures and to make  
15 these calculations correctly arises under Federal law.

16 MR. ROGOW: It does, Justice Kennedy.

17 QUESTION: And it's for that Federal law  
18 Congress has provided a remedy for breach, rescission,  
19 but it says it can only be for 3 years.

20 MR. ROGOW: It says it can only be --

21 QUESTION: So it seems to me, as Justice  
22 Ginsburg is indicating, you're trying to have it both  
23 ways, but that's quite different from saying that there is  
24 simply a State law cause of action.

25 MR. ROGOW: Well, what we're saying, Justice

1 Kennedy, is -- and the supreme court of Florida came to  
2 the conclusion that there is no Federal right to  
3 rescission after 3 years. If they are wrong about that,  
4 then their decision is not properly informed, and that's  
5 what we're arguing, that they are wrong about that.

6 QUESTION: But certainly section -- subsection,  
7 or double subsection (3) of 1635(i), which says nothing in  
8 this subsection affects a consumer's right of rescission  
9 in recoupment -- that does not give any Federal right.

10 MR. ROGOW: It leaves open the door to the  
11 Federal right.

12 QUESTION: It leaves -- well, it leaves open the  
13 possibility that the State may give you a right.

14 MR. ROGOW: It certainly leaves open the State  
15 giving you a right, but it does not preclude, and I think  
16 that's the key to this case, is it does not preclude the  
17 use of the Federal right.

18 QUESTION: No, but it seems to me that your  
19 Federal right of rescission goes when it says an obligor's  
20 right of rescission shall expire 3 years after the date of  
21 consummation.

22 MR. ROGOW: That's 1635(f).

23 QUESTION: Well, and that is your right of  
24 rescission under this statute.

25 MR. ROGOW: That is your right to

1 affirmatively --

2 QUESTION: What do you mean, affirmatively  
3 rescind?

4 MR. ROGOW: By --

5 QUESTION: It doesn't say affirmatively rescind.

6 MR. ROGOW: When one reads 1635(a) and 1635(b)  
7 in that section, they're talking about sending a notice of  
8 rescission within 3 years, affirmatively rescinding. We  
9 are talking about rescinding in recoupment, something that  
10 happens after 3 years when one has been sued in  
11 foreclosure.

12 QUESTION: And that's a State law right.

13 MR. ROGOW: That is, if State law permits  
14 recoupment, then there is a right to rescission and the  
15 question is, which right to rescission, State law  
16 rescission, or State law rescission and the Federal TILA  
17 rescission?

18 QUESTION: Mr. Rogow, did the petitioner ask for  
19 a rescission remedy as a matter of State law in the  
20 proceedings below?

21 MR. ROGOW: As a -- the petitioner raised 1635  
22 rescission, which was Federal rescission.

23 QUESTION: But not State law --

24 MR. ROGOW: At the -- that's right.

25 QUESTION: -- rescission. That was not raised.

1 MR. ROGOW: It was not, and at the time (i)(3)  
2 was not in existence when the petitioner filed his -- his  
3 and her affirmative defenses, so they were relying upon  
4 the right to rescission, which every court that had  
5 addressed this since 1984 found that there was a right to  
6 rescission in recoupment after 3 years.

7 QUESTION: Why is --

8 QUESTION: May I -- no, please.

9 May I go back, though, to an earlier question.  
10 Leaving aside the fact that the word affirmative does not  
11 appear in 1635(f), how do you explain the distinction  
12 between the shall-not-be-brought language with respect to  
13 the damages remedy, which sounds like a normal statute of  
14 limitations, and the shall-expire language with respect to  
15 this rescission right?

16 What is the reason, in effect, that I think  
17 you're telling us we should ignore that distinction?

18 MR. ROGOW: No. The cases, Bull, Reiter,  
19 Western Pacific, clearly make it plain that Congress --  
20 only the clearest congressional language would prevent a  
21 statute of limitations from being used in recoupment, and  
22 the language here, shall expire, is being read now as  
23 something other than a statute of limitations. I don't  
24 think the nomenclature makes any difference in this  
25 situation.



1           QUESTION: Well, but my question is, why  
2 shouldn't it make some difference? The shall -- the shall  
3 not be brought is standard limitation language. Shall  
4 expire is not, and on its face it suggests that in fact a  
5 distinction is being made, and I don't know why we should  
6 ignore that distinction in language and find it of no  
7 significance, and I don't think you've answered that.

8           MR. ROGOW: I think, Justice Souter, that the  
9 answer lies in (i)(3), that if one views, as is right, as  
10 having expired, then (i)(3) revived it by its language  
11 that leaves open the notion that there can be rescission  
12 in recoupment.

13           QUESTION: Well, (i)(3) doesn't have to be read  
14 that way. Cannot (i)(3) refer to State law recoupment  
15 permissions that do not rely upon this Federal statute?

16           That is to say, if the same failure to provide  
17 information under this Federal statute also constitutes a  
18 fraud under State law, this provision can be read to say,  
19 recoupment and rescission for that fraud is not affected  
20 by our 3-year termination of the rescission for violation  
21 of this act.

22           MR. ROGOW: But the question --

23           QUESTION: Violation of the act is also a fraud.

24           MR. ROGOW: But the question, Justice Scalia, is  
25 whether or not it can only be read that way. Congress had

1 the opportunity --

2 QUESTION: No, it need not only be read that  
3 way. I'm saying, when you put that together with the  
4 indication that Justice Souter was just referring to, the  
5 indication that they use language different from the  
6 statute of limitations, those two go together very nicely.

7 MR. ROGOW: But the supreme court of Florida  
8 said it can only be read one way, and that, we think, is  
9 their error. It can be read -- unless there's clear  
10 language that says there is no rescission in recoupment  
11 under Reiter, Bull, and Western Pacific, then the Court  
12 should conclude that --

13 QUESTION: But Mr. Rogow why isn't the word  
14 expire here? I mean, I dimly recall learning in law  
15 school that there were two kinds of time bars. One  
16 extinguished the remedy, and that's no action shall be  
17 brought, and one was supposed to extinguish the right, and  
18 that was the right terminates, not just the remedy.

19 Now, that's what the difference in language  
20 triggered in my mind immediately, that expire sounds like  
21 the one you've got no more right, and the other is, well,  
22 too bad you can't sue on it.

23 MR. ROGOW: And (i)(3) addresses that when it  
24 says that nothing in this section, which includes the 3-  
25 year limitation which is referred to in section (i), shall

1     affect the right to rescission in recoupment under State  
2     law, so while that -- your reading would be the usual  
3     reading, the fact that (i)(3) is added to this changes  
4     this from being that kind of statute of repose where the  
5     right has expired, died as often is suggested, into  
6     something that now has been revived.

7             QUESTION: No, but your argument, as I  
8     understand it, is that the reason (i) revives it is that  
9     (i), in effect -- or State law looks to -- would look to  
10    Federal law, and specifically this act, but when  
11    Federal -- when State law does look to Federal law under  
12    this act, what it sees is what Justice Ginsburg just  
13    described.

14            It sees language that seems to say, with respect  
15    to the 1635 right, it expires, so whether (i) is there or  
16    whether (i) isn't there, you've got to deal with the  
17    expire language and I do not see that the formulaic  
18    incorpora -- or reservation of State law has any bearing  
19    one way or the other on the significance of that  
20    distinction.

21            MR. ROGOW: Justice Souter, Congress had the  
22    opportunity to make it specific that there will be no  
23    rescission in recoupment. The AARP brief has in its  
24    appendix the four different bills, I think it was, that  
25    were offered to accomplish what Owen is now asking this

1 Court. Congress rejected that. Congress did not include  
2 that language that made it clear that this right shall --

3 QUESTION: Did they take a vote on that, the  
4 whole Congress said we do not want these statutes?

5 MR. ROGOW: No, but by --

6 QUESTION: Just a committee, right?

7 MR. ROGOW: But by rejecting the bill, Justice  
8 Scalia, by rejecting the bill --

9 QUESTION: Did the whole Congress reject the  
10 bill?

11 MR. ROGOW: Well, in terms of how Congress  
12 voted, obviously the end result was (i) (3).

13 QUESTION: Those bills were never presented to  
14 the whole Congress, were they?

15 MR. ROGOW: They did not come out of committee,  
16 but in this legislative process there has been no showing  
17 by Congress that this is what it intended, that this right  
18 shall expire. I think it's --

19 QUESTION: But it says in so many words that it  
20 shall expire.

21 MR. ROGOW: It does for the affirmative right to  
22 rescind --

23 QUESTION: It doesn't say affirmative,  
24 Mr. Rogow. You've been putting that word in front of  
25 rescission all during this argument and the statute simply

1 doesn't say it.

2 MR. ROGOW: Justice -- Chief Justice Rehnquist,  
3 by talking about that right in that section they are  
4 dealing specifically with that affirmative right to  
5 rescind within 3 years.

6 I think it's important to note that the lender  
7 controls everything here. If the lender conforms to  
8 Federal law, then there is no potential for rescission.

9 QUESTION: Is the -- I'm back with Justice  
10 Kennedy. That is, this seems like such an odd legal  
11 animal, rescission in recoupment. I don't understand what  
12 it is, that -- is there any other place it exists in the  
13 law?

14 My understanding is that if you give me  
15 \$2,000 -- suppose you gave me \$2,000, and I was supposed  
16 to give it back to you. I never did, and you forgot about  
17 it. 20 years later, I sue you for \$10,000 on something  
18 else, and even though there's a statute of limitations you  
19 could say, wait, Breyer has my \$2,000. Deduct it from the  
20 10. That's recoupment, isn't it?

21 MR. ROGOW: That is, Justice Breyer.

22 QUESTION: All right. Well, by analogy that  
23 would here permit the borrower, the homeowner to deduct,  
24 when 20 years later they try to foreclose on the mortgage,  
25 the bank tries to get its money back, it would permit him



1 to deduct however much he was hurt by a failure to  
2 disclose, but everybody concedes he gets that.

3 Now what he wants is something more. He wants  
4 something he never gave me. He wants me not to collect  
5 any interest over 20 years, so that doesn't sound like  
6 anything to do with recoupment, and it's something else.  
7 It's like a penalty or something.

8 So is there -- if TILA never existed, if you  
9 look across all State law, is there any other instance you  
10 came across where something like that sounded as if it was  
11 part of recoupment? It just doesn't sound like  
12 recoupment. Everybody's saying, rescission in recoupment.  
13 I know it's written in a statute, but I want to know, is  
14 this like a normal legal animal, or is it something they  
15 invented out of TILA, or where did it ever come from?

16 MR. ROGOW: I'm not aware of it anywhere else,  
17 Justice Breyer, but --

18 QUESTION: All right. So if it's nowhere else  
19 in the law, and if it starts out by saying, nothing in  
20 this subchapter shall, you know, have any effect on  
21 something called rescission and recoupment, then it sounds  
22 like, if nothing in this subchapter, then, forget it, it's  
23 gone, because there is no such thing.

24 MR. ROGOW: Well, then I think those words would  
25 be meaningless, the (i)(3) language would be meaningless.

1 QUESTION: No, but it's possible -- you know,  
2 you go to Congress, people get all mixed up and somebody  
3 comes and tells them there's something called rescission  
4 in recoupment under State law, and everybody says well, we  
5 don't want to touch that. I mean --

6 (Laughter.)

7 MR. ROGOW: Well, this was considered and it was  
8 rejected, and I think two points I want to make before I  
9 reserve the rest of my time is, is that not only do the  
10 lenders have the right to cure this defect, because they  
11 can cure it and therefore render them not liable in  
12 rescission in recoupment, but they can conform to the law.

13 And I think the beginning point of this is, this  
14 is a unique statute. It is a consumer protection statute.  
15 It's to inform and protect the consumer, and rescission is  
16 not a penalty. It puts the parties back in their original  
17 position.

18 QUESTION: May I ask you just to comment on one  
19 thing before you sit down, Mr. Rogow? It's a point that I  
20 came across and I thought I answered it, and then it  
21 occurred to me, maybe I didn't.

22 You've mentioned 1635(i)(3). What I have in  
23 mind is the significance of 1635(i)(1). I could read it,  
24 but you probably know it. Does that have any significance  
25 for your position?

1 MR. ROGOW: No. Those provisions in 1635(i)  
2 give the consumer a right to rescind within 3 years in  
3 certain conditions and the 1995 amendments actually  
4 limited the right to rescission. This made clear that  
5 there was a right to rescind within those 3 years for  
6 those reasons. A mortgage broker fee was not disclosed,  
7 those kinds of things.

8 QUESTION: But it's referring to the right which  
9 occurs at the time of foreclosure.

10 MR. ROGOW: Yes.

11 QUESTION: So it's a defensive -- I assume it's  
12 a defensive right which functionally is being employed in  
13 the same way that you're arguing the general rescission  
14 right should be employed.

15 MR. ROGOW: It is, within 3 years, but that  
16 doesn't address recoupment, and recoupment is addressed in  
17 (i)(3) --

18 QUESTION: Okay --

19 MR. ROGOW: -- and (i)(4) makes it --

20 QUESTION: I have a technical question. If they  
21 do rescind 30 years later, the borrower, does he actually  
22 have to tender the value of the money, or is it that the  
23 bank simply has a legal claim to the value of the  
24 principal?

25 MR. ROGOW: Well, there are equitable principles

1 here, and the court could adjust the --

2 QUESTION: Well, when you say -- in other words,  
3 is it possible that 30 years later the homeowner comes  
4 back and says, yes, you are entitled, bank, to my original  
5 principal, \$100,000. By the way, I'm in bankruptcy, and  
6 you don't have any security. Good luck.

7 I mean, has that happened? Is that possible, in  
8 your interpretation that would happen?

9 MR. ROGOW: There is no record of that  
10 happening.

11 QUESTION: No, ever in the country? I mean, I'm  
12 trying to figure out --

13 MR. ROGOW: I'm not aware of any, Justice  
14 Breyer.

15 QUESTION: So they'd actually have to have the  
16 \$100,000 and give it back to the bank, otherwise they  
17 couldn't do the rescission.

18 MR. ROGOW: The rescission requires a give-and-  
19 take.

20 QUESTION: Is there any reason why a borrower  
21 would act within 3 years instead of just sitting back,  
22 once he knows there's been a mistake in the original  
23 transaction, and waiting for foreclosure? Meanwhile, he's  
24 using the money interest-free.

25 MR. ROGOW: Because if that were a strategic

1 default, then under equitable recoupment principles and  
2 even, indeed, under the rescission principles, the court  
3 could take into consideration if there were some bad faith  
4 in the way the borrower had addressed this.

5 QUESTION: And I take it the court could also  
6 take into consideration the fact that there's a provision  
7 in here that mere computational errors in fact do not  
8 support any rescission right at all.

9 I mean, one of the things that surprises me  
10 about this case is what is described as the error here  
11 sounds like somebody's adding machine mistake to me, and I  
12 presume that if the bank comes forward and affirmatively  
13 shows that that's the case, this whole discussion is  
14 academic, isn't it?

15 MR. ROGOW: You would only have the right to  
16 rescind if there have been material disclosure errors that  
17 the court found were in clear violation of TILA, yes,  
18 Justice Souter.

19 QUESTION: Mr. Phillips, we'll hear from you.

20 ORAL ARGUMENT OF CARTER G. PHILLIPS

21 ON BEHALF OF THE RESPONDENT

22 MR. PHILLIPS: Thank you, Mr. Chief Justice, and  
23 may it please the Court:

24 Given the presentation in the first half-an-  
25 hour I'm not sure I'm going to gild this lily at great



1 length, but a couple of points seem to me to warrant  
2 attention at this stage.

3 First, Justice Breyer, in response to your  
4 question, the industry amicus brief talks about the  
5 problems that arise in the bankruptcy setting and the fact  
6 that there are lots of lenders who end up not being able  
7 to recover anywhere near the full amount of the  
8 outstanding loan in the rescission context, so that's some  
9 evidence of --

10 QUESTION: Why would that be? I mean, that's --  
11 I'm trying to figure out legally why would that be? If,  
12 in order to rescind, the homeowner has to tender back the  
13 principal of the loan, why would the bank not get the  
14 principal of the loan? That's what was confusing me.

15 MR. PHILLIPS: As I understand -- because the  
16 principal of the loan is essentially an unsecured debt --

17 QUESTION: No, but tendering back, I take it,  
18 means like you have a certified check and you hand it to  
19 the bank, and --

20 MR. PHILLIPS: Well, the question is going to be  
21 then, as a matter of equity, whether the tender-back rule  
22 has to be applied in the first instance or whether the  
23 bankruptcy protections ought to apply in the first  
24 instance, and I think a lower court's probably divided  
25 with respect to that particular question --

1 QUESTION: That's what I found out. It sounds  
2 to me this is an empirical question that should have an  
3 answer --

4 MR. PHILLIPS: Well, we know in the Bothelo  
5 case --

6 QUESTION: -- and it doesn't sound to me as if  
7 people know, particularly.

8 MR. PHILLIPS: Right. But the Bothelo case was  
9 the one case in which that actually happened and they did,  
10 in fact, eliminate the tender-back requirement in its full  
11 measure. That's the only one I know about that's cited in  
12 the briefs and that's a bankruptcy case, Your Honor.

13 With respect to where their case stands at this  
14 point, we begin with the language of the statute and  
15 section 1635 says as plainly as it can that the right that  
16 the petitioners seek to assert here expired, and it  
17 expired in 1989, and they came in 1991 and they sought to  
18 raise it again.

19 And what they were able to do in 1991, that they  
20 were able to do specifically because of section 1640, is  
21 they were able to get actual compensatory damages and they  
22 were able to get statutory damages, in point of fact, even  
23 though the statute of limitations on violations of TILA  
24 had already run, and that's because Congress was very  
25 careful in devising the remedial scheme that it adopted

1 here.

2 It recognized that that was an equitable  
3 response that frankly tracked this Court's decisions in  
4 Bull and Reiter v. Cooper and Western Pacific. Congress  
5 recognized that that was equitable to allow the borrower  
6 under those circumstances to come in and to assert that  
7 particular right, and they received that, and the question  
8 which Justice O'Connor began the argument with I think is  
9 really the one that we have to focus on.

10 Under these circumstances, where you've received  
11 full recompense, what sense does it make for Congress to  
12 go further and ask you to grant a right of rescission, and  
13 the petitioners say that we have to find something in the  
14 statute that says you cannot have a right of rescission,  
15 and we submit to you that the more reasonable assessment  
16 of the equities of the relationship between the parties  
17 is, we ought to be looking in this statute for some  
18 evidence that a right of rescission in recoupment should  
19 exist under the circumstances of this case.

20 QUESTION: His argument I think was, look at the  
21 language. It says nothing in this subsection affects a  
22 consumer's right of rescission in recoupment under State  
23 law. He says, that's an odd legal animal.

24 The only thing he's ever found that that exists  
25 is this kind of a case, so Congress must have had

1 something in mind, and if they didn't have this thing in  
2 mind, which distinguishes between affirmative rescissions  
3 and rescissions later on in recoupment, what can they have  
4 had in mind, so it's either meaningless, or what he says.  
5 That's what I take --

6 MR. PHILLIPS: Justice Breyer, I can't improve  
7 on your characterization of what probably happened in  
8 Congress, which is that somebody identified the  
9 possibility of a State law right in rescission and  
10 recoupment and the Congress quite rightly reacted  
11 negatively and said, wait a second, in this subsection we  
12 certainly don't mean to withdraw any of those kinds of  
13 State remedies.

14 Remember, this is a statute that is very  
15 solicitous of State law in general, and all of these --

16 QUESTION: Florida --

17 QUESTION: Do you think there's any possibility  
18 that Congress meant rescission or recoupment? Rescission  
19 in recoupment just sounds crazy to me and it would --

20 MR. PHILLIPS: Well, I --

21 QUESTION: -- make perfect sense if it said  
22 rescission or recoupment.

23 MR. PHILLIPS: Well, I think it would have made  
24 more sense if they had simply said State law rescission  
25 and recoupment.

1           Again, I think all they wanted to make clear of  
2       was that State law would be protected.

3           QUESTION: But is there such an animal in State  
4       law as rescission in recoupment?

5           MR. PHILLIPS: There is a reference to that  
6       language in one of the -- actually, one of the earlier  
7       Florida cases, where -- it's not actually that language,  
8       but there is recoupment action, and they do talk about  
9       rescission, but you know, our footnote 6 in our brief goes  
10      to great lengths -- we looked in vain for this to try to  
11      figure out where Congress came up with this particular  
12      animal and frankly couldn't find it.

13          QUESTION: Nobody thought of the possibility of  
14      a scrivener's error?

15          MR. PHILLIPS: Well, I'm always reluctant to  
16      press that as the basis for interpretation, Your Honor.

17               (Laughter.)

18          QUESTION: If it said or --

19          MR. PHILLIPS: Thank you.

20               (Laughter.)

21          QUESTION: How would the case come out if it  
22      said or?

23          MR. PHILLIPS: Rescission or recoupment under  
24      State law? It depends on whether State law applies to  
25      both. You see, I think it's clear --



1 QUESTION: And what's the answer to that?

2 MR. PHILLIPS: Well, I still think that Congress  
3 would have meant for State law to apply to both, so it  
4 wouldn't have made a difference.

5 QUESTION: But Mr. Phillips, as I understand  
6 your position, you're just saying there's no Federal right  
7 here, but I don't think you take the position that if  
8 Florida said we're going to treat even a trivial violation  
9 of TILA as a ground for State law rescission, you aren't  
10 saying that it would be preempted --

11 MR. PHILLIPS: No, I'm not arguing it would be  
12 preempted, but I do think it's important in that regard, a  
13 la Justice Scalia's question about a remand in this case,  
14 is that the first half of the Florida supreme court's  
15 opinion analyzes the Federal statutory issue.

16 The second half of it analyzes it as a matter of  
17 State recoupment law and conclusively says that in our  
18 judgment this kind of a statute is not the kind of a  
19 statute in which we would exercise recoupment and  
20 therefore, as a matter of State law, there's no basis for  
21 recovery.

22 That's over and above the fact that they've  
23 never asked for recovery under State law at any time.

24 QUESTION: Well, that's the other point I was  
25 going to ask is, when did their claim for a State law

1      recoupment first assert itself? I didn't find it in the  
2      early opinion.

3               MR. PHILLIPS: It never asserted itself, to this  
4      day. I mean, there is a single sentence in the reply  
5      brief in which they make reference to seeking rescission  
6      under State law.

7               There's no support for it in the citations in  
8      the reply brief and there's nothing in the record and  
9      actually I heard counsel for petitioner today to  
10     effectively concede that the complaint clearly says  
11     nothing about State law, and nothing else arose throughout  
12     this litigation in --

13              QUESTION: But you think that nonetheless, as  
14     you read the opinion of the Florida supreme court, it  
15     rejected any State law recovery, right?

16              MR. PHILLIPS: Absolutely. Absolutely, because  
17     at the end of the --

18              QUESTION: Even though it wasn't requested.

19              MR. PHILLIPS: That's correct, Justice O'Connor,  
20     because the question that was certified to the Florida  
21     supreme court was whether or not there was this kind of a  
22     right under State law, and if you look at the joint  
23     appendix on 164 to 165, the last line of 164 says, after  
24     analyzing all of the traditional grounds for statutory  
25     interpretation as to why this provision doesn't grant a

1 Federal right it says, but that does not end our inquiry,  
2 and then it turns, in Florida, and I take the rest of that  
3 analysis really --

4 QUESTION: And you don't think that the Florida  
5 court thought that it was simply not at liberty to confer  
6 some State law right of rescission on the theory that TILA  
7 had preempted State law.

8 MR. PHILLIPS: I don't see anything in the  
9 Court's opinion that remotely suggested that to be the  
10 case, Justice O'Connor.

11 QUESTION: Well, the question presented here is,  
12 may an action for the statutory right of rescission  
13 provided by TILA be revived as a defense in recoupment  
14 beyond the 3-year limit on the right of rescission set  
15 forth in section 13 -- 1635(f).

16 I'm not sure that even includes that question.

17 MR. PHILLIPS: Well, I -- no question about it,  
18 Mr. Chief Justice, it doesn't include that question,  
19 and --

20 QUESTION: That certainly wasn't -- that wasn't  
21 the question framed in the petition.

22 MR. PHILLIPS: I'm sorry.

23 QUESTION: We rewrote the question.

24 MR. PHILLIPS: Right. Yes, Justice Stevens.

25 QUESTION: So that's not what they present --

1 yes.

2 MR. PHILLIPS: Right, but the bottom line is, in  
3 terms of I think what is before this Court, is simply a  
4 question of Federal law and I think, based on all that's  
5 happened today, the question -- the Federal question of  
6 law is unmistakable. That is, the right expired.

7 There is nothing in this statute that remotely  
8 revives that right and certainly nothing in (i)(3), which  
9 as I think we've discussed now at sufficient length, which  
10 simply retains certain protection for State law.

11 It was a peculiar way, if all you're trying to  
12 do is -- if what you were really trying to do was to  
13 revive a Federal right that you categorically declare to  
14 be expired, this is not the way you'd do it, and therefore  
15 I don't think that's a fair interpretation of that  
16 language of the statute.

17 If the Court has no further questions, I'll  
18 waive back the rest of my time.

19 QUESTION: Thank you, Mr. Phillips.

20 Mr. Rogow, you have 1 minute remaining.

21 REBUTTAL ARGUMENT OF BRUCE S. ROGOW

22 ON BEHALF OF THE PETITIONERS

23 MR. ROGOW: Several things. The Florida supreme  
24 court opinion clearly is premised on its view that under  
25 1635 there is no right to rescission, and that informed

1 its view of State law also, and that's at page 171 of the  
2 joint appendix.

3 The courts that have looked at this -- Dawes,  
4 Colorado, Massachusetts, New York, New Jersey, Illinois --  
5 have all decided that there is a right to rescission in  
6 recoupment consistent with the Federal TILA right that  
7 could be asserted affirmatively within the first 3 years.

8 This Court has talked generally about  
9 recoupment. It is an equitable remedy. There is nothing  
10 inequitable here.

11 This is a consumer protection statute, and the  
12 lender controls both at the outset the duty to conform to  
13 the law and throughout the life of the loan the ability to  
14 cure the defect and, in this situation, the -- without  
15 clear congressional language saying there shall be no  
16 recoupment, there is recoupment in rescission, and Florida  
17 permits rescission in recoupment and it should have  
18 permitted it in this case under Federal law.

19 CHIEF JUSTICE REHNQUIST: Thank you, Mr. Rogow.

20 The case is submitted.

21 (Whereupon, at 10:43 p.m., the case in the  
22 above-entitled matter was submitted.)  
23  
24  
25



## CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represents an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of The United States in the Matter of:

DAVID R. BEACH, ET UX., Petitioners v. OCWEN FEDERAL BANK  
CASE NO: 97-5310

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BY Donna M. Fedirko-----

(REPORTER)