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No. 13-684

IN THE

Supreme Court of the United States

LARRY D. JESINOSKI AND CHERYLE JESINOSKI,

Petitioners,

v.

COUNTRYWIDE HOME LOANS, INC., ET AL.,

Respondents.

On Writ of Certiorari to the
United States Court of Appeals
for the Eighth Circuit

BRIEF OF PROFESSOR RICHARD R.W. BROOKS AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICUS CURIAE[1]

Richard R.W. Brooks is the Charles Keller Beekman Professor of Law at Columbia Law School. He was previously the Leighton Homer Surbeck Professor at the Yale Law School. Prior to joining the law faculty at Yale in 2003, Professor Brooks taught at Northwestern University and Cornell University. He holds a J.D. from the University of Chicago Law School, a Ph.D. and M.A. from the University of California at Berkeley (both in economics; dissertation title: Essays on the Role of Law and Regulation in Contracts and Organizations), and a B.A. from Cornell University.

Professor Brooks has written extensively on contract law, including several editions of the casebooks and edited volumes *Contracts: Cases and Materials* (Farnsworth) (co-author) (Foundation Press, most recent ed. 2013) and *Selections For Contracts* (co-author) (Foundation Press, most recent ed. 2013). He has written numerous articles on remedies: *On and Off Contract Remedies Inducing Cooperative Investments*, 14 Am. Law & Econ. Rev. 488 (2012); *Beyond Ex Post Expediency: An Ex Ante View of Rescission and Restitution*, 68 Wash. & Lee L. Rev. 1171 (2011); and *Remedies On and Off Contract*, 120 Yale L.J. 690 (2011) (co-author) (addressing when rescission may be elected and the appropriate remedies following rescission). His other works include *Fram-*

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[1] The parties' consents to the filing of amicus briefs are on file with the Clerk. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae* or his counsel made such a contribution.

ing Contracts: Why Loss Framing Increases Effort, 168 J. Institutional & Theoretical Econ. 62 (2012); *Covenants Without Courts: Enforcing Residential Segregation with Legally Unenforceable Agreements*, 101 Am. Econ. Rev. Papers & Proc. 360 (2011); *The Efficient Performance Hypothesis*, 116 Yale L.J. 568 (2006); and *Legal Uncertainty, Economic Efficiency, and the Preliminary Injunction Doctrine*, 58 Stan. L. Rev. 381 (2005) (co-author). His most recent book, *Saving The Neighborhood: Racially Restrictive Covenants, Law, and Social Norms* (co-author) (Harvard University Press, 2013), focuses on the enforcement of restrictive property agreements through the mid-twentieth century at law and in equity.

Congress's use of the remedy of rescission in the Truth in Lending Act (TILA) raises important questions about the interplay between common law rescission and statutory rescission. Professor Brooks has a strong interest in the consistent understanding and application of historical common law doctrines related to contracts. He submits this brief with the hope that it may aid the Court in its disposition of this case.

SUMMARY OF ARGUMENT

Petitioners and the government invoke principles of common law rescission as support for their construction of rescission under TILA. *Amicus curiae* seeks to clarify the American doctrinal approach to rescission at common law, which is to some extent incompletely described by petitioners and the government.

Common law traditionally allowed a party having proper grounds two distinct forms of a rescission

remedy: rescission at law and rescission in equity. In neither form was notice alone generally sufficient to rescind a contract. Rescission in equity required an action to be commenced, resulting in an express decree by the court to accomplish rescission. Rescission at law required prompt notice to the counterparty along with, importantly, tender or offer of tender, as rescission always contemplates restoration to the *status quo ante*. Yet the practical impossibility of restitution achieving the *status quo ante*—a counterfactual state approximated at best, perhaps, by restoration *in specie* of benefits received—left courts with considerable discretion to tacitly grant or deny rescission in actions at law. And that, in substance, is what courts did at common law. Theoretical recitations of the at-law doctrine, suggesting that rescission was unilaterally completed at the moment of notice and tender, are belied by this prevalent, virtually inevitable pattern of its application in practice.

Amicus expresses no position as to whether TILA provides for notice alone as a sufficient condition to rescind a loan contract under the statute. The parties appear to agree that Congress varied rescission under TILA from common law conventions. However, to the extent the correct understanding of the common law informs the Court's construction of TILA, a regime under which notice alone is sufficient to accomplish rescission—as petitioners and the government seek—would constitute a significant departure from established common law doctrine.

ARGUMENT

At common law, if one party wanted to rescind a contract and the other party did not agree or acquiesce, the rescinding party had to bring an action in

court—either at law or in equity. Although the legal and equitable actions to rescind had different features, both involved substantial judicial discretion and exercise of the court's authority, going well beyond mere recognition and enforcement of a rescission declared by one party.

Petitioners and the government argue that under TILA, notice alone is sufficient to rescind a contract, and they contend that the common law supports this statutory position by arguing that this approach is consistent with the common law. *See* Pet. Br. 12-13, 31-32; U.S. Br. 16 n.4. *Contra* Resp. Br. 7-9, 17-18, 28-31. *Amicus* takes no position on the correct statutory interpretation. Rather, this brief is confined to the question whether *the common law* provided for rescission by notice alone.

As a historical matter, petitioners and the government are incorrect to suggest that rescission at law was effective upon notice alone. This brief clarifies this point and the others stated above.

A. Power to Rescind

Rescission is a power to end legal relations created by valid or voidable contracts.[2] The power may be directed mutually among parties to the contract, allowing them to reach an "agreement of rescission,"[3] or singly by a party through "unilateral rescission."

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[2] *See, e.g.*, Restatement (First) of Contracts § 480 (1932) (referring to "[t]he power of any party . . . to avoid a transaction"); *see also* Casenote, *Release—Fraud—Rescission—Tender*, 29 Yale L.J. 688, 688 (1920) (observing "[a] party has the power to avoid by rescission a release obtained from him by fraud").

[3] *See* Restatement (Second) of Contracts § 283 (1981).

1. Agreement of Rescission

When rescission occurs by *ex post* agreement—*i.e.*, when the parties to an already-formed contract agree to rescind it—that rescission is necessarily mutual rather than unilateral. Rescission by agreement does not entail one party's invoking a provision of the original contract giving it a right to rescind or cancel; rather, it reflects the creation of a new contract, legal enforcement of which requires the mutual assent and consent of the parties. Agreements to rescind *may* require restoration of benefits. Parties seeking to enforce an agreement to rescind would proceed along lines of ordinary contract enforcement.

2. Unilateral Rescission

Absent agreement or acquiescence of the counterparty, a party may still proceed unilaterally if it has an individual power of rescission. Either of two general conditions can give rise to this individual power to rescind. First, breach by the counterparty may give a party an election to affirm the agreement and pursue contract remedies or to disaffirm the agreement by rescinding the contract and pursue remedies in restitution.[4] Second, a voidable agreement (as opposed to a breached contract) may allow for unilateral rescission if proper grounds exist. Unilateral rescission *always* contemplates complete and mutual restoration of benefits, even when recognizing its

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[4] *See generally* Richard R.W. Brooks & Alexander Stremitzer, *Remedies On and Off Contract*, 120 Yale L.J. 690 (2011). It has been suggested that breach by counterparty may be taken as an offer to rescind, giving a party the power to accept and thereby by convert the breach into an "agreement to rescind." *Id.* 695 n.10. Little turns on this interpretive nuance for purposes of the matter before the court.

impracticability or impossibility in practice.[5] Parties seeking to unilaterally rescind a contract traditionally had two routes at common law—the so-called actions of rescission "at law" and "in equity."

B. Rescission at Law and Rescission in Equity

At common law, rescission at law was distinct from rescission in equity both procedurally and substantively. Rescission at law, according to formulaic statements of doctrine, demanded that a party first satisfy certain strict requirements prior to commencing the action "at law." As an initial matter, the claimant had to identify proper grounds to rescind at law (such as fraud or duress), and give the counterparty clear and unambiguous notice of rescission, and tender or offer to tender benefits received from the counterparty in order to restore him to the *status quo ante*.[6]

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[5] Restatement (Third) of Restitution and Unjust Enrichment § 54 cmt. h (2011) ("Rescission includes an implicit mutual accounting in which each party makes restitution of any values received in the transaction being set aside that are not capable of specific restitution."); *see also id.* cmt. b.

[6] "[N]otice of rescission is not effectual for any purpose unless given at a time when the party has a clear right to rescind, or under circumstances justifying him in that course." 2 Henry C. Black, *A Treatise on the Rescission of Contracts and Cancellation of Written Instruments* § 569, 1342 (1916) [hereinafter "Black"]. Plaintiff does not have to give grounds for rescission (*id.* § 573, at 1348-49), but the notice itself must be unambiguous and unequivocal (*id.* § 574, at 1350; 1 Dan B. Dobbs, *Law of Remedies: Damages—Equity—Restitution* § 4.8, at 674 (2d ed. 1993)). When the right is unclear or contested, the party asserting the condition giving the right of rescission has the burden to establish the existence of the condition.

Equity, as Chief Judge Cardozo observed, was "not crippled at such times by an inexorable formula."[7] In equity, the absence of strictly legal grounds for rescission was not fatal,[8] nor was failure to give notice of rescission,[9] or tender or offer of tender to the counterparty.[10] Rescission in equity allowed courts to apply broad equitable principles in deciding whether to decree a contract rescinded. Courts of equity exercised considerable latitude in deciding whether the substantive grounds urged for rescinding a contract were sufficiently weighty to allow rescission. Equitable actions for rescission entailed more lenient grounds and for this reason were seen as discretionary and not subject to the strictures of actions for rescission at law. The different formulations used for law and equity suggested sharp dis-

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[7] *Marr v. Tumulty*, 256 N.Y. 15, 21 (1931).

[8] *See, e.g.*, *Stewart v. Preston Pipeline Inc.*, 36 Cal. Rptr. 3d 901, 920 (Ct. App. 2005) (rescission based on unconscionability); Cal. Civ. Code § 1689(b)(6) (enacting equitable sensibility that allowed rescission "[i]f the public interest will be prejudiced by permitting the contract to stand").

[9] *Langdon v. Loup River Pub. Power Dist.*, 297 N.W. 557, 559 (Neb. 1941) (in equity, "[t]he giving of a notice of rescission was not necessary"). Often suit was sufficient for notice. "When a party seeks to rescind a contract by his own act, he must give the other party notice; but when he seeks the aid of a court for that purpose, *the bringing of the action is sufficient* disaffirmance for the purpose of the action." *Geise v. Yarter*, 198 N.W. 359, 363 (Neb. 1924) (emphasis added).

[10] *See* Restatement (First) of Restitution § 65 cmt. d (1937) ("[I]n equity, . . . there need be no offer to restore antecedent to the proceedings."); Hugh S. Koford, *Rescission at Law and in Equity*, 36 Cal. L. Rev. 606, 607 (1948) ("Notice and offer to restore may be made in the suit in equity, but must precede an action at law.").

tinctions, but those distinctions softened or largely disappeared in practice.

C. Courts Were Essential for Rescission at Law

Petitioners and the government portray rescission at law as self-executing, becoming effective before the plaintiff went to court, and accomplished without the court's involvement. They rely on suggestions that rescission was, in essence, a classic self-help remedy, available to any party having proper grounds to rescind and completed by unilateral action of that party. It was sometimes said that in equity, a party brought an action *for* rescission, but at law, a party sued "*on* rescission because the rescission had taken place before the parties went to court."[11] On that view, courts at law had no discretion to withhold or decree rescission, because the rescission would have already been achieved (assuming proper legal grounds existed) by the self-help actions of the claimant.[12] That view, however, does not reflect actual practice at common law, as the court's involvement was necessary and significant even under rescission at law.

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[11] Richard P. Goddard, *Judicial Erosion of the Rescission Right Under Truth in Lending*, 35 Wash. & Lee L. Rev. 979, 984 (1978) (emphasis added; internal quotation marks omitted); *see also* Restatement (First) of Restitution § 65 cmt. d.

[12] Black § 578, at 1356 ("Rescission is a fact, the assertion by one party to a voidable contract of his right (if such he has) to avoid it, and when the fact is made known to the other party, whether by a suit or in any other unequivocal way, the rescission is complete.") (quoting *Cunningham v. Pettigrew*, 169 F. 335 (8th Cir. 1909)).

"The idea that a suit at law is based on a completed rescission is pure conceptualism and outgrown legalistic dogma."[13] This point, observed nearly a century ago in the *Columbia Law Review*, remains true today. All rescission actions, whether at law or in equity, unavoidably enlist the court in determining whether a party is or should be entitled to rescind. As the recent Restatement (Third) of Restitution and Unjust Enrichment puts it, "the practical impossibility of a perfect two-way restoration—and the need to decide in every case how much leeway to permit—means that the availability of rescission depends to an important degree on judicial discretion."[14] Because the strict requirements of the at-law remedy are always, in essence, unachievable, "[t]he underlying test, once [judicial] discretion is acknowledged, is whether 'the interests of justice are served by allowing the claimant to reverse the challenged transaction instead of enforcing it.'"[15]

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[13] Note, *Necessity of Restitution in Suits for Rescission Based on Fraud*, 29 Colum. L. Rev. 791, 798 (1929).

[14] Restatement (Third) of Restitution and Unjust Enrichment § 37 cmt. a(3) (2011).

[15] Restatement (Third) of Restitution and Unjust Enrichment § 37 cmt. a (2011) (quoting *id.* § 54(4)). The referenced test concerns rescission for breached contracts, but a comparable result obtains in rescission for voidable contracts. *See id.* § 54 cmt. b. Rescission actions based on breach of contract are particularly susceptible to judicial discretion, since typically "the court must be persuaded that the advantages of rescission as an alternative to enforcement outweigh its costs in terms of contractual instability and potential forfeiture." *Id.* § 37 cmt. a.

In light of the practical imperative of judicial action, it would be incorrect to characterize the "at law" remedy as Petitioners and the Government do—*i.e.*, as effective with notice alone. That ignores, *inter alia*, the tender requirement—a principal means through which courts at law exercised authority in granting, conditioning or denying rescission. While there certainly are doctrinal descriptions of rescission at law as a *fait accompli* by the time the plaintiff first arrived at court, the historical practice reflected in case law makes it perfectly clear that the court's role in a rescission-at-law proceeding was broader than just the ministerial act of acknowledging the completed exercise of the unilateral power to rescind.

The source of the court's broader authority at law has already been observed, but bears repeating. "A perfect rescission would restore both parties to the status quo ante by specific restitution of property previously transferred, leaving no unjust enrichment, no loss to either party (apart from the defendant's loss of bargain), and no need for the court to place a value on benefits conferred."[16] Against this ideal, courts at law encountered actual parties whose tender or offer to tender fell short of perfectly restoring their counterparties to the status quo ante.[17] Hence a threshold question is presented to the court

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[16] Restatement (Third) of Restitution and Unjust Enrichment § 54 cmt. b (2011).

[17] *See, e.g.*, *Aron v. Mid-Continent Co.*, 8 N.W.2d 682, 684 (Neb. 1943) (holding that offer to tender shares of stock purchased after fraudulent inducement, but not dividends earned in connection with those shares of stock, constituted "a sufficient offer of restoration").

in almost every rescission-at-law action: do the facts and circumstances justify rescinding the contract in the case at bar notwithstanding the practical or legal limitations of the tender? "As a practical matter," observes the Restatement (Third) of Restitution and Unjust Enrichment, "a rule so stated gives a court of law nearly as much discretion to allow rescission or withhold it as the chancellors enjoyed in equity."[18]

In this critical respect, rescission at law and rescission in equity are much closer than suggested by abstract statements of the doctrines. In practice, the court's discretion to decree or deny rescission arises both in cases at law and cases in equity. No doubt this was a key reason why the latest Restatement of Restitution has abandoned entirely the categories of rescission "at law" and "in equity."[19] Yet, even when the categories were more broadly recognized and ac-

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[18] Restatement (Third) of Restitution and Unjust Enrichment § 54 cmt. b (2011). "Because a requirement of specific restitution by the claimant cannot be applied without a lengthy list of exceptions, and because restitution to the status quo ante is literally impossible in any event, the decision whether the claimant has come close enough to an unattainable standard becomes a decision about the propriety of rescission in the circumstances of the particular case." *Id.*

[19] "No distinction is recognized between rescission "'at law' and 'in equity.'" Restatement (Third) of Restitution and Unjust Enrichment § 54 cmt. j (2011). Additionally, the Restatement (Third) would eliminate the tender requirement and align the law on the sufficiency of grounds for rescission. *See id.* § 54 cmts. a, j. These and other changes from earlier Restatements also reflect a distinct view of rescission, in some respects, as a "composite remedy" of "rescission and restitution." Because the remedy entails restitution, the requirement of tender as a precondition to claim the right is lessened, while the necessity of establishing a substantive right is increased.

cepted, common law doctrine and practice did not regard notice alone as sufficient in either rescission action.

To be sure, at common law there were exceptions to the general requirement of tender, and when one of these exceptions applied, it might be claimed that a party could complete the rescission merely by having proper legal grounds and giving notice. For example, if the plaintiff had an independent entitlement to retain the subject of tender, or if the subject was owned or rightly possessed by a third party (for instance, in escrow), then tender was not required. Additionally, if the subject of any tender was continuously worthless or became sufficiently so, or perished or deteriorated to a great extent, then what's the sense tendering rotten tomatoes? Relatedly, if the counterparty would likely reject the tender (rotten tomatoes or otherwise) the court at law might forgive a failure to tender. Other exceptions to tender existed,[20] including when what would be tender "consists of money which can be credited if restitution is granted."[21]

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[20] Restatement (First) of Restitution § 65(f) (1937). For a description of general tender requirement and exceptions, *see* Restatement (First) of Restitution § 65, cmt. d; Henry C. Black, *A Treatise on the Rescission of Contracts and Cancellation of Written Instruments* § 564 (2d ed. 1929); Restatement (First) of Contracts § 480 (1932). Edwin W. Patterson, *Cases on Restitution: including Rescission, Reformation and Quasi Contract* 176-259 (Edmund M. Morgan et al. eds, 1950) (exceptions at 212).

[21] It was not money per se that released the obligation to tender; rather, it was the prospect of set-off. The Restatement (First) of Restitution offered the following illustration: "A owes B a sum which is uncertain, but *which is not less than $100*. By fraudulent representations A induces B to accept Blackacre

Apart from these exceptions, tender was the rule for a rescission at law under the common law. "In actions at law . . . the offer to restore is a necessary part of the manifestation of an election to rescind."[22] Moreover, even when an exception might be implicated, the active role of the court remained critical to the at-law remedy. Determination of whether and to what extent any case fell within the scope of an exception was itself subject to judicial discretion. In other words, not only were the exceptions limited to narrow circumstances, but they also did not remove the courts from the process. Cases reveal that relieving a plaintiff of the requirement of tender, whether through established or novel exceptions, normally required some exercise of discretion by a court. The courts' evaluation of the tender requirement in certain exceptional cases only demonstrates that rescission at law was not a self-effectuating remedy without further judicial involvement.

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with $100 in money, in exchange for Whiteacre and a release of the debt. B is entitled to rescission of the transaction upon tender of a deed to Blackacre without a tender of $100, which will be credited upon the original debt." Restatement (First) of Restitution § 65 cmt. a, illus. 8 (1937) (emphasis added); *see also id.* cmt. f, illus. 17-18. Case law also demonstrates that tender or offer to tender "is not necessary when the thing received is money which can be credited if restitution is granted." *Potucek v. Cordeleria Lourdes*, 310 F.2d 527, 532 (10th Cir. 1962), *cert. denied*, 372 U.S. 930 (1963); *see also Stilwell v. Hertz Drivurself Stations, Inc.*, 174 F.2d 714, 717 (3d Cir. 1949).

[22] Restatement (First) of Restitution § 65, cmt. d (1937). The offer need not be unconditional; it may be conditioned upon restitution by the other party since it is only by mutual restitution that the transaction is effectively rescinded. *Id.*

D. Timing in Rescission Actions at Common Law

It is broadly recognized that a power to rescind at common law must be acted upon promptly and without unreasonable delay once the conditions giving rise to the power are known or should have been known to the party seeking to rescind. Failure to act with reasonable speed and diligence could destroy the power to rescind at common law. But if the point at which rescission must be *initiated* is settled, albeit by a standard, there remains some uncertainty surrounding when rescission is *completed*, particularly under the at-law remedy. In equity, the court's decree of rescission determines the moment when rescission is realized. At law, there are three possible moments when rescission may be deemed to have occurred: first, upon proper notice *and tender or offer of tender* to the counterparty; or second, at initiation of the action at law; or third, when the court renders its determination. Conventional articulation of doctrine favors the first determination, but the latter two moments remain plausible candidates, especially given the court's essential role in realizing rescission at law.

CONCLUSION

Rescission at law, with limited exceptions, required tender or offer to tender as a condition precedent of rescission. Notice alone, as a sufficient condition for rescission, was not a feature of either the doctrine or practice at law. Moreover, abstract application of the at-law doctrine, suggesting that rescission was unilaterally completed at the moment of notice and tender, is belied by the prevalent and virtually inevitable discretion and authority exercised by

courts over the doctrine's application in practice. Judicial administration of rescission doctrine as applied in equity and law was never self-executing in the manner described by petitioners and the government.

Respectfully submitted.

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