

**CONTRACTS—A ROSE BY ANY OTHER NAME:  
NO TOLLING OF AN ARBITRATION AGREEMENT  
LIMITATION PERIOD, BUT UNREASONABLENESS  
ACHIEVES THE SAME END IN  
*ROSE REVOCABLE TRUST V. EPPICH***

Nancy Hylden<sup>†</sup>

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<sup>†</sup> J.D. Candidate 2004, William Mitchell College of Law; M.I.S., University of Minnesota, Duluth, 1993; B.S. Chemistry, University of Minnesota, Duluth, *cum laude*, 1986.

## I. INTRODUCTION

Failure to bring timely civil claims bars a plaintiff's recovery for damages in most jurisdictions.<sup>1</sup> Exactly when a lawsuit for a particular cause of action becomes untimely, however, usually depends upon either contractual limitation periods or statutes of limitation in the jurisdiction. The Minnesota Supreme Court recently considered the timeliness of a fraud claim brought subsequent to the expiration of an arbitration agreement limitation period.<sup>2</sup> In *Rose Revocable Trust v. Eppich*, the court held that an eighteen-month limitations period for claims pursuant to a real estate transaction was unreasonable as applied to claims of fraud.<sup>3</sup> Having found a clear intent of the parties to arbitrate, however, the court enforced the remaining provisions of the arbitration agreement and reinstated an arbitrator's award in favor of the buyers.<sup>4</sup> The *Rose* decision thus preserved the parties' freedom to contract,<sup>5</sup> including the freedom to waive the right to litigate.

Section two of this note explores the general background, purpose, and application in Minnesota of the key legal concepts raised in *Rose*: limitation periods,<sup>6</sup> the discovery rule,<sup>7</sup> the requirement of reasonableness for contract terms,<sup>8</sup> arbitration agreements,<sup>9</sup> and contract silence on relevant statutory provisions.<sup>10</sup> Section three provides a fact summary of *Rose*, as well as an overview of the supreme court's analysis.<sup>11</sup> This analysis is evaluated in section four.<sup>12</sup> Section five concludes that the Minnesota Supreme Court arrived at a just outcome, but missed an opportunity to create law that would better protect innocent victims of fraud. The discovery doctrine should toll contractual limitation periods under circumstances of fraud even if parties have not specifically addressed tolling in their contract. Such a bright-line rule would

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1. See generally James M. Fischer, *The Limits of Statutes of Limitations*, 16 Sw. U. L. REV. 1, 32-33 (1986) (discussing policy and pragmatic benefits and detriments of limitation periods).

2. *Rose Revocable Trust v. Eppich*, 640 N.W.2d 601 (Minn. 2002).

3. *Id.* at 609.

4. *Id.* at 610.

5. *Id.* at 610 n.12.

6. See *infra* Part II.A.

7. See *infra* Part II.B.

8. See *infra* Part II.C.

9. See *infra* Part II.D.

10. See *infra* Part II.E.

11. See *infra* Part III.A.

12. See *infra* Part IV.A-D.

be extremely useful,<sup>13</sup> but did not emerge from this fact-driven decision. Nonetheless, the supreme court did take action that had the same net effect.<sup>14</sup>

This note also concludes that although the home buyer did prevail in this particular instance under an arbitration agreement, such agreements are not generally beneficial to home buyers. There is little reason for home buyers to agree to limit the time during which they may seek legal recourse, especially for fraud claims yet undiscovered.

## II. BACKGROUND

### A. *Limitation Periods in Minnesota*

Statutes of limitation “fix a limit within which an action must be brought.”<sup>15</sup> A statute of limitation usually commences when the plaintiff knows or should know of the injury.<sup>16</sup> If parties do not contract for a specific limitation period, jurisdictional statutes apply.<sup>17</sup>

The purpose served by limitation periods is “to promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared.”<sup>18</sup> Such statutes promote repose, minimize loss of evidence, place parties on equal footing, encourage prompt enforcement of substantive law, and avoid retrospective application of contemporary standards.<sup>19</sup> Parties contracting for shorter limitation periods are motivated by the benefits of certainty which such terms provide.<sup>20</sup> For real estate sales, a time bar against claims reduces the possibility that sellers

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13. *Id.*

14. *See infra* Part V.

15. Tyler T. Ochoa & Andrew J. Wistrich, *The Puzzling Purposes of Statutes of Limitation*, 28 PAC. L.J. 453, 456 (2001).

16. *Id.*

17. 5 MARGARET N. KNIFFIN, CORBIN ON CONTRACTS § 24.26 (Joseph M. Perillo ed., rev. ed. 1998); *see also* Von Hoffman v. Quincy, 71 U.S. 535, 550 (1866). “[T]he laws which subsist at the time and place of the making of a contract, and where it is to be performed, enter into and form a part of it, as if they were expressly referred to . . .” *Id.*

18. Order of R.R. Telegraphers v. Ry. Express Agency, 321 U.S. 342, 348-49 (1944).

19. Ochoa & Wistrich, *supra* note 15, at 453.

20. *In re Brainerd Nat'l Bank*, 383 N.W.2d 284, 289 n.7 (Minn. 1986).

will be sued for damages difficult to prove or defend against after an unreasonable lapse of time.

Minnesota's territorial government imposed statutes of limitation long before Minnesota became a state in 1858.<sup>21</sup> Adhering to this tradition, Minnesota statutes today address fraud claims,<sup>22</sup> providing plaintiffs a six-year period in which to file a claim.<sup>23</sup> In addition, Minnesota case law recognizes the primacy and validity of contractual limitation periods, unless the periods are judged either unreasonable or contrary to statute.<sup>24</sup> For example, the courts have looked with disfavor on terms reducing limitation periods (rather than expanding, for example), and have typically ruled against the party invoking them.<sup>25</sup>

The courts routinely apply statutes of limitation in litigation, but rarely in arbitration.<sup>26</sup> In contrast, however, the *Rose* decision treated litigation and arbitration equally by imposing a reasonableness requirement on limitation periods for both.<sup>27</sup> Such equality in treatment reflects the respect afforded arbitration decisions.<sup>28</sup>

## B. Discovery Rule

### 1. Use of the Discovery Rule to Toll Limitation Periods

It is critical to identify the date on which the limitation period begins because recovery for damages is barred for claims brought after a limitation period has expired.<sup>29</sup> Most jurisdictions apply the

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21. REV. STAT. ch. 70, §§ 4-12 (Minn. Terr. 1851).

22. See RESTATEMENT (SECOND) OF TORTS § 526 (1977) (stating that a party's misrepresentation is fraudulent if the maker (a) knows or believes the matter is other than as he represents it, (b) is not as confident in accuracy as he states or implies, or (c) knows he does not have a basis for his statement or implication).

23. MINN. STAT. § 541.05, subd. 1(6) (2002).

24. *Rose Revocable Trust v. Eppich*, 640 N.W.2d 601, 606 (Minn. 2002).

25. *Prior Lake State Bank v. Nat'l Sur. Corp.*, 248 Minn. 383, 388, 80 N.W.2d 612, 616 (1957).

26. *Har-Mar, Inc. v. Thorsen & Thorshov, Inc.*, 300 Minn. 149, 155, 218 N.W.2d 751, 755 (1974) (holding that arbitration was not a legal action in the same sense as litigation). *But see* *Reconstruction Fin. Corp. v. Harrison & Crosfield, Ltd.*, 204 F.2d 366, 367 (2d Cir. 1953) (including arbitration as a "special proceeding" within the scope of legal actions under New York statute).

27. See *Rose*, 640 N.W.2d at 607.

28. See *id.* at 606 (internal citations omitted).

29. Harvard Law Review Ass'n, *Developments in the Law Statutes of Limitations*, 63 HARV. L. REV. 1177, 1200 (1950) (indicating that the running of statutes of

discovery rule, an equitable doctrine providing that a statutory limitation period is tolled until the plaintiff knows or should have known of harm sufficient to warrant a claim.<sup>30</sup> The discovery doctrine protects aggrieved parties against the absurdity of losing their right to sue prior to knowing that they have a valid claim.<sup>31</sup> Furthermore, the discovery rule prevents those who commit fraud from misusing statutes of limitation as protective shields for their wrongful acts.<sup>32</sup> The discovery rule thus restricts the ability of defendants to invoke time bars as a shield against plaintiff claims.<sup>33</sup>

For the discovery rule to apply, the plaintiff must meet an objective standard of awareness of her injury.<sup>34</sup> Consequently, the plaintiff must show that she became aware of harm done to her in a reasonable period of time. Courts have interpreted this objective standard with slight variation, depending on the jurisdiction and the particular claim.<sup>35</sup> In *United States v. Kubrick*, the United States Supreme Court held that a plaintiff's claim<sup>36</sup> may be tolled unless the plaintiff knew or should have known of the injury, regardless of her awareness of any corresponding legal rights.<sup>37</sup> Most state courts

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limitation is based on the date when the claim accrued, typically when injury occurred or was discovered).

30. Sonja Larsen, Annotation, *Modern Status of the Application of "Discovery Rule" to Postpone Running of Limitations Against Actions Relating to Breach of Building and Construction Contracts*, 33 A.L.R.5th 1, 19-20 (1995).

31. See Harvard Law Review Ass'n, *supra* note 29, at 1203-07 (describing the purpose of tolling limitation periods until discovery); *Rose*, 640 N.W.2d at 608 (citing *Schmucking v. Mayo*, 183 Minn. 37, 40, 235 N.W. 633, 634 (1931)).

32. *Rose*, 640 N.W.2d at 608 (citing *Schmucking*, 183 Minn. at 40, 235 N.W. at 634).

33. The "time" pendulum also swings in the other direction to the benefit of defendants. For example, in *Boggs v. Adams*, 838 F. Supp. 1293, 1298 (N.D.Ill. 1993), the federal district court in northern Illinois found, "The purpose of statutes of repose . . . is to impose a cap on the applicability of the discovery rule . . . terminat[ing] liability after a definite period of time."

34. See, e.g., *Wells v. First Am. Bank West*, 598 N.W.2d 834, 838 (N.D. 1999). "The focus is upon whether the plaintiff is aware of facts that would place a reasonable person on notice a potential claim exists, without regard to the plaintiff's subjective beliefs." *Id.*

35. See generally 2 CALVIN W. CORMAN, *LIMITATION OF ACTIONS* § 11.1.3 (1991) (discussing elements of the discovery rule applied in different jurisdictions).

36. *Id.* § 11.1.4, at 145 (identifying the objective standard in *U.S. v. Kubrick*, 444 U.S. 111, 122 (1979), as a restriction to applying the discovery rule to claims made under the Federal Tort Claims Act).

37. *Kubrick*, 444 U.S. at 122. Compare *Witherell v. Weimer*, 421 N.E.2d 869, 874 (Ill. 1981), and *Franzen v. Deere & Co.*, 334 N.W.2d 730, 732 (Iowa 1983), in which state jurisdictions accommodate plaintiffs' discovery of the legal claim, not just the fact of their injury as in *Kubrick*, 444 U.S. at 122.

abide by this same narrow standard.<sup>38</sup> Some apply a standard easier for the plaintiff to meet by requiring reasonable awareness of an associated legal claim in order for the limitation period to accrue.<sup>39</sup>

The discovery rule originally developed within the common law, but has now been incorporated into federal and state statutes as a prominent exception to statutes of limitation.<sup>40</sup> The discovery rule is a statutory exception in many jurisdictions for claims involving “breach of warranty, progressive occupational disease, fraud, medical and other professional malpractice, breach of contract, bond performance, and general tort.”<sup>41</sup>

## 2. *Discovery Rule in Minnesota*

Minnesota territorial government laws included a discovery provision for tolling statutory limitation periods.<sup>42</sup> Today, Minnesota law still includes a discovery provision as part of its six-year statute of limitation for civil claims,<sup>43</sup> including tolling for fraud.<sup>44</sup> Minnesota courts have applied this early equitable principle quite consistently over time, indicating this jurisdiction’s wide acceptance of the discovery rule.<sup>45</sup> Discovery rule tolling applies to both legal and equitable claims in this jurisdiction.<sup>46</sup>

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38. CORMAN, *supra* note 35, § 11.1.4, at 147-48 (discussing the “*United States v. Kubrick* Restriction”).

39. *Id.* at 148.

40. *Id.* § 11.2, at 170-71.

41. *Id.* at 171.

42. REV. STAT. ch. 70, §§ 4-12 (Minn. Terr. 1851).

43. MINN. STAT. § 541.05, subd. 1(6) (2002). “For relief on the ground of fraud . . . the cause of action shall not be deemed accrued until the discovery by the aggrieved party of the facts constituting the fraud.” *Id.* The original version of this statute is found at Rev. Stat. ch. 70, § 6, subd. 6 (Minn. Terr. 1851).

44. See RESTATEMENT (SECOND) OF TORTS § 526, *supra* note 22, for the definition of fraudulent misrepresentation.

45. *Rose Revocable Trust v. Eppich*, 640 N.W.2d 601, 608 (Minn. 2002) (citing *Schmucking v. Mayo*, 183 Minn. 37, 40, 235 N.W. 633, 634 (1931) (addressing fraudulent concealment)); *accord* *Bailey v. Glover*, 88 U.S. 342, 347-48 (1874); *Murray v. Fox*, 220 N.W.2d 356, 360 (Minn. 1982). See generally *Boyum v. Johnson*, 127 F.2d 491, 494 (8th Cir. 1942) (applying Minnesota law and holding that after the statute of limitation has run, an aggrieved party must show he never consented to nor had knowledge of the other party’s actions against his own interest in order to toll the running of the statute); *Sanborn v. Trs. of Hamline Univ.*, 38 Minn. 211, 211, 36 N.W. 338, 338 (1888) (holding that a fifteen year delay in bringing suit was not barred where the plaintiff showed a prima facie case of fraud). *But see* *Kopperud v. Agers*, 312 N.W.2d 443, 446-47 (Minn. 1981) (concluding that “the legislature did not intend the discovery rule for accrual purposes”).

46. *Lewis v. Welch*, 47 Minn. 193, 204, 48 N.W. 608, 611 (1891) (pointing out

Minnesota courts have already applied a variation of the discovery doctrine to some contractual limitation periods. In *O'Reilly v. Allstate Insurance Co.*, the court of appeals allowed tolling of an insurance contract limitation period until “appreciable damage occur[red] and [was] or should [have] be[en] known to the insured.”<sup>47</sup> This decision is an example of the court applying the discovery doctrine, normally invoked to toll statutory limitation periods, to toll a contractual limitation period.<sup>48</sup> However, *O'Reilly*, dealing with a dispute over the meaning of an insurance contract term, is distinguishable from *Rose*, which involved undiscovered fraud and a contract that expressly included fraud claims behind the aegis of a shortened limitation period.<sup>49</sup>

*C. Reasonableness Requirement for Contractual Limitation Periods*

*1. General Requirement*

Parties may contract for shorter or longer limitation periods than those provided by statutes of limitation.<sup>50</sup> Shortened limitation periods, however, may be unenforceable if they are deemed unreasonable.<sup>51</sup> Courts have largely declined to define “reasonable” as applied to contractual limitation periods, preferring instead to consider the particular circumstances of each

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that if a legal action is not barred by a limitation period until after discovery, then equitable actions should also not be barred).

47. *O'Reilly v. Allstate Ins. Co.*, 474 N.W.2d 221, 223 (Minn. Ct. App. 1991) (citing *Henning Nelson Constr. Co. v. Fireman's Fund Am. Life Ins. Co.*, 383 N.W.2d 645, 650-51 (Minn. 1986) (applying the discovery doctrine)). *But see* *Bohlke v. Ass'n Life Ins. Co.*, No. 4-84-1221, 1986 WL 9677, at \*4 (D. Minn. Sept. 4, 1986) (barring airplane crash victim recovery on insurance plan with three-year limitation period, rejecting tolling until discovery).

48. *O'Reilly*, 474 N.W.2d at 224.

49. *Compare O'Reilly*, 474 N.W.2d at 222-23 with *Rose Revocable Trust v. Eppich*, 640 N.W.2d 601, 601-05 (Minn. 2002).

50. 51 AM. JUR. 2D *Limitation of Actions* §§ 96, 98 (2000).

51. *See* *Honeywell, Inc. v. Ruby Tuesday, Inc.*, 43 F. Supp. 2d 1074, 1078 (D. Minn. 1999); *Prior Lake State Bank v. Nat'l Sur. Corp.*, 248 Minn. 383, 388, 80 N.W.2d 612, 616 (1957); *Hayfield Farmers Elevator & Mercantile Co. v. New Amsterdam Cas. Co.*, 203 Minn. 522, 530, 282 N.W. 265, 269 (1938); *Dechter v. Nat'l Council of Knights and Ladies of Sec.*, 130 Minn. 329, 335, 153 N.W. 742, 744 (1915); *Stewart v. Nat'l Council of Knights & Ladies of Sec.*, 125 Minn. 512, 514, 147 N.W. 651, 652 (1914). *But cf.* *Order of United Commercial Travelers of Am. v. Wolfe*, 331 U.S. 586, 608 (1947). “Such shorter periods . . . have been held to be entitled to the constitutional protection of the Fourteenth Amendment [Due Process Clause] . . .” *Id.*

case.<sup>52</sup> Only one jurisdiction, New York, has identified three imprecise factors to consider when determining the reasonableness of a contractual limitation period.<sup>53</sup> Generally, courts want assurance that contractual limitation periods provide adequate opportunity for people to seek legal remedy.

## 2. *Minnesota's Test for Contractual Limitation Periods*

Minnesota applies a two-pronged standard for the evaluation of contractual limitation periods.<sup>54</sup> The first prong looks to applicable statutes to determine whether the contract term is valid or prohibited.<sup>55</sup> The second prong evaluates the reasonableness of the limitation period applied to the specific facts in a case.<sup>56</sup> The court uses its discretion to evaluate the reasonableness of private parties' contractual limitation periods only when these periods are legally challenged.

The *Rose* decision reinforced the existing standard for evaluating shortened contractual limitation periods.<sup>57</sup> The court applied this two-pronged test to the contractual limitation periods in the arbitration agreements, a test it had previously applied only to civil court claims.

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52. *See, e.g.*, *Order of United Commercial Travelers of Am.*, 221 F.2d at 706 (upholding under both Ohio and Michigan law a jury finding unreasonable a sixth-month limitation period for filing an insurance claim, based on the specific facts of the case).

53. *Brown & Guenther v. N. Queensview Homes, Inc.*, 239 N.Y.S.2d 482, 484 (1963) (considering the following factors to determine reasonableness: (1) all contract provisions (2) circumstances of performance and (3) relative bargaining power of the parties).

54. *Henning Nelson Constr. Co. v. Fireman's Fund Am. Life Ins. Co.*, 383 N.W.2d 645, 650-51 (Minn. 1986); *Prior Lake State Bank*, 248 Minn. at 388, 80 N.W.2d at 616.

55. *Rose Revocable Trust v. Eppich*, 640 N.W.2d 601, 606 (Minn. 2002) (citing *Henning*, 383 N.W.2d at 650-51 and *Prior Lake State Bank*, 248 Minn. at 388, 80 N.W.2d at 616).

56. *Henning*, 383 N.W.2d at 650-51 (holding insurance contract limitation period less than the statutory period acceptable if not unreasonably short); *Prior Lake State Bank*, 248 Minn. at 388, 80 N.W.2d at 616 (requiring that surety bond contract must reasonably limit the time to bring suit to less than the statutory period); *see also* *Duxbury v. Boice*, 70 Minn. 113, 120, 72 N.W. 838, 840 (1897) (holding that fraud tolls the statute of limitation applicable to parties' contract). *See generally* B.H. Glenn, Annotation, *Validity of Contractual Time Period, Shorter than Statute of Limitations, for Bringing Action*, 6 A.L.R.3d 1197, 1207 (1966) (surveying jurisdictions' requirement that limitation periods not be unreasonable "in itself" or to "show imposition or undue advantage").

57. *Rose*, 640 N.W.2d at 606.

*D. Minnesota's Use of Arbitration Agreements in Real Estate Transactions*

The Minnesota Territory first enacted a statute governing arbitration agreements in 1851.<sup>58</sup> This first statute applied common law doctrine and was seldom used to replace standard litigation.<sup>59</sup> In 1957, Minnesota set a national precedent by adopting the Uniform Arbitration Act of 1955, a codification of *Park Construction Co. v. Independent School District*.<sup>60</sup> The decision in *Park* provided the teeth necessary to enforce arbitration of future disputes based on the parties' contract terms.<sup>61</sup> This significant change from traditional common law made clarity and inclusivity of contract terms paramount when arbitration agreements concerning future disputes were legally challenged.<sup>62</sup>

Recent Minnesota case law emphasizes the pragmatic reason to uphold arbitration agreements: avoid litigation costs, delays, and court-immobilizing congestion.<sup>63</sup> Additionally, contract law

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58. REV. STAT. ch. 96, §§ 1-21 (Minn. Terr. 1851).

59. Maynard E. Pirsig, *The Minnesota Uniform Arbitration Act and the Lincoln Mills Case*, 42 MINN. L. REV. 333, 334 (1958) (describing Minnesota's arbitration statutes prior to adoption of the Uniform Arbitration Act in 1957).

60. *Id.* at 333; *Park Constr. Co. v. Indep. Sch. Dist.*, 209 Minn. 182, 194, 296 N.W. 475, 481 (1941) (holding that an arbitration agreement could be enforced for a future dispute).

The decision in this case is perhaps the only one of record in which it is held that a party after performance has been stopped may proceed with performance of an executory contract. In effect the holding is that in the case of an executory contract to arbitrate future controversies one party may by resort to a sort of self help complete the arbitration after the other has refused to perform.

*Id.*

61. *Park Constr. Co.*, 209 Minn. at 183, 296 N.W. at 476.

62. Pirsig, *supra* note 59, at 346-47 (discussing the effect of interpretation of the Minnesota Uniform Arbitration Act).

63. *Correll v. Distinctive Dental Servs., P.A.*, 607 N.W.2d 440, 445 (Minn. 2000) ("The purpose of the arbitration act is to provide an efficient and relatively inexpensive mechanism for resolving disputes."); *Schmidt v. Midwest Family Mut. Ins. Co.*, 426 N.W.2d 870, 873 (Minn. 1988) ("[Arbitration] provides a comparatively informal, expeditious, and inexpensive procedure."); *Valentine v. Conticommodity SVS, Inc.*, 344 N.W.2d 405, 407 (Minn. 1984) ("As a general matter, arbitration is encouraged."); *Freeman v. Duluth Clinic, Ltd.*, 334 N.W.2d 626, 629 (Minn. 1983) ("[P]ublic policy in Minnesota favors arbitration of disputes where parties have entered into an arbitration agreement."); *Layne-Minn. Co. v. Regents of Univ. of Minn.*, 266 Minn. 284, 289, 123 N.W.2d 371, 375 (1963) ("[T]he basic intent of the [Uniform Arbitration] [A]ct is to discourage litigation.").

promotes the right of parties to freely contract,<sup>64</sup> even if contract terms supplant a party's right to remedy by trial.

In 1987, the American Arbitration Association and the Minnesota Association of Realtors compiled arbitration rules for disputes involving residential home sales.<sup>65</sup> The rules required that arbitrable claims pertain to the physical condition of the property.<sup>66</sup> These rules were published in May 1988, and within eighteen months, 102 residential real estate arbitrations had already been filed, mainly for small claims over issues such as water damage and seller misrepresentation.<sup>67</sup>

In summary, arbitration clauses provide a popular alternative to litigation. Because consumers' legal rights may be affected by such clauses, it is imperative that such contracts be narrowly construed to limit the rights abrogated by entering such an agreement.

*E. Contract Silence Regarding Applicable Statute or Common Law*

*1. Contract Silence Regarding Whether a Particular Dispute is Subject to Arbitration*

The United States Supreme Court has concluded that when an

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64. Randy E. Barnett, *Some Problems with Contract as Promise*, 77 CORNELL L. REV. 1022, 1023 (1992). "[T]he vitality of contract [may be assessed] by the extent to which a legal system implements the classical liberal conception of justice, a central principle of which is freedom of contract." *Id.*

65. James R. Deye, *Arbitration of Home Buyer Home Seller Disputes*, 1989 Real Estate Law and Practice 12-13 (Minn. State Bar Ass'n Continuing Legal Educ.); see also *Rose Revocable Trust v. Eppich*, 640 N.W.2d 601, 607 (Minn. 2002) (referencing the extensive use of the Minnesota Realtors Association arbitration agreement).

66. Deye, *supra* note 65, at 12-13. *Contra* Daniel R. Tyson & Steven G. Thorson, *New Residential Purchase Agreements: Supplemental Official Comments of the Purchase Agreement Commercial Real Property Security*, 1988 Real Estate Law and Practice 3 (Minn. State Bar Ass'n Continuing Legal Educ.) (discussing the Minnesota State Bar's concerns that arbitration of residential real estate should not be contracted for prior to a dispute, that the requirement that disputes of physical conditions is unclear and may effect legal recourse if title is clouded, and improperly places certain decisions on the seller rather than the buyer).

67. Deye, *supra* note 65, at 13-14. Professionals familiar with common problems arising from real property transactions (e.g. builders, architects, developers, brokers, appraisers or real estate attorneys) are likely to serve as arbitrators of residential home sale disputes. *Id.*; see generally 21 SAMUEL WILLISTON, WILLISTON ON CONTRACTS § 57:68 (Richard A. Lord ed., 4th ed., 2001) (discussing the selection process of arbitrators with special expertise for a certain type of dispute).

arbitration agreement is silent about who decides the issue of arbitrability of a particular dispute, the court, rather than an arbitrator, will determine *de novo* if the issue should be decided by the court or by an arbitration proceeding.<sup>68</sup> Minnesota law corresponds with the federal approach of *de novo* review of the arbitrability of any issue by the court.<sup>69</sup>

Minnesota courts favor submitting disputes to arbitration if the parties' intentions are ambiguous or silent regarding the conditions under which arbitration will occur.<sup>70</sup> Nonetheless, courts have read arbitration agreements narrowly so that not all issues are necessarily arbitrable merely because an arbitration agreement exists. For example, the court of appeals has held that an agreement to arbitrate claims of fraud inducing a home purchase was not the same as an agreement to arbitrate claims of fraud inducing signing the arbitration contract itself.<sup>71</sup>

## 2. *Contract Silence on Tolling Until Discovery of Fraud*

An important issue in *Rose* is how the court should approach silence in a contract regarding a statutory provision such as the tolling of a limitation period until discovery of fraud. In *Rose*, the arbitration agreement expressly provided that the limitation period begins to accrue immediately upon the date of closing the sale.<sup>72</sup> In contrast, Minnesota's statute of limitation for fraud provides for tolling until the harmed party knows or should have known of the damage.<sup>73</sup>

The legislative supremacy doctrine provides that if application of a statute is at issue, the legislature's intent is determinative of the

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68. 7 SAMUEL WILLISTON, WILLISTON ON CONTRACTS § 15:11 (Jack K. Levin ed., 1997) (summarizing recent U.S. Supreme Court analyses of arbitrability decisions).

69. *Rose Revocable Trust v. Eppich*, 640 N.W.2d 601, 606 (Minn. 2002) (applying *de novo* review to the arbitrability of a dispute); *Freeman v. Duluth Clinic, Inc.*, 334 N.W.2d 626, 629 (Minn. 1983) (acknowledging the court's ability to review *de novo* the arbitrability of an issue if it is "reasonably debatable"); *State v. Berthiaume*, 259 N.W.2d 904, 909-10 (Minn. 1977) (holding that *de novo* review of the issue of arbitrability was proper, whereas the arbitrator's decisions of law and fact are not). Review of arbitrability was a matter of first impression for the court in this case. *Id.* at 909.

70. *Heyer v. Moldenhauer*, 538 N.W.2d 714, 716 (Minn. Ct. App. 1995).

71. *Id.* at 716-17.

72. *See infra* Part III.A.

73. *See supra* Part II.B.2.

court's ruling on the matter.<sup>74</sup> Thus, notwithstanding the highly regarded private right to freely contract,<sup>75</sup> statutes apply where contract terms end. "In the absence of a contrary indication of intention [by contracting parties] . . . reference is to the local [state] law . . . ."<sup>76</sup> Although this doctrine is designed to guide interpretation where multiple jurisdictions' laws would conflict, it is arguably also applicable in a simplified form where both parties to a contract are from the same jurisdiction. Thus, if a contract is silent on a condition expressly handled by statute, the statute should apply.

Few cases have addressed the specific issue of contract silence regarding tolling limitation periods. Guidance, however, can be deduced from cases involving disputes over whether claims have been barred by particular limitation periods.

First, state statutes of limitation have been strictly enforced unless they provide specific exceptions.<sup>77</sup> Extending this concept, if the statute of limitation expressly states an exception, that exception should also be strictly enforced.<sup>78</sup> Second, when the statute is silent on the issue of tolling until discovery, the court is empowered to make the determination of whether to toll the accrual of a limitation period.<sup>79</sup> The parallel to statutory silence on

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74. Both the United States Constitution and the Minnesota Constitution provide foundation for the legislative supremacy doctrine. U.S. CONST. art. I, § 1; MINN. CONST. art. III, § 1, art. IV, § 1; *Remington Arms Co. v. G.E.M. of St. Louis, Inc.*, 257 Minn. 562, 570, 102 N.W.2d 528, 534 (1960) (recognizing that the Minnesota Constitution vests legislative power in the Minnesota House of Representatives and Senate); *Bloom v. Am. Exp. Co.*, 222 Minn. 249, 256, 23 N.W.2d 570, 575 (1946) (holding that the grant of power to one branch of state government is denial of that power to other branches). See REED DICKERSON, *THE INTERPRETATION AND APPLICATION OF STATUTES* 7-9 (1975) (providing historical development of the legislative supremacy doctrine). "[T]he legislative branch exercises lawmaking power that takes precedence over the lawmaking powers respectively exercised by the executive and judicial branches." *Id.* at 7. See also *The Sinking Fund Cases*, 99 U.S. 700, 718 (1878) (recognizing the presumption of validity courts give to statutes); MICHAEL SINCLAIR, *GUIDE TO STATUTORY INTERPRETATION* 119-21 (2000) (discussing generally the deference given to legislatively-made law).

75. *Sinking Fund Cases*, 99 U.S. at 718-19 (recognizing the limitation on both the federal and state governments to "impairing the obligation of contracts").

76. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187(3) (1971).

77. *State v. Bies*, 258 Minn. 139, 145, 103 N.W.2d 228, 234 (1960) (citing early case law for enforcement of statutes of limitation: *Cock v. Van Etten*, 12 Minn. 522, 12 Gil. 431 (1867); *Weston v. Jones*, 160 Minn. 32, 199 N.W. 431 (1924); *Lagerman v. Casserly*, 107 Minn. 491, 120 N.W. 1086 (1909)).

78. See *Bies*, 258 Minn. at 145, 103 N.W.2d at 234.

79. *E.g.*, *Baird v. Am. Med. Optics*, 713 A.2d 1019, 1025 (N.J. 1998) (pointing

tolling for fraud is contractual silence on tolling for fraud, and the court's role can be presumed to be similar.<sup>80</sup> Third, judicial determination of when a claim is barred due to an established limitation period creates precedent for a class of similar cases.<sup>81</sup> A "bright line" created by the court would serve to guide contracting parties.<sup>82</sup> Fourth, "where a general limitation law applicable to numerous classes of cases conflicts with a law applicable only to a particular class, the latter controls."<sup>83</sup> Minnesota law expressly addresses the particular class of cases involving fraud, providing for tolling until discovery.<sup>84</sup> From these holdings and statutory guidelines, there is authority allowing for tolling of a contractual limitation period until the discovery of fraud.

### III. THE *ROSE* DECISION

#### A. *Facts & Procedural History*

In January 1996, Rose and Keith Kajander ("Buyers") signed a purchase agreement to buy Kenneth Eppich's ("Seller") house.<sup>85</sup> A second contract between the parties stipulated that binding arbitration would be used to resolve all property disagreements between the parties, including fraud claims.<sup>86</sup> The parties agreed to raise disputes no later than eighteen months from the date of closing, even for fraud.<sup>87</sup> Unlike the analogous statute of

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out that although New Jersey's statute of limitation for personal injuries is silent on when the time begins to run on a claim, the court will determine accrual); *Schanilec v. Grand Forks Clinic, Ltd.*, 599 N.W.2d 253, 255 (N.D. 1999) (citing *Baird* for the same proposition); see also *Wells v. First Am. Bank West*, 598 N.W.2d 834, 837 (N.D. 1999) (acknowledging the court's role to determine whether a claim is barred by the statute of limitation if there is no dispute about the facts of the case).

80. See *Baird*, 713 A.2d at 1025.

81. See *Fernandi v. Strully*, 173 A.2d 277, 285 (N.J. 1961) (quoting 1 DEWITT MOORE, *WOOD ON LIMITATIONS* § 122a (4th ed. 1916)) ("[W]hen a cause of action accrues is a judicial [question], and to determine it in any particular case is to establish a general rule of law for a class of cases, which rule must be founded on reason and justice.").

82. See *Bond v. Pa. R.R. Co.*, 124 Minn. 195, 203, 144 N.W. 942, 945 (1914) (construing state law to provide uniform guidelines for the commencement of all civil actions).

83. See *Bies*, 258 Minn. at 147, 103 N.W.2d at 235.

84. See MINN. STAT. § 541.05, subd. 1(6) (2002).

85. *Rose Revocable Trust v. Eppich*, 640 N.W.2d 601, 601 (Minn. 2002).

86. *Id.* at 603.

87. *Id.*

limitation, this contract did not address tolling the limitation period until discovery of any fraud.<sup>88</sup>

Seller represented that the house was free from water problems. He indicated on documents provided to Buyers that there was not a wet basement or leaks causing roof, wall or ceiling damage.<sup>89</sup> However, these statements proved false. Buyers acquired evidence indicating that Seller began experiencing “serious water problems” just a year after the house was built, approximately five years prior to this home purchase.<sup>90</sup> In October, 1997, several months after the contractual limitation period lapsed, Buyers discovered that the building was structurally unsound due to persistent water damage.<sup>91</sup>

Buyers filed suit in February, 1998, and Seller moved for summary judgment, arguing that the parties’ arbitration agreement included an eighteen-month limitation period, which had expired by the time the claim was filed.<sup>92</sup> Buyers also initiated arbitration proceedings by filing a demand with the American Arbitration Association.<sup>93</sup> The district court denied summary judgment for the Seller, tolled the limitation period in the arbitration agreement, and referred the dispute to arbitration.<sup>94</sup> Arbitration was concluded in October, 1999, finding that Seller committed fraud and granting Buyers’ damages.<sup>95</sup> The district court confirmed both

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88. *Id.*

89. *Id.* Seller filled out a Real Estate Transfer Disclosure Statement upon listing the house with a broker. *Id.* Also, Seller represented to Buyers at closing that there had been no notable water problems. *Id.*

90. *Id.* at 604; Appellant’s Brief at A.3, *Rose Revocable Trust v. Eppich*, 640 N.W.2d 601 (Minn. 2002) (No. C3-00-1163). Arbitration findings included, among other things, seven letters from Smuckler Architect’s attorney to suppliers and contractors regarding “continuing and pervasive” water problems experienced by Seller the year following completion of the house. *Rose*, 640 N.W.2d at 604. *See also* Appellant’s Brief, *supra*, at A.16. The district court’s findings included the affidavit of Seller’s neighbor, to whom Seller indicated he had experienced significant leaking and water damage in the house. *Id.*

91. *Rose*, 640 N.W.2d at 604-05. Buyers had siding removed in order to ascertain the source of window frame deterioration and discovered repeated, prolonged leaking making the structure unsound. *Id.*

92. *Id.* at 602, 604-05.

93. *Id.* at 605.

94. *Id.* at 603, 605. The district court concluded that for fraud, contractual limitations were treated like statutory limitations, in which the time to bring suit is tolled until discovery of wrongdoing. *Id.* at 605. Uncertainty regarding when the Buyers knew or should have known of the defects, and whether the Seller misrepresented the extent of known water problems, lead the court to find arbitration appropriate. *Id.*

95. *Id.* at 604-05. Buyers did not bring their claim within eighteen months of

the arbitration award and the tolling of the limitation period until discovery of Seller's fraud.<sup>96</sup> The court of appeals reversed the district court, finding no reason to toll the contractual limitation period despite Seller's fraud, because the parties had not specifically included a tolling provision in their contract.<sup>97</sup>

*B. The Supreme Court's Analysis*

The supreme court reversed the appellate court, finding that, as applied in this fraud case, the eighteen-month contractual limitation period was unreasonable.<sup>98</sup> The court did not nullify the entire arbitration agreement but rather enforced the remaining provisions.<sup>99</sup> Emphasizing public policies favoring arbitration and freedom to contract, it reconfirmed the arbitrator's award for Buyers.<sup>100</sup> Four significant points can be drawn from this decision.

First, the supreme court extended the state's reasonableness standard<sup>101</sup> for contractual limitation periods to arbitration.<sup>102</sup> Before *Rose*, Minnesota courts applied the reasonableness test only to limitation periods challenged in litigation, and not to those challenged in arbitration proceedings.<sup>103</sup> Because binding arbitration is encouraged as a legally valid means of resolving disputes in Minnesota,<sup>104</sup> the court subjected limitation periods in arbitration agreements to the same standard of reasonableness traditionally applied in litigation.<sup>105</sup>

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signing the arbitration agreement. *Id.* They did, however, file a request to proceed with arbitration within eighteen months of discovering the source of the defect. *Id.* at 605.

96. *Id.* (resulting in Buyers award of \$154,812.12).

97. *Rose Revocable Trust v. Eppich*, No. C3-00-1163, 2001 WL 50878, at \*2 (Minn. Ct. App. Jan. 23, 2001), *review granted*, (Mar 27, 2001), *rev'd*, 640 N.W.2d 601 (Minn. 2002) (noting the court of appeals' recognition that the district court disregarded the requirement that reasonableness be considered on a case-by-case basis). The limitation period was determined to be reasonable based in part on Rose's attorney status, and the clear language used in the Arbitration Agreement without provision of tolling for fraud. *Id.* at \*3.

98. *Rose*, 640 N.W.2d at 603.

99. *Id.* at 610.

100. *Id.* at 603, 606, 610.

101. *Henning Nelson Constr. Co. v. Fireman's Fund Am. Life Ins. Co.*, 383 N.W.2d 645, 650-51 (Minn. 1986).

102. *Rose*, 640 N.W.2d at 607.

103. *Id.* at 606-07.

104. *Id.* (recognizing efficiency and cost-savings as strong public policy reasons favoring upholding arbitration agreements between parties).

105. *Id.* at 606:

Second, the court differentiated between statutes of limitation and contractual limitation periods. The court determined that freedom to contract trumped statutory protections in this case.<sup>106</sup> Therefore, the parties' silence regarding a tolling provision under circumstances of fraud did not justify application of the statutory discovery rule.<sup>107</sup> The supreme court agreed with the court of appeals that "it is not proper to impose a tolling requirement for claims of fraud where the plain language of the agreement does not suggest that one was contemplated."<sup>108</sup> The court applied the rule that parties may contract for limitation periods shorter than statutorily imposed limits unless (1) the limitation is specifically prohibited by statute, or (2) the period fixed is unreasonable.<sup>109</sup>

Third, the supreme court disagreed with the court of appeals' conclusion that the eighteen-month contractual limitation period beginning from the date of closing was reasonable.<sup>110</sup> Although not applying it in this case, the court referenced the application of the discovery doctrine in thirty-eight states.<sup>111</sup> The court also recognized the impossibility of parties raising a timely claim if they are not yet aware they are harmed.<sup>112</sup> The court did not indicate what made the contractual limitation term unreasonable; the

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A written agreement to submit any existing controversy to arbitration or a provision in a written contract to submit to arbitration any controversy thereafter arising between the parties is valid, enforceable, and irrevocable, save upon such grounds as exist at law or in equity for the revocation of any contract.

MINN. STAT. § 572.08 (2000); *see also* *Rose*, 640 N.W.2d at 609 (confirming the arbitrator's finding that Buyers did not discover they had a legal claim until after the eighteen-month limitation period accrued); *Atcas v. Credit Clearing Corp. of Am.*, 292 Minn. 334, 340, 197 N.W.2d 448, 452 (1972) (submitting to arbitrator based on parties' original intent).

106. *Rose*, 640 N.W.2d at 608, 610.

107. *Id.* at 609. In this regard, the supreme court agreed with the court of appeals, although it ultimately reversed the decision below. *Id.* at 610.

108. *Id.*

109. *Id.* at 606 (citing *Henning Nelson Constr. Co. v. Fireman's Fund Am. Life Ins. Co.*, 383 N.W.2d 645, 650-51 (Minn. 1986); *Prior Lake State Bank v. Nat'l Sur. Corp.*, 248 Minn. 383, 388, 80 N.W.2d 612, 616 (1957) (adding that such provisions are not favored and are strictly construed against the party invoking them); *see also* *Fitger Brewing Co. v. Am. Bonding Co.*, 115 Minn. 78, 80, 131 N.W. 1067, 1070 (1911) ("In insurance policies, language used to limit the liability of the company is uniformly construed strictly against the company, and any doubt or ambiguity is resolved in favor of the insured and against the insurer.").

110. *Rose*, 640 N.W.2d at 609.

111. *Id.* at 609 n.8.

112. *Id.* at 607-08.

brevity or the firm commencement date of the limitation period remain unnamed possibilities.<sup>113</sup>

Fourth, this decision was limited to the specific facts of the case. The court determined that reaffirming the arbitration award was appropriate based on two facts: the parties clearly agreed to arbitrate their disputes, and the plaintiffs, who were key witnesses, were both deceased.<sup>114</sup>

#### IV. ANALYSIS OF THE *ROSE* DECISION

##### A. *Decision by Default*

The supreme court arrived at a just outcome in *Rose*. However, it bypassed an opportunity to apply the discovery rule to toll a contractual limitation period for fraud when the parties' agreement was silent on tolling.<sup>115</sup> The court relied on general policy favoring arbitration and accepted the parties' intent to arbitrate all claims, including fraud. Had the plaintiffs not died, the court might have set aside the arbitration decision, and allowed a full trial on the facts, as proposed by the defendant.<sup>116</sup> The court's decision indicates support for arbitration and the right to freely contract, while reserving judicial authority to interpret the reasonableness of limitation periods. For the narrow circumstance in which contract terms do not specifically address tolling the limitation period for fraud, the court could have provided more guidance. The court's efforts to avoid restricting the right to contract were unnecessary and undesirable in the circumstance of fraud.

##### B. *A Bright Line Is Desirable, But Was Not Established*

Unless parties expressly agree otherwise, contractual limitation periods should generally be respected. This "limitation clock," however, should restart upon the discovery of fraud. The arbitration agreement in *Rose* did not specify how parties should deal with fraud undiscovered before the contractual limitation

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113. *Id.* at 609-10.

114. *Id.* at 610. Buyers' deaths were apparently not directly related to the Seller's wrongdoing or subsequent legal actions.

115. *See supra* Part II.E.2.

116. *Rose*, 640 N.W.2d at 610.

period's expiration.<sup>117</sup>

Given that the statutory discovery doctrine has long been applied to fraud claims in Minnesota<sup>118</sup> and that contracts are interpreted to incorporate existing law,<sup>119</sup> the court should have applied the statutory discovery doctrine in this case. The benefits would be two-fold. First, the parties' primary right to freely contract would be maintained; no infringement would result if parties expressly decline tolling for undiscovered fraud. Second, it would establish that the act of fraud could not be protected as a "silent rider" in a contractual limitation clause.

*C. Arbitration Agreements Are Unlikely to Benefit Home Buyers*

Real estate brokers, most commonly representing sellers' interests, have encouraged the use of arbitration agreements to address future disputes arising from residential home sales.<sup>120</sup> In Minnesota, these agreements frequently include a clause requiring that arbitration be requested within a time shorter than the state's statutory six-year limitation period.<sup>121</sup>

As a result of the *Rose* holding pertaining to limitation periods, the supreme court underscored the right to freely contract, the binding nature of arbitration agreements, and the reluctance to reexamine arbitration decisions.<sup>122</sup> This development will likely discourage challenges to completed arbitration. If parties dissatisfied with an arbitrator's award were able to use arbitration merely as a first step, leaving litigation as recourse for an unfavorable judgment, the essence and value of arbitration would be undermined.

In addition to the societal benefit of easing pressure on overloaded court calendars, real estate arbitration agreements primarily benefit home sellers and brokers. Waiving the right to seek legal redress via litigation, however, compromises home buyers. They lose the option to sue for potentially higher damage awards if latent defects are discovered after completion of a home

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117. *Id.* at 609.

118. *See* MINN. STAT. § 541.05, subd. 1(6) (2002); *see also supra* note 43.

119. *Von Hoffman v. Quincy*, 71 U.S. 535, 550 (1866) (stating the principle that laws in existence and applicable at the time of contract formation are incorporated into its terms).

120. *Deye, supra* note 65, at 12-13.

121. *See supra* Part II.D.

122. *Rose*, 640 N.W.2d at 606-07.

sale.<sup>123</sup> Even in *Rose*, where arbitration concluded in favor of the home buyers, the arbitration agreement worked against the them and in favor of the seller. Arbitration expenses for a home buyer may approximate those of litigation and therefore, as in this case, merely impose a shorter time frame in which the buyer must act.

In its amicus brief, the Minnesota Association of Realtors (MAR) suggested that upholding arbitration results would create a windfall for the home buyer because the seller had already compromised other aspects of the sale.<sup>124</sup> The court properly disagreed that the seller made any significant compromises to obtain an abbreviated eighteen-month limitation period when state law provides six years. The parties' original agreement appears to provide repose and primary benefit for the seller by defining an absolute time period, commencing at the date of closing, after which no claim would be recognized.

Although in this case the court upheld an arbitration award benefiting a home buyer, the procedural aspects of arbitration agreements for future disputes seem tipped in favor of sellers rather than buyers, particularly for claims involving fraud. Buyers beware! With little to lose by declining to sign an arbitration agreement, home buyers should retain their legal rights and the option to freely contract anew. An arbitration agreement can always be made at a later date, once the existence of an injury and legitimacy of a claim has been ascertained.

If the seller insists on a standardized arbitration agreement form at the closing,<sup>125</sup> it may be an adhesion contract,<sup>126</sup> which is

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123. See F. PAUL BLAND ET AL., NATL. CONSUMER LAW CTR., CONSUMER ARBITRATION AGREEMENTS: ENFORCEABILITY AND OTHER TOPICS § 1.3.1 (2001); see also, e.g., *Kulukundis Shipping Co. v. Amtorg Trading Corp.*, 126 F.2d 978, 985 (2d Cir. 1942) (discussing historical English common law revocability of arbitration agreements based on "the jealousy of the English courts for their own jurisdiction . . . [and their] refus[al] to enforce specific agreements to arbitrate upon the ground that they were thereby ousted from their jurisdiction").

124. *Rose*, 640 N.W.2d at 609.

125. See MINN. ASS'N OF REALTORS FORM: ARBITRATION DISCLOSURE AND RESIDENTIAL REAL PROPERTY ARBITRATION AGREEMENT, MN:ADRAA (8/02) (Edina, Minn.). This standardized contract is commonly offered to home buyers at the time of making a purchase offer on a home. See *id.*

126. An *adhesion contract* is a "standard-form contract prepared by one party, to be signed by the party in a weaker position, usually a consumer, who has little choice about the terms." BLACK'S LAW DICTIONARY 318-19 (7th ed. 1999). See generally E. ALLAN FARNSWORTH, CONTRACTS 296-97 n.4 (3d ed. 1999) (tracing the development of this concept and the coining of this term by R. Saleilles in a 1901 French text, *De la déclaration de volent, as contrat d'adhésion*).

unenforceable if legally challenged.<sup>127</sup> Alternatively, buyers may protect their interests by striking from the arbitration agreement provisions shortening the limitation period or including fraud claims. More proactively, buyers could even insert a handwritten notation that allows for tolling until discovery of any injury.<sup>128</sup>

*D. Legislation Could Fill the Gap Left by the Court*

A system relying upon individually adjudicated solutions for recurrent or predictable problems is unwieldy, inefficient, unnecessary, and hence, undesirable. Minnesota courts and home buyers currently face this reality with the issues confronted in *Rose*; each occurrence of similar circumstances will continue to require special consideration to determine whether an arbitration agreement's limitation period is reasonable. Alternatively, legislation could be crafted which would toll limitation periods in the circumstance of fraud until the injury is discovered, *unless* the contract expressly provides otherwise.

V. CONCLUSION

The Minnesota Supreme Court, while not restoring the district court-imposed tolling of a contractual limitation period, took action that had the same net effect.<sup>129</sup> The court found the parties' contractual limitation term unreasonable. Nevertheless, the court should have set a bright line establishing clearly that the discovery rule will toll contractual limitation periods under all circumstances of fraud if the parties do not expressly exclude tolling. This would serve to protect both the integrity of contracts and innocent victims of fraud.

We should not be satisfied with the current case-by-case evaluation to determine the reasonableness of limitation periods in arbitration agreements. This system essentially limits justice to only those home buyers with adequate time, tenacity, and resources to pursue fraudulent home sellers shielded by shortened limitation

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127. RESTATEMENT (SECOND) OF CONTRACTS § 211 cmt. c (1979) (referencing sections of the Restatement serving to limit the potency of standard form contract terms, such as section 206 (construing terms against the draftsman), section 205 (subject to good faith), and section 208 (unenforceable if found unconscionable)).

128. FARNSWORTH, *supra* note 126, § 7.11 (indicating that courts interpret handwritten terms as controlling over printed terms).

129. *See supra* Part III.B.

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periods. In lieu of clear guidance from the court, a legislative solution could be crafted. For example, a statute could prohibit real estate businesses from offering home sale contracts with shortened limitation periods when no provisions are made for tolling the limitation periods until the discovery of the injury.

In conclusion, this case illuminates the disadvantages to home buyers resulting from arbitration agreements with shortened limitation periods. Even though the court found in favor of the home buyer in this instance, its decision was based on finding the specific arbitration agreement unreasonable. Allowing unreasonable terms in home purchase contracts will discourage buyers with legitimate claims. Buyers will stop short of pursuing justice due to the impression that they will fail on a technicality.