

## Articles

# The Time Should Begin to Run When the Deed Is Done: A Proposed Solution to Problems in Applying Limitations Periods to the Rescission of Contracts

By MEGAN BITTAKIS\*

### Introduction

**M**ANY PROBLEMS ARISE in applying limitations periods to rescission claims. For purposes of this Article, “rescission” refers to when the court cancels a contract, as opposed to when the parties to the contract cancel the contract without the court’s assistance.<sup>1</sup> These problems become apparent when attorneys raise claims for rescission in response to court rulings that the contracts do not mean what the attorneys say they mean.

Consider the following scenario. During the course of litigation regarding a contract, the trial judge rules that a provision of the contract is unenforceable. In response, the plaintiff amends his complaint to plead a claim for rescission on the basis of mutual mistake, alleging

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\* Assistant Professor of Legal Research and Writing, Barry University School of Law; J.D., *cum laude*, Stetson University College of Law, 1999; B.A., *magna cum laude*, Flagler College, 1996. I would like to thank Daniel P. O’Gorman for his invaluable insight regarding this Article and enthusiasm in assisting me with the issues raised herein, and Heather Kolinsky for her unwavering support and assistance with this endeavor.

1. The definition of rescission is discussed more fully at Part I *infra*. This Article also does not address repudiation, which differs from rescission in that repudiation occurs when a party to the contract informs the other party that she will breach the contract. RESTATEMENT (SECOND) OF CONTRACTS § 250 (1981). Rescission, as discussed in this Article, is when the court cancels the contract and restores the parties to the status quo, rather than awarding damages to either party based on an alleged breach. 13 AM. JUR. 2D *Cancellation of Instruments* § 1 (2009).



that the parties mistakenly believed the provision *was* enforceable. To perfect his rescission claim, the plaintiff returns the money he received under the contract to the defendant during this same litigation. The defendant then moves for dismissal of the rescission claim, arguing that it is barred by the running of the limitations period. The defendant contends that the contract was executed over five years ago,<sup>2</sup> and the plaintiff knew or should have known that the provision was invalid at that time.

The plaintiff counters the limitations defense by arguing the limitations period only begins to run when the last element needed for rescission occurs. Because the plaintiff only recently fulfilled that last element by returning the benefits he received under the contract to the defendant, the limitations period has not yet run.

If the plaintiff is correct, then the plaintiff controls when the limitations period begins to run. Putting this power into the plaintiff's hands is inherently unfair. The plaintiff may wait until memories fade and witnesses become unavailable before bringing his rescission claim, to the detriment of the defendant. A cursory reading of the law regarding limitations periods, however, seems to dictate this unfair result. This Article offers a solution to this unjustness: the limitations period should begin to run when the act supporting the rescission claim occurs. Part I defines rescission, and Part II addresses whether laches or statutes of limitations should apply to rescission claims. Next, Part III reviews the different approaches regarding when the limitations period for rescission begins to run and the advantages and disadvantages of these approaches. Part IV discusses several different solutions to the limitations problems. The Article then concludes by positing which solution best addresses the issues.

## I. What Is Rescission?

Before contemplating the problems in applying limitations periods to rescission, rescission must first be defined. In the past, several meanings were ascribed to "rescission."<sup>3</sup> It was used to refer to various situations, including the following: when the parties to a contract agree to abandon the contract; when one party cancels a contract due to the other party's breach; and when a party sought to avoid a con-

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2. Due to the excessive demands placed on limited court resources, it is not unusual for parties to litigate issues regarding a contract executed more than five years before the litigation.

3. *United States v. Scruggs*, 356 F.3d 539, 545 (4th Cir. 2004).

tract, usually due to fraud or incapacity.<sup>4</sup> The Uniform Commercial Code and the Restatement (Second) of Contracts uses rescission to refer to the parties' mutual assent to abandon the contract.<sup>5</sup> A good working definition of rescission is when a court cancels a contract and restores the parties to the contract to the status quo, i.e., the status they held prior to entering into the contract.<sup>6</sup>

But can one rescind a contract when it is impossible for the parties to the contract to be returned to the status quo? Some authorities contend that there are exceptions to the rule that the parties must be capable of being returned to the status quo for the court to decree rescission.<sup>7</sup> Professor Andrew Kull argues that "the traditional requirement that performance be fully returnable has been greatly relaxed by a series of accommodations,"<sup>8</sup> including when the plaintiff received an incidental benefit from the temporary possession of an item purchased from the defendant, or when the benefit is "impossible to restore and difficult to value."<sup>9</sup> Kull also includes "[a]ny obstacle to the restoration of performance that is attributable in some manner to defendant's fault,<sup>[10]</sup> or to a defect constituting a breach of defendant's warranty" among those circumstances where restoration of the status quo as an essential part of rescission will be excused.<sup>11</sup> In addition, he notes that the courts are more willing now than they were in the past to permit a monetary payment to substitute for restoration of the status quo.<sup>12</sup> Kull concludes that courts are not reluctant to order rescission in cases even when the court must determine the value of the

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4. *See id.*

5. U.C.C. § 2-209 cmt. 3 (2004); RESTATEMENT (SECOND) OF CONTRACTS § 283 cmt. a (1981); *Scruggs*, 356 F.3d at 545.

6. 13 AM. JUR. 2D *Cancellation of Instruments* § 1 (2010).

7. Sol Goodell, *Need Rescission Be Sought Within a Reasonable Time?*, 8 TEX. L. REV. 342, 368 (1930).

8. Andrew Kull, *Restitution As a Remedy for Breach of Contract*, 67 S. CAL. L. REV. 1465, 1496 (1994).

9. *Id.*

10. Kull cites *Timmerman v. Stanley*, 51 S.E. 760, 762 (Ga. 1905), where the court found that the plaintiff could pursue a rescission claim, even though the plaintiff could not return the instruction the plaintiff received to the defendant. Kull, *supra* note 8, at 1496 n.7. In *Timmerman*, the court specifically noted:

[The defendant could not] by his own conduct place himself in a situation where restoration is impossible, repudiate the contract, and set up this situation as a defense to a suit for the amount paid. If he abandons the contract, he should not complain that the other party is willing to treat it as rescinded.

*Timmerman*, 51 S.E. at 762.

11. Kull, *supra* note 8, at 1496.

12. *Id.*

contractual exchange.<sup>13</sup> Thus, although the definition of rescission includes the ability of the parties to be returned to the status quo, in practice this may not be required.

“Legal rescission” refers to the circumstance in which one of the parties to the contract unilaterally cancels the contract because the other party committed a material breach of the agreement or because of some other valid reason.<sup>14</sup> In contrast, equitable rescission refers to the situation when one of the parties to the contract asks the court to nullify the contract.<sup>15</sup> This Article focuses on equitable rescission, as it would be the court that would apply a limitations period.

Courts now recognize certain elements as being essential to maintaining rescission. These include: the character or relation of the parties (i.e., whether there is contractual privity);<sup>16</sup> the making of a valid contract; whether there is ground for rescission, including mistake, misrepresentation, or impossibility or impracticability of performance;<sup>17</sup> whether the party has rescinded the contract and notified the other party of rescission; whether the rescinding party returned the benefits she received from the contract, if such a return is possible;<sup>18</sup> and whether unusual equity exists, such as fraud, mistake, “turpitude of consideration,” or the party has no adequate remedy at law.<sup>19</sup>

## II. Laches or Statutes of Limitations?

Limitations periods are reviewed in two separate, but not necessarily different, contexts: statutes of limitations and the doctrine of laches.<sup>20</sup> Traditionally, statutes of limitations did not apply to equitable claims.<sup>21</sup> Instead, stale equitable claims were precluded by

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13. *Id.*

14. *Great Am. Ins. Co. v. Gen. Builders, Inc.*, 934 P.2d 257, 262 n.6 (Nev. 1997).

15. See 13 AM. JUR. 2D *Cancellation of Instruments* § 1 (2010); *Great Am. Ins. Co.*, 934 P.2d at 262 n.6.

16. “In order to maintain an action for rescission of contract, the parties to the lawsuit must lie in contractual privity.” *Bland v. Freightliner LLC*, 206 F. Supp. 2d 1202, 1206 (M.D. Fla. 2002).

17. In the hypothetical at the beginning of this Article, the ground for rescission is the mutual mistake of the parties that the contractual provision was enforceable.

18. “This rule is based on the equitable maxim that he who would have equity must do equity.” *Smith v. Merck*, 57 S.E.2d 326, 333 (Ga. 1950). This element is also discussed in terms of the court being able to return the parties to the status quo.

19. *Crown Ice Mach. Leasing Co. v. Sam Senter Farms, Inc.*, 174 So. 2d 614, 617 (Fla. Dist. Ct. App. 1965).

20. *Gammill v. The Bradley T.*, 879 F. Supp. 737, 740 (W.D. Ky. 1995).

21. *Virginia C. Mining, Milling & Smelting Co. v. Clayton*, 233 S.W. 215, 218 (Mo. 1921).

laches.<sup>22</sup> Thus, it appears this Article should address problems in applying laches to rescission, rather than statutes of limitations to rescission.

The difference between laches and statutes of limitations may be without relevant distinction, however. In many states, the same time period set forth in the statutes of limitations is also the same time period used to determine if laches bars an equitable claim.<sup>23</sup> For example, under section 95.11(6) of the Florida Statute, laches bars any action that would be barred under a statute of limitations concerning the same subject matter.<sup>24</sup> In addition, the Florida Statute omits the usual element of laches that distinguishes it from statutes of limitations: the defendant must suffer some injury due to that passage of time to preclude the plaintiff from succeeding on the claim.<sup>25</sup> The Florida Statute specifically states that the time period applies “regardless of . . . whether the person sought to be held liable is injured or prejudiced by the delay.”<sup>26</sup>

Because at least one jurisdiction has not only eliminated that distinguishing characteristic of laches from laches itself, and other jurisdictions have decreed that the time period for laches is the same as that of the statute of limitations, there is no practical difference in applying statutes of limitations, rather than laches, to rescission claims.<sup>27</sup> For example, in *Hogue v. Pellerin Laundry Machinery Sales Co.*,<sup>28</sup> the defendant argued that the statute of limitations barred the plaintiff’s claim to rescind a contract for laundry equipment.<sup>29</sup> The Eighth Circuit, applying Arkansas law, noted that both courts of equity

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22. See 51 AM. JUR. 2D *Limitation of Actions* § 8 (2010).

23. See generally Michael E. Baughman, *Defining the Boundaries of the Adverse Domination Doctrine: Is There Any Repose for Corporate Directors?*, 143 U. PA. L. REV. 1065, 1072 (1995) (“By the end of the nineteenth century, equity courts generally adopted the limitation periods found in analogous statutes of limitations at law.”).

24. Specifically regarding rescission, this issue would not arise in Florida, as Florida Statute section 95.11(3)(l) (2009) provides a four-year statute of limitations for “[a]n action to rescind a contract.”

25. Katherine A. McDowell, Note, *The Doctrine of Laches in Florida: A Statutory Hybrid?*, 13 STETSON L. REV. 446, 455 (1984) (“Thus, the statute would not be applicable in two sets of circumstances: if the time period for commencing analogous cases at law had not yet expired; or if no time period existed for commencing an analogous action at law.”).

26. FLA. STAT. § 95.11(6) (2009).

27. *Hogue v. Pellerin Laundry Mach. Sales Co.*, 353 F.2d 772, 774 n.2 (8th Cir. 1965). *But see* Laurie v. Thomas, 294 S.E.2d 78, 81–82 (W. Va. 1982) (applying laches to suit to rescind a deed based on fraud, not statute of limitations, as rescission is an equitable claim).

28. 353 F.2d 772 (8th Cir. 1965).

29. *Id.* at 774.

as well as courts of law are bound by the statute of limitations—not laches.<sup>30</sup> The plaintiff's claim for rescission was not barred by the statute of limitations, even though the defendant defaulted on some of the payments earlier than three years (the statute-of-limitations period) prior to the plaintiff filing suit, because defaulting on the payments did not accelerate the total amount due.<sup>31</sup> These later defaults over the five-year period may actually be within the statute of limitations period and would therefore not be barred by the statute. "Thus, failure of performance as to a subsequent installment as much constituted a contract breach and as much legally provided a basis for rescission as did the first default that occurred."<sup>32</sup> The court noted that only the statute of limitations was attempted to be used by the defendant: "There is no claim of any preclusion from laches prior to and other than as a question of bar by the statute itself."<sup>33</sup>

Interestingly, although the doctrine of laches predated statutes of limitations, courts of equity "began to refer to the statute as furnishing a convenient measure of the length of time that ought to bar a particular equitable demand."<sup>34</sup> In cases as early as the seventeenth century, courts of equity applied the statute of limitations for the cause of action most analogous to the claim before it.<sup>35</sup>

Although rescission is an equitable claim, it is more likely that a statute of limitations will be applied to it, rather than a strict application of laches. As discussed above, many jurisdictions that do retain laches look to the statute of limitations for the most analogous claim to determine whether a sufficient length of time has elapsed to impose laches. Other areas have eliminated the distinguishing characteristic of laches; that is, requiring harm to the defendant due to the delay. Still others have specifically set forth a statute of limitations for rescission, thus obviating the need to apply laches. Litigants will therefore encounter similar problems in applying laches to rescission as they would if the statute of limitations is applied instead.<sup>36</sup>

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30. *Id.* at 774 n.2.

31. *Id.* at 774.

32. *Id.*

33. *Id.*

34. Goodell, *supra* note 7, at 344.

35. *Id.* at 344, 344 n.10; *see also* Ludwig v. Scott, 65 S.W.2d 1034, 1035 (Mo. 1933) ("Our statutes of limitations apply alike to legal and equitable actions."), *rev'd on other grounds*, Dreckshage v. Cmty. Fed. Savings & Loan Ass'n, 555 S.W.2d 314, 321 (Mo. 1977).

36. *Hogue*, 353 F.2d at 356.

### III. Different Approaches to When the Claim for Rescission Begins to Accrue

In analyzing the application of limitations periods to rescission claims, it must be determined when the limitations period should begin to run. There are several choices, which include when the last element of rescission occurs<sup>37</sup> or when the plaintiff suffers actual harm and has notice of the invasion of her legal rights.<sup>38</sup> In addition, rather than picking a particular act from which the limitations period should commence, some courts have decided that rescission must be sought within a reasonable time.<sup>39</sup> By answering the question of when the limitations period should begin to run, solutions to the problems of applying limitations periods to rescission claims can be ascertained, as determining when the time period begins to accrue tends to cause the most litigation regarding limitations periods.

#### A. The Limitations Period Begins to Run When the Last Element of Rescission Occurs

In many jurisdictions, the limitations period begins to run when the last element of the cause of action occurs.<sup>40</sup> If this is the case, then the court must know the elements of rescission. As noted above, the elements of rescission are as follows: (1) the character or relation of the parties (i.e., privity of contract); (2) the making of a contract; (3) a ground for rescission, including mistake, misrepresentations, or impossibility or impracticability of performance; (4) the party has rescinded the contract and notified the other party of rescission; (5) the rescinding party returned the benefits she received from the contract, if such a return is possible; and (6) an unusual equity exists, such as fraud, mistake, “turpitude of consideration,” or the party has no adequate remedy at law.<sup>41</sup>

Of the elements listed above, the party seeking rescission has control over at least two of them. The party seeking rescission decides when to rescind the contract and notify the other party of rescission.

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37. See FLA. STAT. § 95.031 (2009).

38. Hughes v. Papich, 553 So. 2d 754, 756 (Fla. Dist. Ct. App. 1989).

39. Miller v. Reynolds, 223 S.E.2d 883, 886 (Va. 1976).

40. See Frank E. Kulbaski III, *Statutes of Repose and the Post-Sale Duty to Warn: Time for a New Interpretation*, 32 CONN. L. REV. 1027, 1029 (2000) (noting that the time for filing suit does not commence until the plaintiff's cause of action accrues, and “in most jurisdictions, . . . a cause of action does not accrue until all requisite elements of a cause of action have occurred”).

41. Crown Ice Mach. Leasing Co. v. Sam Senter Farms, Inc., 174 So. 2d 614, 617 (Fla. Dist. Ct. App. 1965); see also 13 AM. JUR. 2D *Cancellation of Instruments* § 51 (2010).



In addition, the party seeking rescission decides when to return, or attempt to return, the benefits she received under the contract.<sup>42</sup> Thus, the party that wants to rescind the contract can control when the limitations period begins to run if it *begins to run when the last element of rescission occurs*.

For example, suppose that a young man decides to enlist in the Navy, based on representations made by the recruiter that he can become a member of an air crew.<sup>43</sup> Despite these representations, and after completing seven years of training, the enlistee is not permitted to become a member of an air crew due to a physical condition. The enlistee now, seven years after he made the agreement, notifies the Navy of his intent to rescind his agreement based on the misrepresentation that he could become a member of the air crew.

Now suppose that the recruiter that made the misrepresentations to the enlistee passed away during those seven years.<sup>44</sup> The second party has a genuine proof problem that was not of its doing, as the witness best able to address the issue raised in the litigation is no longer available.<sup>45</sup> Additionally, it is precisely such proof problems

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42. Some courts hold that the return or offer to return must be made before the complaint is filed and may not be made for the first time in the complaint. *Williams v. Fouche*, 121 S.E. 217, 217 (Ga. 1924). If this is considered an element of a claim for rescission, though, the plaintiff still controls when the limitations period begins to run, as the plaintiff's rescission claim is not perfected until such a return or offer to return is complete. The plaintiff must only file his lawsuit within the limitations period following his return or offer to return the contract benefits to prevent his claim from being barred as untimely, even if such offer was made a decade after the contract was executed. In addition, commentators have noted that, at least regarding equitable rescission, rescission can be granted even when the plaintiff has not made such an offer, because the court, in ordering rescission, will order the plaintiff to return the consideration received. 27 WILLISTON ON CONTRACTS § 69:50 (Richard A. Lord ed., 4th ed., 2009).

43. This hypothetical situation is based on *Brown v. Dunleavy*, 722 F. Supp. 1343 (E.D. Va. 1989).

44. Under the RESTATEMENT (SECOND) OF CONTRACTS § 214(e) (1981), negotiations that result in a contract are admissible to establish a ground for rescission. Thus, in this example, the parol evidence rule would not preclude the recruiter's testimony, if he were still alive.

45. For an example of the proof problems in litigating a contract case where one of the parties to the contract has passed away, see *Rosenfeld v. Basquiat*, 78 F.3d 84 (2d Cir. 1996) where, after two trials, the appellate court ruled that one party to a contract could not testify as to the circumstances surrounding formation of the contract with the now-deceased other party to the contract. Interestingly, after two trials and one appeal, the plaintiff lost this case based on the statute of limitations. The jury found that the deceased intended to deliver the paintings that were the subject of the contract following a particular art exhibition, and the plaintiff filed suit more than five years after the deceased failed to make the delivery. *Rosenfeld v. Basquiat*, No. 89 Civ. 7702(HB), 1997 WL 363814, at \*1 (S.D.N.Y. July 1, 1997).



that limitations periods are designed to protect against.<sup>46</sup> If the limitations period does not begin to run until the last element of the claim occurs, however, then this purpose is thwarted.

Courts have addressed the issue of plaintiffs having control over when the limitations period begins to accrue by holding that the plaintiff must complete the condition precedent within a reasonable time,<sup>47</sup> e.g., a party cannot indefinitely delay the statute of limitations from beginning to accrue.<sup>48</sup> The problem with this approach is that in most cases the question of reasonableness will go to a jury, and thus the defendant will still have to prepare her case based on a stale claim, as the limitations issue will not be decided before trial. Necessarily, the limitations bar cannot be decided on a motion to dismiss or for summary judgment, as judges do not typically decide what is “reasonable” on these non-evidentiary motions. For example, in *Templeton et ux. v. Oliver H. Russ Piano Co.*,<sup>49</sup> the jury was asked to determine whether the litigant rescinded the contract in a reasonable time. It answered the question in the negative.<sup>50</sup> This demonstrates that if the reasonable time approach is followed, then litigants may be forced to prepare for trial without the benefit of evidence that was lost due to the passage of time.

#### **B. The Limitations Period Begins to Run When the Plaintiff Suffers Actual Harm and Has Notice of the Invasion of Her Legal Rights**

Another option courts have in determining when the limitations period should begin to accrue is to start the clock when the plaintiff suffers actual harm and has notice of the invasion of her legal rights.

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46. See Goodell, *supra* note 7, at 343 (Statutes of limitation were intended “to afford security from stale claims after the transactions giving rise to them may have become obscure by loss of evidence . . .”).

47. Wisler v. Ca. State Bd. of Accountancy, 288 P.2d 322, 325–26 (Cal. Dist. Ct. App. 1955).

48. Weston v. Jones, 199 N.W. 431, 433 (Minn. 1924).

49. 17 S.W.2d 474, 476 (Tex. Ct. Civ. App. 1929).

50. *Id.* at 476. In comparison, the court noted in *Henson v. James M. Barker Co.*, 636 So. 2d 887, 889 (Fla. Dist. Ct. App. 1994), that if there are disputed issues of fact, then a jury would determine whether the contract was rescinded within a reasonable time, but if there were no disputed issues of fact, then a judge could make that determination. The *Henson* case, however, did not rest on a statute of limitations or laches argument; instead, the appellants argued that the appellees *waived* their right to rescission by failing to rescind within a reasonable time. *Id.* at 889.



At least one case has followed this approach in evaluating whether the statute of limitations precluded a rescission claim.<sup>51</sup> In the Florida case of *Hughes v. Papich*,<sup>52</sup> the appellant sought rescission, and the trial court granted summary judgment for the defendant, finding that the statute of limitations precluded the claim.<sup>53</sup> The appellate court reversed, finding that the “action may not have been barred by the statute of limitations.”<sup>54</sup>

In *Hughes*, the appellant bought a condominium, and as part of the purchase, became obligated to make sublease payments to the condominium association for his portion of a land lease that the association had with a third party.<sup>55</sup> Before the appellant bought the condo, however, the association had agreed to buy the land lease from the third party<sup>56</sup> and to allow each member of the condominium association to buy the portion of the land associated with that member’s unit.<sup>57</sup> Because the appellant was not yet a member of the association, he did not receive notice of the opportunity to buy the land associated with his unit,<sup>58</sup> and the condominium association, instead, bought the land relating to the appellant’s unit.<sup>59</sup> The former president of the condominium association then transferred and assigned the appellant’s land lease to himself.<sup>60</sup> Later, the association notified the appellant that he was no longer obligated to make sublease payments for that land.<sup>61</sup> Following that, the association claimed that the former president did not make the required payments, and thus the association still owned the land associated with the appellant’s unit.<sup>62</sup> Based on this information, the appellant stopped the sublease payments.<sup>63</sup> Consequently, the former president filed a lien on the appellant’s unit for failure to make the payments.<sup>64</sup> When the former president filed an action to foreclose the lien, the appellant sought to rescind the transfer to the former president.<sup>65</sup> The appellant’s request for rescis-

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51. *Hughes v. Papich*, 553 So. 2d 754, 756 (Fla. Dist. Ct. App. 1989).

52. *Id.*

53. *Id.* at 755.

54. *Id.*

55. *Id.*

56. *Id.*

57. *Id.*

58. *Id.*

59. *Id.*

60. *Id.*

61. *Id.* at 756.

62. *Id.*

63. *Id.*

64. *Id.*

65. *Id.*

sion came at least five years after he had notice of the association's purchase of the land lease and three years after the former president's attempt to purchase the land lease.<sup>66</sup>

The appellate court used subsections (3)(j),<sup>67</sup> (1),<sup>68</sup> and (p)<sup>69</sup> of section 95.11 of the Florida Statute, to apply a four-year statute of limitations.<sup>70</sup> It found that the evidence could show that the appellant did not discover the transfer to the former president until within four years of when the appellant sought rescission, and it was not until the former president filed the lien that the appellant became aware of the harm.<sup>71</sup> Thus, the court held that the statute of limitations began to run when the appellant suffered harm and had notice of the invasion of his legal rights.<sup>72</sup> In reversing the trial court's decision, the appellate court stated that the statute of limitations could still bar the appellant's claim if the appellant knew earlier of the former president's actions.<sup>73</sup>

There was one case regarding the statute of limitations and rescission before *Hughes*, however. A different Florida appellate court determined *Allie v. Ionata*,<sup>74</sup> which addressed the appellants' argument that the statute of limitations for rescission had expired.<sup>75</sup> After stating the appellant's argument that the rescission claim began to run when the contract was executed, the court in *Allie* interpreted section 95.031 of the Florida Statute to hold the appellant's rescission claim began to run when the contract was executed.<sup>76</sup> Section 95.031 states the statute of limitations begins to run when the cause of action accrues and "[a] cause of action accrues when the last element constituting the

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66. *Id.* at 755–56.

67. Subsection (3) of Florida Statute section 95.11 describes those actions that must be brought within four years; sub-subsection (j) pertains to "[a] legal or equitable action founded on fraud." FLA. STAT. § 95.11(3)(j) (1983).

68. Statute of limitations on actions to rescind a contract. *Id.* § 95.11(3)(1).

69. Providing a four-year statute of limitations on "[a]ny action not specifically provided for in these statutes." *Id.* § 95.11(3)(p).

70. *Hughes*, 553 So. 2d at 756.

71. *Id.*

72. *Id.* The court did not address whether the notice had to be actual or whether it could be constructive, but, because of its directions on remand that the trial court determine whether "appellant knew of [the former president's] actions earlier," it appears that the court was only concerned with actual notice. *Id.*

73. *Id.*

74. 417 So. 2d 1077 (Fla. Dist. Ct. App. 1982).

75. *Id.* at 1078.

76. *Id.* at 1078–79. The court implicitly accepted the appellants' argument by rejecting the appellees' arguments regarding why the four-year statute of limitations should not apply and specifically stating that the four-year period did apply. *Id.*

cause of action occurs.”<sup>77</sup> Rather than computing the time period from when the last element of rescission occurred, as the *Allie* court had implicitly endorsed, the *Hughes* court followed the “actual harm suffered and notice of invasion of legal rights” time period, but did not explain why it did so.<sup>78</sup> The *Hughes* court did not cite either the *Allie* case or section 95.031.

Actual harm suffered and notice of invasion of a legal right is similar to the discovery rule.<sup>79</sup> The discovery rule, and thus the rule that the statute of limitations does not begin to run until the plaintiff has notice of the invasion of his legal rights, is unnecessary in rescission cases if the court follows the proscription that the statute of limitations begins to run when the last element of rescission occurs. Two elements of rescission include: (1) that the party notifies the other party of the intent to rescind, and (2) that the rescinding party returns the benefit received under the contract to the other party.<sup>80</sup> The plaintiff will not complete these elements of the claim unless the plaintiff has suffered harm and has notice of the invasion of his legal rights, as the plaintiff would not notify the defendant of the intent to rescind without a reason for wanting to rescind, i.e., suffering some harm. Thus, if the court follows the rule that the limitations period does not begin to run until the last element of rescission is completed, the plaintiff will also fulfill the discovery rule requirement that the plaintiff suffer actual harm and have notice of the invasion of her legal rights. On the surface, it appears that courts should decree that the limitations period will begin to run when the last element of rescission is completed since, in practice, this incorporates the discovery rule. As discussed in Part III.A. above, however, the plaintiff decides when she gives notice of the intent to rescind, and thus she can control when the last element of rescission happens. Therefore, it is not recommended that the courts follow this approach, even though it incorporates the discovery rule.

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77. FLA. STAT. § 95.031(1) (2009).

78. *Hughes*, 553 So. 2d at 756.

79. 54 C.J.S. *Limitations of Actions* § 116 (2009) (defining the discovery rule as the limitations period not beginning to run until the plaintiff knows or should know of her claim).

80. *See supra* Part I.

**C. If Rescission Is Based on Mutual Mistake, Then the Limitations Period Begins to Run When the Mistake Was or Should Have Been Discovered**

One basis for rescission is the mistake of both parties regarding the contract that was executed between them.<sup>81</sup> An example is when both parties thought that a contractual provision was enforceable or meant something different than the meaning subsequently ascribed by a judge.<sup>82</sup> Another example of mutual mistake is when the buyer and seller of a piece of land believe the zoning for the land is compatible with the buyer's proposed use, but then, unbeknownst to the buyer and seller, the zoning is changed to prohibit the buyer's proposed use following execution of the contract for sale, but before closing, and the new zoning is applied retroactively so that technically it was in existence on the date the contract was entered into.<sup>83</sup>

Many states start the clock for the limitations period on a rescission claim founded upon the mutual mistake of the parties from the time the mistake was or should have been discovered.<sup>84</sup> This is done regardless of whether that cause of action is for rescission or some other relief, such as reformation.<sup>85</sup> The "should have been discovered" aspect of this method of determining when the limitations period begins to run usually indicates the time period by which the party to the contract exercising ordinary diligence would have discovered the mistake.<sup>86</sup>

In at least one case, however, the court was not noticeably concerned with whether the purchasers of a lot should have discovered the mistake sooner than they did. In *Wedge v. Security-First National Bank of Los Angeles*,<sup>87</sup> the purchasers of a lot sought rescission more than five years after the contract was formed.<sup>88</sup> The purchasers did not discover that a residence could not be built on the property until they had raised enough money to begin building, which led them to

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81. *See id.*

82. *See supra* Introduction.

83. *See* *Dover Pool & Racquet Club, Inc. v. Brooking*, 322 N.E.2d 168 (Mass. 1975). The court specifically found that the situation before it constituted a mutual mistake, rather than frustration of purpose. *Id.* at 170–71.

84. Goodell, *supra* note 7, at 354; *see also* CAL. CIV. PROC. CODE § 337(3) (West 2006) ("Where the ground for rescission is . . . mistake, the time does not begin to run until the discovery by the aggrieved party of the facts constituting the . . . mistake.").

85. Goodell, *supra* note 7, at 354.

86. *Id.* at 355.

87. 25 P.2d 411 (Cal. 1933).

88. *Id.* at 411.

find out that a condemnation prevented any feasible residence on the property.<sup>89</sup> The seller argued that either the statute of limitations or laches prevented the purchasers from rescinding the contract.<sup>90</sup> First, the court determined that, although the condemnation was in the public records, this did not preclude rescission based on the limitations period.<sup>91</sup> The seller's agent convinced the purchasers not to use a title company and secure an abstract because the seller was a reputable bank.<sup>92</sup> The court noted that a title report, which the defendant's agent implicitly discouraged the plaintiffs from obtaining, would have revealed the condemnation.<sup>93</sup>

Second, in specifically addressing whether the limitations period had expired, the court was concerned with how the purchasers acted during the contract's existence and when they discovered the mistake.<sup>94</sup> The court found that the purchasers acted promptly once they discovered the mistake.<sup>95</sup> The purchasers sent written notices to the seller of their intention to rescind the contract within one month of discovering the condemnation.<sup>96</sup> The court was also impressed that the purchasers paid more than two-thirds of the purchase price at the time the contract was formed and made payments under the contract until they learned of the mistake.<sup>97</sup> Thus, the court seemed to rely more on the purchasers' behavior under the contract after the mistake was discovered, rather than whether the purchasers could have discovered the mistake earlier through ordinary diligence.

Using the time when the mistake should have been discovered to determine when the limitations period begins to run does not provide a clear-cut rule for litigants and, instead, promotes future litigation. It is difficult, if not impossible, to accurately predict how a judge or jury will rule on the issue of when the mistake "should have been discovered."<sup>98</sup> Without a clear-cut rule, the only method to find the answer is to go to court, thus not providing any incentives to the contracting

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89. *Id.* at 413.

90. *Id.*

91. *Id.*

92. *Id.*

93. *Id.*

94. *Id.*

95. *Id.*

96. *Id.*

97. *Id.*

98. This may only be avoided if the mistake is discovered within the limitations period. If it is, then the statute of limitations or the laches defense is presumably without merit in those jurisdictions where the limitations period on the claim begins to run when the mistake is or should have been discovered.

parties to avoid litigation. Therefore, other ways to determine when the limitations period begins to run would be preferable to using the date the mistake should have been discovered.

**D. If Rescission Is Based on Mistake, Then the Limitations Period Begins to Run from the Date the Mistake Was Made**

As discussed above, many jurisdictions hold the limitations period for a cause of action based on mistake begins to run when the mistake was or should have been discovered.<sup>99</sup> In contrast to this approach, other jurisdictions find the limitations period begins when the mistake was actually made.<sup>100</sup> In these cases, the mistake is deemed made when the contract is formed.<sup>101</sup>

In *Mills v. Everest Reinsurance Co.*,<sup>102</sup> the rehabilitator of an insurance company that became insolvent filed suit against the insurance company's reinsurer in an attempt to rescind the reinsurance contract.<sup>103</sup> The rehabilitator claimed rescission should be granted due to a mutual mistake,<sup>104</sup> and the reinsurer moved to dismiss the claim for rescission as untimely.<sup>105</sup>

The court found the statute of limitations "period [began] to run when the alleged mistake or actionable wrong occurred—in this case, when the agreement was formed."<sup>106</sup> As the court stated, "[t]he relevant inquiry then is when the reinsurance agreement . . . was formed."<sup>107</sup> The rehabilitator argued the contract was not formed until the formal reinsurance policy was signed.<sup>108</sup> Even if a formal con-

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99. Goodell, *supra* note 7, at 354.

100. *See id.*

101. *See, e.g.,* *Mills v. Everest Reinsurance Co.*, 410 F. Supp. 2d 243, 249 (S.D.N.Y. 2006); *Foxley v. Sotheby's, Inc.*, 893 F. Supp. 1224, 1234 (S.D.N.Y. 1995) (claim for rescission based on mistake made by purchaser of inauthentic painting at auction was time-barred when the rescission claim was brought more than six years after the auction occurred); *Prand Corp. v. County of Suffolk*, 878 N.Y.S.2d 198, 200 (N.Y. App. Div. 2009) (rescission claim based on mistake brought more than six years after contract was executed was untimely); *Zavaglia v. Gardner*, 666 N.Y.S.2d 671, 672 (N.Y. App. Div. 1997) (reversing trial court's judgment of rescission based on mistake concerning a contract executed more than six years before suit was brought, and thus falling outside the applicable statute of limitations); *First Nat'l Bank of Rochester v. Volpe*, 629 N.Y.S.2d 906, 907 (N.Y. App. Div. 1995) (finding that cause of action for reformation based on mutual mistake asserted in amended complaint was untimely).

102. 410 F. Supp. 2d 243 (S.D.N.Y. 2006).

103. *Id.* at 245.

104. *Id.*

105. *Id.* at 246.

106. *Id.* at 249.

107. *Id.*

108. *Id.*



tract is not executed until later, however, in the reinsurance context, the limitations period accrues from the date of agreement on the essential terms.<sup>109</sup> The reinsurer argued that the parties agreed on the essential terms when they executed the binder.<sup>110</sup>

The binder contained the following items: the parties' identities; the subject matter of the agreement; the insured risk; the risk's duration; the coverage amount; and the premium amount.<sup>111</sup> The court decided that these items were "material to a reinsurance contract."<sup>112</sup>

Despite this, the rehabilitator put forth two reasons why the binder did not constitute the contract between the reinsurer and the insurance company.<sup>113</sup> The rehabilitator argued that the terms of a related trust agreement were not agreed upon when the binder was issued.<sup>114</sup> In addition, the rehabilitator pointed to the fact that the reinsurer unilaterally modified the definition of a term in the Reinsurance Confirmation, which constituted a counter-offer that was not accepted until after the binder was issued.<sup>115</sup>

The court rejected the rehabilitator's first argument by finding that when the binder was issued, the parties had agreed to the essential terms of the trust agreement and that performance under the reinsurance contract began immediately upon the binder being signed, "with the understanding that the Trust Agreement . . . would follow."<sup>116</sup> As to the rehabilitator's second argument that the reinsurer had made a counter-offer, the court found that the alleged counter-offer was not made until after the parties entered into their agreement.<sup>117</sup> The "change was at most a proposed modification of an already-existing contract."<sup>118</sup> Thus, this argument was also unavailing, and the court held that the limitations period began to run from when the binder was issued.<sup>119</sup>

As demonstrated above, even if the limitations period is measured from the time the mistake was made (i.e., when the contract was formed), there can still be complicated disputes for the court and liti-

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109. *Id.* at 250.

110. *Id.* at 249.

111. *Id.* at 250.

112. *Id.*

113. *Id.*

114. *Id.*

115. *Id.*

116. *Id.* at 251.

117. *Id.* at 252.

118. *Id.*

119. *See id.* at 254-55.

gants to work through. Another example of such a dispute is when the claim for rescission based on mistake is first asserted in an amended complaint, and that amended complaint is presented outside of the limitations period.

When amending a complaint to state a claim for rescission based on mistake, and the limitations period has run between the time the original complaint was filed and when the motion to amend was filed, the plaintiff may have a difficult time making the argument that the amended complaint should relate back to the date the original complaint was filed.<sup>120</sup> In *First National Bank of Rochester v. Volpe*,<sup>121</sup> the plaintiff unsuccessfully made this very argument.<sup>122</sup> The plaintiff's amended complaint that proposed a claim based on mistake was filed more than six years after the mistake was made.<sup>123</sup> In rejecting the plaintiff's relation-back argument, even though the original complaint was filed within the limitations period, the court first noted that, in its jurisdiction, the time for bringing a claim based on mistake does not begin to accrue when the mistake was either discovered or should have been discovered.<sup>124</sup> Instead, it begins to accrue when the mistake was made.<sup>125</sup> The court specifically stated the mistake was made when the contract was executed.<sup>126</sup> The court then found that the claim based on mutual mistake asserted in the proposed amended complaint did not relate back to the original complaint because the original complaint only alleged the defendants had breached the contract and "did not give notice of the same transactions or occurrences sought to be proved by the proposed amendment, which alleges a mistake in the formation or articulation of the contract . . . ."<sup>127</sup>

Thus, parties that wish to amend their complaints beyond the limitations period must first determine if their proposed amendments will relate back to their timely original complaints. It appears that simply arguing the defendants had some notice of a mutual mistake claim based on a breach of contract complaint will not carry the day. A

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120. Under the relation back doctrine, an amended pleading filed outside of the limitations period is considered filed as of the date of the timely filed original complaint, thus preventing dismissal of the amended complaint due to the running of the limitations period. 54 C.J.S. *Limitation of Actions* § 275 (2009). In order to relate back to the original complaint, though, courts will not permit any changes whatsoever to the pleading. *See id.*

121. 629 N.Y.S.2d 906, 908 (N.Y. App. Div. 1995).

122. *Id.*

123. *Id.* at 907–08.

124. *Id.* at 908.

125. *Id.* at 907.

126. *Id.*

127. *Id.* at 908.

breach of contract cause of action presupposes a valid contract existed and is recognized by the plaintiff as existing.<sup>128</sup> Bringing an action for breach of contract does not suggest the plaintiff believes the contract is voidable by mutual mistake. Pleading breach of contract necessarily tells the defendant that the plaintiff, at the very least, recognizes the existence of the contract. A breach of contract claim therefore provides absolutely no notice to the defendant that at some point in the future, the plaintiff will contend there was a mistake in formation so severe as to render the contract voidable.

At first glance, the rule that a claim for rescission based upon mistake accrues when the mistake was made seems draconian. After all, it provides no relief for the circumstance when the mistake was not discovered until after the limitations period runs. This seems unfair, because how can one expect a party to a contract founded upon a mistake to pursue a claim for rescission when that party did not know it had one? Suppose for example that the parties enter into a contract for the sale of property in 2000, both believing the property is not subject to rent control.<sup>129</sup> In 2007, the buyer discovers the property is subject to rent control.<sup>130</sup> If the statute of limitations is six years,<sup>131</sup> the buyer cannot pursue rescission based on mistake, even though the delay in filing suit for rescission was not due to dragging one's feet or done with malicious intent, as the mistake occurred when the contract was executed, which was more than six years prior to actual discovery of the mistake. Here, the buyer, who has arguably not done anything wrong, still suffers the injury produced by the mistake, i.e., possessing a piece of property that does not fit the qualifications of what the buyer thought he received.

The above example seems to indicate that setting the time for accrual of rescission based on mistake as of the date the contract was executed has no redeeming qualities. Such is not the case, however. The first and most obvious advantage to setting the date as of the time the contract was made is that it is, in most cases, a clear time.<sup>132</sup> Although an allegedly innocent party may be precluded from bringing the claim for rescission, both parties are spared the time and expense

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128. See *Coram Healthcare Corp. v. Aetna U.S. Healthcare, Inc.*, 94 F. Supp. 2d 589, 593 (E.D. Pa. 1999).

129. See *Zavaglia v. Gardner*, 666 N.Y.S.2d 671, 672 (N.Y. App. Div. 1997).

130. Here, the example differs somewhat from *Zavaglia*. There, the discovery that the property was subject to rent control occurred within one year of the contract. *Id.*

131. See *id.*

132. See Stephen V. O'Neal, Comment, *Accrual of Statutes of Limitations: California's Discovery Exceptions Swallow the Rule*, 68 CAL. L. REV. 106, 116 (1980).

of litigation, as they can clearly determine whether the rescission claim is barred as untimely even before the complaint is filed. Additionally, in the above example of the rent-controlled property, it is the new buyer that now has the most opportunities and incentives to ensure that no mistakes were made in the description of the property that he bought. The new buyer is now the one entitled to possession (and thus, unhampered inspection) of the property. The seller, on the other hand, has relinquished all her rights to the property, and thus could not examine it after the contract is executed to see if it comports with her beliefs. Having a certain, easily calculable date forces the buyer to be diligent in ensuring the property meets his expectations in entering into the contract to purchase, even after conclusion of the transaction.<sup>133</sup>

This rule also benefits the seller. If the seller is the party to the contract that is harmed by the mistake, then the onus is on her to discover such facts before the contract is executed, when she has the best chance and opportunity to prevent the contract from being formed in the first place. For example, the seller of land may not know there is drillable oil under the ground on her piece of property.<sup>134</sup> By setting forth the rule that rescission based on mistake must be brought within a definite time period of when the contract was formed, the seller knows she must ascertain the true character and value of her property before the contract to sell the property is executed, and while the property is still within her control and easily accessible for inspections.<sup>135</sup> In addition, “if not in every particular case, the owner will have access at lower cost than the buyer to information about the characteristics of [her] property and can therefore avoid mistakes about these characteristics more cheaply than prospective buyers can.”<sup>136</sup> Therefore, setting a clear and definite date as to when the claim for rescission based on mistake begins to run does not work such an injustice as could be initially perceived from the first example given.<sup>137</sup>

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133. *See id.* (using a date certain “creates a strong incentive for timely action by plaintiffs, thus furthering the policy concerns central to the statutes of limitation”).

134. *See* RESTATEMENT (SECOND) OF CONTRACTS § 154 cmts. a, d (1981).

135. This comports with the Restatement of Contracts that allocates risk to the seller in such a situation. *See id.*

136. RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 104 (7th ed. 2007).

137. In addition, equitable tolling of the limitations period may be applicable in situations where the other party to the contract takes steps to prevent the injured party from discovering the mistake. *See* 54 C.J.S. *Limitations of Actions* § 115 (2009).

A bright-line rule is in the best interests of the party seeking rescission, the party opposing rescission, and the courts. First, the bright-line rule, as discussed above, makes it easier for the party wanting rescission to determine if she actually can pursue a rescission claim that is not barred by the limitations period. In most cases, she need not go through costly discovery to determine when the contract was executed. Therefore, she can use her resources to pursue other claims that would have merit, as opposed to expending her resources to pursue a claim that may or may not succeed. Second, the bright-line rule benefits the party against whom rescission is brought in that that party need not worry about defending a stale claim for rescission, including trying to locate witnesses that have long since relocated or died. Once the time period beyond the contract execution date has passed, the presumptive defendant can rest assured that he will not be forced to defend a claim with limited evidence. Finally, establishing that the cause of action for rescission based on mistake accrues when the contract was formed aids the court in keeping out cases for rescission that would require tricky evidentiary issues, such as which side to believe when neither side can present a witness to the contract formation. A clear rule also necessarily restricts the number of claims for rescission that can be brought, thus reducing the load of an already overburdened court system.

**E. Rather than a Specific Act Triggering the Accrual of the Limitations Period, Rescission Must Be Sought Within a Reasonable Time**

Some courts follow the rule that rescission must be sought within a reasonable time, rather than any set time period.<sup>138</sup> The reasonable time requirement has been applied in the context of waiving the right to rescission, as opposed to whether the limitations period has run.<sup>139</sup>

In *Henson v. James M. Barker Co.*,<sup>140</sup> the court applied a reasonable time requirement, rather than a strict time period. In *Henson*, the appellants entered into a construction contract with the appellee.<sup>141</sup> During the course of construction, the parties had a dispute and eventually executed a take-over agreement, whereby another construction company replaced the appellee on the project.<sup>142</sup> The appellants al-

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138. See *Miller v. Reynolds*, 223 S.E.2d 883, 886 (Va. 1976).

139. *Henson v. James M. Barker Co.*, 636 So. 2d 887, 888-89 (Fla. Dist. Ct. App. 1994).

140. *Id.* at 888.

141. *Id.*

142. *Id.*

leged that they ended up paying \$200,000 more than they expected on the construction project due to the appellee's construction defects.<sup>143</sup> The appellants sought rescission of the take-over agreement, but the trial court found their delay in seeking rescission resulted in a waiver of the claim.<sup>144</sup>

On appeal, the appellants argued the trial court incorrectly applied laches to the rescission claim.<sup>145</sup> The appellate court stated the trial court did not apply laches but instead, found the appellants had waived their claim for rescission.<sup>146</sup> The appellate court noted that the waiver defense to a rescission action "has long been recognized in Florida law."<sup>147</sup> Although the appellants filed suit for rescission less than two years after receiving notice of the construction defects, the attempted rescission occurred only after the appellee demanded payment on the promissory note supporting the take-over agreement and after the construction was complete.<sup>148</sup> Thus, the appellate court determined the trial court did not err in finding that appellants waived any right to rescission of the take-over agreement, as rescission was not sought until after the appellee tried to collect its money due under the agreement.<sup>149</sup>

Although the *Henson* court rejected the contention that failure to seek rescission in a reasonable time period is the same as a laches argument,<sup>150</sup> the court in *Miller v. Reynolds*<sup>151</sup> did consider the reasonable time period as applicable to a laches defense.<sup>152</sup> The plaintiffs in the *Miller* case sought rescission based on the mutual mistake of the parties that the land the plaintiffs purchased from the defendants was suitable for building a residence.<sup>153</sup> The plaintiffs learned this one year after executing the contract to purchase the land.<sup>154</sup>

In responding to the defendants' laches argument, the court stated that, for the most part, rescission must be sought within a reasonable time.<sup>155</sup> The court determined the plaintiffs' rescission claim

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143. *Id.*

144. *Id.* at 888–89.

145. *Id.* at 889.

146. *Id.*

147. *Id.*

148. *Id.*

149. *Id.*

150. *Id.*

151. 223 S.E.2d 883 (Va. 1976).

152. *Id.* at 886.

153. *Id.* at 883–84.

154. *Id.* at 884.

155. *Id.* at 886.

was not barred by laches because the plaintiffs learned of the unsuitability of the land within eleven months of the execution of the deed to the property, and the plaintiffs filed suit immediately after discovering the problem.<sup>156</sup>

Thus, in contrast to *Henson*, the court in *Miller* considered the reasonable time criteria in the context of the argument that the limitations period barred the claim, not in terms of a waiver of the rescission claim.<sup>157</sup>

The reasonable time requirement is heavily criticized in Sol Goodell's 1930 Texas Law Review article *Need Rescission Be Sought Within a Reasonable Time?*<sup>158</sup> Goodell explores the reasonable time requirement under Texas law.<sup>159</sup> At the time the article was written, Texas's statute of limitations of four years applied to all actions unless specifically enumerated in a different statute.<sup>160</sup> As rescission did not have a specific statute applying a limitations period, Goodell argues the four-year limitation should apply to it and, by imposing a reasonable time requirement, the court was usurping the statutorily provided time period.<sup>161</sup>

Goodell's main complaint regarding using a reasonable time period is that it causes unnecessary confusion.<sup>162</sup> In most cases where rescission was denied due to the passage of time, it was because the delay resulted in some sort of harm either because the actions of the party seeking rescission indicated that party's intention to affirm the contract, rather than rescind it, or the delay caused the parties to be unable to be returned to the status quo.<sup>163</sup> If a reasonable time period in which to seek rescission is required, then it is not clear whether this is a defense to rescission or something that the party seeking rescission must prove.<sup>164</sup> In addition, if the reasonable time requirement is a separate defense, then it would conflict with the statute of limitations.<sup>165</sup> Finally, in determining whether rescission was sought within a reasonable time, it would seem that the important consideration

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156. *Id.*

157. *See also* *Courtois v. Millard*, 529 N.E.2d 77, 81 (Ill. App. Ct. 1988) (holding that the trial court did not abuse its discretion in holding that the plaintiffs did not unreasonably delay in bringing their claim for rescission, and thus laches did not preclude the claim).

158. Goodell, *supra* note 7.

159. *Id.* at 355-70.

160. *Id.* at 348.

161. *Id.* at 356.

162. *Id.* at 357.

163. *Id.*

164. *Id.* at 357, 361-62.

165. *Id.* at 357.

would be whether prejudice resulted from the delay.<sup>166</sup> If true, then the courts should simply discuss the prejudice aspect, without causing confusion by using the reasonable time language.<sup>167</sup>

The reasonable time requirement could also result in harm to the party seeking rescission.<sup>168</sup> For example, although the plaintiff brought her rescission claim within the statute of limitations, a jury could find that the time period she waited before bringing the claim was not reasonable.<sup>169</sup> If the jury made this finding, even though there was no prejudice to the defendant, then “it would be unjust to allow a jury to bar the suit in less time than that prescribed by the statute of limitation.”<sup>170</sup> As with almost all of the methods for determining when a claim for rescission begins to accrue for statute of limitations purposes, the reasonable time period solution has many disadvantages.

#### IV. Solutions to Limitation Period Problems

Various approaches to applying limitations periods to rescission claims have been discussed, but all of the approaches have advantages and disadvantages. Most of the pros and cons of the different theories come from determining when the claim for rescission should begin to accrue. There are several solutions to this problem. One is to recognize rescission as a remedy, and to consequently deal with the limitations period from that perspective. The other is to do away with any limitations period whatsoever, and instead require the defendant to prove the time period in which the plaintiff waited in bringing the claim for rescission caused the defendant harm.

As an alternative to these proposed solutions, the courts could determine the limitations period should begin to run when the action supporting the rescission claim occurred.

##### A. Rescission as a Remedy—Not a Cause of Action

Rescission is not a cause of action, but instead is a remedy.<sup>171</sup> If a remedy requires a condition precedent, the occurrence of that condition does not delay the running of the limitations period for the cause

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166. *Id.*

167. *Id.*

168. *Id.* at 363.

169. *Id.*

170. *Id.*

171. *Bischoff v. Cook*, 185 P.3d 902, 911 (Haw. Ct. App. 2008); *McGarvey v. Penske Auto. Group, Inc.*, 639 F. Supp. 2d 450, 466 (D.N.J. 2009).

of action upon which the remedy is based.<sup>172</sup> In *Swing v. Barnard-Cope Manufacturing Co.*,<sup>173</sup> an Ohio court issued a decree in 1901 that policyholders were liable for the debt of a company.<sup>174</sup> The trustee was able to bring an action against the policyholders for the assessments thirty days after giving the policyholders notice of the assessment.<sup>175</sup> The trustee commenced the actions against the policyholders more than six years after the Ohio court's decree was issued, which would be beyond the statute of limitations if the date of the Ohio court's decree was when the limitations period began to run.<sup>176</sup> To defeat the statute of limitations defense, the trustee argued its cause of action did not accrue until the thirty-day notice was given, which was within six years of filing suit.<sup>177</sup>

The Supreme Court of Minnesota rejected this argument.<sup>178</sup> Instead, the court determined it was the decree that created the cause of action.<sup>179</sup> The trustee could not delay giving the notice, and thus delay the accrual of the cause of action, "practically annul[ing] the statute of limitations."<sup>180</sup> As the court put it, although the time to bring suit begins to run when the cause of action accrues, "[i]t does not necessarily follow that the right to sue on the cause of action arises immediately when" this happens.<sup>181</sup> The giving of notice was a part of the *remedy*, and not a part of the *cause of action*.<sup>182</sup> The notice was a step in collecting the assessments, and thus part of the *remedy*.<sup>183</sup> Consequently, because giving notice was not part of the cause of action, the failure to give notice did not delay the accrual of the cause of action.<sup>184</sup> Thus, the trustee's attempt to collect the assessments was barred by the statute of limitations, even though the notice was given within the limitations period.<sup>185</sup>

Under *Swing*, if rescission is a remedy, rather than a cause of action, then the plaintiff would lose the ability to control when the limi-

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172. *Swing v. Barnard-Cope Mfg. Co.*, 131 N.W. 855, 855-56 (Minn. 1911).

173. *Id.*

174. *Id.* at 855.

175. *Id.*

176. *Id.*

177. *Id.*

178. *Id.* at 856.

179. *Id.*

180. *Id.*

181. *Id.*

182. *Id.* at 855.

183. *Id.*

184. *Id.*

185. *Id.*

tations period begins to run. As discussed earlier in Part III.A. of this Article, if the limitations period begins to run when the last element of the claim occurs, then a plaintiff could control when the rescission claim begins to run by delaying giving notice of the intent to rescind.<sup>186</sup> The *Swing* court noted this problem, and its solution was to hold that giving the notice was part of the *remedy*, not part of the *cause of action*.<sup>187</sup>

That same court later determined that a condition precedent to a remedy should also be performed within the limitations period.<sup>188</sup> In *Weston v. Jones*,<sup>189</sup> money was paid to the petitioner pursuant to a court decree that was entered under a mistake of fact.<sup>190</sup> The respondent sought return of the money beyond the limitations period, but argued that the limitations period did not begin to run until the original court decree was reversed.<sup>191</sup> The court disagreed, instead finding that reversing the original court decree was a step in the remedy, not a step in the respondent's cause of action, stating that "the decree stood as a barrier between [the respondent] and the remedy the law provided."<sup>192</sup> In ruling against the respondent, the court determined that a condition precedent to a remedy must also "be performed within the statutory period for bringing the action."<sup>193</sup>

As rescission is a remedy, it should be treated like one in applying limitations periods. The requirements of rescission that there be notice and a return of the benefits received under the contract are thus steps in the remedy, and therefore must be performed within the limitations period.<sup>194</sup> Under *Weston*, treating rescission as a remedy requires the plaintiff to complete all of the necessary conditions precedent to receiving rescission within the limitations period. Thus, for the court to rescind the contract, the plaintiff must show that within the five years prior to asking for rescission, she accomplished *all* of the following: (1) that a contract was entered into by the parties; (2) that a ground for rescission exists, such as mutual mistake; (3) that she rescinded the contract and notified the other party of the rescis-

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186. *See supra* Part III.A.

187. *Swing*, 131 N.W. at 855–56.

188. *Weston v. Jones*, 199 N.W. 431, 433 (Minn. 1924).

189. *Id.*

190. *Id.* at 432.

191. *Id.*

192. *Id.* at 433.

193. *Id.*

194. *See id.*

sion; and (4) that she returned the benefits she received under the contract.<sup>195</sup>

This approach has several benefits. First, it will give certainty to the litigants, as the specific amount of time to accomplish the elements of rescission will be clearly known. Second, statutes of limitations are enacted by the legislature,<sup>196</sup> so careful policy considerations underlie them,<sup>197</sup> and this proposal would give effect to those considerations by keeping the time periods the legislature determined as the time within which all elements of rescission must be accomplished. Finally, this approach takes control of the running of the statute of limitations out of the plaintiff's hands. All steps of the rescission remedy must be accomplished within the limitations period, and the plaintiff cannot control when the contract was made or when the basis for rescission happened.

There are also disadvantages to this approach. First, this approach dictates that rescission is only available if it is sought within so many years of the contract being executed, as one of the elements—conditions precedent—to rescission is the making of a contract.<sup>198</sup> This could result in an unfair situation, such as when impossibility of performance of the contract arises beyond that time period.<sup>199</sup> Second, the court would need to determine when every element of the claim for rescission occurred to determine if the remedy was timely sought. This results in a significant expenditure of time and money, as contrasted with only having to determine when one element occurred.

## B. Delay Bars Rescission Only if Prejudicial to the Opposing Party

Another solution to the problem of applying limitations periods to rescission is to not have any limitations period whatsoever. Instead, the court could put the onus on the defendant to demonstrate that

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195. See *supra* Part I.

196. Goodell, *supra* note 7, at 359.

197. See *id.* at 359 (The legislature that provides a specific limitations period for rescission claims defines the state's public policy regarding those claims, "[w]hen [it] . . . balance[s] the hardships that might be caused by delay in bringing suit against the duty to protect the rights of the public, and tak[es] into consideration the nature of the evidence by which a particular cause of action may be established . . .").

198. The same issue arises when establishing the statute of limitations as running from the date the mistake is made, i.e., the date the contract was formed. See *supra* Part III.C.

199. See *id.*

she has been injured by the delay in bringing suit, regardless of whether the time in bringing suit was long or short.<sup>200</sup>

There are two major problems with this approach. First, it provides no certainty to the parties. In determining whether the defendant was prejudiced by the delay, the courts will necessarily proceed on a case-by-case basis. For example, if one of the witnesses to the contract formation has passed away, but the other has not, is the defendant still prejudiced by the delay? The parties will have to proceed with the litigation to find out whether the defendant will be considered so harmed by the delay that the plaintiff may not maintain the rescission claim. Also, in most cases the plaintiff cannot determine on her own whether the defendant was prejudiced by the delay. This information may not be known to the plaintiff until litigation commences. Thus, the plaintiff has to resort to litigation to determine if she even has a viable claim for rescission. This results in a waste of judicial resources—and the parties' resources—that could have been avoided if a bright-line rule was followed.

Second, requiring the defendant to demonstrate prejudice is the basis for laches.<sup>201</sup> Florida, for example, has eliminated this requirement from laches, as demonstrated by section 95.11(b) of the Florida Statute, which states that laches may still bar a plaintiff from bringing his claim regardless of whether the delay injured the defendant. Specifically eliminating the requirement of prejudice evinces a decision by the legislature to disregard whether a defendant was injured due to the passage of time. Instead, it demonstrates that the legislature considers the passage of time to be more important than whether the defendant was injured by it. Because the legislature has made this determination, it is not recommended that the defendant need only show harm caused by the delay to preclude rescission; instead, a set time period within which the plaintiff must bring the claim for rescission should be established, regardless of whether the defendant suffered harm due to the delay.

### **C. The Limitations Period Should Begin to Run from the Date of the Action That Supports the Rescission Claim**

A better solution to the problem in applying limitations periods to rescission is to have the time begin to run from the date of the act that provides a basis for rescission, as in those jurisdictions where the

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200. Goodell, *supra* note 7, at 360.

201. *See supra* Part II.

time period begins to run from the date that the mistake was made. This eliminates the plaintiff's ability to control when the limitations period begins to run. In addition, in most situations involving rescission, it establishes a bright-line rule.

For rescission claims, the time period would thus run from the basis for rescission, which would be the date the mistake was made, the date the fraud occurred, the date the false representation was made, or the date the performance of the contract became impossible or impracticable.

California has somewhat adopted this approach.<sup>202</sup> Section 337(3) of the California Code of Civil Procedure states that the time to bring a claim for rescission of a written contract is four years, and that "[t]he time begins to run from the date upon which the facts that entitle the aggrieved party to rescind occurred."<sup>203</sup> The acts that justify rescission include fraud, false representations, and mistake,<sup>204</sup> but California has specifically exempted those grounds from this requirement. Instead, section 337(3) states, "Where the ground for rescission is fraud or mistake, the time does not begin to run until the discovery by the aggrieved party of the facts constituting the fraud or mistake."<sup>205</sup>

Even where the rescission is based on mistake, however, having the time period begin to run from the date the mistake was made, which is usually when the contract was executed, in most cases provides a simple, certain date from which to begin calculating. Although in some circumstances it can result in an unfair situation, these rare instances do not outweigh its benefits.<sup>206</sup>

In cases where the rescission is based on fraud, the time period for the running of the statute of limitations would begin from the date the fraud occurred. If the fraud is ongoing, then the limitations period would not begin until the last time the fraud was perpetrated.

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202. CAL. CIV. PROC. CODE § 337(3) (West 2006).

203. *Id.*

204. *See supra* Part I.

205. CAL. CIV. PROC. CODE § 337(3) (West 2006). The section also includes another exception for rescission based on misrepresentation under a specific section of California's Insurance Code. *Id.*

206. *But see* O'Neal, *supra* note 132, at 116–20 (arguing that the plaintiff that exercises diligence in discovering the basis for her claim should not lose her claim due to the benefits of establishing a clear-cut rule).

For example, an oil company contracts to sell a piece of property, but conceals oil field waste and trash on the property.<sup>207</sup> The purchaser only discovers the contaminants when he has a soil investigation performed.<sup>208</sup> In this situation, the limitations period would begin to run when the contract to purchase was entered into, as that is when the fraud occurred, rather than when the purchaser discovered the contaminants. If the purchaser's discovery occurred outside of the limitations period, then his claim for rescission would be time-barred, even though he did not discover the fraud until later.

Although this is a harsh result, as it precludes a claim before the purchaser knew he had one, its benefits outweigh its disadvantages. The time period is easily calculable, and thus the purchaser is encouraged to fully investigate his new property before that time period elapses. Because it is an easily calculable date, the purchaser knows exactly how long he has to complete the necessary actions to investigate his property, assuming he did not do so before entering into the contract to purchase it. In addition, although the remedy of rescission might be precluded by the limitations period, other potential claims against the perpetrator of the fraud might be timely.

False representation, as a basis for rescinding a contract, is similar to fraud, but with one important distinction. Where fraud requires intent to deceive, a party may be entitled to rescission of a contract where the other party made false statements without knowledge of their falsity or any intent to deceive.<sup>209</sup> In rescission claims based upon false representations, "[a]ll that need be shown under such circumstances is that the representations were false and actually misled the person to whom they were made."<sup>210</sup>

The limitations period for a rescission claim based on a false representation should begin to run when the representation was made. Certainly, a disadvantage to this approach would be the possibility that an innocent party could be prevented from seeking rescission even if her claim was sought within the limitations period if that period was measured from the date the contract was executed, rather than the

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207. This example is based on *Galen v. Mobil Oil Corp.*, 922 F. Supp. 318 (C.D. Cal. 1996).

208. *See id.* at 321.

209. *Ellenburg v. Edward K. Love Realty Co.*, 59 S.W.2d 625, 627 (Mo. 1933).

210. *Id.* at 627. False representation also differs from mistake in that a rescission claim based on mistake technically does not require that any representation be made. All that is required is that the parties operated under a mistake, as in the situation where the seller sells land without knowing that it contains drillable oil beneath the surface. *See* discussion at Part III.D *supra*.

date of the false representation. This might occur if the representation was made prior to the formation of the contract.

The disadvantages are outweighed by the advantages, however. Having the limitations period for rescission accrue from the date the false representation was made provides a clear deadline. In most, if not all, cases, the parties will be able to identify which representation was false. Although the parties may dispute when the representation was made, litigation involving this issue should be relatively simple, as it requires only a determination of the communications between the parties to the contract, and may be shown by letters or e-mails, telephone records, or meetings between the parties, of which there should be evidence independent of the parties' testimony.

For rescission cases based on impossibility of performance, the time should begin to run from the date the performance becomes impossible. That may be when the contract is formed, if there was never any possibility the contract could be performed, or it may be at some later time. For example, parties may agree to transfer their rights to sell certain items in a particular geographic area.<sup>211</sup> If those rights were, in fact, nontransferable, then it would be impossible to perform a contract to transfer those rights.<sup>212</sup> Theoretically, a party seeking to transfer those rights obtained them before entering into the contract. Thus, the contract to transfer the nontransferable rights was impossible to perform from the moment it was executed, and the limitations period would begin to run from the date the contract was formed.

In contrast, parties may execute a contract for one party to provide dancing lessons to the other party.<sup>213</sup> Following execution of the contract, the party that was to receive the lessons could become physically disabled and unable dance.<sup>214</sup> In such a situation, the time to bring a claim for rescission would run from the date the party became physically disabled, rather than the date that the contract was formed, as the date of the disability is the date that the contract became impossible to perform.

As demonstrated by the above examples, using the time that performance of the contract becomes impossible establishes a bright-line rule that is easy to apply, thus leading to certainty to the parties and

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211. See *E.B. Sherman, Inc. v. Mirizio*, 556 So. 2d 1143, 1144 (Fla. Dist. Ct. App. 1989). This case is the basis of this example.

212. See *id.*

213. See *Richardson v. Cole*, 173 So. 2d 336, 337 (La. Ct. App. 1965).

214. See *id.* at 337-38.

judicial efficiency, as litigation would be unnecessary to determine whether the limitations period expired based on when it began to run. In addition, such a rule solves the problem posed by the hypothetical outlined at the beginning of this Article, in that in most circumstances the party seeking rescission would not be able to control the time when the contract becomes impossible to perform.

### **Conclusion**

There are currently several issues involved in applying limitations periods to claims for rescission, not the least of which is the ability of the party seeking rescission to control when the limitations period begins to run. This problem could be solved by several methods. The courts could start treating rescission as the remedy that it is, and hold that all of the elements to rescission must be performed within the limitations period, rather than treating rescission as a cause of action and determining that the time period does not begin to run until the last element is accomplished. Another idea is for the courts to not require any time period, but instead put the onus on the defendant to demonstrate how she has been harmed by the delay, however short or long the delay was. The best approach, however, is to have the limitations period begin to run from the date of the act supporting the claim for rescission. This establishes a fair, easy-to-apply, and bright-line rule for the litigants and the court, thus saving the parties and the courts time and money.



