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Protecting the Benefit of a Seller's Bargain in Real Estate Contracts

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Matthew Ingber[*]

I. INTRODUCTION

Courts measure damages for breach of a real estate contract based on the difference between the contract price and the fair market value of the property at the time of the breach,[1] which seeks to protect the injured party's expectation interest.[2] This measure usually provides an injured seller with an adequate remedy in the event of a buyer's breach[3] but "[i]n some cases, the actual loss suffered as a result of a breach exceeds the amount yielded by that formula."[4] In *American Mechanical v. Union Machine Co.*,[5] the buyer contracted to purchase the vendor's real estate for $100,000.[6] The property was then resold for $55,000, and the seller sought to recover the difference between the original contract and resale price.[7] Although the

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[1] Kirkpatrick v. Stosberg, 894 N.E.2d 781, 792 (Ill. App. Ct. 2008); E. ALLAN FARNSWORTH, FARNSWORTH ON CONTRACTS, § 12.12 (3d ed. 2004) (stating that damages are measured at the time of the breach in real estate contracts); *cf.* Hopkins v. Lee, 19 U.S. (6 Wheat.) 109, 118 (1821) (stating that the "rule settled in this Court, that in an action by the vendee for breach of contract on the part of the vendor, for not delivering the article, the measure of damages is its price at the time of the breach.").

[2] A party's expectation interest may also be referred to as its loss of bargain damages. The two terms will be used interchangeably throughout this Comment. *See* RESTATEMENT (SECOND) OF CONTRACTS § 347 cmt. a (1981) (stating that "[c]ontract damages are ordinarily based on the injured party's expectation interest and are intended to give him the benefit of his bargain").

[3] Am. Mech. Corp. v. Union Mach., 485 N.E.2d 680, 684 (Mass. App. Ct. 1985).

[4] *Id.* The court is referring to the formula that calculates real estate contract damages as the contract price less the market value of the property at the time of the breach.

[5] 485 N.E.2d 680 (Mass. App. Ct. 1985).

[6] *Id.* at 682.

[7] *Id.* at 681-82.

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court recognized that the general measure of damages sometimes inadequately protects the benefit of the injured seller's bargain,[8] the court failed to formulate an alternative measure to address the problem.

To illustrate the inadequacy of the general measure of damages, suppose Sam contracts to sell his home ("Blackacre") to Bradley on July 1, 2013 for $500,000, closing to be on October 1, 2013. On August 1, Bradley breaches the contract, forcing Sam to put Blackacre back on the market. On December 1, 2013, Sam sells Blackacre for $450,000. Sam then brings suit against Bradley to recover $50,000,[9] arguing that this amount is needed in order to realize the benefit of the bargain that he made with Bradley. Sam's argument may not necessarily prevail when applying the general measure of damages—the contract price less the fair market value of the property at the time of the breach.[10] If Blackacre's fair market value was $500,000 when Bradley breached, the court will find that Bradley's breach did not damage Sam; therefore, Sam will not recover the $50,000 difference when reselling his home. The rationale is that because the Sam-Bradley contract price equaled the fair market value at the time of the breach, Sam could have resold the property for $500,000 once Bradley breached.

In order for a real estate seller to recover damages when applying the general damages measure, a seller, like Sam, must mitigate his damages by securing a substitute purchaser willing to pay fair market value when the original buyer breaches.[11] However, this measure often leads to unfair results when the seller seeks to recover, as demonstrated in the Sam-Bradley transaction. Because the seller's damages are calculated as the fair market value *at the time* of the breach, the seller must mitigate before the fair market value changes.

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[8]   *Id.* at 684. However, the majority of courts measuring damages at the time of the breach fail to concede that the measure is inadequate even when the injured seller resells the property for less than the original contract price. *See, e.g.*, Barry v. Jackson, 309 S.W.3d 135, 140 (Tex. Ct. App. 2010); White v. Farrell, 987 N.E.2d 244, 252 (N.Y. 2013) (upholding the general measure of damages).

[9]   Sam expected to sell Blackacre for $500,000 based on the Sam-Bradley contract. Since Sam later resold the property for $450,000, the $50,000 in controversy represents the difference Sam believes he has a right to in order to protect the benefit of his bargain with Bradley.

[10]   *See infra* section II.

[11]   *See* RESTATEMENT (SECOND) OF CONTRACTS § 350 cmt. b (1981) (stating that an injured party "is expected to take such affirmative steps as are appropriate in the circumstances to avoid loss by making substitute arrangements or otherwise.").

Therefore, the seller must not only quickly find a substitute purchaser but must also find a substitute purchaser willing to pay fair market. Only then will a seller be found to have a right to damages for breach. This harsh mitigation standard, particularly in a declining real estate market, is difficult to satisfy and is improper due to the uniqueness of the subject matter at issue. Real estate transactions typically take longer to complete than other types of transactions, and due to their price and unique nature, involve a limited supply of potential buyers.[12]

This Comment argues that applying the time of breach rule— "common in contract law and in the Uniform Commercial Code"[13]— to real estate contracts inadequately protects an injured seller's expectation damages. Instead, real estate vendors would be afforded greater protection for their expectation interest if damages were measured as the difference between the contract price and subsequent lower resale price so long as the seller sufficiently mitigates damages. Section II of this Comment analyzes the time of the breach rule and its justification. Section III discusses how measuring damages at the time of breach in real estate contracts provides buyers with an unfair advantage over sellers. Finally, Section IV proposes adopting the standard of measuring a seller's damages in real estate contracts set forth in the Uniform Land Transactions Act § 2-504 ("ULTA").[14]

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[12] *See White*, 987 N.E.2d at 255-56 (Pigott, J., concurring). The court found that the "sale of real estate is clearly different [when compared to fungible goods] because each parcel is unique." *Id.* at 255. Due to the unique nature of real property, there are a limited number of potential buyers and an injured seller must restart the sales process after the breach, "which may require a reassessment of the list price and more showings of the property to new buyers. . . . This may take substantial amount of time and effort of the seller's part." *Id.* at 256.

[13] *Id.* at 255. *See also* Kuhn v. Spatial Design, Inc., 585 A.2d 967, 971 (N.J. Super. Ct. 1991); *Am. Mech. Corp.*, 485 N.E.2d at 684 (noting that the general measure of damages may not adequately protect a party's expectation interest); *Barry*, 309 S.W.3d at 150 (Patterson, J., concurring and dissenting); Royal v. Carter, 233 P.2d 539, 551-52 (Ca. 1951) (Schauer, J., concurring).

[14] *See* Uniform Land Transactions Act § 2-504(a) (1975) (*hereinafter* ULTA). ULTA § 2-504(a) provides:

> If a buyer wrongfully rejects, otherwise commits a material breach, or repudiates as to a substantial part of the contract, the seller may resell the real estate in the manner provided in this section and recover any amount by which the unpaid contract price and any incidental and consequential damages exceeds the resale price, less expenses avoided because of the buyer's breach.

ULTA has not been adopted by any jurisdiction; however, at least one court has relied on it. *See, e.g.*, *Kuhn*, 585 A.2d at 971; *infra* section IV. In addition, courts have calculated an injured real estate vendor's damages similarly to ULTA § 2-504(a). Bowser v. Cessna, 62 Pa.

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Under ULTA, an injured seller is provided adequate protection of his expectation interest in the event of breach because the seller may more readily recover the difference in price between the original and resale contract.

II.   MEASURING EXPECTATION DAMAGES IN REAL ESTATE SALES CONTRACTS

A.   The General Measure of a Seller's Legal Damages

A basic principle of contract damages is to place the injured party in as good of a position had the contract been performed.[15] Guided by this principle, courts throughout the country almost uniformly hold that the measure of damages for breach in a real estate contract is the difference between the contract price and its fair market value at the time of the breach.[16] This measure has been found to sufficiently allow an injured real estate vendor to realize the "benefit of the bargain."[17]

For example, in *White v. Farrell*,[18] the New York Court of Appeals considered for the first time "the measure of damages for a buyer's breach of contract to sell real property."[19] White contracted to purchase Farrell's home for $1.725 million but refused to perform, claiming Farrell was not ready, willing, and able to close on the declared date.[20] Farrell resold the home fourteen months later for $1,376,550[21] and sought damages of $348,450, representing the dif-

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148, 150-51 (1869); Di Scipio v. Sullivan, 816 N.Y.S.2d 578, 579 (App Div. 3d Dep't 2006).

[15]   Brushton-Moira Cent. School Dist. v. Fred H. Thomas Assocs., P.C., 692 N.E.2d 551, 553 (N.Y. 1988).

[16]   *White*, 987 N.E.2d at 245; Quigley v. Jones, 334 S.E.2d 664, 665 (Ga. 1985); Piroschack v. Whelan, 106 P.3d 887, 893 (Wyo. 2005); *Royal*, 233 P.2d at 542-43; Williams v. Ubaldo, 670 A.2d 913, 917 (Me. 1996); Hickey v. Griggs, 738 P.2d 899, 902 (N.M. 1987); Freidman Iron & Supply Co. v. J. B. Beaird Co., 63 So. 2d 144, 149 (La. 1952) (applying civil law).

[17]   *Ubaldo*, 670 A.2d at 917. *See also* Lawson v. Menefee, 132 S.W.3d 890, 894 (Ky. Ct. App. 2004). The court in *Lawson* found that "[t]he loss of bargain consists of any deficiency in the actual value [at the time of the breach] compared to the contract price." *Id.* at 894. Further, in situations where the "actual value exceeds the contract price, there is no loss of the bargain caused by the breach." *Id.*

[18]   987 N.E.2d 244 (N.Y. 2013). *White* is similar to the *Sam-Bradley* example, see *supra* text accompanying notes 9-12. Both demonstrate the unfairness the general measure of damages causes to a seller when seeking to recover from the breaching buyer.

[19]   *White*, 987 N.E.2d at 249.

[20]   *Id.* at 247.

[21]   *Id.* at 247-48, 254.

ference between the original contract and subsequent resale price.[22] The trial court found that White breached the contract and measured Farrell's damages as the difference between the contract price and the fair market[23] value at the time of breach.[24] After Farrell's real estate broker testified that the fair market value of Farrell's home was $1.725 million at the time of breach, the court found that White's breach failed to cause Farrell any actual damages.[25]

Farrell claimed that this remedy failed to protect his actual damages because he received less money than he expected due to the buyer's breach of contract. Farrell argued that the benefit of his bargain could be realized if damages were measured by the difference between the contract price and the later lower selling price.[26] The Court of Appeals declined to accept Farrell's position and held that the "measure of damages is the difference . . . between the contract price and the fair market value of the property at the time of the breach."[27] The court found that the time of the breach measure is uniformly applied throughout the country[28] and gives the parties a sense of stability when entering into the contract.[29] In addition, the court found that a seller's diligence in reselling the property to mitigate the breach is relevant to determine damages.[30]

B.   Justification for the Rule

There has been a reluctance to set aside the general rule for calculating damages as the difference between the purchase price and

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[22]   *Id.* at 247-48.

[23]   See *infra* note 31 and 49 for factors in determining the fair market value.

[24]   *White*, 987 N.E.2d at 248.

[25]   *Id.* The reason that that the trial court held that Farrell did not suffer damages due to White's breach is because the contract price equaled the fair market value at the time of the breach.

[26]   *Id.* at 248-49. *See also Di Scipio*, 816 N.Y.S.2d at 579 (finding that the measure of damages is "either the difference between the contract price and a subsequent lower sale price or, where no subsequent sale has occurred, the difference between the contract price and market value of the real property at the time of the breach"); Grossman v. Melinda Lowell, 703 F. Supp. 282, 284 (S.D.N.Y. 1989) (finding the measure of damages for breach of real estate contract "is measured by the difference between the contract price and the price at which the property was sold by plaintiffs.").

[27]   *White*, 987 N.E.2d at 245, 252.

[28]   *Id.* at 252.

[29]   *Id.* at 253-54.

[30]   *Id.* at 254.

the fair market value[31] of the property at the time of the breach. Courts have emphasized the importance of not setting aside precedent when measuring damages in real estate sales contracts.[32] Yet, those same courts have strictly adhered to precedent, despite acknowledging that the general rule may not adequately protect the injured party's interest.[33]

In *White*, Farrell, the non-breaching seller, argued that the appellate court erred when measuring his expectation damages as the difference between the contract price and the property's fair market value at the time of the breach.[34] Instead, Farrell argued that his damages should have been the difference between the breached contract price less the resale amount.[35] In response to the proposed rule

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[31] In determining fair market value, *see, e.g.*, Shirley's Realty, Inc. v. Hunt, 160 S.W.3d 804, 808 (Mo. Ct. App. W.D. 2005) (finding that "fair market value is the price at which the property could be sold by a willing seller to a buyer who is under no compulsion to buy"); *Piroshack*, 106 P.3d at 893 (finding that courts "should consider all relevant evidence of market value, including other sales of the same or similar property, which were transacted reasonably close in time and distance and under comparable market conditions"); Village of Lawrence v. Greenwood, 90 N.E.2d 53, 56 (N.Y. 1949) ("A non-compulsory sale between a willing seller and buyer is ordinarily regarded as a good test or criterion . . . in determining the value of the land in controversy. The opinion of the buying public so expressed in a free market is what usually determines value.") (quoting Epstein v. Boston Hous. Auth., 58 N.E.2d 135, 137 (Mass. 1944)). For other relevant factors in determining fair market value at the time of resale, *see infra* note 49.

[32] *White*, 987 N.E.2d at 253; Gerald Korngold, Symposium, *Seller's Damages From a Buyer of Realty: The Influence of the Uniform Land Transactions Act on the Courts*, 20 Nova L. Rev. 1069, 1076 (1996). *But see Hopkins*, 19 U.S. at 118. Although the case involved a seller breaching a contract to convey land, the Court reasoned that:

> the measure of damages is its price at the time of the breach. The price being settled by the contract, which is generally the case, makes no difference, nor ought it to make any; otherwise the vendor, if the article have risen in value, would always have it in his power to discharge himself from the contract, and put the enhanced value in his own pocket. Nor can it make any difference in principle, whether the contract be for the sale of real or personal property. . . . In both cases, the vendee is entitled to have the thing agreed for, at the contract price, and sell it himself at its increased value. If it be withheld, the vendor ought to make good to him the difference.

Id.

[33] *White*, 987 N.E.2d at 253; Mildred Hine Trust v. Buster, No. 07AP-277, 2007 WL 4532672, at *3 (Ohio Ct. App. Dec. 27, 2007) (questioning why real estate contract damages are measured at the property's fair market value at the time of the breach because "the usual measure of damages for breach of contract [not including real estate] involving a resale is the difference between the contract price and the resale price.").

[34] *White*, 987 N.E.2d at 248-49.

[35] *Id.* Recall that White contracted to purchase Farrell's home on June 13, 2005 for $1.725M. *Id.* at 246. After White repudiated the contract, Farrell resold the property on

change, the Court of Appeals stated that "adherence to tradition is particularly apt in cases involving the legal effect of contractual rela- tions . . . where it can reasonably be assumed that settled rules are re- lied upon, stability and adherence to precedent are generally more important than a better or even a correct rule of law."[36] The court re- jected the proposed resale rule, not because the general rule protects the bargain better, but rather because the "time-of-the-breach rule is longstanding in New York, as illustrated by the preceding Cook's tour[37] of appellate decisions throughout the State."[38]

In *Barry v. Jackson*,[39] the Texas Court of Appeals also relied on precedent when rejecting the seller's argument that measuring damages at the time of the breach inadequately protected his expecta- tion interest.[40] The seller argued that applying a rule of law decided 120 years ago[41] leads to unjust results because closings often take thirty days from the time the contract is signed in the current real es- tate market.[42] Because of this "a [c]ourt would never find damages since the contract is an indicator of market value, and there would very rarely be any factors that would change the value in a short peri- od of time."[43] The court, as in *White*, did not address the merits of the seller's argument. Instead, the court relied on a 120-year-old precedent—and stated that measuring damages at the time of the breach "has been applied consistently since its pronouncement."[44]

January 11, 2007 for about $1.38M. *Id.* at 247. Although Farrell received less money than he expected from the White-Farrell contract, the appellate court found that Farrell suffered no legal damages as the fair market value equaled the contract price at the time White breached. *Id.* at 248.

[36] *White*, 987 N.E.2d at 253 (internal citations omitted).

[37] A Cook's tour is defined as a rapid or cursory survey or review. MERRIAM-WEBSTER ONLINE DICTIONARY, http://www.merriam-webster.com/dictionary/cook's%20tour (last visited May 2, 2014). The term "Cook's tour" originated from *Thomas Cook & Son*, an English travel agency. *Id. See infra* note 38.

[38] *White*, 987 N.E.2d at 252. The court in *White* examined at least eight New York Appel- late Division decisions dating from 1916 supporting the assertion that the measure of dam- ages is the difference between the contract price and the market value of the property at the time of the breach.

[39] 309 S.W.3d 135 (Tex. Ct. App. 2010).

[40] *Id.* at 138, 142.

[41] *See* Kempner v. Heidenheimer, 65 Tex. 587, 592 (1886) (finding that upon breach in a real estate contract, a plaintiff is only entitled to "recover the difference between the market value at the date of defendant's breach and the price defendant had agreed to pay").

[42] *Barry*, 309 S.W.3d at 140 n.8.

[43] *Id.*

[44] *Id.*

The court in *Mildred Hine Trust v. Buster*[45] endorsed the time-of-breach rule like the courts in *White* and *Barry*.[46] In *Mildred*, the seller accepted the buyer's high bid to purchase his home for $516,000.[47] After the buyer rescinded the contract, the seller resold the property for $472,000 and brought suit seeking $44,000, representing the difference between the breached contract price and the subsequent resale price, which the trial court granted.[48] The appellate court found that trial courts generally err by " 'merely [awarding] the difference between the original contract price and the resale price upon the assumption that the resale price constitutes fair market value'. . . . [b]ecause a number of factors affect whether the resale price represents the fair market value."[49] Although the court upheld the summary judgment award in favor of the plaintiff,[50] the court also recognized that the general rule might not be the most effective measure of damages.[51] The court stated that:

> [u]nlike the principles applied in cases involving breach of real estate contract, the usual measure of damages for breach of contract involving a resale is the difference between the contract price and the resale price. We may question why the same measure of damages does not apply in cases involving breach of real estate contract where, as here, a resale occurs.[52]

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[45] No. 07AP-277, 2007 WL 4532672 (Ohio Ct. App. Dec. 27, 2007).

[46] *Id.* at *3.

[47] *Id.* at *1.

[48] *Id.* at *1-2.

[49] *Id.* at *3 (quoting Peterman v. Dimoski, No. C-020116, 2002 WL 31894859, at *1 (Ohio Ct. App. Dec. 31, 2002). Factors the court listed in determining whether the resale price represents the fair market value include: (1) the length of time between the breach and the resale; (2) the terms of the original contract and the resale; and (3) any evidence as to the stability of the real estate market during the months between the breach and resale. *Mildred Hine Trust*, 2007 WL 4532672, at *3; *White*, 987 N.E.2d at 253.

[50] *Mildred Hine Trust*, 2007 WL 4532672, at *4. The court upheld the judgment due to the breaching buyer's failure to provide evidence showing the property's fair market value at the time of the breach. *Id.* at *3. *See infra* text accompanying notes 83-85.

[51] *Id.* at *3.

[52] *Id. See also Am. Mech. Corp.*, 485 N.E.2d at 684 (finding that "[t]here is no logical basis for treating real estate purchase and sale agreements differently from . . . contracts generally, for purposes of measuring damages."). *See also White*, 987 N.E.2d at 255 (Pigott, J., concurring). The concurring opinion by the court in *White* argued that ULTA § 2-504 should apply because the injured seller established that it adequately mitigated its damages when reselling the property. *Id. But see Bowser*, 62 Pa. at 150 (finding that there is no reason to treat the measure of damages differently when the property involves realty or chattel).

Furthermore, the court questioned why the ULTA's proposed measure of damages which allows an injured seller to "resell the property and recover the amount by which the contract price exceeds the resale price"[53] does not apply in this situation.

III.   PROBLEMS WITH MEASURING DAMAGES AT THE TIME OF THE BREACH

The general rule provides a seller with monetary relief to recover the actual damages incurred from the breach.[54] This remedy, however, may provide the buyer with an unfair advantage. First, the parties likely agreed that the purchase price would reflect the fair market value. Second, the majority of real estate contracts are breached relatively quickly after the agreement. Due to these factors, the purchase price and the fair market value at the time of the breach, in most cases will be the same and leave the non-breaching seller without a legal remedy. As such, it is unlikely that a non-breaching seller will have a claim for damages during a static market, unless the seller secures a buyer willing to pay more than fair market value. In addition, the innocent party is left to bear the risk of a declining post-breach market should the seller not find an immediate substitute buyer.

Below is a hypothetical demonstrating the mitigation principle when measuring a vendor's damages at the time of the breach. The example shows how the time of the breach measure may often cause an unjust result to a vendor even when making a good faith effort to secure a substitute buyer. The following example will be revisited in Section IV of this Comment, where the same set of facts will be analyzed by measuring the seller's damages using the approach in the ULTA § 2-504(a).

The court stated "that the vender [sic] can resell if he see fit, and charge the vendee with the difference between the contract price and that realized" on resale. *Id.*; Noble v. Edwardes [1877] 5 Ch. 378 at 382-83 (Eng.), *reprinted in* NATHANIEL CLEVELAND MOAK, et al., REPORTS OF CASES DECIDED BY THE ENGLISH COURTS 142, 146 (1879) (finding that "the measure of damages is the difference between the contract price and the price for which [the vendor] was able to resell the property . . . . There is no difference between contracts for sale of land and chattels in this respect.").

   [53]   *Mildred Hine Trust*, 2007 WL 5432672, at *3 (supporting ULTA § 2-504 (a)).

   [54]   *See supra* note 1.

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Example 1: Post-Breach Mitigation

On March 1, 2013, Steve hires a real estate broker to sell his home, Blackacre. The broker actively marketed Blackacre to potential buyers and advertised the property in the local newspaper. On April 1, 2013, Steve contracted to sell Blackacre to Karen for $500,000. The contract required Karen to leave a $50,000 down payment in an escrow account and closing was made conditional upon Steve's repairing the roof within sixty days. On June 1, 2013, the date of the closing, Karen failed to perform, claiming the roof was not substantially repaired.[55] On June 1, 2013, the fair market value of Blackacre remained $500,000. Immediately after the breach, Steve began marketing the property in the same manner that led to the original contract. On July 1, 2013, a major employer left Steve's community, causing a decrease in demand in Blackacre and other property located in the community. Steve eventually resold Blackacre on June 1, 2014, in a declining post-breach market for $400,000.[56]

When applying the general time of the breach rule, Steve will have a right to retain only the $50,000 down payment should the court find that the fair market value on April 1, 2013 equaled the contract price.[57] Assuming that the court finds that the contract price and

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[55] The hypothetical assumes that a court will find Karen, the buyer, in breach for her failure to perform. It also assumes the seller was ready, willing, and able to perform. *Cf.* Pesa v. Yoma Dev. Grp., Inc., 965 N.E.2d 228, 229 (N.Y. 2012) (holding that "in a case alleging that a seller has repudiated a contract to sell real property, the buyers must prove they were ready, willing and able to close the transaction.").

[56] The post-breach declining market could have similarly been caused by an economic recession, natural disaster, or a large employer's departure from Blackacre's community. Similar questions were asked during oral argument in *White* regarding the fairness requiring an injured seller to bear the risk of a declining post-breach real estate market. *See* Oral Argument at 16-17, White v. Farrell, 987 N.E.2d 244 (N.Y. 2013) (No. 43), *available at* http://www.nycourts.gov/ctapps/arguments/2013/Feb13/Feb13_OA.htm (last visited May 2, 2014). It is noteworthy that buyer's counsel admitted that measuring damages at the time of the breach is "not a perfect rule and there could be injustices in some cases," in response to a question as to why the injured seller should bear the risk of a post-breach market decline. *Id.* at 17.

[57] In a minority of jurisdictions, Steve may not be able to retain the $50,000 deposit. For example, a court may find that although Karen breached the contract, Karen's breach did not cause Steve to suffer an actual loss because the contract price equaled the fair market value of Blackacre at the time of the breach. *See, e.g.*, Kutzin v. Pirnie, 591 A.2d 932, 941 (N.J. 1991) (finding that the breaching vendee was entitled to restitution of the deposit that was in excess of the actual damages that the vendee's breach caused the vendor); RESTATEMENT (SECOND) OF CONTRACTS § 374 cmt. a, illus. 1 (1981) (stating that "[i]t is often unjust to allow the injured party to retain the entire benefit of the part performance rendered by the party in breach without paying anything in return.").

the fair market value of the property were equal, Steve will be left with $50,000 less than he would have realized had Karen not breached the contract. Still, the court will nonetheless find that Steve's expectation interest was adequately protected and that he was left in as good of a position had the contract been performed.[58]

A.   Mitigation Should Not Be a Requirement Under the General Rule

The majority of courts measuring damages at the time of the breach require the injured vendor to mitigate damages after the breach.[59] The rationale is that mitigation encourages the injured party "to make such efforts as he can to avoid loss by barring him from recovery for loss that he could have avoided if he had done so."[60] With respect to real estate contracts, mitigation should motivate the injured seller to quickly resell the property in order to avoid a possible post-breach market decline.[61]

The court in *Evergreen Land Co. v. Gatti*[62] provided a general rule for post-breach mitigation when damages are measured at the fair market value of the property at the time of the breach.[63] In *Evergreen Land Co.*, the vendee agreed to purchase vendor's land for $165,000 in a private sale.[64] When the buyer breached the agreement

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[58]   *See supra* text accompanying notes 15-17.

[59]   *White*, 987 N.E.2d at 252 (finding that the "injured party has a duty to mitigate . . . ."); Frank v. Jansen, 226 N.W.2d 739, 746 (Minn. 1975). *But see, e.g.,* Gilmartin Bros. v. Kern, 916 S.W.2d 324, 332 (Mo. Ct. App. 1995) (finding that an injured seller is under no duty to mitigate damages under the time of breach rule). The court in *Gilmartin Bros.* rejected the buyer's argument that the seller was not entitled to damages for failing to mitigate. *Id.* The court instead found that "[u]pon breach, the seller may resell the property or keep the property and, with either choice, the seller is entitled to recover the difference between the contract price and the market price." *Id.*

[60]   RESTATEMENT (SECOND) OF CONTRACTS § 350 cmt. a (1981).

[61]   Korngold, *supra* note 32, at 1077. *See* Aboud v. Adams, 507 P.2d 430, 437 (N.M. 1973) (finding that "[i]t is the duty of the trial court when using the resale price as evidence of . . . the time of the breach to make an adjustment for any decline in market value between the date of breach and the date of resale.") (quoting Bouchard v. Orange, 177 Cal. App. 2d 521, 525 (1960)). *See also* Van Burskirk v. McClenahan, 329 P.2d 924, 927 (Cal. App. 2d 1958) (stating that "[i]f the resale time is different or later than the time of the breach, then evidence should be adduced as to any difference, if any, in the market value between the two dates.").

[62]   554 S.W.2d 862 (Ky. Ct. App. 1977).

[63]   *Id.* at 866. *See infra* note 72.

[64]   *Id.* at 863.

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on August 17, 1972,[65] the property was then resold at a public auction a month later for $121,000.[66] The vendor sought damages for the difference between the contract price and the subsequent foreclosure sale price.[67]

The court's application for mitigation of damages began with the premise that the "difference between the contract price and net selling price is not totally applicable[,]"[68] meaning that the resale price alone is not dispositive. The court stated that to successfully mitigate damages and establish that the resale price is evidence of actual value, the vendor must: (1) resell the property under comparable conditions to the contract that was breached and (2) resell the property "within a reasonable time after the breach."[69]

These mitigation criteria set forth a conflicting standard and, thus, provide little guidance as to how an injured seller can protect his expectation interest after the breach. First, the court found that the vendor's reselling of the property a month after the breach was within a reasonable time after the breach, thus satisfying the first element of the mitigation test.[70] However, the court then found that "a foreclosure sale is not comparable to a private sale[,] nor is the selling price alone considered as competent evidence of actual or market

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[65] *Id.* at 866.

[66] *Id.* at 865.

[67] *Evergreen Land Co.*, 554 S.W.2d at 865.

[68] *Id.* at 866.

[69] *Id.*; *Aboud*, 507 P.2d at 436 (finding that the subsequent sale is not conclusive to fair market value as the court must determine what the value was at the time of the breach); Costello v. Johnson, 121 N.W.2d 70, 76 (Minn. 1963) (finding that "[i]n case of a private sale of land courts in this country have generally denied the right of the vendor to resell on account of the purchaser and then recover from him any deficiency arising out of the resale."). The principle in *Evergreen Land Co.*, that the resale price is evidence of the property's fair market value, is similar to the rule in Corbitt v. Amos, No. M2011-01916, 2012 WL 4473963, at *6 (Tenn. Ct. App. 2012). The court in *Corbitt* stated:

> When evaluating cases involving a breach of real estate contract, "the amount a seller is eventually able to obtain for the property *may* constitute evidence of its fair market value at the time of the breach." However, "[t]his rule is conditioned upon the second sale being made on the same or equally favorable terms as the initial sale, the price obtained from the resale be the highest price obtainable for the property and the resale be accomplished within a 'reasonable time' after the vendee's breach."

Id. (internal citations omitted).

[70] *Evergreen Land Co.*, 554 S.W.2d at 866. *See also Barry*, 309 S.W.3d at 141 (finding that it was the injured seller's burden to establish the property's market value at the time of the breach and "it was their burden to establish that the later sale was within a reasonable amount of time.").

value," thus failing to satisfy the second mitigation factor.[71]

The specific facts in *Evergreen Land Co.* did not lead to an unfair result because the property was resold in a less favorable manner than it was sold to the defendant. Therefore, the court was correct in not granting the vendor the difference between the contract and resale price.[72] The *Evergreen Land Co.* mitigation standard, however, will lead to unfair results when the method of the original sale and the resale are the same.

For example, if the vendor resold the property in the same manner and within a reasonable amount of time after the breach, therefore satisfying both mitigation elements, the vendor is not guaranteed the difference between the contract and resale price. In *Evergreen Land Co.*, the subsequent resale price of a property made within a reasonable amount of time after the breach is not by itself competent evidence of the actual or market value of the property at the time of the breach. Even if a vendor uses reasonable efforts and satisfies both mitigation elements, the breaching party can still rebut the amount the vendor received at resale with evidence of a contrary market value when the contract was breached.[73]

Similarly, in *Mildred Hine Trust*, the seller marketed the original sales contract by advertising in a newspaper and by conducting an open bidding process.[74] After the breach, the seller resold the property for $472,000 "as a result of competitive bidding held within one month of [the buyers'] breach on terms identical to those" of-

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[71] *Evergreen Land Co.*, 554 S.W.2d at 866.

[72] *Id.* at 866-67. Specifically, the court remanded the case with instructions that should it be proven that the difference in contract price and resale price was due to the foreclosure sale, then the "measure of damages is to be the difference in the contract price and the actual or market value" at the time of the breach, which would not entitle the vendor to an offset. *Id.* at 867. The facts of the case should set up an exception when measuring damages under the time of the breach rule. At the time of the contract in *Evergreen Land Co.*, the vendee had actual knowledge that the vendor's property was subject to a foreclosure action. *Id.* at 864. Should the buyer breach, courts should grant the vendor the difference between the contract and foreclosure price even if the foreclosure price does not reflect the fair market value because this result was reasonably foreseeable to the buyer as a consequence of the breach. Hadley v. Baxdale, [1854] 156 Eng. Rep. 145 (Exch.). If the vendee had no such knowledge, then the criteria from *Evergreen Land Co.* will apply, and the vendee will not be liable for the offset in price because the manner of the resale was less favorable than the breached contract. *Supra* text accompanying note 69.

[73] *White*, 987 N.E.2d at 256 (Pigott, J., concurring) (arguing that mitigation is meaningless when measuring damages at the time of the breach because the fair market value is dispositive).

[74] 2007 WL 4532672, at *1.

fered in the original contract.[75]   The trial court granted summary judgment in favor of the seller, awarding $44,000, reflecting the difference between the original contract price and actual resale price.[76] The buyer made two arguments on appeal: (1) the fair market value at the time of the breach was $560,000;[77] and (2) the seller failed to sufficiently mitigate his damages because the bidding process was not on the open market and the resale occurred too quickly,[78] meaning the seller could have sold the property at a higher price had it entertained more offers.[79]

The mitigation analysis in *Mildred Hine Trust* provides vendors little guidance as to what post-breach efforts are necessary to ensure that the remedy reflects the difference between the purchase price and resale price under the general time of breach rule. Starting with the second argument, the court found that it was unnecessary for the seller to hire a realtor in order for the home to be sold on the open market.[80] It was sufficient that the seller advertised the sale in two newspapers, held open houses, and received six bids from prospective purchasers.[81] Based on the similarities of the seller's marketing efforts in both sales, it is probable that the court found the subsequent sale was conducted "under conditions comparable to those of the original contract."[82]

The court's rationale for upholding the damages award becomes problematic when the court addressed the buyer's first argument regarding the fair market value of the home.[83] The buyer claimed that an appraiser calculated the fair market value of the home as $560,000.[84] However, this argument was set aside due to the buyer's failure to provide an affidavit with the appraisal.[85] This allowed the court to uphold the summary judgment award because the buyer failed to bring forth evidence disputing the resale price as the fair

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[75] *Id.* at *4.

[76] *Id.* at *2.

[77] *Id.* at *4.

[78] *Id.*

[79] *Mildred Hine Trust*, 2007 WL 4532673, at *5.

[80] *Id.*

[81] *Id.*

[82] *Lawson*, 132 S.W.3d at 893.

[83] *Mildred Hine Trust*, 2007 WL 4532672, at *3.

[84] *Id.*

[85] *Id.* at *4.

market value.[86]

The reasoning in *Mildred Hine Trust* as well as the reasoning in other jurisdictions that require a seller to mitigate should trouble future real estate vendors because it establishes two standards that must be satisfied for a court to award damages. First, the seller must market the property in the same manner as he did under the original contract.[87] Assuming the court finds that this is satisfied, the seller is not guaranteed to recover the difference between the original and re-sale price. The breaching buyer can still argue that even though the seller diligently resold the property on the open market, the original contract and the market value at the time of the breach were equal and, therefore, actual damages cannot be awarded.[88] Second, because a vendor will want to act quickly to avoid a potential market de-cline,[89] the breaching party can argue that the resale occurred too fast and that the seller could have obtained a higher price had he enter-tained more offers.[90] This post-breach uncertainty runs contrary to the "stability and adherence to precedent,"[91] which the court in *White* found necessary for contracting parties to rely upon.[92] Although mit-igation seeks to encourage the injured seller to find another buyer,[93] the uncertainty in recovering damages to offset the difference in re-sale price should lead to the opposite effect. Sellers may ultimately forgo mitigation and incurring unnecessary expenses in an attempt to find a substitute buyer because a breaching buyer may provide evi-dence of fair market value contrary to the resale price and preclude the vendor's recovery.

B.   A Ready Market of Buyers to Make Post-Breach Substitute Transactions Is Lacking

The general measure of damages assumes the availability of a market of ready, willing, and able buyers to whom a seller of real

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86   *Id.*

87   *Id.* at *5.

88   *See, e.g.*, *White*, 987 N.E.2d at 247. *See also Lawson*, 132 S.W.3d at 893 (finding that the amount received from a subsequent sale "is merely evidence of the actual value at the time of the breach" and may be rebutted).

89   *See supra* text accompanying note 61.

90   *Mildred Hine Trust*, 2007 WL 4532672, at *5.

91   *White*, 987 N.E.2d at 253.

92   *Id.*

93   *Supra* note 11.

property may make post-breach substitute transactions. As mentioned earlier, the time of breach rule is also applied in other areas of contract law where there is an established market for the seller to make substitute sales after a breach.[94] Assuming the existence of a ready market in real estate transactions—like in other areas of contract law applying the time of breach measure—contributes to unfavorable results for real estate vendors.

For example, the court in *White* relied on *Brushton-Moira Central School District v. Thomas*[95] to support its position that a real estate vendor's contract damages "are properly ascertained as of the date of the breach."[96] In *Brushton-Moira*, the plaintiff school district hired the defendant to install new windows for the purpose of conserving energy by reducing the amount of heat loss through the windows in the winter.[97] Less than two years later, the plaintiff sued for breach of contract, claiming that the installed windows were not the proper type to prevent heat loss during an upstate New York winter.[98] At issue was "the proper date from which breach of contract damages should be measured."[99] The court concluded that the injured party's damages "should be based on the cost to repair or replace the defective panels,"[100] which must be measured "as of the date of the breach."[101]

The court in *White* relied on the *Brushton-Moira* holding that real estate vendors' damages are to be measured based on the fair market value of the property at the time of the breach.[102] Measuring damages at the time of the breach, common in the sale of goods[103] or services, would have been sufficient under the circumstances in *Brushton-Moira*. In all likelihood, there was a ready market of willing and able substitute contractors to repair or replace the school

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[94] *See* RESTATEMENT (SECOND) CONTRACTS § 350 cmt. c (1981) (stating that an injured seller can adequately mitigate his damages when there is a ready market available at the time the buyer breaches); *see also* U.C.C. § 2-708(2) (allowing an injured seller to be put into as good of a position had the contract been performed when the difference between the market price at the time and place for tender and the unpaid contract price is inadequate).

[95] 692 N.E.2d 551 (N.Y. 1998).

[96] *White*, 987 N.E.2d at 252.

[97] *Brushton-Moira*, 692 N.E.2d at 552.

[98] *Id.*

[99] *Id.*

[100] *Id.* at 554.

[101] *Id.*

[102] *White*, 987 N.E.2d at 252.

[103] U.C.C. § 2-708(2).

windows when the defendant breached the contract. However, this reasoning does not always translate in real estate contracts. First, it takes a longer amount of time to secure a buyer in a real estate trans-action due to the unique nature of property.[104] Second, real estate purchases typically involve a significant purchase price, thus limiting the number of ready, willing, and able buyers.[105] In addition, the av-erage real estate transaction, compared to the sale of goods or ser-vices, usually has a slower sales process after the contract is signed due to various conditions leading up to the closing date.[106] Lastly, "prospective purchasers may be wary of the amount of time the home has been on the market, leading them to conclude that the property is tainted,"[107] and to a longer post-breach resale turnaround.

C.   The Faulty Premise of a Ready Market Makes "Efficient Breaches" Illusory

Courts do not impose penalties on breaching parties if it is so-cially and economically useful to breach a contract when the "breach would leave no party worse off, while leaving at least one party better off."[108] If the promisor discovers that his performance is worth more to someone else, "efficiency is promoted by allowing him to break his promise, provided he makes good the promisee's actual losses."[109] The efficient breach concept, when applied under the circumstances of a real estate contract, especially during a stable market, enables the breaching vendee to benefit while the innocent vendor will unlikely be compensated for his actual loss.[110]

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[104]   *White*, 987 N.E.2d at 256 (Pigott, J., concurring).

[105]   *Id.*

[106]   *Kuhn*, 585 A.2d at 971 (finding that a house cannot be resold the instant the contract buyer breaches).

[107]   *White*, 987 N.E.2d at 256 (Pigott, J., concurring).

[108]   Gil Lahav, *A Principle of Justified Promise-Breaking and its Application to Contract Law,* 57 N.Y.U. ANN. SURV. AM. L. 163, 163 (2000). *See also* RESTATEMENT (SECOND) OF CONTRACTS ch. 16, intro. note (1979) ("a party may find it advantageous to refuse to perform a contract if he will still have a net gain after he has fully compensated the injured party for the resulting loss.").

[109]   Patton v. Mid-Continent Systems, Inc., 841 F.2d 742, 750-51 (7th Cir. 1988) (Posner, J.); *cf. Kutzin*, 591 A.2d 932, 941 (finding that economic efficiency is promoted by allowing a breaching buyer of real property to seek restitution of the deposit that was in excess of the seller's actual damages); *but see* Maxton Builders v. Lo Galbo, 502 N.E.2d 184, 186, 189 (N.Y. 1986) (holding that a non-breaching real estate vendor has a right to retain the ven-dee's entire deposit even if the deposit is greater than the vendor's actual damages).

[110]   The breaching vendee will benefit from her breach while the injured vendor will not

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Example 2, stated below, demonstrates that social and economic efficiency is not necessarily promoted when a real estate vendor's damages are measured at the time of the breach. A contracting buyer will not be deterred from breaching so long as she has knowledge that the original contract price generally equals the fair market value at the time of the breach. As mentioned in *Example 1*, the injured party will not have a claim for damages; therefore, the breaching party will have an economic incentive to break the contract as long as the breaching party finds a less expensive alternative before the closing date.

Example 2: The "Efficient" Breach

Hamilton contracted to purchase Jefferson's home, Monticello,[111] on January 1, 2013, for its fair market value of $2 million. The contract required a $100,000 deposit ("$K_1$"). A week later, Hamilton contracted to purchase a similar home from Madison, a motivated seller, for $1.5 million ("$K_2$"). After contracting with Madison, Hamilton repudiated K_1.[112] After the breach, Jefferson could not find another buyer willing to pay $2 million. Jefferson eventually sold Monticello for $1.7 million.

Assuming Jefferson can retain the $100,000 deposit from K_1, he will claim Hamilton's breach caused an economic injury of $200,000. Analyzing the consequence of the breach under an efficiency concept, Hamilton is left in an economically advantageous position for having breached K_1, while Jefferson is theoretically unaffected, as Hamilton will remedy Jefferson's actual losses caused by the breach. Yet, when Jefferson seeks to recover his alleged damages of $200,000 to realize the benefit of his bargain, a court will deny this recovery since the market value of Monticello equaled the original purchase price when Hamilton breached. Due to the time of breach rule denying Jefferson a recovery, Hamilton is left in a better position

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recoup the benefit of his bargain when the market is stable or in decline. *See* Korngold, *supra* note 32, at 1079 (arguing that "[t]he time of breach rule creates an incentive for the buyer to breach in declining markets.").

[111] Monticello was the name of the home of Thomas Jefferson, the third president of the United States. *See* FORREST MCDONALD, THE PRESIDENCY OF THOMAS JEFFERSON 159 (1976). For more information on America's founding generation, see GORDON S. WOOD, REVOLUTIONARY CHARACTERS: WHAT MADE THE FOUNDERS DIFFERENT (2006).

[112] Assume Hamilton can provide evidence that the fair market value of Monticello at the time of the breach was $2 million, which is equal to the original contract price.

for breaching while Jefferson is not.

When measuring damages at the time of the breach, a breaching party can knowingly enter a contract and benefit by breaching while the injured party suffers when the fair market value remains constant. As a formula,[113] a vendee will benefit by breaching when:

$$(K_1 - K_2) - \text{Lost Deposit from } K_1{}^{114} > \text{Damages Owed to the Injured Party } (K_1 - \text{FMV of vendor's property at the time of the breach})$$

Using *Example 2*, Hamilton's breach of contract benefited him by $400,000. Jefferson was technically left in the same position had the contract been performed, even though he diligently resold the property at a $300,000 loss and retained Hamilton's $100,000 deposit. The benefit of Hamilton's breach is illustrated below:

$$(\$2M - \$1.5M) - \$100,000 = \$400,000 > \$2M \ (K_1) - \$2M$$
$$(\text{FMV when breached}) = 0$$

Yet, under the efficient breach rationale, this scenario is socially and economically beneficial and, Hamilton could have predicted his non-liability should he decide to breach his original contract with Jefferson.

IV.   THE STANDARD UNDER THE UNIFORM LAND TRANSACTIONS ACT

ULTA was approved in 1975 by the National Conference of Commissioners on Uniform State Law[115] to promote interstate real estate transactions.[116] The Commission intended for ULTA to be adopted by the States as a means of establishing a national body of real estate law, much like the Uniform Commercial Code.[117] Although never

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[113] Glezos v. Frontier Invs., 869 P.2d 1230, 1235 (Utah Ct. App. 1995) (stating that "[w]hen there is no decrease in value between the contract price and the fair market value at forfeiture, the seller may not recover loss of bargain damages").

[114] Absent a liquidated damages clause, the deposit may or may not be forfeited as damages due to the breach. *Supra* notes 57 and 109.

[115] Korngold, *supra* note 32, at 1070.

[116] ULTA § 1-102 (2).

[117] ULTA § 1-202 (4).

adopted by any state,[118] ULTA provides a preferable substitute for measuring damages when compared to the general measure of calculating damages at the time of the breach.[119]   According to ULTA § 2-504(a):

> If a buyer wrongfully rejects, otherwise commits a material breach, or repudiates as to a substantial part of the contract, the seller may resell the real estate in the manner provided in this section and recover any amount by which the unpaid contract price and any incidental and consequential damages exceeds the resale price, less expenses avoided because of the buyer's breach.[120]

Although not adopted by state legislatures, some courts have directly applied the Act,[121] while others stressed that the Act would provide a just result in protecting an injured vendee's expectation interest.[122]

A.   Protecting the Benefit of the Bargain by Applying ULTA § 2-504(a)

In *Kuhn v. Spatial Design, Inc.*,[123] Kuhn, the plaintiff vendee, contracted to purchase a home from Spatial Design ("Spatial") for $515,000,[124] conditioned upon Kuhn's obtaining financing.[125]   Kuhn sought to have his $50,000 down payment returned from Spatial when his mortgage broker withdrew his financing.[126]   Spatial resold

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[118]   *White*, 987 N.E.2d at 253.

[119]   *See supra* note 16.

[120]   ULTA § 2-504(a).   This section of the Act derives from the Uniform Commercial Code § 2-706(1), providing that "[w]here the resale [upon breach] is made in good faith and in a commercially reasonable manner the seller may recover the difference between the resale price and the contract price together with any incidental damages." *See also Lawson*, 132 S.W.3d at 894-95, 895 n.23 (finding that the ULTA § 2-504 provides a similar approach to a seller's damages as the Uniform Commercial Code § 2-706).

[121]   *Kuhn,* 585 A.2d 967.

[122]   *White*, 987 N.E.2d at 255 (Pigott, J., concurring); *Mildred Hine Trust*, 2007 WL 4532672, at *3; *Am. Mech. Corp.*, 485 N.E.2d at 684 n.3.   For decisions not referring to the ULTA but arguing that the time of the breach measure provides unfair results, see *Barry*, 309 S.W.3d at 152 (Patterson, J., concurring and dissenting); *Royal*, 233 P.2d at 552 (Schauer, J., concurring); Womack v. Sternberg, 172 So. 2d 683, 690 (La. 1965) (Hawthorne, J., dissenting) (applying civil law).

[123]   585 A.2d 967 (N.J. Super. Ct. App. Div. 1991).

[124]   *Id.* at 968-69.

[125]   *Id.* at 968.

[126]   *Id.* at 970.

the home in a declining market for $434,000.[127] Kuhn then filed suit after Spatial refused to return the deposit.[128] Spatial counterclaimed for damages resulting from Kuhn's breach of contract, consisting of the difference between the original contract price and the resale price.[129] The trial court "found in favor of Spatial Design and against the Kuhns, and assessed damages at almost $100,000, less the re-tained deposit of $50,000."[130]

Kuhn appealed, arguing that the measure of damages was in error and claimed that the measure should have been calculated as "the difference between the contract price and the market value at the time of the breach."[131] The appellate court rejected the argument. First, the court found that an injured vendor must be afforded a rea-sonable amount of time for a post-breach resale because "[i]n the usual course of things, a $515,000 house cannot be resold the instant a contract buyer breaches."[132] In addition, the court found that it would have been difficult for Spatial to immediately resell the prop-erty at market value at the time of the breach since "buyers take long-er to find, and they buy at reduced prices[,]"[133] during a falling real estate market.

The unfairness that would have resulted had Kuhn's argument been accepted, led the court to conclude that the general measure of damages is too restrictive because it "works fairly only in a static market."[134] Instead, the appellate court adopted "the essence of the

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[127] *Id.*

[128] *Kuhn*, 585 A.2d at 970.

[129] *Id.*

[130] *Id.*

[131] *Id.*

[132] *Id.* at 971.

[133] *Kuhn*, 585 A.2d at 971. *See also Womack*, 172 So. 2d at 691-92 (Hawthorne, J., dis-senting). The dissent argued that measuring damages at the time of the breach leads to un-just results during periods of economic instability. The dissent provided an illustration in which *A* contracted to purchase *B's* horse for $300, and *B* breaches by failing to deliver. *Id.* at 692. *A* then finds a substitute horse for $350 three months after the breach. *Id.* The dis-sent stated:

> There is no question that *A* has sustained a loss of $50.00 by having to pay that amount over and above the price of the horse he had purchased from *B*. Yet if *A* is restricted to the date of the breach, the damages could not thus be measured because on that day *A* did not even know of the existence of the other horse. The proper time for measuring the damages, of course, is at the time of the new contract.

Id.

[134] *Kuhn*, 585 A.2d at 971.

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sellers' damage rules . . . of the Uniform Land Transactions Act, which New Jersey has not adopted."[135] The court reasoned that unlike the time of the breach measure of damages, ULTA takes "account of the effect of changing market conditions"[136] in a manner that better protects the non-defaulting party's expectation interest.[137] To achieve a fair result, the court stated that when a "seller puts the property back on the market and resells, the measure is not the contract price less value at the time of breach, but rather the resale price, if it is reasonable as to time, method, manner, place and terms."[138]

B.   Courts Have Protected Sellers' Expectation Interest Without Expressly Adopting ULTA

Although the court in *Kuhn* may have been the only court that applied ULTA § 2-504(a),[139] other courts have measured damages in a similar fashion. For example, in *Clever v. Clever*,[140] the plaintiff vendee contracted to purchase the defendant-vendor's farm on October 15, 1904, with the transfer of the deed to take place on April 1, 1905.[141] The contract stated that "I [seller] am to releas [sic] to the [buyer] the lease now held by Russell & Hykes."[142] After a dispute as to whether the vendor fulfilled this condition precedent to sale, the vendor resold the farm at a public sale for $3,825, which caused the seller to incur a $154 loss because of the plaintiff's refusal to pur-

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[135]   *Id.* The court is referring to ULTA § 2-504(a).

[136]   *Id. See also* Naylor v. Siegler, 613 S.W.2d 546 (Tex. Civ. App. 1981). Although the court in *Naylor* evaluated whether a liquidated damages clause constituted a penalty, the court found:

> It is impossible to forecast the damages which might flow to the seller of real property in the event of breach of the contract by the purchasers. Real property has a fluctuating value. There is no way to ascertain at any given time what the value of a particular tract of real property might be in the future.

Id. at 547; *Barry*, 309 S.W.3d at 141 (stating that "[r]ecent events in the nationwide real estate market show without a doubt that one year can make an enormous difference in the value of real estate . . . .").

[137]   According to the court in *White*, the decision in *Kuhn* appears to be the single instance that an appellate court adopted ULTA's "measure-of-damages rule for a buyer's breach." *White*, 987 N.E.2d at 253.

[138]   *Kuhn*, 585 A.2d at 971.

[139]   *Supra* note 137. For examples of courts that have calculated damages in a similar manner as ULTA § 2-504, see *supra* note 14.

[140]   38 Pa. Super. 66 (Pa. Super. Ct. 1908).

[141]   *Id.* at 67.

[142]   *Id.*

chase.[143] The plaintiff brought suit claiming that the seller breached and sought restitution of his initial $150 deposit.[144] On the other hand, the seller claimed that the buyer breached and sought damages for the difference between the original and resale contract prices.[145] The trial court found for the defendant as a matter of law on the contract's interpretation. As such, the defendant had a right to retain plaintiff's $150 deposit and awarded the defendant an additional $4.00.[146]

The appellate court reversed, finding the interpretation issue to be a matter of fact that should have been brought to the jury.[147] In addition, the court stated that if the jury finds that the seller complied with the conditions of sale, the seller would be entitled to "a verdict for any damages he suffered beyond the purchase money he received"[148] meaning that the seller would have a right to the difference between the original contract price and resale price. The court, citing *Bowser v. Cessna*,[149] stated that:

> the measure of damages, where there has been a re-sale, is the difference between the price agreed to be paid by the vendee and that obtained on the resale. It is predicated of course of the undisputed facts in the case that the resale was a public one, fairly conducted, after full notice to the public and the vendee, upon the same or as advantageous terms as the first . . . .[150]

This rule functions similarly, if not identically, to ULTA § 2-504.[151] When applying the rule, a court will give greater weight to the resale price when calculating damages as compared to measuring the vendor's damages at the fair market value at the time of the breach.[152] Like ULTA § 2-504, the rule stated by the court in *Bowser*

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[143] *Id.* at 70.

[144] *Id.* at 73.

[145] *Clever*, 38 Pa. Super. at 73.

[146] *Id.* at 70-71.

[147] *Id.* at 75.

[148] *Id.*

[149] 62 Pa. 148, 150 (1869).

[150] *Clever*, 38 Pa. Super. at 75 (internal citations omitted).

[151] For the full text of ULTA § 2-504(a), see *supra* note 14.

[152] When measuring damages at the time of the breach, resale price provides some evidence of fair market value. *Evergreen Land Co.*, 554 S.W.2d at 866. However, expert witnesses can successfully rebut this evidence by testifying that the fair market value at the time of the breach was greater than the amount the vendor resold the real property for. *See, e.g.*,

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provides the breaching party an opportunity to rebut the resale price by showing that the seller failed to make a good faith effort in mitigating his damages.[153]

C.   ULTA § 2-504 and the Rule in *Bowser* Provide a Workable Post-Breach Mitigation Standard for Non-breaching Vendors

The court in *Bowser* provides guidance to mitigate damages for a non-breaching real property seller when claiming a right to recover the difference between the contract and resale price.[154] In *Bowser*, the plaintiff vendor sold a parcel of real estate at a public sale on August 31, 1867, to the defendant for $2,600, with possession to transfer on October 1, 1867.[155] After the plaintiff tendered performance and the defendant refused to accept the deed, the plaintiff notified the defendant that he would resell the property and sue for the difference.[156] The plaintiff then "advertised the property in the same way, and upon the same terms, and sold it at a public sale on October 31, 1867, for $2,125."[157] The lower court ruled for the plaintiff, finding that he was entitled to recover the difference between the contract and resale price.[158]

The court in *Bowser* affirmed and held that the vendor was entitled to the difference between contract and resale price.[159] The court's holding was "predicated . . . [on] the undisputed facts in the case that the resale was a public one, fairly conducted, . . . upon the

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White, 987 N.E.2d at 247-48.

[153] *Id.* at 256 (Pigott, J., concurring) (finding that "[u]nder the ULTA rule . . . the seller's mitigation is very relevant, and would constitute a valid defense by a breaching purchaser on the issue of damages once the nonbreaching seller has made a prima facie case for breach of contract and entitlement to damages.").

[154] *Cf. supra* text accompanying notes 87-91, arguing that measuring damages at the time of the breach provides little guidance to a non-breaching vendor. Even if an injured seller makes a good faith effort in obtaining the highest possible resale price, his efforts can simply be rebutted with evidence that the fair market value at the time of the breach was greater.

[155] *Bowser*, 62 Pa. at 148-49.

[156] *Id.* at 149.

[157] *Id.*

[158] *Id.* The lower court found that the plaintiff had a right to recover "the full amount of the loss and damages suffered by reason of defendant's refusal to take the land at his bid. What is the amount of this loss? Manifestly the difference of the price on the resale of the property." *Id.*

[159] *Bowser*, 62 Pa. at 151.

same or as advantageous terms as the first, in short, that [the resale effort] was bona fide."[160] This mitigation standard is consistent with *Kuhn*.[161] The court in *Kuhn*, when applying ULTA § 2-504(a), stated that the resale be "in a manner that is reasonable as to method, manner, time, place and terms" to the breached contract.[162] The court in *Bowser* also provided, as did the concurrence in *White*,[163] that the breaching party may rebut the evidence of the resale price by showing that the seller did not sufficiently mitigate, such "as when the resale is wantonly delayed . . . ."[164]

The mitigation requirements set forth by the courts in *Bowser* and *Kuhn* provide a workable standard for a non-breaching vendor in protecting his expectation interest. After the breach, a seller should be reasonably certain that his mitigation efforts in reselling the property will not simply be rebutted with contrary evidence of the property's fair market value at the time of the breach.[165] Therefore, for a seller to protect his expectation interest and obtain the difference between the contract and resale price, the resale must be timely and on terms as favorable as the original contract.[166]

D.   ULTA § 2-504(a) Provides a Just Outcome for an Injured Seller

The ULTA § 2-504(a) standard to measure the seller's damages for breach of a real estate contract is a preferable remedy when compared to measuring damages at the time of the breach. ULTA adequately protects the seller's expectation interest by allowing a recovery of the original and resale contract price. At the same time, the remedy is fair for both parties because the breaching buyer may rebut the resale price by showing that the seller did not make a bona fide effort in mitigating his damages. The fairness of the ULTA standard may be shown by comparing the results in the prior hypotheticals, "*Example 1*"[167] and "*Example 2*,"[168] under the ULTA.

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[160] *Id.* at 150.

[161] *Kuhn*, 585 A.2d 967.

[162] *Id.* at 971.

[163] *White*, 987 N.E.2d at 254-56 (Pigott, J., concurring).

[164] *Bowser*, 62 Pa. at 151.

[165] *See White*, 987 N.E.2d at 256 (Pigott, J., concurring).

[166] *Bower*, 62 Pa. at 150; *Clever*, 38 Pa. Super. at 75.

[167] *Supra* text accompanying notes 55-58.

[168] *Supra* text accompanying notes 111-14.

In *Example 1*, Steve, the injured seller, contracted to sell Karen his home for $500,000. After Karen's breach, the fair market value of the home remained at $500,000. Steve eventually sold the home for $400,000 despite his best efforts in reselling it. Although Steve was allowed to retain Karen's $50,000 deposit, the court found that Steve did not suffer damages because the contact price equaled the fair market value at the time of the breach.

Had this court applied the ULTA standard, Steve would have recovered the additional $50,000, representing a full recovery of his expectation interest. The court would have found that Steve made a bona fide effort in mitigating his damages after Karen breached. In addition, the court's ruling would not have allocated the risk of loss of an uncontrollable event, the relocation of the town's major employer on Steve, the injured party. Instead, when applying the ULTA measure of damages, the risk of loss of an event beyond the control of either party is placed on the party most at fault—the party in breach.

The ULTA measure of a seller's damages may deter opportunistic breaches by a buyer because it does not guarantee a specific point in time when damages will be measured. Instead, an injured seller will be able to offset his damages so long as he sufficiently mitigates. In *Example 2*, Hamilton was able to predict that he would not incur damages for breaching his contract to purchase Jefferson's home because he breached during a stable market when the contract price and the fair market value at the time of the breach would likely be equal. Hamilton may not have fared as well under the ULTA standard. Assuming Jefferson sufficiently mitigated after the breach, Hamilton would have been liable for the difference between the contract price and the resale.

V.   CONCLUSION

The measure of damages for breach in real estate contracts falls short in protecting an injured seller's expectation interest. Instead, courts and legislatures should reconsider adopting the measure of damages provided in ULTA as a means to adequately protect the benefit of the seller's bargain. Under ULTA § 2-504(a), a seller can "recover any amount by which the unpaid contract price . . . exceeds

the resale price . . . ."[169] This standard better protects a seller's expectation interest than measuring damages at the time of the breach.

As mentioned in this Comment, ULTA allocates the risk of a falling real estate market on the more culpable party, the one in breach. Therefore, a seller will not have to bear the burden of a lower post-breach resale price due to a less advantageous real estate market and will not have to worry that market conditions will affect the amount of damages. In contrast, measuring damages at the time of the breach places the risk of a declining market on the seller—the non-beaching party. Second, when measuring damages at the time of the breach, a buyer can take advantage of a stable real estate market because it can predict that the contract price and fair market value of the property at the time of the breach will most likely be the same, leaving the seller without a claim for damages. In comparison, ULTA deters opportunistic behavior by a buyer deciding to breach the contract[170] because the injured seller can recover the difference between the original and resale price so long as he mitigates. Finally, measuring damages under the ULTA provides a workable mitigation standard. The seller should be certain that by timely placing the property back onto the market after the breach and by reselling under similar contract terms as the original, the seller will have a right to the difference between the original and resale price. This will help avoid the harsh consequence of measuring damages at the time of the breach, as a seller can simply provide evidence that the fair market value was greater than the resale price, limiting the seller's recovery, despite the seller's good faith effort to mitigate.[171]

As the general measure of damages continues to be calculated at the contract price, non-breaching real estate sellers will continue to be subject to unjust results. When a seller makes a contact to sell his property, it is reasonable for him to expect that he will ultimately realize the benefit of his bargain. Yet, when an injured seller seeks damages, he may find that he has a right to nothing, while the breaching buyer walks away unharmed. A seller has a right to expect more than this; adopting ULTA is the best remedy.

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[169] For ULTA § 2-504(a) in full, see *supra* note 14.

[170] *Supra* section IV (C).

[171] *See, e.g.*, *White*, 987 N.E.2d at 256 (Pigott, J., concurring).