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Sometimes Blackacre *Is* a Widget: Rethinking Commercial Real Estate Contract Remedies

TABLE OF CONTENTS

I. Introduction 636
II. The Foundation of the Uniqueness Doctrine 640
A. The Struggle Between Law and Equity 641
B. The Anglo-American "Particular Esteem" for Land 642
C. The Meaning of "Uniqueness" 648
II. Measuring Damages 650
III. The Modern Commercial Real Estate Industry 655
A. Income-Generating Real Estate for Investment 656
B. Land Acquired for Development 662
C. Real Property Acquired for Speculation 664
D. Real Estate Incidental to Other Business 666
IV. Revisiting the Uniqueness Doctrine 667
A. All Land is Not Unique 670
B. The Demise of the Doctrine 674
C. The Problem of Equity Jurisdiction 676
V. The Solution 680
A. No Adequate Remedy at Law 681
B. Buying and Selling the Cathedral 682
C. A Proposal 687
D. Where Do We Go From Here? 690
V. Conclusion 691

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I. INTRODUCTION

It is a cornerstone principle of the common law that real property is special. "Widgets and Blackacre are not the same," wrote one commentator, "and (at least arguably) ought not be treated identically in the law."[1] The distinction between real and personal property has important consequences in modern American law, none more evident than the treatment of remedies for the breach of a real estate purchase agreement.

Under the modern common law rule, if a seller breaches a contract for the sale of personal property, the purchaser can only receive specific performance of the contract if she is able to prove that she has no adequate remedy at law.[2] The purchaser may be able to do so, for example, by convincing the court that the property in question is irreplaceable, or that the circumstances of the transaction mean that damages would not be a fair and complete remedy.[3]

On the other hand, if a seller breaches a contract for the sale of Blackacre, a purchaser need not show that Blackacre is irreplaceable or that damages are difficult to estimate in order to receive specific performance—the common law does that for her. The social and economic rationales for granting special protection to the non-breaching purchasers of real estate have been distilled through the years to a succinct principle that this Article will refer to as the "uniqueness doctrine": "[M]oney damages are considered an inadequate remedy at law to a purchaser of land because all land is considered unique."[4]

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1. Nancy Perkins Spyke, *What's Land Got to Do With It?: Rhetoric and Indeterminacy in Land's Favored Legal Status*, 52 BUFF. L. REV. 387, 394 (2004) (quoting Arthur Allen Leff, *Unconscionability and the Code—The Emperor's New Clause*, 115 U. PA. L. REV. 485, 534–35 (1967)). *See also* John V. Orth, *Leases: Like Any Other Contract?*, 12 GREEN BAG 53, 60 (Autumn 2008) (arguing that contract rules are an "imperfect fit" when applied to leases because "[l]and, even in the form of residential apartments or office or retail space, is unlike the proverbial widget or bushel of wheat"). *But see* Robert J. Goldstein, *Green Wood in the Bundle of Sticks: Fitting Environmental Ethics and Ecology into Real Property Law*, 25 B.C. ENVTL. AFF. L. REV. 347, 404 (1998) ("[T]he belief that land is a unique type of property which mandates its unique treatment is anything but settled.").
2. *See* 3 E. ALLAN FARNSWORTH, FARNSWORTH ON CONTRACTS 162 (3d ed. 2000).
3. *See* Sokoloff v. Harriman Estates Dev. Corp., 754 N.E.2d 184, 188 (N.Y. 2001) ("Specific performance is an appropriate remedy for a breach of contract concerning goods that 'are unique in kind, quality or personal association' where suitable substitutes are unobtainable or unreasonably difficult or inconvenient to procure.") (quoting RESTATEMENT (SECOND) OF CONTRACTS § 360 cmt. c (1981)); FARNSWORTH, *supra* note 2 at 171 ("[I]t came to be recognized that equitable relief would not be granted if the legal remedy was adequate to protect the injured party."). *But see* Douglas Laycock, *The Death of the Irreparable Injury Rule*, 103 HARV. L. REV. 687, 692 (1990) (concluding that the "irreparable injury rule is dead" because "damages are never adequate unless the court wants them to be").
4. Bermont Lakes, LLC v. Rooney, 980 So. 2d 580, 586 (Fla. Dist. Ct. App. 2008). Although the doctrine is normally described as well-settled, there are many nu-

Although the uniqueness doctrine has become so enshrined in the common law that it is said to be "settled beyond the need for citation,"[5] this Article argues that *all* land is *not* unique. Sometimes, particularly in the context of commercial real estate, Blackacre *is* a widget. The uniqueness doctrine, which provides strong protection for nonbreaching purchasers of real estate, arose in England for sound social and economic reasons and was absorbed by American common law for equally sound, and sometimes overlapping, social and economic rea-

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ances. The aggrieved purchaser of Blackacre can more easily avail himself of equitable relief than can the aggrieved purchaser of a widget—that much is clear. But the precise path to that relief is less uniform. Terminology, tests, and standards vary slightly or significantly from court to court. Is specific performance on equal footing with damages, or is it the preferred remedy? Do trial courts have the jurisdiction to award equitable relief without a finding of fact that the plaintiff has no adequate remedy at law? Does it matter if the land in question is unique? Further confusing the issue is the tendency of courts to refer to different doctrines to support their decision to award or deny specific performance, particularly eminent domain cases and decisions regarding requests for injunctive relief. *See* FARNSWORTH, *supra* note 2 at 164; WILLIAM B. STOEBUCK AND DALE A. WHITMAN, THE LAW OF PROPERTY 738 (3d ed. 2000) ("The traditional bromide tells us that specific performance should be ordered only when the remedy at law is inadequate. When the purchaser seeks specific performance, this test is automatically deemed satisfied; each parcel of land is unique, and no other parcel can possibly be an exact substitute for the one the purchaser bargained to buy. Hence, damages are inadequate per se. This notion is generally accepted as a truism and the courts impose no duty on the purchaser to prove the unique qualities of the land for which he or she contracted.").

5. United Church of the Med. Ctr. v. Med. Ctr. Comm'n, 689 F.2d 693, 701 (7th Cir. 1982) ("It is settled beyond the need for citation . . . that a given piece of property is considered to be unique . . . ."); *see also* Crafts v. Pitts, 162 P.3d 382, 387 (Wash. 2007). The *Craft* court cited familiar precedent for the principle that "damages cannot adequately and completely compensate" a plaintiff who had sued for specific performance of a land contract because "[n]o piece of land has its counterpart anywhere else and it is impossible to duplicate by the expenditure of any amount of money." *Id.* at 384, 387 (quoting Carpenter v. Folkerts, 29 Wash. App. 73, 76 (1981)). The court then included the following footnote, which acknowledged that "others" had argued that the doctrine should be revisited, and then declined to do so:

> Others argue the motivation behind specific performance being the presumed remedy for land is deeper than land merely being unique or being difficult to value. Professor Cohen examines English history and early contract cases to develop a broader understanding beyond uniqueness and valuation problems. David Cohen, *The Relationship of Contractual Remedies to Political and Social Status: A Preliminary Inquiry,* 32 U. TORONTO L.J. 31 (1982). Cohen argues that the ancient relationship between land ownership and political identity, legal authority, and social status gave parcels of land paramount importance. *Id.* at 39. This integral relationship between land and status drove the development of early English contract law to carve out special remedies for landholders. *Whatever the rationale*, however, it is clear when a party breaches a contract to convey real property, the presumptive remedy is specific performance. 71 AM. JUR. 2D *Specific Performance* § 133 (2001) [emphasis supplied].

sons. Although valid and understandable in the historical context, none of those reasons apply to modern commercial real estate transactions. However, this Article argues, specific performance may nevertheless be the most appropriate remedy for many commercial real estate transactions. In addition, the strength and longevity of the common law presumption has resulted in economic reliance by the parties to commercial real estate transactions.

I develop this argument in two parts. First, I discuss the historical evolution of the uniqueness doctrine and the factors that led to the strong common law presumption that all land is unique. Exploring my typology of modern commercial real estate transactions, I argue that any intangible, unique attributes of real property are irrelevant where deals are valued and structured based on the quantifiable, commercial attributes of land. Recognizing the inapplicability of the uniqueness doctrine to commercial real estate does not, however, mean that courts should abandon the remedy of specific performance. Thus, in the second part of my argument, I argue that specific performance may still be the best remedy because damages are generally difficult to calculate, in large part because of the customary matrix of risk between sellers and purchasers which evolved in reliance on the stability of the uniqueness doctrine.

An inquiry into the legitimacy of the uniqueness doctrine is both an interesting doctrinal question and a substantive issue for an economy which, in 2008, included commercial real estate assets valued at approximately $6.5 trillion.[6] Given the surprising dearth of material on the subject, original empirical research was conducted by surveying experienced practitioners who specialize in commercial real estate transactions.[7] The results of the survey, which will be presented

6. William Patalon III, *Will the Dark Cloud of Commercial Real Estate Blot Out the U.S. Recovery?*, MONEY MORNING, April 1, 2009, http://www.moneymorning.com/2009/04/01/commercial-real-estate-crisis/ ("Here in the U.S. market, commercial real estate is worth about $6.5 trillion, and is financed by an estimated $3.1 trillion in debt.").

7. The 588 members of the American Bar Association Section of Real Property, Trust and Estate Law Commercial Real Estate Transactions Group were invited to participate in a survey via an email sent by the ABA on March 31, 2009. As of April 9, 2009, seventy-one members of the group had responded to the survey. In addition, an invitation to participate in a slightly different survey was sent on March 19, 2009 to twenty attorneys with whom the author practices, with an invitation for them to share it with other commercial real estate attorneys. As of April 9, 2009, forty-one attorneys responded to that invitation, for a total of 112 responses. The survey asked several questions aimed at identifying the practitioner's experience with commercial real estate. Question 1 asked: "Do you consider yourself primarily a real estate transactional attorney?" Over 90% answered "Yes." Question 2 asked: "How many years have you been practicing law?" Nearly 75% of the respondents reported that they had been practicing law for fifteen years or more. Most of the questions gave the respondents the opportunity to provide an open-ended answer. For example, Question 10 asked: "Do

throughout this Article, demonstrate that a significant number of those practitioners simultaneously question the legitimacy of the uniqueness doctrine[8] and defend the important role that specific performance plays in the commercial real estate industry.[9] The survey results highlight the sharp disconnect between the way that the principle is viewed by courts (i.e., entrenched, settled beyond the need for citation) and many practitioners familiar with the customs and practices of the commercial real estate industry (i.e., antiquated, simply wrong).

The survey reveals that the uniqueness doctrine is like the emperor with no clothes. Courts routinely echo the words—all land is unique—with rare attempts to explain or justify its modern applicability. Even those surveyed practitioners who defended the doctrine failed to provide any rationale other than adherence to historical precedent and a desire to protect the availability of specific performance.[10] It is this focus on protecting the equitable remedy, by courts and practitioners, which has permitted the fallacy of the uniqueness doctrine to persist. This Article argues that there is a doctrinally legitimate and practical argument to justify specific performance following the breach of at least a subset of commercial real estate contracts. This alternative justification does not fully resolve the problem because courts would still be required to determine which remedy is most appropriate in each case. To finally resolve the issue, I propose a statutory framework that grants parties the right to bargain for the remedy most appropriate for each transaction.

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you agree that specific performance is an important remedy for the Purchaser? Please explain." Approximately half of the respondents provided narrative responses. The survey was hosted by SurveyMonkey.com and a paper copy of all responses are on file with the author. Narrative responses made by survey respondents will be cited throughout this Article in the following form: "Marsh Survey, *supra* note 7, at Respondent ___.".

8. Approximately 60% of respondents rejected the uniqueness doctrine completely or argued that only some land is unique. A significant minority of practitioners argued that the uniqueness doctrine no longer justifies special treatment even for residential properties. *See* Marsh Survey, *supra* note 7, at Respondent 13-b ("The proposition that land is unique has always been wrong."); *id.* at Respondent 24-b ("The concept is antiquated."); *id.* at Respondent 2-b ("Some land is unique, not all."); *id.* at Respondent 20-b ("Property may be unique.").

9. Ninety-seven percent of respondents agreed with the statement that "specific performance is an important remedy for the purchaser." Marsh Survey, *supra* note 7.

10. Roughly 40% of the respondents echoed the maxim that "all land is unique." *See* Marsh Survey, *supra* note 7, at Respondent 10-b ("[A]ll land is unique. Location, location, location."); *id.* at Respondent 34-b ("I still tend to buy into the classic rationale."); *id.* at Respondent 63-c ("Real estate is a unique asset, and to convert it into a fungible commodity is like wearing a shoe that is too small.").

II. THE FOUNDATION OF THE UNIQUENESS DOCTRINE

For centuries, the general rule of the Anglo/American legal system has been that a breach of contract could only be remedied through an action for damages.[11] As one commentator wrote, "the Common Law of England made no attempt to actually enforce the performance of contracts, but gave the injured party only the right to satisfaction for non-performance."[12] Oliver Wendell Holmes noted that the concept crossed the Atlantic, famously stating that "[t]he duty to keep a contract at common law means . . . that you must pay damages if you do not keep it—and nothing else."[13] The historic preference for money damages remains clear today: "[s]pecific performance . . . will not be ordered if damages would be adequate to protect the expectation interest of the injured party."[14] As every first-year law student learns, the most significant exception to this rule is for contracts for the conveyance of real property.[15]

This remedies regime, and the uniqueness doctrine, arose in a particular social and economic context that existed during the development of the common law in England and the United States. Part I seeks to unpack the layered meanings of the word "unique" and that historical environment in which the doctrine developed. The uniqueness doctrine seems rational and appropriate in this context and in

11. Allan Farnsworth provides a very good description of the evolution of the common law courts and the chancery courts, and the different remedies available through each. *See* E. Allan Farnsworth, *Legal Remedies for Breach of Contract*, 70 COLUM. L. REV. 1145, 1150–58 (1970).

12. EDWARD FRY, A TREATISE ON THE SPECIFIC PERFORMANCE OF CONTRACTS 4 (1892). Lord Fry explained the preference for money damages:

> The . . . spirit of commerce which led to the enforcement of contracts, also brought in the notion that money is an equivalent of everything—is a universal common measure: and this, coupled with the simplicity of early contracts and the difficulty attendant on the specific performance of complicated ones, probably led to the arrested growth of the remedies for their breach and the confining of such remedies for the most part to the payment of money or the delivery of a chattel.

Id. at 4–5.

13. Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 462 (1897).

14. RESTATEMENT (SECOND) OF CONTRACTS § 359(1) (1981).

15. "Because land has long been considered 'unique' by the law, and because of the social and economic importance of land when the doctrines of equity were developed, a contract to convey land, or any interest therein, is specifically enforceable by the purchaser or by the vendor." 3 AMERICAN LAW OF PROPERTY: A TREATISE ON THE LAW OF PROPERTY IN THE UNITED STATES 173 (A. James Casner ed. 1952). The Right Honorable Sir Edward Fry, one of the Lords Justices of Appeal, identifies the first case of specific performance as a 1227 dispute where William, the son of Godwin, was accused of having "unjustly desseized Richard, the son of Maria de Brom," of a certain parcel of land. FRY, *supra* note 12, at 12–13. In an English ecclesiastical court, Richard ultimately was "held entitled to recover the seizin of the land." *Id.*

light of the "functional characteristics" of real property aptly summarized by Judge Loren Smith:

> Unlike money, or most personal property, [real property] is not fungible. Its location can never be exactly duplicated, and each location has a unique value. Second, the owner of land rarely has the same degree of liquidity as the owner of personal property such as stocks, bonds, gold, or the like. If someone does something I object to near my land, I generally have to deal with that action, rather than shift my assets. Third, people have deep emotional attachments to land that they rarely have towards the other common types of wealth. Fourth, a piece of land is part of a community, always connected to other land, and existing in a matrix of roads, rivers, and the whole of civilized society.[16]

A. The Struggle Between Law and Equity

Historically, justice in England was the business of the king alone. In the thirteenth century, however, the courts of common pleas, based at Westminster, split from the crown.[17] After the Magna Carta, the courts of common pleas implemented the rigid and precedent-based common law and had the authority to award only monetary damages in civil actions.[18] The king retained his inherent authority to decide cases and developed the courts of chancery "dispensing, not common law, but equity, which professed to give . . . redress on the merits of each case as it arose, unrestrained by precedents."[19]

The courts of chancery and the courts of common pleas operated separately to enforce different and complementary substantive and procedural rights.[20] During the sixteenth and seventeenth centuries, a power struggle developed between the two competing systems for jurisdiction over civil actions. Ultimately, "[t]he common law judges won the battle."[21] As a result, a wronged party could not seek relief

16. Loren A. Smith, *The Morality of Regulation*, 22 WM & MARY ENVTL. L. & POL'Y REV. 507, 518 (1998).

17. Justice Joseph Story discussed the origin of the Chancery Courts in his 1835 treatise on equity jurisprudence. JOSEPH STORY, COMMENTARIES ON EQUITY JURISPRUDENCE AS ADMINISTERED IN ENGLAND AND AMERICA 47–48 (14th ed. 1918). He noted that legal scholars differed on when the chancellors first began to hold courts of equity, with some arguing that they began with Henry IV (1367–1413) and others (including Lord Coke) arguing that they did not begin until the reign of Henry V (1386–1422), with significant expansion under the leadership of Cardinal Wolsey during the reign of Henry VIII (1491–1547). *Id.*

18. Judy Beckner Sloan, *Quantum Meruit: Residual Equity in Law*, 42 DEPAUL L. REV. 399, 404 (1992).

19. WILLIAM SHAWN MCKECHNIE, MAGNA CARTA: A COMMENTARY ON THE GREAT CHARTER OF KING JOHN 312 (1905).

20. *See, e.g.* Montana Co. v. St. Louis Mining & Milling Co., 152 U.S. 160, 167 (1894) ("The very great powers with which a court of chancery is clothed were given it to enable it to carry out the administration of nicer and more perfect justice than is attainable in a court of law.").

21. Sloan, *supra* note 18, at 406.

from the courts of chancery unless he proved that he had no adequate remedy in a court of law.[22]

The historic division between law and equity in the English system obviously informed the development of the American legal system. That law continues to dominate equity in our modern system is clear from the jurisprudence of remedies.[23] State and federal courts consistently characterize equitable relief as an "extraordinary" remedy which "should be granted with caution" and as a last resort.[24] In the event of a breach of contract, treatises explain—and courts consistently hold—that monetary damages are the preferred remedy and that "[e]quity has no jurisdiction where there is an adequate, complete, and certain remedy at law."[25]

B. The Anglo-American "Particular Esteem" for Land

Historically, there are a handful of exceptions to the general requirement that a plaintiff must establish that she has no adequate remedy at law to receive specific performance,[26] but contracts involv-

22. Sloan, *supra* note 18, at 406; *see also* WILLIAM HOLDSWORTH, HISTORY OF ENGLISH LAW 457 (7th ed. 1956) ("It was not till the eighteenth century that it was settled that equity would only grant specific relief if damages were not an adequate remedy.").

23. *See* Farnsworth, *supra* note 11, at 1145 ("The historical development of the parallel systems of law and equity may afford an adequate explanation of the reluctance of our courts to grant specific relief; it is scant justification for it."); *see also* Sidney Post Simpson, *Fifty Years of American Equity*, 50 HARV. L. REV. 171, 172, 174 (1936) ("A considerable part of the jurisdiction and doctrines of equity has been long settled, in the large, and may be regarded as standardized and mostly static [including] specific performance of land contracts. . . . For the most part, the present doctrines of American equity courts as to contracts for the sale of land would have seemed familiar enough to American lawyers of 1887, or, for that matter, to Lord Eldon and Chancellor Kent.").

24. *See* Dible v. City of Lafayette, 713 N.E.2d 269, 272 (Ind. 1999) ("'A mandatory injunction is an extraordinary equitable remedy which should be granted with caution.'") (quoting Campbell v. Spade, 617 N.E.2d 580, 583 (Ind. Ct. Ap. 1993)); FARNSWORTH, *supra* note 2, at 163–62 ("Equitable remedies were therefore readily characterized as 'extraordinary.'").

25. JAMES W. EATON, HANDBOOK OF EQUITY JURISPRUDENCE 31 (1901); *see also* RESTATEMENT (SECOND) OF CONTRACTS § 359(1) (1981) ("Specific performance or an injunction will not be ordered if damages would be adequate to protect the expectation interest of the injured party."); FARNSWORTH, *supra* note 2, at 170 ("The historical limitation on the availability of specific performance and injunction has persisted in spite of the merger of law and equity . . . ."); Steven Shavell, *Specific Performance Versus Damages for Breach of Contract: An Economic Analysis*, 84 TEX L. REV. 831, 858 (2006) ("[S]pecific performance is still an unusual remedy under the Uniform Commercial Code, authorized only where goods are unique or in certain other circumstances.").

26. Common exceptions include "contracts for the sale of paintings, antiques, patents, franchises, licenses, and untraded stock." Shavell, *supra* note 25, at 858. Some antebellum courts used the uniqueness doctrine to hold that the parties to a contract for the purchase and sale of slaves also had no adequate remedy at

ing land are the most significant.[27] This is consistent with a fundamental dichotomy in English common law—the categorical distinctions between real and personal property.[28]

A number of commentators have discussed the origins of the preference for real property in the common law.[29] As one put it, "[t]here is little doubt that land is the darling of Anglo-American law."[30] Land developed this favored status in England and America, respectively, for very different reasons. In England, parcels of land and the titles that sometimes accompanied them were bestowed by the monarch on

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law. *See, e.g.,* Mangus v. Porter, 276 So. 2d 250, 251 n.1 (Fla. App. 1973) ("It is a well-established legal principle that a court of equity will grant specific performance of a contract involving personal property when the property is of a unique character and value, such as an antique, and there is no adequate remedy at law."); Young v. Burton, 16 S.C. Eq. 255, 260, 262, 1841 WL 2598 at *3–4 (S.C. App. Eq. May 1841) ("The principles on which the English courts proceeded in the cases referred to, and in enforcing the specific performance of contracts for the sale of land, strike me forcibly as applying directly, and irresistibly, to the case of slaves generally. . . . Is there any thing in a barren sand hill that could attach a purchaser to it, and give it a peculiar and special value that may not be found in an able, honest, and faithful slave?").

27. *See, e.g.*, Tauber v. Quan, 938 A.2d 724, 732 (D.C. 2007) ("[I]t is routine for courts to enforce contracts to purchase real estate by ordering that they be specifically performed."); In re Smith Trust, 745 N.W.2d 754, 759 (Mich. 2008) ("[C]ontracts involving the sale of land are generally subject to specific performance."); Crafts v. Pitts, 162 P.3d 382, 387 (Wash. 2007) ("It is well established that a court may use its equitable powers to order a party to convey land.").

28. Although he notes that deconstructionist legal scholars, such as Duncan Kennedy, are critical of such common-law distinctions as "social constructions" which provide a "false sense of the orderliness of legal thought," Michael Allan Wolf argues that the distinctions between the categories of real and personal property are important in a number of contexts, particularly with respect to regulatory takings. Michael Allan Wolf, *Taking Regulatory Takings Personally: The Perils of (Mis)Reasoning by Analogy*, 51 ALA. L. REV. 1355 (1999). Wolf argues that "judges should resist the temptation to collapse categories and [should] instead . . . maintain, or even erect, meaningful distinctions." *Id.* at 1357 (quoting Duncan Kennedy, *The Structure of Blackstone's Commentaries*, *in* CRITICAL LEGAL STUDIES 139, 142 (Alan C. Hutchinson ed., 1989)).

29. Anthony (Tony) Arnold, *The Reconstitution of Property: Property as a Web of Interest*, 26 HARV. EVNTL. L. REV. 281 (2002); Lawrence V. Berkovich, *To Pay Or To Convey?: A Theory of Remedies for Breach of Real Estate Contracts*, 1995 ANN. SURV. AM. L. 319 (1995); Cohen, *supra* note 5; Spyke, *supra* note 1. *But see* Claire Priest, *Creating an American Property Law: Alienability and Its Limits in American History*, 120 HARV. L. REV. 385, 386–87 (2006) (focusing on laws shielding real property from the claims of creditors and arguing that beginning with the 1732 Act for the More Easy Recovery of Debts in His Majesty's Plantations and Colonies in America, this "legal transformation likely led to the greater commodification of real property" in America) (citing 1 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 182 (Boston, Hilliard, Gray, & Co. 1833)) (Changes in colonial property law "[made] land, in some degree, a substitute for money, by giving it all the facilities of transfer, and all the prompt applicability of personal property.").

30. Spyke, *supra* note 1, at 420.

favored nobles. More broadly, the ownership of land was required to vote and hold political office.[31] Thus, land "bestowed intangible political authority and social status upon its owner."[32] Some scholars have explained that this is the origin of the preference for specific performance in real estate cases because "while a substitute parcel of land could have been acquired by the non-breaching buyer, an otherwise comparable parcel might not confer equivalent political or social privileges."[33] It has been noted that the Anglo-American approach in this regard is "remarkable": "In all systems we should expect to find some legal distinction between immovable and movable things; but the English division is much more than that. Real property is, in its origin, not a species of private ownership, but a quasi-political status . . . ."[34]

The high concentration of land ownership in a small number of families, plus the fact that land remained in a particular family for generations, gave rise to the "sentimental attachment" described by Alexis de Tocqueville: "[F]amily feeling finds a sort of physical expression in the land. The family represents the land and the land the family, perpetuating its name, origin, glory, power and virtue. It is an imperishable witness to the past and a precious earnest of the future."[35]

The rigid feudal system did not serve the common man well. The vast majority of the population lived and worked on land that belonged to another, a situation that created the potential for personal and political instability. The land distribution system in the American colonies was initially modeled on England as the crown handed out vast land grants to nobles and colonizing companies.[36] But there were two major differences between colonial America and England: (1) the land was completely unimproved; and (2) there was not nearly

31. Berkovich, *supra* note 29, at 383 (citing Cohen, *supra* note 5, at 52).
32. Berkovich, *supra* note 29, at 348; *see also* McKechnie, *supra* note 19, at 95 ("Practically every holder of land in England came to be also the holder of a court for the inhabitants of the land.").
33. Berkovich, *supra* note 29, at 347–48 (citing Cohen's conclusion).
34. Roland Knyvet Wilson, History of Modern English Law 17 (1875) ("[English common law] refused to recognize any private rights over land except rights of occupation, more or less permanent, conditional on the rendering of certain services to the sovereign . . . [an approach] traceable partly to feudalism, partly to the primitive tribal institutions of the Teutonic race."). *But see* Edmund Batten, A Practical Treatise on the Law Relating to The Specific Performance of Contracts 244–45 (1849) (arguing that the routine granting of specific performance in real estate purchase agreements did not arise from "any distinction between realty and personalty" or "because of the real nature of land").
35. Alexis de Tocqueville, Democracy in America 52 (J.P. Mayor ed., George Lawrence trans., 1988). De Tocqueville's description broadly referred to the sentimental attachment to land in countries which have laws of inheritance based on primogeniture.
36. *See generally* Charles A. Beard and William C. Bagley, The History of the American People 100–102 (1918).

enough available labor to improve it. These challenges led to the practice in certain parts of the colonies of broadly granting land in smaller parcels. The early colonists quickly adapted to the idea and it came to be that "[o]ne of the greatest attractions which America held for the colonists was the opportunity to obtain possession of land."[37] Richard Coote, the Earl of Bellomont and governor of New York, wrote to the Lords of Trade in 1698, complaining that the old system of granting large tracts in New York was suppressing settlement there: "What man will be such a fool as to become a base tenant [in New York] when for crossing the Hudson's River that man can for a song purchase a good freehold in the Jerseys?"[38]

As the Earl's letter suggested, colonies that employed a broader land distribution system were more successful in attracting immigrants and, after the Revolution, the new states and the federal government continued that model.[39] Following each major conflict from the Revolution through the Civil War, veterans were given the right to claim land in the undeveloped West.[40] The Homestead Acts and their predecessors made land nearly universally available at a nominal price to those willing to work to improve it.[41] Beginning in 1862, and for the next half-century, the Homestead Acts allowed nearly 800,000 American households to acquire 285 million acres of land, nearly one-eighth of the total acreage of the United States.[42]

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37. THURMAN W. VAN METRE, ECONOMIC HISTORY OF THE UNITED STATES 45 (1921).

38. VAN METRE, *supra* note 37, at 47; *see* Orin Grant Libby, *The Geographical Distribution of the Vote of the Thirteen States on the Federal Constitution, 1787-8*, *in* 1 BULLETIN OF THE UNIVERSITY OF WISCONSIN 1, 18–26 (June 1894) (explaining that by perpetuating the landed aristocracy, colonial New York "oppos[ed] the general current of settlement").

39. The Land Ordinance of 1785 was the first act following the Revolution to organize the sale of lands in the Northwest Territory; *see* E. WADE HONE, LAND AND PROPERTY RESEARCH IN THE UNITED STATES 127–28 (1997). Buyers were required to purchaser no less than 640 acres, a tract much too large for a single family to improve and farm. *Id.* Due to the failure to attract sufficient settlers, the Land Laws of 1796 and 1800 both reduced the minimum acreage for purchase. *Id.*

40. KENNETH HAWKINS, RESEARCH IN THE LAND ENTRY FILES OF THE GENERAL LAND OFFICE (RECORD GROUP 49), NATIONAL ARCHIVES AND RECORDS ADMINISTRATION GENERAL INFORMATION LEAFLET 3 (1997) ("The United States issued bounty land warrants to attract enlistments during the Revolutionary War, the War of 1812, and the Mexican War, and, during the 1850s, to reward service in these conflicts and in a variety of Indian wars, Indian removal, and other military actions.").

41. The first Homestead Act was passed on May 20, 1862 and provided that each household, including widows and single men and women over the age of twenty-one, who owned less than 160 acres could apply for the right to homestead land so that their total holdings would not exceed 160 acres. HONE, *supra* note 39, at 140–41. Homesteaders were required to live on the land for five years and meet other obligations, including cultivating and improving it. *Id*.

42. HONE, *supra* note 39, at 140.

Throughout the nineteenth century, as the vast majority of American households became landowners,[43] the idea of the "yeoman farmer" became inexorably linked with the American self-image. Our sentimental attachment to the land is a consistent theme in popular literature, music, and film.[44] For example, in John Ford's 1940 *The Grapes of Wrath*, the character of Muley Graves confronts the agent of the bank that foreclosed on his farm:

> I'm right here to tell you, mister, there ain't nobody gonna push me off my land! My grandpaw took up this land seventy years ago. My paw was born here. We was all born on it. An' some of us was killed on it. An' some of us died on it. That's what makes it our'n. Bein' born on it and workin' on it and dyin', dyin' on it.[45]

Broad private ownership of land also became thought of as a necessary prerequisite for democracy.[46] A schoolbook popular in the nineteenth century attributes the following to Thomas Jefferson: "[T]he man who owns his own land and looks to the sun in heaven and to the labor of his hands for his sustenance, can have the spirit of independence which is the life breath of republics."[47]

For much of this nation's history, the majority of the population literally lived off the land, which served both as residence and liveli-

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43. HONE, *supra* note 39, at xi ("It is estimated that by the mid-1800s, as many as ninety percent of all adult white males owned land in the United States.").

44. *See, e.g.,* JOHN MELLENCAMP, *Rain on the Scarecrow*, *on* SCARECROW (Mercury Records 1985) (During the family farm crisis of the 1980s—"Scarecrow on the wooden cross, blackbird in the barn/ Four hundred empty acres that used to be my farm/ I grew up like my daddy did, my grandpa cleared this land/ When I was five I walked the fence while Grandpa held my hand/ Rain on the scarecrow, blood on the plow/ This land fed a nation, this land made me proud/ And son I'm just sorry there's no legacy for you now."); GONE WITH THE WIND (Selznick Int'l Pictures 1939) (Gerald Butler chastised his daughter: "Do you mean to tell me, Katie Scarlett O'Hara, that Tara, that land doesn't mean anything to you? Why, land is the only thing in the world worth workin' for, worth fightin' for, worth dyin' for, because it's the only thing that lasts.").

45. GRAPES OF WRATH (20th Century Fox 1940). Muley Graves' impassioned speech to the foreclosure agent was included in the original John Steinbeck novel, but the succinct version quoted above appears only in the film.

46. "[T]he great step toward a modern world was taken when ownership of land shifted from the lord proprietor or the colonizing company to the individual. That was the step that made America." PEARL JANET DAVIES, REAL ESTATE IN AMERICAN HISTORY 1 (1958); *see also* Geoffrey D. Korff, *Reviving the Forgotten American Dream*, 113 PENN. ST. L. REV. 417, 419–20 (2008) ("Broad ownership of productive property, what we now call capital, was a widely lauded, key aspect of democracy according to the founders of America. The argument is still true today. Widespread capital ownership is necessary for sustainable growth and for a functional democracy.").

47. BEARD, *supra* note 36, at 102. In 1821, Daniel Webster shared a similar thought: "A country of such vast extent . . . so secure in the title it confers on every man to his own acquisitions,—needs nothing but time and peace to carry it forward to almost any point of advancement." SCOTT NEARING, THE AMERICAN EMPIRE 106 (1921).

hood.[48] As Muley Graves' monologue suggests, this reliance on a particular parcel of land, improved by a family's own labors, the location of their joys and tragedies, further strengthened the emotional connection to and identification with it.

It should be no wonder, then, that if the idea that every man should be able to own land is so central to the American identity, the law would protect it.[49] As Alexis de Tocqueville observed in the 1830s: "In no other country in the world is the love of property keener or more alert than in the United States, and nowhere else does the majority display less inclination toward doctrines which in any way threaten the way property is owned."[50]

In twenty-first century America, however, the ownership of land no longer conveys the same political authority and social status that it did in feudal England and colonial times. Nor do most Americans depend on the fruits of their land to feed their families.[51] But the "sentimental attachment" to land in popular culture and the common law persists, particularly with respect to homes.[52] The National Housing

48. According to the federal census, farmers made up the majority of the American labor force through 1880. *See* A History of American Agriculture 1840, http://www.agclassroom.org/gan/timeline/1840.htm; (last visited April 11, 2010); *see generally* BEARD, *supra* note 36, at 100 ("[I]t should be remembered that the foundation of American self-reliance was in the cheap land and the system of small farms owned outright. Nine tenth of the people got their living from the soil."); DEBORAH KAY FITZGERALD, EVERY FARM A FACTORY: THE INDUSTRIAL IDEAL IN AMERICAN AGRICULTURE (James C. Scott ed., 2003).

49. NEARING, *supra* note 47, at 106 ("Men were free to get what they could, and once having secured it, they were safeguarded in its possession. Property ownership was a virtue universally commended. Constitutions were drawn and laws were framed to guarantee to property owners the rights to their property . . . "); *see also* HENRY L. DIAMOND & PATRICK F. NOONAN, LAND USE IN AMERICA 13 (1996) ("Land . . . has a possessive, emotional appeal, as well as an economic dimension, and decisions about its use are seldom made on a purely rational basis.").

50. DE TOCQUEVILLE, *supra* note 35, at 638–39. The same could be said in reference to the popular reaction to *Kelo v. City of New London*, 545 U.S. 469 (2005).

51. Eduardo Moisès Peñalver, *Is Land Special? The Unjustified Preference for Landownership in Regulatory Takings Law*, 31 ECOLOGY L.Q. 227, 259–60 (2004).

> The small farmer is a dying breed in the United States. According to census data, less than one percent of the U.S. population is engaged in farming as a primary occupation. Even in rural areas, only 7.6 percent of employment is in agriculture. Were the fate of liberty dependent on the survival of such a lifestyle, these would indeed be frightening statistics. Although the prevalence of small farmers in the early republic may well have made it plausible for men like Thomas Jefferson to see an essential connection between such forms of landownership and liberty, the apparent survival of our liberties despite the disappearance of small-scale agriculture should at least give pause to contemporary adherents of that position.

Id.

52. *See, e.g.*, Jones v. Miles, 658 S.E.2d 23, 25 (N.C. Ct. App. 2008) (Mr. and Mrs. Thomas refused to sell a portion of their land to Mr. Jones, stating that the land "had been a gift from God"); *In re* Estate of Olson, 744 N.W.2d 555, 563 (S.D.

Act of 1934 and the resulting creation of the Federal Housing Administration made homeownership possible for most American families.[53] Broad ownership leads to social expectation. As President George W. Bush proclaimed in 2008, "For many Americans, owning a home represents freedom, independence, and the American dream."[54]

C. The Meaning of "Uniqueness"

As this brief history suggests, at least through the nineteenth century, money damages were rightly considered to be categorically inadequate for the breach of a real estate purchase agreement for at least three reasons: (1) sentimental attachment or entanglement with family identity; (2) land was bound together with non-quantifiable social and political benefits; and (3) the lack of a functioning market meant that there was no such thing as "market value." The word "unique" came to be used to encompass these factors, and as shorthand for the resulting presumption that a court could not award a wronged purchaser money damages sufficient to acquire a substitute.[55] As one commentator put it: "English courts came to regard money damages

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2008) ("While the appraiser indicated such homesteads could be bought and sold without difficulty, that fact ignores the family's historical and sentimental attachment to this land which transcends monetary valuation. It was not just Glenn's investment to be sold when the opportunity for profit presented itself, it was his home.").

53. Korff, *supra* note 46, at 437.

54. George W. Bush, Proclamation No. 8263, 73 Fed. Reg. 31747 (May 29, 2008). Maintaining a high level of homeownership is popularly understood to be an important goal for a number of reasons. "Research has shown that . . . benefits include increased civic engagement that results from having a stake in the community, and better health, school, and behavioral outcomes for children." Katie Jones, *Preserving Homeownership: Foreclosure Prevention Initiatives*, CONGRESSIONAL RESEARCH SERVICE 3 (July 6, 2009), *available at* http://opencrs.com/document/R40210/ (citing Donald R. Haurin et al., *The Impact of Homeownership on Child Outcomes*, Joint Center for Housing Studies, Harvard University, Low-Income Homeownership Working Paper Series, October 2001, http://www.jchs.harvard.edu/publications/homeownership/liho01-14.pdf, and Denise DiPasquale & Edward L. Glaeser, *Incentives and Social Capital: Are Homeowners Better Citizens?*, National Bureau of Economic Research, NBER Working Paper 6363, Cambridge, MA, January 1998, http://www.nber.org/papers/w6363.pdf)). Geoffrey Korff provides a realistic alternative to the rosy view that rising rates of homeownership are an unmitigated good:

> The dream of home ownership has almost ubiquitously been transformed into another mode of indebtedness from which the typical "owner" faces 30 years of debt payment to own his home outright, or the potential of foreclosure and a reversion to rental living, or possibly homelessness. Regardless of what moral judgment can and perhaps should be made about this trend, one thing is clear: poor and working people are falling further behind, relative to their wealthier neighbors, and increasing rates of home ownership have not altered this fact.

Korff, *supra* note 46, at 428.

55. FARNSWORTH, *supra* note 2, at 175.

as the norm and specific relief as the deviation. Only for land, which English courts regarded with particular esteem, was a general exception made, on the ground that each parcel of land was "unique" so money damages were inadequate."[56]

The history of land ownership in England and America clearly informed the notion that all land is unique.[57] Although it is difficult to pinpoint when the formulation first appeared, by the end of the nineteenth century, the uniqueness doctrine was entrenched and it has long been described as a well-established rule.

> The most frequent use of the equity of specific performance is in the case of contracts for the sale of real property. One who has contracted to purchase a particular tract of land cannot get its exact counterpart anywhere, with all its surroundings and conveniences. It is a unique thing, not capable of being duplicated.[58]

Although the phraseology of the uniqueness doctrine varies slightly from state to state, the principle has remained static. For example, under Missouri law, specific performance is the preferred remedy "on the theory that land is unique and has a peculiar value"[59] while Washington law holds that "because land is unique, it has no

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> A critical factor in determining whether damages are an adequate remedy is whether money can buy a substitute for the promised performance. If a substitute can readily be obtained, the damage remedy is ordinarily regarded as adequate. Because entering into a substitute transaction is a more efficient way of preventing further injury than is specific performance or an injunction, there is good reason to limit the injured party to damages in such a case.

Id.

56. E. ALLAN FARNSWORTH, CONTRACTS 741 (4th ed. 2004). For an example of an early English case using the concept of uniqueness, see J.H. BALFOUR BROWNE, THE LAW OF COMPENSATION 718–35 (1896) (reprinting the 1833 unpublished case of *Countess Ossalinsky v. Corporation of Manchester* where a member of the High Court of Justice stated "[a]s to this particular piece of land, I will not say it is unique, but it is very nearly unique.").
57. The idea that land is unique also exists outside the Anglo-American legal system. *See, e.g.*, Wendy Espeland, *Legally Mediated Identity: The National Environmental Policy Act and the Bureaucratic Construction of Interests*, 28 LAW & SOC'Y REV. 1149, 1160–61 (1994) ("The Yavapais' relationship to their land helps to define them as a people and as individuals. They believe that their land is unique and intrinsically valuable, just as people are unique and intrinsically valuable, and that the value of land cannot be expressed as a commodity, or as somehow commensurable with other valued things."); James Scheinman, *Symposium: the Evolution and Impact of Jewish Law, Jewish Business Ethics*, 1 U.C. DAVIS J. INT'L L. & POL'Y 63, 74 (1995) ("The Talmud explains that each parcel of land is unique, and thus impossible for the courts properly to value.") (citing EDWARD ZIPPERSTEIN, BUSINESS ETHICS IN JEWISH LAW 87 (1983)).
58. *See* EATON, *supra* note 25. In 1932, the *Restatement (First) of Contracts* repeats the rationale—"A specific tract is unique and impossible of duplication by the use of any amount of money." § 360 at cmt. a (1932).
59. State *ex rel*. Place v. Bland, 183 S.W.2d 878, 890 (Mo. 1944); *see also* Southampton Wholesale Food Terminal v. Providence Produce Warehouse Co., 129 F. Supp. 663, 664 (D. Mass. 1955) ("Since the law regards land as unique . . .").

readily ascertainable market value."[60] The *Restatement (Second) of Contracts* explains that: "A specific tract of land has long been regarded as unique and impossible of duplication by the use of any amount of money. Furthermore, the value of land is to some extent speculative."[61] In Vermont, damages are considered to be "necessarily inadequate,"[62] so "[u]nless some countervailing equitable consideration exists, [specific performance] is usually granted as a matter of course."[63]

II. MEASURING DAMAGES

Despite this well-established preference for equity, courts have had numerous occasions over the years to establish a regime for awarding damages to an aggrieved purchaser—either because the purchaser did not desire specific performance, or because the seller was unable to convey title. The standard measure of damages for the total breach of a real estate purchase agreement is the difference between the contract purchase price and the market value of the land on the date of the breach or the scheduled date of closing.[64] This measure is variously referred to as general or "loss of bargain" damages.[65] For example, if the seller agreed to convey Blackacre for $2.5 million and the

60. Brotherson v. Prof'l Basketball Club, L.L.C., 604 F. Supp. 2d 1276, 1293 (W.D. Wash. 2009) (citing Tombari v. Griepp, 350 P.2d 452, 454–55 (Wash. 1960)).
61. RESTATEMENT (SECOND) OF CONTRACTS § 360 cmt. e (1979).
62. Fowler v. Sands, 73 Vt. 236, 236 (1901).
63. Villeneuve v. Bovat, 262 A.2d 925, 925 (Va. 1970).
64. WILLIAM B. STOEBUCK & DALE A. WHITMAN, THE LAW OF PROPERTY 724 (3d ed. 2000); *see also* Hoang v. Hewitt Ave. Assocs., LLC, 936 A.2d 915, 935 (Md. Ct. Spec. App. 2007) ("In a purchaser's breach of contract action for failure to convey real property, a direct profit loss is the difference in fair market value of the property on the day settlement was to take place and the day the contract was made. Thus, if but for the seller's failure to convey as promised, the buyer would have owned property on the day of settlement that was worth more than it was worth on the day the contract was made, the buyer may recover that direct loss . . ."); Normadin v. Eastland Partners, Inc., 862 N.E.2d 402, 416 (Mass. App. Ct. 2007) ("The usual measure of damages for breach of a purchase and sale agreement is the difference between the contract price and the fair market value of the land as of the date the conveyance was to occur."); Hickey v. Griggs, 738 P.2d 899, 902 (N.M. 1987) ("The general rule is that the purchaser is entitled, as general damages, for the refusal or inability of the vendor to convey, to recover the difference between the actual value of the property and the contract price."); AMERICAN LAW OF PROPERTY, *supra* note 15, at 170 ("Under the rule generally prevailing in the United States, however, such distinctions are unnecessary. The purchaser is, in every case where the vendor has broken his contract without legal excuse, entitled to the difference between so much of the contract price as is unpaid and the market price of the land; or, stated otherwise, the difference between the actual value of the land and the agreed price together with any payments he may have made.").
65. *Hoang*, 936 A.2d at 935 (referring to "direct profit loss" damages); *Hickey,* 738 P.2d at 902 (referring to this measure as "general" damages).

fair market value on the date of the breach was $3 million, the purchaser's damages would be $500,000.[66] If, however, the fair market value of Blackacre declined as of the date of the breach, the purchaser would be entitled to no general damages.[67] "In a rough sense," wrote one commentator, "general damages represent the non-breaching party's lost profit on the transaction."[68]

There are two categories of special damages that may be also recovered by the non-breaching purchaser: reliance damages and expectation damages. Reliance damages—sometimes also called "incidental damages"—are generally understood to include costs incurred by the purchaser in reliance upon seller's promise to convey the property.[69] Courts generally limit reliance damages to normal expenses such as title, survey, attorneys' fees, inspections, and increased costs of financing and construction due to delays caused by the seller's breach.[70] A non-breaching party is required to mitigate reliance damages and will not be reimbursed for damages incurred after the breach.[71] Some jurisdictions do not treat reliance damages as a separate category of "special" damages but instead include reimbursement of these costs automatically in the award of general damages.[72]

66. *See* BSL Dev. Corp. v. Broad Cove, Inc., 577 N.Y.S.2d 98, 99 (N.Y. App. Div. 1991). *But see* Foster v. Bartolomeo, 581 N.E.2d 1033, 1035 (Mass. App. Ct. 1991) (holding that "the 'usual rule' [of general damages] is not a rigid rule," to justify limiting a purchaser's damages to $260,000, which represented a projected profit margin of 20% rather than $575,000, which represented the difference between the market value of $1,875,000 and the contract price of $1,300,000).

67. *See, e.g.*, Mihalich v. Heyden, Heyden, & Hindinger, II, 2003 WL 21276186 (Ohio. Ct. App. June 4, 2003) (remanding back to trial court to permit purchaser to submit evidence of lost profits in case where the contract price was $500,000, the actual value of the property was $400,000, and purchaser was therefore awarded $1 in nominal damages by the trial court).

68. STOEBUCK & WHITMAN, *supra* note 64, at 724. Of course, that "lost profit" assumes that the purchaser would have immediately flipped the property to a third party, which only the third category of purchasers, speculators, would have been likely to do.

69. FARNSWORTH, *supra* note 2, at 153.

70. St. Lawrence Factory Stores v. Ogdensburg Bridge and Port Auth., 810 N.Y.S.2d 532, 533 (N.Y. App. Div. 2006) ("We likewise reject plaintiff's contention that it is entitled to reliance damages for the costs incurred in preparing to develop a factory outlet center. The contract in question does not require plaintiff to engage in any of the preparatory tasks for which it seeks to be compensated."); AMERICAN LAW OF PROPERTY, *supra* note 15, at 170 ("Special damages may also be awarded for losses which are the natural and proximate result of the vendor's breach, such as his expense for attorney's fees in having the title searched or for similar work in connection with the transaction."); RICHARD R. POWELL, POWELL ON REAL PROPERTY §81.04[1][c] (Michael Allan Wolf ed., 2000).

71. POWELL, *supra* note 70, at §81.04[1][c].

72. *See, e.g.*, Astoria Caterers, Inc. v. J&P 1870 Realty Corp., 806 N.Y.S.2d 242, 244 (N.Y. App. Div. 2005) ("The proper measure of damages in an action to recover damages for the breach of a contract for the purchase of real property is the difference between the contract price and the market value at the time of the

Courts often hesitate to award expectation damages or lost profit damages on the theory that the general damages plus direct reliance damages normally equate to lost profits.[73] When considered by the courts, expectation damages are designed to protect "the expectation that the injured party had when making the contract by attempting to put that party in as good a position as it would have been in had the contract been performed."[74] Expectation damages are subject to the foreseeability rule set forth in *Hadley v. Baxendale*,[75] which provides that lost profits "can be the basis of recovery only if they were within the contemplation of the parties when the contract was made."[76] To receive expectation damages, the plaintiff's injury "must be proved with reasonable (although not total) certainty."[77] In most commercial

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breach, together with a reasonable attorney's fee and other expenses necessarily incurred in reliance upon the contract, with interest from the date of the breach.").

73. Lindemuth v. Morgason, 2006 WL 768911, at *1 (Ken. Ct. App. Mar. 24, 2006)
> It is fundamental contract law that a non-breaching party suing under a contract is requesting the court to place him or her in as good a position as if the contract had been performed. This measure of damages, also known as the expectation interest, generally consists of lost profits and any incidental or consequential losses occasioned by the breach of contract which may be proved with reasonable certainty when such losses are within the contemplation of the parties. *In a real estate transaction,* the measure of lost profits is generally the difference between the market value of the property and the contract price of the property, together with any costs associated with the purchase.

Id. (emphasis added).

74. FARNSWORTH, *supra* note 2, at 149. *But see* L.L. Fuller & William R. Perdue, Jr., *The Reliance Interest in Contract Damages: 1*, 46 YALE L.J. 52, 52–53 (1936).
> [Expectation damages] 'compensate' the plaintiff by giving him something he never had. This seems on the face of things a queer kind of 'compensation.' We can, to be sure, make the term 'compensation' seem appropriate by saying that the defendant's breach 'deprived' the plaintiff of the expectancy. But this is in essence only a metaphorical statement of the effect of the legal rule. In actuality the loss which the plaintiff suffers (deprivation of the expectancy) is not a datum of nature but the reflection of a normative order. It appears as a 'loss' only by reference to an unstated *ought*. Consequently, when the law gauges damages by the value of the promised performance it is not merely measuring a quantum, but is seeking an end, however vaguely conceived this end may be.

Id.

75. (1854) 9 L.R. Exch. 341, 156 Eng. Rep 145.

76. STOEBUCK AND WHITMAN, *supra* note 64, at 727, (citing (1854) 9 Exch. 341, 156 Eng. Rep 145); *see, e.g.,* Hoang v. Hewitt Ave. Assocs., LLC, 936 A.2d 915, 934 (Md. Ct. Spec. App. 2007) ("Such . . . damages are not presumed to have been in the contemplation of the parties when they made their contract but may be shown from evidence of the particular circumstances to have been in their contemplation."); Della Ratta, Inc. v. Am. Better Comty. Developers, Inc., 380 A.2d 627, 639 (Md. Ct. Spec. App. 1977) (holding that profit losses were foreseeable to developer because developer "should have known that Della Ratta, as a contractor, entered into the building contract to make a profit").

77. STOEBUCK AND WHITMAN, *supra* note 64, at 731; *see also Hoang*, 936 A.2d at 935 ("'[R]easonable certainty' of contract damages means the likelihood of the dam-

real estate transactions, these two requirements make expectation damages very difficult for purchasers to obtain.[78] For example, in *St. Lawrence Factory Stores v. Ogdensburg Bridge and Port Authority*, the purchaser was under contract to purchase twelve acres of land in order to develop a retail factory outlet center.[79] The seller refused to close. Although the purchaser had signed leases in hand, the court determined that its claim for expectation damages was "speculative" because several tenants had cancelled their leases during the litigation and the purchaser did not "demonstrate that it would be able to obtain sufficient financing to fill the remaining units in the proposed facility."[80] The court reiterated that new businesses face a high bar: "[A] start-up commercial enterprise faces a stricter standard when seeking damages for lost profits 'for the obvious reason that there does not exist a reasonable basis of experience upon which to estimate lost profits with the requisite degree of reasonable certainty.'"[81]

The continuing hesitancy to award expectation damages is in line with the 1776 decision *Flureau v. Thornhill*[82] in which the court limited a purchaser's recovery to "reliance" expenses. In the words of the court: "I do not think that the purchaser can be entitled to any damages for the fancied goodness of the bargain, which he supposes he has lost."[83]

Courts often use overlapping terminology to describe the three measures of damages, which can lead to some confusion. For example, in *West Willow-Bay Court, LLC v. Robino-Bay Court Plaza, LLC*[84] the

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ages being incurred as a consequence of the breach, and their probable amount. Losses that are speculative, hypothetical, remote, or contingent either in eventuality or amount will not qualify as 'reasonably certain' and therefore recoverable as contract damages.").

78. *But see Hoang*, 936 A.2d at 936. If not for an error in pleading, the purchaser would have received nearly $1.9 million in collateral lost profits or expectation damages on a $760,000 land sale. *Id.*

> 'Collateral lost profits' in the context of a contract action by a buyer against a seller for failure to convey real estate are the profits the buyer anticipated earning upon resale of the property to another, or to several others. In the case at bar, HAA's damages evidence was offered to prove collateral lost profits: the loss of profit HAA anticipated realizing from the resale of the land, after development, to fourteen town house purchasers.

Id. at 943. Although the purchaser did not have resale contracts in hand to substantiate its calculation of collateral lost profits, the court noted: "The nature of the residential real estate development business ordinarily does not allow for developers to have resale contracts in hand before the land on which they plan to build is purchased." *Id.*

79. 810 N.Y.S.2d 532, 533 (N.Y. App. Div. 2006).
80. *Id.* at 533.
81. *Id.* (quoting Kenford Co. v. County of Erie, 502 N.Y.S.2d 131 (1986)).
82. (1776) 96 Eng. Rep. 635 (K.B.).
83. *Id.* at 635.
84. C.A. No. 2742-VCN, 2009 WL 458779 (Del. Ch. Feb. 23, 2009).

court described the general damages test but then awarded something more akin to expectation damages. The purchaser was under contract to purchase a pad site in a shopping center in order to lease the pad to Wawa, Inc. for the construction of a convenience store. The seller refused to convey the property after failing to obtain a required third party consent. Specific performance was requested by the purchaser and denied. The court stated that damages would be measured by the general damages rule: "[The purchaser's] damages, or the loss of the economic benefit of its bargain, would be the difference between the property's value and the amount that [the purchaser] would have had to pay for it if the transaction had closed."[85]

However, the court then found that the "value" of the property was appropriately determined not by an appraisal of its fair market value at the time of scheduled settlement, but by appraising the property as if the fully negotiated lease had been signed between Wawa and the purchaser. In other words, in the court's view, the value of the property was not what the seller could actually sell it for, but what the purchaser would have been able to sell it for if it had closed and signed the Wawa lease. Key to its decision was a finding that the purchaser intended to lease to Wawa and that "there is no question that [the purchaser] aimed to close on the [p]roperty, lease it pursuant to the Wawa Lease, and sell it quickly on the Section 1031 exchange market."[86] The court concluded that: "It follows that [the purchaser] is entitled to damages in the amount of $625,000. This is the difference between the Property's value *as if conveyed subject to the Wawa Lease* ($1,350,000) and the purchase price established by the Purchase Agreement ($725,000)."[87]

This reasoning is fairly unusual, but the conflation of the different measures of damages by the court is not. The damages award is also overcompensatory because the purchaser was awarded its full anticipated profit without any adjustment for the myriad risks that it faced during the development process.

The next part of this Article describes the four major types of commercial real estate transactions, assesses the risks typically faced by a purchaser in each category, and analyzes whether an aggrieved purchaser in a series of hypothetical transactions is likely to receive a measure of damages that would be adequate—either because such damages permit it to replace the contracted-for real estate or because they otherwise place the purchaser in as good a position as it would have been in had the contract been honored.

85. *Id.* at *2.

86. *Id.* at *7.

87. *Id.* at *8 (emphasis added).

III. THE MODERN COMMERCIAL REAL ESTATE INDUSTRY

Part IV argues that the uniqueness doctrine simply does not apply to modern commercial real estate transactions. While the justifications described in Part I seem rational and appropriate—particularly in their historical context, and may even be true and reasonable today in other areas of the law—they are irrelevant to the determination of remedies for the breach of a commercial real estate contract. Where commercial real estate is increasingly commodified and market value is readily determined, the common law's blanket assertion that all land is unique is increasingly tenuous. Before turning to a doctrinal and theoretical discussion about the optimal remedies regime in the absence of a presumption of uniqueness, it is important to first understand the customs and practices of the modern commercial real estate industry, how transactions are structured, and how the parties understand and allocate for the risk that the other side will refuse to close. For the purposes of this Article, commercial real estate will be broadly defined as real property which is primarily valued by the purchaser for its ability to generate income or support the purchaser's business enterprise.[88]

The commercial real estate industry is a significant sector of the American economy. Purchasers of commercial real estate can be broken down into four broad categories: (1) those interested in using the property and improvements in their current form in order to generate income through rent from third parties (investors); (2) those in the

88. Most transactions clearly fall in one category or another, although some cases are more difficult. For example: (i) a family's second home which is used for personal vacations and also rented out to unrelated parties; (ii) a farm which includes both the family home and a commercial enterprise; and (iii) a multi-unit residential structure where the owner lives in one unit and rents out one or more additional units. "Commercial real estate" is defined in various ways by statute, regulation, or private body. *See, e.g.*, ASTM INT'L, STANDARD PRACTICE FOR ENVIRONMENTAL SITE ASSESSMENTS: PHASE I ENVIRONMENTAL SITE ASSESSMENT PROCESS, ASTM Standard E 1527-05 § 3.2.12 (2005). "Commercial real estate" is defined as

> [a]ny real property except a dwelling or property with no more than four dwelling units exclusively for residential use (except that a dwelling or property with no more than four dwelling units exclusively for residential use is included in this term [commercial real estate] when it has a commercial function, as in the building of such dwellings for profit). This term includes but is not limited to, undeveloped real property and real property used for industrial, retail, office, agricultural, other commercial, medical, or educational purposes; property used for residential purposes that has more than four residential dwelling units; and property with no more than four dwelling units for residential use when it has a commercial function, as in the building of such dwellings for profit.

Id.; *see* Sally J. Gordon, *Glossary of Terms: Commercial Mortgage-Backed Securities Published by the Commercial Mortgage Securities Association (CMSA),* SM100 ALI-ABA 799 (May 3 - 4, 2007) ("Commercial Property: An income-producing property, e.g., multifamily housing, retail, office, warehouse, industrial or hotel.").

development business (developers); (3) those interested in "flipping" the property quickly to take advantage of a rising market (speculators); and (4) those interested in utilizing real estate in conjunction with a non-real estate business (businessmen). Each of these categories of purchasers have a variety of needs and interests and the resulting transactions are structured and proceed very differently.

A. Income-Generating Real Estate for Investment

The first category of acquisitions are carried out by investors who are interested in real estate because of its ability to generate a rent stream and therefore a return on their investment.[89] The purchaser may be a wealthy individual or family with capital to invest, or it may be an institution such as an insurance company, hedge or pension fund, or real estate investment trust. Shopping centers, office buildings, apartment complexes, and hotels are popular assets for this type of investment.

In a typical transaction, the prospective purchaser will hire a broker to find a deal which meets certain criteria. Some purchasers limit their search to only particular markets and/or product types while others cast a wide net. Since the attraction of the asset is the income that it generates, purchasers focus heavily on the financial aspects of the deal, including the required equity, the perceived risk, and the projected return.

After a broker has identified a potential deal and the buyer has run the preliminary numbers to estimate the profitability of the property, the buyer and seller will negotiate the price. If a seller advertises an income-producing property with a price, it normally does so based upon a "cap rate," short for "capitalization rate."[90] For example, an advertisement for a parcel of land leased to Walgreens in Sacramento, California reads as follows: "Reasons to buy this Walgreens: 7.3%

89. Investors may have significant enough real estate holdings to justify an in-house staff to perform property management and related functions or, more commonly, a third party is hired for the purpose.

90. The cap rate is an "evaluation tool" used to determine the market price of a property. Jeff K. Johnson, *Bad Economic Times Tend to be Good for Real Estate Investing*, JOURNAL OF BUSINESS, May 21, 2009, at B9.

> An investor evaluates a property and determines what rate of return he would require if he paid cash for the property and there was no debt. . . . Many factors will influence what cap rate an investor will require to make a property an attractive investment. . . . To determine an appropriate cap rate, an investor will consider factors such as the property's age, location, parking availability, vacancy history, and its long-term flexibility; tenants' credit and occupancy history; length of current leases; deferred maintenance; and future capital investment needed. Cap rates also will vary from city to city, based on a property's unique characteristics.

Id.

CAP—Highest Cap new Walgreens in California; Open, paying rent, available for closing today."[91] A capitalization rate, which is market-driven for particular locations and product types, is applied to the annual net operating income, or "NOI," of a commercial asset to determine the market value.[92] (Property value equals NOI divided by the cap rate.)[93] This is called the "income capitalization approach" to valuation and essentially uses the anticipated future income from an operating asset to determine a present value.[94] So if the advertised cap rate of 7.3% in the foregoing example was acceptable to the buyer and the NOI for the asset was $500,000 per year, the price should be just over $6.8 million.[95]

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91. E-mail from John Giordani, Battery Commercial, to Tanya D. Marsh, (Apr. 8, 2009) (on file with author). Subject: 7.3% Walgreens in California - New NNN 25 Year.

92. Cap rates are fluid and reflect the market's perception of the stability of the income stream for particular types of properties. A brand-new shopping center anchored by a tenant with great credit and populated by a diverse mixture of stable, national tenants in an attractive location will demand a lower cap rate than an aging strip center anchored by a local grocery store and populated by "mom and pop" tenants. As the cap rate applicable to a particular property drops, it increases the market value of the asset relative to its NOI. For example, in July 2008, the market cap rate for limited service hotels was 8.18, for regional malls it was 6.19, and for central city office it was 6.34. URBAN LAND INSTITUTE & PRICEWATERHOUSECOOPERS, EMERGING TRENDS IN REAL ESTATE 2009 44–45 (2009), "Exhibit 4-3—Prospects for Capitalization Rates and Internal Rates of Return" ("After several years of significant cap rate compression to near-record lows, respondents predict continuing rate hikes through 2009 . . . Survey cap rates, which registered in the 5 to 7.5 percent range in 2007, advance into a 6 to 9 percent band for 2009.").

93. John F. McDonald & Sofia Dermisi, *Capitalization Rates, Discount Rates, and Net Operating Income: The Case of Downtown Chicago Office Buildings*, 14 J. OF R. E. PORT. MGMT. 363, 363 (2008) (explaining the results of an empirical study of capitalization rates for 132 downtown Chicago office buildings sales between 1996 and 2007).

94. *See, e.g.*, WILLIAM B. BRUEGGEMAN & JEFFREY D. FISHER, REAL ESTATE FINANCE AND INVESTMENTS 228–239 (2001). For a discussion of the application of the income capitalization method to the valuation of commercial income-producing property, see *West Willow-Bay Court, LLC v. Robino-Bay Court Plaza, LLC*, C.A. No. 2742-VCN, 2009 WL 458779, at *2 (Del. Ch. Feb. 23, 2009.)

> An appropriate capitalization rate is selected based on the tenant's creditworthiness, the lease's length, the extent to which the tenant will be responsible for insurance, taxes, improvements, and operating expenses, and the location of the property. A lower capitalization rate, of course, lends to a higher valuation. Although a property's physical characteristics may inform the valuation, an income capitalization calculation is predominantly a financial analysis instead of an appraisal of the physical property.

Id.

95. In *West Willow-Bay*, the court did not indicate the net operating income of the Wawa lease, but noted that the expert witnesses valued the property between $1.4 and $1.5 million based on capitalization rates between 6.75% and 7.25%. 2009 WL 458779, at *3.

A single-tenant property like the Walgreens in Sacramento is the most simplistic example of an investment property. The property is just as likely to be a multi-tenant property. Price is calculated in a similar manner, although the NOI will be adjusted to reflect the purchaser's assessment of the risk of vacancy, requirements to repair the property, future estimates of property taxes, or the likelihood of future capital improvements.[96] None of those adjustments need to be made to the price of the Walgreens because the land lease between the seller and the tenant puts nearly all of the risk and cost of ownership (e.g., property taxes, insurance, repair, etc.) on the tenant. Purchasers' primary risk is that the tenant will default, which is why single-tenant properties are attractive to investors only if the tenants are large companies with solid credit or the real estate is so attractive that it will be easily re-let on similar terms.

After a purchaser arrives at an agreeable price based upon the income capitalization approach, either the purchaser or the prospective lender will try to confirm that valuation through the "sales comparison approach," in which the subject property is compared to similar properties that were recently sold.[97] The sales comparison approach assumes that "an informed investor would never pay more for a property than what other investors have recently paid for comparable properties."[98] The sales comparison method of valuation—the primary valuation method used in residential real estate transactions—is highly subjective, particularly with respect to properties that lack comparables, and it is used secondarily in valuing income-producing commercial property.[99] This is consistent with the idea that the best way to value income-producing property is based on the anticipated income, adjusted for the risk that the income will be stable and collectable. In other words, it is the income stream that is being valued, not the land itself.[100]

96. The types of factors that will cause an adjustment to NOI depend upon the product type and location. For example, in a study of downtown Chicago office building sales, "NOI per square foot is presumed to be a function of building characteristics (Class A vs. Class B, age, availability of parking in the building, and renovation) market conditions as reflected in the occupancy rate for the building, and a time trend." McDonald & Demisi, *supra* note 93, at 372.

97. BRUEGGEMAN & FISHER, *supra* note 94, at 226.

98. BRUEGGEMAN & FISHER, *supra* note 94, at 226.

99. For a criticism of the sales comparison method, see John F. Shampton, *Statistical Evidence of Real Estate Valuation: Establishing Value Without Appraisers*, 21 S. ILL. U. L.J. 113, 114 (1996) ("Appraisals are ultimately products of opinion rather than pure calculation. As such, the worth of the appraisal is related, at least in part, to the quality of the witness. As such, appraisals are not a function solely of objective evidence as to the value of the subject property.").

100. The physical features of the land and any improvements are relevant only to the extent that they potentially impact the income stream. For example, in the empirical study of 132 sales of downtown Chicago office buildings between 1996 and 2007, the authors noted that

After agreeing on a price, the purchaser and seller will negotiate and sign a purchase agreement. The purchaser will place an earnest money deposit with an escrow agent as consideration for the contract and then receive the exclusive right to conduct due diligence for a period of thirty to sixty days. During this "free look" or "due diligence period," the purchaser will examine the leases and financial records of the property and order a number of third party reports, including: A title insurance commitment to confirm the seller's state of title and private encumbrances on the property, a survey to show whether the improvements comply with title restrictions and land use laws, a building condition report similar to a residential inspection report, and an environmental study.[101] In addition to the earnest money de-

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> the capitalization rate is found to be related to variables that are signals for an expected change in the value of office buildings in downtown Chicago. Those variables include the class and age of the building, whether it has been renovated, and the changes in the downtown vacancy rates and financial sector employment.

McDonald & Dermisi, *supra* note 93, at 371.

101. During the due diligence process, in addition to verifying seller's legal title to the property and understanding legal encumbrances, great emphasis is placed on verifying the income stream. For example, a continuing legal education presentation advised attorneys of their role in assisting their clients in their financial analysis of a commercial real estate purchase. This advice highlights the role of financial information in the valuation of operating commercial real estate assets.

> Since many properties today are priced on in-place NOI, verifying NOI will be paramount and the majority of that NOI will come from the leases. A good place to start to insure that you will have accurate information upon which to assess NOI, both now and in the future, is the Purchase and Sale Agreement ("PSA"). The PSA should include at least the following exhibits, which the Seller should represent and warrant to be accurate and complete as of the date of execution of the agreement: a current rent roll, a schedule of all tenant allowances that have not been paid, a schedule of all Landlord work that has not been completed, and a schedule of all leasing commissions that will be due for leases executed before the PSA is signed. The PSA should include a specific list of due diligence items that will be delivered to the Purchaser within a short time after closing, and the Seller should warrant that all such items will be complete and accurate copies of the records maintained by the Purchaser. The due diligence list attached can be tendered to the Seller for review and comment as part of the PSA negotiation. Consideration of payment responsibility for leasing commissions and TI costs is also an important consideration in the purchase and sale contract. If NOI from prospective leases is priced into the transaction, the Seller should be responsible for all tenant improvement allowances, landlord work and leasing commissions with respect to each such lease.
>
> Perhaps most importantly, an Argus run should be completed and analyzed thoroughly. Argus software is a commercial real estate financial analysis program used to forecast and model cash flows, prepare budgets, and determine property valuations. It uses base building information, contractual lease information, market assumptions, and valuation/reporting tools to allow the user to model potential real estate deals. A cash flow analysis, commonly ten years, is the usual output. This cash flow analysis is comprised of both contractual lease terms and market

posit, a purchaser can easily invest $50,000 to $100,000 in legal and third party report expenses during the due diligence period. The larger and more complex the asset, the more time and expense is incurred to conduct due diligence.

At the conclusion of the due diligence period, the purchaser normally has the right under the contract to either terminate the purchase agreement for no reason or a specified range of reasons and receive a refund of its earnest money, or proceed to closing. Closing can take place in as few as fifteen days after the expiration of due diligence, although thirty days is the norm.

Purchasing operating properties for their ability to generate income is very rarely done with cash. An investor will leverage the property as much as possible to maximize the return on his equity contribution.[102] Assume that an office building is acquired for $100 million. If the investor used all cash and the building generates $10 million in profit in a year, then the investor has made a 10% return. If the investor obtained a loan for $90 million at an interest rate of 5% and invested only $10 million, then his return was 55%.[103] The systemic incentives push investors to leverage as highly as possible.[104]

Land is most like a widget in the single-tenant property investment scenario, and damages are generally the easiest to determine because the purchaser's timeline is shorter and less resources are at risk. Consider the following hypothetical:

> assumptions. This is used to project what is most likely to occur over time based on the information available at the time the model is created. Argus allows one to build a cash flow projection for a project by inputting the contractual lease terms for each tenant in a project and make assumptions with regard to what will happen to the leases at expiration. It also allows the user to input operating expenses and capital expenditures associated with the operation of the project. The user can then analyze the cash flow and add valuation criteria so that decisions can be made regarding the real estate project.

Linda K. Schear & George A. Schmidt, *Workshop 2: Due Diligence in Acquisition of Major Retail Properties*, International Council of Shopping Centers 2006 United States Shopping Center Law Conference (Oct. 25, 2006).

102. In the first decade of the twenty-first century, until the credit crunch began, cap rates were so low as a result of market demand for quality properties that investors were purchasing properties at cap rates lower than the rate of interest at which they could borrow money, a phenomenon known as "negative leverage." *See* Johnson, *supra* note 90.

103. This is an extreme example of the power of leverage. In the normal course, real estate investors use leverage to attempt to achieve high single digit or low double digit returns. Without leverage, any meaningful profit would be difficult to achieve.

104. The widespread use of leverage is rarely taken into account by the courts. *See, e.g.*, Ash Park LLC v. Alexander & Bishop, Ltd., 767 N.W.2d 614 (Wis. Ct. App. 2009) (affirming the circuit court's order of specific performance despite purchaser's protestations that it would be "unable to pay" due to its inability to obtain financing).

Seller is the owner of a one acre parcel of land leased to a national drug store chain. The lease has a term of thirty years and the tenant has the responsibility for all costs of maintaining the property, including insurance and property taxes. Using the direct capitalization valuation approach, the parties have agreed on a purchase price of $10 million. The purchase agreement provides an earnest money deposit of $500,000, a thirty day due diligence period, and thirty additional days to close. Purchaser hires an attorney to draft the purchase agreement and review the due diligence materials, and orders a title commitment, survey, environmental report, and building condition report, at a total cost of $35,000. After Purchaser has completed its due diligence, Seller refuses to close. What damages would Purchaser be entitled to?

Given the short time that the property has been under contract, and assuming that it was correctly valued by the parties, Purchaser would be unlikely to receive any general damages, although it would be compensated for its earnest money and reliance damages. That measure would reimburse it for out-of-pocket expenses, but would not address its loss of anticipated profit. Purchaser could claim expectation damages, as in *West Willow-Bay Court*. Purchaser's investment expectation would certainly be foreseeable at the time of contract, but its plans to hold indefinitely would pose a complication. In *West Willow-Bay Court*, the direct capitalization valuation method was used to determine the market value of the property with the lease in place, not to estimate the profits that Purchaser would have lost over an indefinite period of time.

Assuming that damages were timely received and included interest, Purchaser would certainly be able to find a replacement property with a similar risk profile and profit potential. An income-producing parcel of real estate is more fungible than any other type of commercial real estate. Historical notions of uniqueness seem most strained when applied in this context.

In the case of a multi-tenant property, the analysis is largely the same, with one important difference that impacts a court's ability to assess damages. While the expectation in a single-tenant property is that the lease will remain in place for the next several decades, the same is not true of a multi-tenant property. An investor will expect stability on the part of the anchor tenants, who usually sign long-term leases, but smaller tenants generally sign shorter leases and will therefore may be replaced organically every five to seven years. This rollover provides both the opportunity for the new owner to increase its income stream by raising rents or, in a down economy, creates the opportunity for the income stream to diminish through increased vacancy or decreased rents. In other words, estimating the loss of antici-

pated profit in a multi-tenant investment property is significantly more difficult than in the case of a single-tenant investment property.

B. Land Acquired for Development

If transactions involving operating income-producing property are at the low end of the spectrum in terms of the purchaser's upfront investment of time and resources, transactions involving real property for development or re-development are at the high end.[105] While a transaction in the former category can be initiated and wrapped up in less than three months, a transaction in the latter category could easily take three years.

These transactions take a long time because the economic model of the development business makes it difficult for the developer to incur the cost of land until it is ready to begin construction. Only the largest and wealthiest developers finance the acquisition of land and construction with cash. The vast majority obtain financing and, even in the best economic times, a lender will not normally make funds available until a developer has an economically viable project and is ready to start construction.

The developer may have a "free look" period under the purchase agreement as well as a number of contingencies after the expiration of due diligence.[106] In other words, the developer will not be required to close the transaction unless it can obtain the entitlements, financing, and approvals necessary to complete its project. In contrast to the acquisition of income-producing properties, the purchaser of real property for development or re-development normally invests significant time and resources in a project prior to closing. In addition, it may pass on other business opportunities because its equity and time are finite resources. Depending on the nature of the project, a developer may also enter into pre-leasing or pre-sales, both contingent upon closing on the land. For example, a lender may not agree to finance a shopping center without a commitment from an anchor tenant, or a condominium development without a certain number of commitments from prospective homeowners.

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105. The re-development process may begin with land that is being under-utilized. For example, if a parcel of land is improved with a bowling alley, but there is no market for a bowling alley in the location, the improvements themselves devalue the real estate because a developer will likely be required to demolish them in order to adapt the property to a different use, such as an office building or multi-family residential.

106. *See, e.g.*, Main Street Dining, L.L.C. v. Citizens First Sav. Bank, No. 282822, 2009 WL 349758 (Mich. Ct. App. Feb. 12, 2009) (describing the purchaser's due diligence period and various contingencies to closing); *Ash Park*, 767 N.W.2d at 617 (describing the purchaser's leasing contingency).

A common scenario requires the developer to put together an assemblage of parcels owned by different sellers. This can involve a number of contracts running on parallel paths of due diligence and timing. If the acquisition of one parcel falls through, it may jeopardize the entire project, so a developer's willingness to pay a particular price for any one parcel depends upon its ability to close on all parcels.

Valuation works differently with the acquisition of real property for development or re-development. The income capitalization approach is inappropriate because unlike the first category of transactions, the purchaser is interested in potential uses for the real estate rather than the present income stream that it generates. The sales comparison method of valuation is normally used to arrive at—or, in the case of a lender, to justify—a purchase price; but the real value of the land is the anticipated profitability of the project that the developer intends to build.

A hypothetical illustrates the difficulty of determining damages in the development scenario:

Seller is the owner of a 100 acre parcel which is currently being used for agricultural purposes and is located near the edge of suburbia. Nearby parcels are being sold to developers who intend to build residential subdivisions. Based on comparable sales prices, Seller agrees to sell the property to Purchaser for $100,000 per acre, for a total price of $10 million. Purchaser intends to develop the property as a "lifestyle" shopping center with 350,000 square feet of retail space. The purchase agreement provides that Purchaser will have a due diligence period of 180 days and then an additional "approvals" period of 365 days in which Purchaser will have the right to rezone the property from agricultural to retail, apply for a state permit to mitigate wetlands on the property, and work with appropriate municipal authorities on preliminary site plan approval. Purchaser deposits $250,000 into escrow, which shall be refunded to it if it terminates before the expiration of the approvals period because it is unable to satisfy any of its contingencies. Purchaser hires an attorney, engineer, environmental specialist, and architect to plan the project, and begins negotiating leases. In total, Purchaser incurs pre-closing costs of $500,000 before Seller repudiates the contract and refuses to close. A year passes between the date that the parties signed the contract and the date that Seller defaults, during which time the value of market value of the land rises to $105,000 per acre ($10.5 million). The remaining parcels in the immediate area, which were suitable for a similar retail project, are placed under contract to other buyers. To what damages are Purchaser entitled?

As a simple matter, Purchaser would be entitled to general damages equal to the $500,000 difference between the contract price and the value of the land at breach. Purchaser would also receive the re-

turn of its $250,000 earnest money and reasonable reliance damages. Conceptually, Purchaser could claim that the reasonable value of its employees' work on the project should be compensable reliance damages. But the most significant damages suffered by Purchaser are the time and lost opportunity represented by a year spent on a project for which it will never realize a profit.[107] Simple reimbursement of costs or general damages do not begin to address lost opportunity. Although this injury is inherently speculative and therefore ineligible for compensation, it is often the most significant loss to a developer. A small real estate developer could be forced out of business by one such lost deal.

It is important to note that the inadequacy of the money damages in the development scenario stem not from the uniqueness of the land, nor from the inability to determine the market value of the land.[108] Instead, money damages are inadequate because Purchaser would have invested significant funds (debt and equity) over a long period of time, been subject to a number of development, construction, leasing, and financing risks, and made a profit (or suffered a loss) at an ultimately inestimable rate. Purchaser could show a court the profit that it anticipated to make, and could show that its intent on realizing a profit was foreseeable to Seller, but it is highly unlikely that such damages could ever be proven with reasonable certainty.

C. Real Property Acquired for Speculation

The first two categories of purchasers are generally interested in holding the property for an indefinite period of time, although many developers intend to sell their new project upon lease-up and stabilization. The third category of purchasers, however, are speculators who intend to quickly "flip" their newly acquired property in anticipation of rising prices. In some cases, the purchaser signs a contract to sell the property to a third party before it even acquires title to the property. Real estate speculators are particularly active in niches of the residential market where values are sharply rising. For example, during the early 2000s, South Florida was a booming real estate market for new condominium developments. Between 2003 and early 2009, eighty-three towers with nearly 23,000 units were built in downtown

107. "[T]he law has not yet generally recognized yet another kind of reliance—reliance that consists in forgoing opportunities to make other contracts." FARNSWORTH, *supra* note 2, at 154.

108. In determining damages, Purchaser may be unable to find a comparable 100 acre parcel in the immediate area, but will undoubtedly be able to find a comparable parcel upon which to build a nearly identical project in a similar market.

Miami.[109] A significant number of those units, perhaps as many as 80%, were contracted to be sold to speculators who were purchasing more than one unit "[hoping] to flip them."[110] The early speculators surely profited, but the "oversupply of epic proportions" caused property values to rapidly decline.[111] Speculators walked away from their contracts, often forfeiting their earnest money deposit as liquidated damages.[112] Reportedly, approximately 45% of the new units in downtown Miami remained unsold as of December 31, 2008.[113]

The 1929 case of *Schmid v. Whitten*[114] demonstrates that real estate speculators are not a new phenomenon. Schmid contracted to purchase Whitten's land, then contracted to sell the land to a third person, who in turn contracted to sell it to a fourth. Each of these transactions, presumably, would have resulted in a profit for the respective sellers. However, when the time came for Schmid to close on the first transaction, Whitten refused. Schmid sued for specific performance.

The court was highly critical of the underlying transaction, beginning by stating that "[t]he respondent did not enter into the contract to purchase a home, but the only inference from the evidence is that he was on the make."[115] It continued that: "[I]t is a rule of absurdity if a court of equity intends to decree specific performance in such cases, and lend their aid and assistance to enforcing such barefaced gambling and speculative contracts."[116]

Purchasers who intend to quickly flip their acquisitions normally complete limited due diligence to keep their transaction costs low. Contracts may be closed quickly, or the purchaser may negotiate for a long contingency period so that it may locate a buyer before it is required to close. In the case of the South Florida condominiums, speculators most likely banked on the assumption that they would find a buyer before the project was complete.

Consider the following hypothetical:

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109. Denise Kalette, *Ghost Towers Spur Condo Backlash*, NATIONAL REAL ESTATE INVESTOR July–Aug. 2009, at 14, 14; Terry Pristin, *Miami Condo Colossus is Monument to Excess*, N.Y. TIMES, Mar. 11, 2009 at B7.

110. Pristin, *supra* note 109, at B7.

111. Pristin, *supra* note 109, at B7.

112. Kalette, *supra* note 109, at 14 ("Over the past three years, speculators and other investors bought thousands of units in the preconstruction phase at the height of the city's building boom. Now many buyers are unable or unwilling to close on their purchases and are simply leaving deposits of as much as $100,000 on the table and walking away.").

113. Kalette, *supra* note 109, at 14.

114. 103 S.E. 553 (S.C. 1920).

115. *Id.* at 553–54 ("One of the curses of the country at present is the gambling speculative craze, whereby a lot are out for easy money and a desire for quick riches.").

116. *Id.* at 553.

Seller is a condominium developer who is planning a 1,000 unit complex. Purchaser signs a pre-sale contract for a unit which has not yet been constructed. The purchase price is $250,000 and the unit is anticipated to be completed in one year. Purchaser signs a contract to sell the unit to Third Party for $300,000. Before completion and closing, Seller refuses to close. At the time of breach, the unit is worth $325,000. What are Purchaser's damages?

This scenario is the cleanest—Purchaser is entitled to the $75,000 difference between the original contract price and the value at the time of breach. In addition, Purchaser should receive his earnest money and reliance damages. Purchaser has no expectation damages claim because in speculation cases, loss of bargain and lost profit are identical. As *Schmid* demonstrates, some courts find it difficult to justify awarding specific performance to land speculators because even though the land may be technically unique, the purchaser views it as a widget to be quickly converted to dollars. What is more fungible than an asset that is committed for resale before it is even purchased? The court in *Watkins v. Paul*[117] was less judgmental of the purchaser's intentions than the *Schmid* court, but still refused to award specific performance:

> It cannot be seriously contended that the remedy at law via damages was not adequate, plain, speedy, and complete in this case. The evidence fails to show that the plaintiffs need the land in question for any particular, unique purpose, which is one of the main reasons for granting specific performance; on the contrary, the plaintiffs' own evidence shows that they seek to obtain the land only so that they may resell it for profit. Under these circumstances, specific performance would bring the plaintiffs no greater relief than would damages in the amount of their lost profit.[118]

D. Real Estate Incidental to Other Business

Buyers in the first three categories can be understood to be in the "real estate business." They are in the business of making money from the real estate itself through a rental stream or sale. For the fourth category of purchasers, however, real estate is one of many resources used in the furtherance of another business purpose. This group of buyers is too diverse, and their needs too divergent, to make any generalizations about a "typical" transaction. However, one common issue in these transactions is that the acquisition of the real estate is usually part of a chain of events, so timing is key. If the real estate closing is delayed or falls apart and the purchaser has taken other steps in reliance on closing, the purchaser may suffer significant consequential damages.

117. 511 P.2d 781 (Idaho 1973).

118. *Id.* at 783 (quoting Suchan v. Rutherford, 410 P.2d 434, 443 (Idaho 1972)).

IV. REVISITING THE UNIQUENESS DOCTRINE

It is clear that in pre-modern England and perhaps in colonial America, Blackacre was not a widget. Blackacre was unique. As a result of that historical fact, modern courts routinely hold that each parcel of land is utterly without equal and therefore irreplaceable as a matter of law.[119] There can be no substitutional damages because the law assumes that Blackacre has no substitute,[120] an irrebuttable pre-

119. The words "all land is unique" echo throughout the common law. As Nancy Perkins Spyke observed:

> Reading through more than a few specific performance cases is a mind-numbing exercise. The reason for this is the remarkable repetition in language regarding the nature of the remedy . . . . Invariably, courts seize upon the idea that land's uniqueness warrants the relief requested. So strong is this idea that it is often treated as a time-honored presumption.

Spyke, *supra* note 1, at 391; *see, e.g.*, Tauber v. Quan, 938 A.2d 724, 732 (D.C. 2007) (quoting Drazin v. Am. Oil. Co., 395 A.2d 32, 34 (D.C. 1978)) ("'Specific performance of a contract is ordered when the legal remedy, usually money damages, is deemed to be either inadequate or impracticable. When land is the subject matter of the agreement, the legal remedy is assumed to be inadequate, since each parcel of land is unique. . . .' Thus, it is routine for courts to enforce contracts to purchase real estate by ordering that they be specifically performed."); Pinkowski v. Calumet Tp. of Lake County, 852 N.E.2d 971, 981–82 (Ind. Ct. App. 2006) (citations omitted) ("Finally, we note that our courts order specific performance of contracts for the purchase of real estate as a matter of course. Courts readily order specific performance with regard to real estate purchases because each piece of real estate is considered unique, without an identical counterpart anywhere else in the world."); 3's Lounge Inc. v. Tierney, 741 N.W.2d 687, 699 (Neb. Ct. App. 2007) ("Real estate is assumed to possess the characteristic of uniqueness, and, therefore, special value, necessary for availability of specific performance. . . . Specific performance should generally be granted as a matter of course or right regarding a contract for the sale of real estate where a valid, binding contract exists which is definite and certain in its terms, mutual in its obligation, free from overreaching fraud and unfairness, and where the remedy at law is inadequate.");. *In re* Korn, 352 B.R. 228, 246 n. 29 (Bankr. D. Idaho 2006) (citations committed) ("Specific performance is an equitable remedy available when legal remedies (monetary damages) are inappropriate or inadequate. Inadequacy of remedies at law is presumed in an action for breach of a real estate purchase and sale agreement due to the perceived uniqueness of land."); Arnold, *supra* note 29, at 307–08.

120. *See, e.g.*, Raynor v. Russell 231 N.E.2d 563, 564 (Mass. 1967) ("'[I]t is well-settled law in this Commonwealth that real property is unique and that money damages will often be inadequate to redress a deprivation of an interest in land.' Specific performance therefore 'is usually granted with respect to contracts to convey land.'"); Pierce v. Clark, 851 N.E.2d 450, 452 (Mass. App. Ct. 2006) (quoting Greenfield Country Estates Tenants Assn., Inc. v. Deep, 666 N.E.2d 988, 993 (Mass. 1996)); Anthony T. Kronman, *Specific Performance*, 45 U. CHI. L. REV. 351, 362 (1978) ("In asserting that the subject matter of a particular contract is unique and has no established market value, a court is really saying that it cannot obtain, at reasonable cost, enough information about substitutes to permit it to calculate an award of money damages without imposing an unacceptably high risk of undercompensation on the injured promisee.").

sumption that irrevocably leads to the conclusion that the purchaser has no adequate remedy at law.[121] This section questions the central premise of the uniqueness doctrine and then addresses the role that the uniqueness doctrine plays in the commercial real estate industry and the impact that may be caused by its demise.[122]

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121. *See, e.g.*, O'Halloran v. Oechslie, 402 A.2d 67, 70 (Me. 1979) ("Although no direct evidence of the uniqueness of the property to be conveyed was adduced nor monetary damages otherwise shown to be inadequate, a [court] may assume the inadequacy of money damages in a contract for the purchase of real estate and order the specific performance of the contract without an actual showing of the singular character of the realty."); Pruitt v. Graziano v. Fox & Lazo, Inc., 521 A.2d 1313, 1314 (N.J. Super. Ct. Ch. Div. 1987) ("Presumptively, real property is unique and damages at law are an inadequate remedy for breach of a contract to sell it. A factual resolution of uniqueness of the real property is immaterial); Fowler v. Sands, 50 A. 1067, 1067 (Vt. 1901) ("[W]hen the contract is for the sale of land, it is considered that damages are *necessarily inadequate*, and hence, if the other equitable conditions exist, . . . it is almost a matter of course, although spoken of as a matter of sound discretion, to enforce its performance."). Michigan courts suggest that damages may be adequate, but conclude that for unspecified reasons, they are still irrelevant: "[t]he adequacy of a remedy at law is not a bar to specific performance where the contract involves realty." Clancy Realtors v. Rubick, Nos. 276309, 276310, 2008 WL 4958793, at *6 (Mich. App. Nov. 20, 2008) (citing Wilhelm v. Denton, 266 N.W.2d 845 (1978)).

122. This Article limits itself to a discussion of a *purchaser's* remedies for the breach of a commercial real estate contract. Beyond this footnote, it will not address the interesting yet doctrinally distinct question of the remedies available to the *seller*. It has been historically true that "[t]he overwhelming weight of authority states that specific performance is as freely available to vendors as it is to purchasers." Perron v. Hale, 701 P.2d 198, 202 (Idaho 1985); *see also* RESTATEMENT (SECOND) OF CONTRACTS § 360 cmt. e (1979) ("[T]he seller who has not yet conveyed is generally granted specific performance on breach by the buyer."); AMERICAN LAW OF PROPERTY, *supra* note 15, at § 11.68 ("Because land has long been considered 'unique' by the law, and because of the social and economic importance of land when the doctrines of equity were developed, a contract to convey land, or any interest therein, is specifically enforceable by the purchaser or by the vendor."); MILTON R. FRIEDMAN & JAMES CHARLES SMITH, FRIEDMAN ON CONTRACTS AND CONVEYANCES OF REAL PROPERTY, 7-11 to 7-12 (2008) ("Specific performance is generally given the seller as a matter of course. . . . The right to damages at law nevertheless remains."). Modern treatises hold that it is granted "as a matter of course" and some jurisdictions, including Indiana, Kentucky, Massachusetts, Washington, and Wisconsin have recently confirmed that it remains a well-settled principle. *See, e.g.*, Perroncello v. Donahue, 859 N.E.2d 827, 831 (Mass. 2007) ("It is a settled principle that when the purchaser of real property breaches a contract for sale, the seller may retain the property and bring an action for damages or may request specific performance of the contract by offering to perform, and bringing an action for the purchase price."); Humphries v. Ables, 789 N.E.2d 1025, 1034–5 (Ind. Ct. App. 2003) ("It is a matter of course for the trial court to grant specific performance of a valid contract for the sale of real estate. . . . It is true that the number of cases in Indiana in which a vendor has been awarded specific performance of a contract is rather small. . . . We have found no law which changes this time honored principle. . . . While the reasons for awarding specific performance to vendors may be less compelling than the reasons for awarding specific performance to purchasers following a vendor's breach,

the remedy is available nonetheless."); Westlake Vinyls, Inc. v. Goodrich Corp, 523 F. Supp. 2d 577, 583 (W.D. Ky. 2007) ("With respect to a conveyance of real property, specific performance requiring a party who is contractually obligated to take title to the property to accept title to the property is an appropriate remedy for the breach."). A 1996 case from Washington state cited a 1921 treatise on specific performance to provide an unusual explanation for the appropriateness of the equitable remedy for a wronged seller: "'[D]amages are not the same as being rid of all the liabilities of land, with the net purchase price in one's pocket,' and are therefore inadequate." Kofmehl v. Steelman, 908 P.2d 391, 393 (Wash. Ct. App. 1996) (citing AMERICAN LAW OF PROPERTY, *supra* note 15, at § 11.68) (quoting EDWARD FRY, SPECIFIC PERFORMANCE § 23 (6th ed. 1921)); *see also* Ash Park, LLC v. Alexander & Bishop, Ltd., 767 N.W.2d 614, 618–19 (Wis. Ct. App. 2009) (affirming a trial court's award of specific performance to a seller even though the purchaser argued that it was unable to pay because it could not obtain financing based on the reasoning that "a circuit court has very little discretion to deny a vendor's request for specific performance" because "'specific performance of a contract to sell land should be ordered as a matter of course,' unless doing so would be 'unfair, unreasonable, or impossible.'").

However, some courts question whether it makes sense to grant specific performance to sellers. One good example of a court willing to revisit the historical rationales is *Centex Homes Corporation v. Boag*., 320 A.2d 194 (N.J. Super. 1974). In 1972, Mr. and Mrs. Eugene Boag entered into a purchase agreement with the Centex Homes Corporation for a condominium unit under construction in a high-rise development in New Jersey. *Id.* After giving Centex a check equal to about ten percent of the purchase price, Mr. Boag learned that he was to be transferred to Chicago. *Id.* He stopped payment on the check and informed Centex that he would be unable to complete the transaction. Centex sued for specific performance or, in the alternative, for liquidated damages in the amount of the deposit. *Id.*

The court briefly discussed the principles behind granting specific performance and noted that

> at the time this branch of equity jurisdiction was evolving in England, the presumed uniqueness of the land as well as its importance to the social order of the era led to the conclusion that damages at law could never be adequate to compensate for a breach of a contract to transfer an interest in land.

Id. at 196. The court questioned the application of this reasoning to the breach of a purchase agreement by the buyer:

> While the inadequacy of the damage remedy suffices to explain the origin of the vendee's right to obtain specific performance in equity, it does not provide a Rationale for the availability of the remedy at the instance of the vendor of real estate. Except upon a showing of unusual circumstances or a change in the vendor's position, such as where the vendee has entered into possession, the vendor's damages are usually measurable, his remedy at law is adequate, and there is no jurisdictional basis for equitable relief.

Id. The court then critiqued the reasoning of the *Restatement of Contracts* in comment c to Section 360, finding it to be internally inconsistent because it proposes that equity is the proper remedy because either the seller may have sustained no damages, or it sustained "damage equal to the loss of interest on the proceeds of the sale." *Id.* The court took issue with this formulation — "Yet loss of interest is readily measurable and can be recovered in an action at law, and to the extent that the vendor has sustained no economic injury, there is no compelling reason for equity to grant to him the otherwise extraordinary remedy of specific performance." *Id.* at 196–97 n.2.

A. All Land is Not Unique

The first fundamental problem with the uniqueness doctrine is that the central assumption—that *all* land is unique—is wrong.[123] The statement is *technically* true. Each inch of soil on this planet is different from every other inch of soil because they each occupy a different location. But the word "unique" does not appear to have been intended to have such a mundane meaning. Instead, the story of Anglo-American land ownership and the development of the common law outlined in Part I demonstrates that the word is layered with significance, beginning with the ancient English idea that ownership of real property conveys a "quasi-political status" and ending with the modern American "respect for the sanctity of the home that has been embedded in our traditions since the origins of the Republic."[124]

As discussed in Part I, a number of social and economic factors in pre-modern England and colonial America played a role in the development of the notion that land is unique and therefore had a "peculiar" value. These factors can be divided into three categories.

First, the sentimental attachment to land described by Alexis de Tocqueville, Thomas Jefferson, and John Steinbeck, and the idea that the identity of the family was linked to ownership of a particular parcel of real property.[125]

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123. *See* Jason S. Kirwan, *Appraising a Presumption: A Modern Look at the Doctrine of Specific Performance in Real Estate Contracts*, 47 WM. & MARY L. REV. 697, 708 (2005) ("The most commonly cited reason for the special treatment of real property . . . is the simple statement that 'land is unique.' Fundamentally, this is quite accurate. No one parcel of land is exactly like any other. But granting specific relief simply based upon uniqueness proves too much. The law does not presume that specific performance is required in any contract involving particular heads of livestock, which are, of course equally unique."); Michael Madison, *The Real Properties of Contract Law*, 82 B.U. L. REV. 405, 407 (2002) ("[M]ost of the property theory that underlies . . . conveyancing law has been quite rigid, because it is rooted in early common law history when England was an agrarian society and land uses remained static. As a result, commentators on the law of sales contracts and conveyancing complain that much of property theory has become obsolete and decry the lack of any internal consistency in the body of rules that still apply."); Marsh Survey, *supra* note 7, at Respondent 33-c ("I believe that with rare exceptions, the urbanization of our world has made properties fungible based upon value."); *id.* at Respondent 13-b ("The proposition that land is unique has always been wrong."); *id.* at Respondent 24-b ("Businesses are unique, land it seems to me hardly is anymore. Maybe it was when you could only travel by donkey, but today, when you can get to wherever in hours, there's always another deal like your deal."); *id.* at Respondent 24-b ("The concept [that land is unique] is antiquated.").

124. Kelo v. City of New London, 545 U.S. 469, 518 (Thomas, J., dissenting) (2005) (quoting Payton v. New York, 445 U.S. 573, 601 (1980)).

125. Spyke, *supra* note 1, at 421 (quoting Hanoch Dagan, *Restitutionary Damages for Breach of Contract: An Exercise in Private Law Theory*, 1 THEORETICAL INQUIRIES L. 115, 138).

Second, the ownership of land conveyed important social and political benefits which were inseparable from the real estate and had no value to the market, but special value to the owner.[126] This point likely informs the common law's repeated references to the "peculiar" value of real estate.

Third, in pre-modern England, few people had the wealth to acquire land. Real property was a scarce resource and transactions were infrequent. Moving across the Atlantic, land was cheap and plentiful, but there was arguably an oversupply. In addition, the new United States was large and communication between communities was limited. For these very different reasons, neither pre-modern England nor pre-industrial America had a functioning real estate market which allowed land to be easily valued,[127] hence the references in the common law to the value of land being "speculative."

None of these three factors hold true today with respect to the American commercial real estate industry.[128] Our society and common law may be willing to honor sentimental attachment to residential property, but not commercial property.[129] Intangible social and political benefits no longer attach to commercial real estate. Finally, commercial real estate is appraised based on its ability to generate

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> Land, as a fixed asset, is seen as a component of one's identity, as a 'symbol of the self and as a resource closely linked to personal freedom, rank, and power.' We develop close personal ties to our land, which becomes part of our identity and heritage. Personal property does not convey this power.

Id.

126. *See generally* Bagdasarian v. Gragnon, 192 P.2d 935, 942 (Cal. 1948) ("[H]istorically, parcels of real property have always been treated as unique and not similar to other parcels of realty."); Conaway v. Sweeney, 24 W. Va. 643, 649 (1884) ("This proposition is self-evident.").

127. Professor Anthony Kronman argues that "where the subject matter of the contract is unique . . . there is by definition no developed market [and] transactions are spotty at best," a suggestion that is disputed by Steven Shavell. *See* Shavell, *supra* note 25, at 837 (citing Anthony Kronman, *Specific Performance*, 45 U. CHI. L. REV. 351, 368 (1978)). In fact, there appears to be no evidence that the modern commercial real estate market is an undeveloped or inefficient market. Either Professor Kronman's description is incorrect, or commercial real estate is not unique.

128. *See* Peñalver, *supra* note 51, at 248 ("[W]hatever special significance landownership once had in feudal societies, increasing commodification of land has steadily eroded that significance. In the modern economy, land is just another form of property.") (citing THOMPSON ON REAL PROPERTY § 14.03 (David A. Thomas ed., Supp. 1999)) ("It is important . . . to keep in mind that [the distinction between land and personal property is] traceable to conditions no longer existing in England, and which never had any existence in this country.").

129. There may be very limited circumstances, such as where a commercial property has been owned by a particular family for generations. However, even in residential transactions, "an aggrieved party cannot . . . recover damages for mere disappointment or mental distress in an action for the breach of a land sales contract." Foote v. Clark, 962 P.2d 52, 53 (Utah 1998).

income or support an income-generating business—a convention which, coupled with an active, competitive marketplace, allows market value to be much more easily and reliably determined.[130]

After unpacking the formulation of the uniqueness doctrine, it becomes clear that none of the historical rationales for giving real property special treatment apply to *all* land. Romantic notions of the presumed uniqueness of land seem quaint when applied to a strip shopping center, a cookie-cutter suburban office building, or a nondescript lot in a subdivision.[131] Yet recent decisions have found the following types of real property to be unique: a new condominium unit,[132] a mobile home park intended for a quick resale,[133] unimproved lots,[134] and farmland.[135] A few courts have clearly stated that the actual uniqueness of a parcel of real property is irrelevant because of the strength of the common law presumption: "Our holding rests . . . upon a broader ground: that a contract of sale of a designated condo-

130. *See* Kirwan, *supra* note 123, at 720 (describing the "dramatic improvements in real estate appraisal techniques").

131. *See* Kelvin H. Dickinson, *Mistaken Improvers of Real Estate*, 64 N.C. L. REV. 37, 71–72 (1985) ("Not every piece of land is cherished by its owner for the sweetness of the fruits that grow there or for the majesty of the view from its crest; therefore, some exceptions to the principle that land is unique should be made in cases where the principle obviously does not apply."); Marsh Survey, *supra* note 7, at Respondent 49-c ("Just as a price can be put on a life lost in a car accident or business damages suffered as a breach of contract, so too can a price be put on the 'uniqueness' of real estate . . . Real estate is an investment that can be replaced or otherwise compensated for.").

132. *See, e.g.*, Giannini v. First Nat. Bank of Des Plaines, 483 N.E.2d 924 (Ill. App. Ct. 1985); Pruitt v. Graziano v. Fox & Lazo, Inc., 521 A.2d 1313 (N.J. Super. Ct. Ch. Div. 1987).

133. *See* Real Estate Analytics, LLC v. Vallas, 72 Cal. Rptr. 3d 835, 843 (Cal. Ct. App. 2008) ("[T]he property was unique not merely because of its physical attributes and location, but also because of its investment potential and the reasonableness of the agreed upon contract price.").

134. *See* Fisher v. Applebaum, 947 A.2d 248, 253 (R.I. 2008) (The court did not discuss the uniqueness of the lots, but simply stated: "[W]e are of the opinion that specific performance was an appropriate remedy in this case. The plaintiff was ready and willing to perform the contract and there was no legitimate and articulable equitable defense.").

135. *See In re* Heigle, 401 B.R. 752, 772 (Bankr. S.D. Miss. 2008) ("Under Louisiana's civil law, specific performance is the preferred remedy for breach of contract. . . . In addition to the remedy of specific performance for breach of contract, Louisiana law also allows for the recovery of monetary damages that result from the obligor's delay in performing its obligations under a contact."); Szambelak v. Tsipouras, No. 936-VCN, 2007 WL 4179315, at *7 (Del. Ch. Nov. 19, 2007) ("Real property is unique; thus, specific performance of a real estate sale contract is often the only adequate remedy for a breach by the seller, except in rare circumstances. Although it may be true that there are other farms that would adequately accommodate the Szambelaks' needs, they nevertheless chose the Tsipouras Farm for all of its unique attributes.").

minium unit like any real property is specifically enforceable by the purchaser irrespective of any special proof of its uniqueness."[136]

On the other hand, it is an overstatement to claim that *no* land is unique. Surely a case could be made that some real property on the margins is utterly without equal. But how then to distinguish between unique and non-unique real property?

Categories could be created based on a purchaser's ability to readily locate a substitute. Some types of real property are easily replaceable. As it has been noted, "[t]here is nothing so fungible [in the United States] as a 1,500 square foot single family residence."[137] While that may be objectively true, it may be difficult to convince the owner of a cookie cutter tract structure that his home is not unique. It is also true that *purchasers* are unlikely to have established deep emotional attachments to real property. While the law (and political leaders) honor the "sanctity" of residential property, particularly in a post-*Kelo* landscape,[138] commercial real estate has never deserved, or received, the same respect.

A stronger (and more politically-resilient) set of categories could be created by distinguishing between parcels of real property based on their intended use—residential or commercial. Although residential real estate may be valued for its intangible qualities—the view, the babbling brook—such considerations do not apply to commercial real estate. In the typical commercial real estate transaction, Blackacre is difficult to differentiate from a widget.[139] Real estate purchased and used for profit has largely become a commodity that is readily valued, traded, and substituted. A few courts and at least one state legislature have drawn this distinction, pointing out that "a loss of profit and

136. Pruitt v. Graziano v. Fox & Lazo, Inc., 521 A.2d 1313, 1314–15 (N.J. Super. Ct. Ch. Div. 1987); *see also* Tatum v. Worsham, No. 03A01-9507-CH-00219, 1996 WL 87453, at *3 (Tenn. Ct. App. Mar. 1, 1996) ("As evident from her attempts to prove the subject property is not unique, Mrs. Worsham does not realize that by its very nature, real property is unique.").

137. Marsh Survey, *supra* note 7, at Respondent 2-b.

138. *See* Ilya Somin, *The Limits of Backlash: Assessing the Political Response to* Kelo, EXPRESSO (2008) http://works.bepress.com/ilya_somin/2.

139. Residential and commercial transactions are different for a number of reasons that are meaningful in the application of the doctrine. This Article primarily addresses commercial real estate transactions. *See, e.g.*, Peter Linzer, *On the Amorality of Contract Remedies—Efficiency, Equity, and the Second Restatement*, 81 COLUM. L. REV. 111, 117 (1981) (discussing the difficulty of valuing the "love of [one's] home"). *But see* Daniel B. Bogart, *Good Faith and Fair Dealing in Commercial Leasing: The Right Doctrine in the Wrong Transaction*, 41 J. MARSHALL L. REV. 275, 299–300 (2008) ("Residential housing has become, in some sense, almost a fungible commodity, similar to personal property that an individual might own. (A widget is a widget is a widget).").

rent"[140] and "economic loss"[141] suffered in a commercial real estate transaction can be appropriately compensated by damages.[142]

The presumption that specific performance will be ordered as a matter of course following the seller's breach of a purchase agreement for real property is a foundational assumption in the real estate industry and taken into account whenever prospective parties to a contract negotiate the other terms.[143] The participants in the real estate industry assume, given the historical stability of the uniqueness doctrine, that equitable relief will be nearly automatic if a seller refuses to convey title.[144] Deals are struck, and time and money are invested in a project in accordance with this reliance on the well-settled principles of law and equity.

B. The Demise of the Doctrine

Given the vulnerabilities described above, it is only a matter of time until courts begin to categorically hold that commercial real estate is not unique. In *Real Estate Analytics, LLC v. Vallas*,[145] a California trial court recently made such a broad holding. Although the

140. Akahi Orchid LLC v. Danel Props., LLC, No. 1 CA-CV 08-0039, 2009 WL 223285, at *4 (Ariz. Ct. App. Jan. 29, 2009) (mem.).

141. Shin v. Fujita Kanko Guam, Inc., No. CVA07-002, 2007 WL 4348300, at *3 (Guam Dec. 6, 2007) (citing Hong Kong and Shanghai Banking Corp. Ltd. v. Kallingal, No. CVA04-001, 2005 WL 2095263, at *5 (Guam Aug. 30, 2005)).

> Irreparable harm is not assumed; it must be demonstrated. Even where real property is involved, [s]peculative injury does not constitute a showing of irreparable harm. While real property is often judicially perceived as unique, [where] plaintiffs are faced with the loss of commercial, and not residential, property[,] . . . [t]hey are thus threatened with an economic loss which is compensable in large part, if not entirely, in damages.

Id.

142. *See also* Code Commentary, 14A West's Ann. Code Civ. Proc. § 405.33 (2005) ("With respect to commercial real estate, a presumption of uniqueness is often inappropriate. The essence of commercial activity is the earning of money; loss of a commercial investment opportunity can normally be offset by a pecuniary award.").

143. *See* John H. Scheid, *Buying Blackacre: Form Contracts and Prudent Provisions*, 23 J. Marshall L. Rev. 15, 57–58 (1989) ("Since each parcel of land is unique, specific performance is universally available to the buyer. Therefore, where the contract is unambiguous in its terms, and it has been entered into without misrepresentation, over-reaching, or other suspect dealings, specific performance is an appropriate remedy.").

144. Marsh Survey, *supra* note 7. Nearly 98% of the respondents agreed with the statement that "specific performance is an important remedy for the purchaser." *Id.* When asked to explain why they valued specific performance, the predominant view was that the most significant threat to a purchaser's investment in a potential deal is that the seller will get a better offer prior to closing and that the damages available through customary contracts and/or the common law are generally insufficient to make the purchaser whole. *Id.*

145. 72 Cal. Rptr. 3d 835 (Cal. Ct. App. 2008).

appellate court ultimately rejected that holding based on a unique California statute, the trial court's reasoning may be persuasive to courts in other states. Real Estate Analytics ("REA") entered into a contract with Theodore Vallas ("Vallas") to purchase a fourteen acre mobile home park with 147 units and amenities. Two weeks before closing, Vallas purported to cancel the contract. REA sued for specific performance. At trial, Vallas argued that REA had an adequate remedy at law because it was interested in the property only for its profit-making potential and that a number of similar parcels were available.[146] The trial court agreed with Vallas and awarded REA general damages equal to the difference between the contract price and the value of the property at the time of breach, plus the return of its earnest money deposit and interest. The trial court explained its reasoning at some length:

> '[A] presumption of uniqueness is often inappropriate with respect to commercial real estate. The essence of commercial activity is the earning of money. Loss of a commercial investment can normally be offset by a pecuniary award.' [REA] purchased the [property] solely as a commodity. The evidence is overwhelming that their sole purpose in buying this property was to make money for their investors, as they have done on many, many occasions. The property's uniqueness was not a concern. Their goal was to turn a profit on the property as quickly as possible. . . . Courts oftentimes . . . specifically enforce the sale of residential and other properties because of the uniqueness of the property itself and the fact that . . . it cannot be obtained by some other manner. In this particular case, [REA] was not concerned with the property. . . . They were simply interested, and *the entire intent was to earn money for their investors . . . and as such specific performance under the circumstances of this case would not be appropriate*.[147]

The trial court appeared to struggle to overcome the language of the uniqueness doctrine, essentially concluding that the presumption should not benefit REA because "the property's uniqueness was not a concern." Rather, "their sole purpose" was to "make money for their investors" and the "loss of a commercial investment" can be remedied at law. More broadly, the court appeared to argue a purchaser should be able to obtain specific performance only if it is interested in a property because of its unique qualities. But if the purchaser, like REA, treats land as a commodity, then it has an adequate remedy at law.

The main problem with this line of reasoning is that even in cases where a purchaser's sole purpose is to make money for their investors, it does not necessarily follow that they have an adequate remedy at law. This is because, as described in Part III, damages may be particularly difficult to determine if the purchaser is other than a speculator. Thinking back to the developer hypothetical discussed in section III.B, the failure of the common law to adequate compensate him is

146. *Id.* at 839.

147. *Id.* at 839–40 (quoting Reese v. Wong, 112 Cal. Rptr. 2d 669 (Cal. Ct. App. 2001) (emphasis added)).

not a result of the uniqueness of the real estate. In commercial real estate transactions, it isn't the *land* that is unique and has a peculiar value—it is the *deal*. It is the creative use that a developer will put to the land and add value. But those are precisely the kind of the damages that the law has the most difficulty estimating. The uncertainty is intuitive:

> In a world where people share identical information about risk, the entrepreneur's opportunity to profit from discovering new opportunities would vanish. People differ in their ability to make sense of situations, and the same situation might be closer to the risk end of the spectrum for some, especially entrepreneurs, while it is characterized by uncertainty for others.[148]

C. The Problem of Equity Jurisdiction

The presumption that specific performance will be ordered as a matter of course following seller's breach of a purchase agreement for real property is a foundational assumption in the real estate industry and taken into account whenever prospective parties to a contract negotiate the other terms.[149] The participants in the real estate industry assume, given the historical stability of the uniqueness doctrine, that equitable relief will be nearly automatic if a seller refuses to convey title.[150] Deals are struck, and time and money are invested in a project in accordance with this reliance on the well-settled principles of law and equity.

Therefore, if the uniqueness doctrine is found by the courts to be inapplicable to commercial real estate, as it was by the trial court in *Real Estate Analytics*, this doctrinal evolution will create a significant problem for the industry. The near-certainty that specific performance will be rewarded to a non-breaching purchaser is a powerful incentive for a seller to abide by the terms of the agreement. This, in turn, gives the purchaser the security to routinely deposit earnest money equal to 5 to 10% of the purchase price and, particularly in the case of developers, invest significant time, money, and other resources pre-closing. One survey respondent summed up the balance between the parties:

> Having the "hammer" available makes a purchaser secure in the knowledge that the seller will not be able to go out at the last minute and find a better deal. It encourages the purchaser to spend the time/money necessary to conduct all of the due diligence and pre-closing development work that often

148. Henry E. Smith, *Property and Property Rules*, 79 N.Y.U. L. REV. 1719, 1725 (2004) (citing FRANK H. KNIGHT, UNCERTAINTY AND PROFIT 264–90 (1921)).

149. *See* Scheid, *supra* note 143, at 57–58 ("Since each parcel of land is unique, specific performance is universally available to the buyer. Therefore, where the contract is unambiguous in its terms, and it has been entered into without misrepresentation, over-reaching, or other suspect dealings, specific performance is an appropriate remedy.").

150. Marsh Survey, *supra* note 7.

> needs to be done. Without [specific performance] purchasers would not be as likely to want to spend the time/money to do this work.[151]

The purchaser's investment also gives a seller confidence that a purchaser is serious about a deal and intends to close. The threat of specific performance protects a purchaser's pre-closing investment by reducing the opportunity for sellers to use the threat of litigation to limit their damages through a forced settlement.[152] If, however, the presumption of uniqueness fades and sellers believe that courts will evaluate on a case-by-case basis whether remedies at law are adequate, the risks for both parties fundamentally changes.[153]

For example, suppose Seller and Purchaser are parties to an agreement to purchase a $50 million office building with forty-five days due diligence and thirty days to close. Purchaser deposits $2.5 million in earnest money and invests an additional $75,000 in due diligence investigation. Seller refuses to close. If Seller understands that specific performance will almost automatically be awarded, it has no rational reason to continue to refuse to perform—it has nothing to gain.[154] In the development context, there may be a number of circumstances where it would be economically reasonable for Seller to pay general and incidental damages to Purchaser and keep the property because it had a plan to make a larger profit in the long term. In such a scenario, Purchaser may regard money damages as adequate, but only if timely received so that they could be reinvested. The essential problem is that the removal of the certainty of equitable relief will require Pur-

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151. Marsh Survey, *supra* note 7, at Respondent 54-c.

152. Marsh Survey, *supra* note 7, at Respondent 13-c ("The right to specific performance is an important arrow in the quiver of a buyer. Hampering the rights of the buyer in this area would make it more difficult to enforce an agreement. It would just get down to money which is not always what a buyer wants, and there would probably be less of it without this right.").

153. Marsh Survey, *supra* note 7, at Respondent 12-c ("If there is no specific performance there will be more litigation over the 'correct measure of damages.'); *id.* at Respondent 22-c (If specific performance were more difficult for purchasers to obtain, "[i]t would eliminate a material leverage which will influence negotiated settlements and decisions to litigate. The sanctity of contracts will suffer and Sellers will be more likely to act badly.").

154. If we assume that Seller breached because it received an offer of $55 million, champions of the theory of efficient breach would argue that Purchaser's relief under either remedy would be the same. If it received damages, it would receive general damages of $5 million (the difference between the contract price and the new market price) plus reliance damages and a return of its earnest money. If it received specific performance, it could flip the property to the new purchaser and receive the same profit. However, that analysis ignores significant transaction costs, including the cost of title insurance and transfer taxes in states like Florida, which would cut into Purchaser's profit. More importantly, it ignores the special value that developers play in the real estate industry. What if Seller breached not because it received a better offer, but because it came up with a better plan to maximize the value of the asset? What if Purchaser had no interest in flipping the property because it also envisioned a redevelopment plan?

chaser to endure lengthy and expensive litigation in order to receive an adequate remedy. As one practitioner noted:

> Given the time value of money, and the length of time to litigate matters, the availability of specific performance is the only way to adequately level the playing field between the buyer and seller to avoid routine refusals on the part of sellers to close. . . . Buyers have a very difficult time obtaining any security for the performance of the seller's obligations outside of the remedy of specific performance.[155]

During litigation, in this example, Purchaser is out-of-pocket over $2.5 million. It would be entitled to interest on that money, but interest cannot replace the opportunities lost by Purchaser while it was without the cash to use as earnest money on a replacement deal.[156] Given these powerful incentives, Purchaser will very likely settle with Seller in order to reclaim at least its earnest money and move on to the next deal.[157]

If the foregoing hypothetical dealt with an investment other than in real property, the threat of specific performance never would have been a factor when the parties were entering into the deal. Some may argue then that if Blackacre is a widget, it should be treated like a widget and we should be unconcerned with the purchaser's risk. However, the practices and customs of the commercial real estate industry have developed gradually in response to the regime of remedies established by the common law. The uniqueness doctrine may be wrong, but many still echo the fallacy because the commercial real estate industry relies upon its stability to govern the risk and security of both parties to a purchase agreement.

This reliance on the strong common law preference for equity is clear because under the current regime, the parties to a real estate purchase agreement barely negotiate remedies provisions.[158] Where the parties do negotiate, purchasers predictably try to keep all of their options at common law open and ask for a general remedies provision

155. Marsh Survey, *supra* note 7, at Respondent 42-c.

156. The interest awarded may match what Purchaser would have otherwise earned in profit on the lost opportunity, but it is more likely than not that the awarded interest will have no relationship to Purchaser's anticipated return.

157. Marsh Survey, *supra* note 7, at Respondent 19-c ("A tougher burden of proof and presumably more prolonged litigation might cause a purchaser to be less likely to pursue the remedy through enforcing the contract, especially if the likelihood of winning is less certain.").

158. *See, e.g.*, John D. Hastie, *Real Estate Acquisition, Development and Disposition from the Developer's Perspective*, American Law Institute - American Bar Association Continuing Legal Education (July 30–Aug. 2, 2008) ("Many sale agreements which we review have no provisions dealing with default or remedies. We are never certain whether the law in this area is well developed as a result of sloppy draftsmanship or draftsmanship is sloppy because the law is well developed."); James P. Nehf, *Contract Damages as Substitute for Full Performance*, 32 IND. L. REV. 765, 772 (1999) ("[M]ost contracting parties (and their lawyers) do not think much about the consequences of breach during the contract formation stages.").

that gives them "all rights at law or equity."[159] Sellers are understandably resistant to a potentially open-ended suit for damages and are remarkably successful at limiting purchasers to a choice between the return of their earnest money (sometimes with reimbursement of out-of-pocket expenses) or the right to seek specific performance.[160] Purchasers are often willing to give up the right to a suit for damages because they understand that the right to seek specific performance gives them the practical ability to negotiate for a settlement later.[161] Negotiating an informal settlement is obviously cheaper and faster than a lawsuit for damages.[162]

This is not just a drafting problem that could be solved if both parties stipulate in the contract—as they do in liquidated damages provisions—that there is no adequate remedy at law in the event of a breach. If the common law determines that the presumption of uni-

159. As one handbook advises: "If the seller defaults, the buyer would like to have the right to either terminate the contract and get back its deposit, or, alternatively, pursue any legal or equitable remedies, including a suit for specific performance." COMMERCIAL REAL ESTATE TRANSACTION HANDBOOK 272 (Mark Senn ed., 3rd ed. 2000). The following language is suggested:

> If Seller shall fail to complete settlement as herein provided, or default in any other manner under this Agreement, the Buyer, in addition to obtaining a refund of the Deposit, together with any interest thereon, may undertake any and all legal and equitable actions, including, without limitation, a suit for specific performance.

Id. at 293.

160. One sample compromise provision:

> In the event the sale of the Property is not consummated because of a default under this Agreement on the part of the Seller, Buyer may either (1) terminate this Agreement by delivery of notice of termination to Seller, whereupon (A) Buyer's Deposit plus interest accrued thereon shall be immediately returned to Buyer, and (B) Seller shall pay to Buyer any title, escrow, legal and inspection fees incurred by Buyer and any other expenses incurred by Buyer in connection with the performance of its due diligence review of the Property, including, without limitation, environmental and engineering consultants' fees, or (2) continue this Agreement pending Buyer's action for specific performance.

Adapted from PETER AITELLI, PURCHASE, SALES, AND CLOSING, UNDERSTANDING THE SOPHISTICATED REAL ESTATE PRACTICE 358 (2002).

161. Marsh Survey, *supra* note 7, at Respondent 14-b ("The purchaser can use [specific performance] as a hammer to either get the land or get a favorable settlement and therefore avoid litigation. This gives certainty to the process and cuts down on litigation and the costs associated with litigation."); *id.* at Respondent 19-b (arguing that the availability of specific performance "compels parties to settle"); *id.* at Respondent 10-c (arguing that the threat of litigation is a "substantial threat to hold over the head of the seller and forces settlement out of court").

162. The respondents to the Marsh Survey were asked whether they had ever represented a purchaser in a transaction where the seller refused or was unable to convey the property and, if so, what the resolution was. Fifty-seven percent of respondents stated that they had represented a purchaser in such a dispute and that over 68% of those matters were settled either before or after the commencement of litigation. Marsh Survey, *supra* note 7.

queness no longer applies to commercial real property, then most jurisdictions would hold that the trial court has no authority or discretion to award specific performance without a finding of fact that the purchaser has no adequate remedy at law. As the *Restatement (Second) of Contracts* explains, "[b]ecause the availability of equitable relief was historically viewed as a matter of jurisdiction, the parties cannot vary by agreement the requirement of inadequacy of damages, although a court may take appropriate notice of facts recited in their contract."[163]

A recent Indiana decision illustrates the point.[164] The Indiana Court of Appeals overturned the trial court's grant of specific performance to a seller, holding that the seller was ineligible for any remedy due to his failure to bring suit for six years. The court noted that in Indiana, the decision whether to grant specific performance is a matter within the discretion of the trial court.[165] However, it cautioned that "[s]uch judicial discretion is not arbitrary, but is governed by and must conform to the well-settled rules of equity."[166] Those "well-settled rules" include the notions that equitable remedies like specific performance are "extraordinary" remedies and that they are "not available as a matter of right."[167] Although not central to its holding, the Indiana Court of Appeals emphasized that in its view, the trial court abused its discretion in ordering specific performance where its findings did not support the conclusion that no adequate remedy at law existed. If the uniqueness doctrine collapsed and it was no longer assumed that a purchaser of real property lacked an adequate remedy at law as a matter of law, then the purchaser would be forced to prove the inadequacy of damages on a case by case basis. Such litigation would be costly, time-consuming, and inefficient. As one respondent put it: "[t]o litigate the reasons one purchases real estate seems too cumbersome."[168]

V. THE SOLUTION

The uniqueness doctrine suffers from two fundamental flaws. The first is that the historical conditions that informed the development of the doctrine—sentimental attachment, non-quantifiable social and political benefits, and the lack of a functioning market—are inapplicable to modern commercial real estate transactions. The second is that the doctrine is a one-size-fits-all approach. As Edward Yorio observed: "[T]he allure of any routine remedy for breach of contract, especially

163. RESTATEMENT (SECOND) OF CONTRACTS § 359 cmt. a (1981).
164. Kesler v. Marshall, 792 N.E.2d 893 (Ind. Ct. App. 2003).
165. *Id*. at 896.
166. *Id*. (citing Wagner v. Estate of Fox, 717 N.E.2d 195, 200 (Ind. Ct. App. 1999)).
167. *Id*.
168. Marsh Survey, *supra* note 7, at Respondent 63-c.

specific performance, is deceptive, for the issues that arrive in the formulation of contract remedies are so diverse and complex that they do not yield to any universal solution."[169]

This Part argues that it is desirable for doctrinal, theoretical, and practical reasons to grant parties to commercial real estate agreements the power to establish their own matrix of risk and freely bargain for the remedies that they agree would be reasonable and adequate given the circumstances of their transaction.[170] Based on this analysis, a model statute is proposed to entrench that choice, a solution that is predicated on the idea that the parties to an agreement are in a better position than the courts to assess their respective risks and an appropriate set of remedies.

A. No Adequate Remedy at Law

Even in the absence of the uniqueness doctrine, the rules of law and equity provide doctrinal justification for specific performance in at least a subset of commercial real estate transactions. As discussed above, a purchaser may still appeal to equity if damages are insufficient to place it in as good a position as it would have been in had the contract been honored, in other words, if it has no adequate remedy at law.[171] Each of the three hypothetical scenarios described in Part III is obviously simplified, but several points emerge.

The cleanest case is that of the speculator. General damages plus reliance damages, timely received, are adequate to permit the specula-

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169. Edward Yorio, *In Defense of Money Damages for Breach of Contract*, 82 COLUM. L. REV. 1365, 1366–67 (1982).

170. *See* Madison, *supra* note 123, at 406–07.

> Absent a substantial disparity in bargaining power, contract theory allows the parties the freedom to create their own bargains and have their intentions fulfilled without outside interference—so long as the terms of the bargain are not unconscionable and are not applied to produce unfair results. Such flexibility and freedom of contract allows for easier transferability of property interests and this enhanced alienability makes for a productive use of land.

Id.

171. Normandin v. Eastland Partners, Inc., 862 N.E.2d 402, 416 (Mass. Ct. App. 2007) ("It is a well-settled rule that a plaintiff in an action for breach of contract is entitled to damages in an amount sufficient to put him in as good as, but not better than, the financial position he would have been in had there been no breach."). *But see* Nehf, *supra* note 158, at 765.

> In theory, the payment of damages is the monetary equivalent of full performance. Practicing lawyers and their clients, of course, know differently. The successful prosecution of a breach of contract claim rarely means that the plaintiff has been 'made whole.' The plaintiff may rejoice at first upon hearing that the case on the merits is strong, only to despair when told about the difficulties of obtaining full compensation and the expenses that must be borne by the plaintiff to prosecute the action. As it turns out, the payment of damages seldom, if ever, even approximates the equivalent of contract performance.

Id.

tor to buy a substitute property. This makes sense because the speculator treats Blackacre most like a widget. She has no long term plans to hold the property so her general damages and anticipated profit are identical and easy for the court to determine.

At the other end of the spectrum, it is the purchaser for development who most clearly does not have an adequate remedy at law. The common law does not have a satisfactory mechanism for compensating for lost opportunity in this context, and the developer's expectation damages are likely far too speculative to be compensable.

The investor poses a messier problem. The purchaser of a single-tenant property on a long-term ground lease may have easily quantifiable damages, as in the *West Willow-Bay Court*[172] case. But a court will have a very difficult time estimating the expectation damages of a purchaser of a multi-tenant property who intends to hold that property for investment.

The fourth type of purchaser, the non-real estate business, also poses a problem. Some purchasers may have an adequate remedy at law and others may not, depending upon the circumstances of the transaction.

So in the absence of the uniqueness doctrine, some purchasers of commercial real estate (developers, some investors, some businessmen) will still be able to obtain specific performance under existing doctrine because they will lack an adequate remedy at law, while others (speculators, some investors, and some businessmen) will not. The fundamental flaw with this resolution is that the choice between the two remedies will have to be settled by litigation—messy, time-consuming, expensive litigation.

B. Buying and Selling the Cathedral

A different way to understand the issue is within the property rules/liability rules paradigm first described by Guido Calabresi and Douglas Melamed.[173] In their 1972 article, Calabresi and Melamed imagined an elegant framework to approach conflicts over an entitlement to private property. Their principles have been restated, expanded upon, and criticized by a number of other scholars.[174] Calabresi and Melamed described conflict over entitlements in terms

172. West Willow-Bay Court, LLC v. Robino-Bay Court Plaza, LLC, C.A. No. 2742-VCN, 2009 WL 458779 (Del. Ch. Feb. 23, 2009).

173. Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089 (1972).

174. *See, e.g.*, James E. Krier & Stewart J. Schwab, *Property Rules and Liability Rules: The Cathedral in Another Light*, 70 N.Y.U. L. REV. 440 (1995); John A. Lovett, *A Bend in the Road: Easement Relocation and Pliability in the New Restatement (Third) of Property: Servitudes*, 38 CONN. L. REV. 1 (2005); Carol M. Rose, *The Shadow of the Cathedral*, 106 YALE L. J. 2175 (1997).

of two variables. The first variable is determining "which of the conflicting parties will be entitled to prevail."[175] In their central problem, the conflict was between a factory's theoretical entitlement to pollute and the neighboring residents' entitlement to have one's property be free of pollution. The second variable is whether society will enforce that the chosen entitlement at law (through a liability rule) or at equity (through a property rule).[176]

Calabresi and Melamed write in terms of "property interests" and "entitlements" which implies, as a threshold matter, that we must determine the nature of the purchaser's interest in real property before understanding whether we can apply their paradigm to the conflict following a seller's unjustified breach.

Surprisingly, there is little literature on the nature of purchaser's interest, perhaps because the doctrine of equitable conversion, which dates at least to 1801,[177] is so well-settled. Under the doctrine of equitable conversion, when the parties enter into a real estate purchase agreement, the purchaser is immediately deemed the equitable owner of the real estate and the seller is considered to be the owner of the purchase price.[178] In other words, as soon as the purchase agreement is signed, the doctrine of equitable conversion holds that a purchaser has a property interest. Although there appears to be no modern debate on this characterization of a purchaser's interest, the doctrine has historically had its share of critics. Chief Justice Harlan Fiske Stone denounced the doctrine of equitable conversion as a "fiction" nearly 100 years ago.[179]

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175. Calabresi, *supra* note 173, at 1090.

176. It is a little too simplistic to equate property rules with equitable relief and liability rules with remedies at law. Some scholars describe property rules as including supercompensatory damages.

177. *See* (1801) Paine v. Meller, 31 Eng. Rep. 1088 (Ch.).

178. *See, e.g.*, Briz-Ler Corp. v. Weiner, 171 A.2d 65, 67 (Del. Ch. 1961) ("The rule followed in a majority of American jurisdictions is that an executory contract for the sale of lands requiring the seller to execute a deed conveying the legal title upon payment of the full purchase price works an equitable conversion so as to make the purchaser the equitable owner of the land and the seller the equitable owner of the purchase money. The result is that the purchaser, the equitable owner, takes the benefit of all subsequent increase in value and, at the same time, becomes subject to all losses not occasioned by the fault of the seller."); Hull v. Maryland Cas. Co., 79 So. 2d 517, 518 (Fla. 1954) ("By ordinary common-law principles, the doctrine of equitable conversion becomes operative upon entry of an agreement to convey title to realty. The vendee immediately becomes the beneficial owner, and the vendor retains only naked legal title as security for payment of the purchase price."); DiDonato v. Reliance Standard Life Ins. Co., 249 A.2d 327, 329 (Pa. 1969) ("[I]t is well-established law here that when the Agreement of Sale is signed, the purchaser becomes the equitable or beneficial owner through the doctrine of equitable conversion. The vendor retains merely a security interest for the payment of the unpaid purchase money.").

179. Harlan Fiske Stone, *Equitable Conversion by Contract*, 13 COLUM. L. REV. 369, 388 (1913) ("Most of the difficulties and perplexities which attend the disposition

Equitable conversion may be another emperor with no clothes, or at least the product of some fairly circular reasoning. The doctrine has been explained as reasonable because purchasers of real property are entitled to specific performance.[180] However, under the property rules/liability rules paradigm, purchasers of real property would only be extended the protection of a property rule (i.e. specific performance) if they had a valid entitlement. So purchasers have a property interest because they are entitled to specific performance and they are entitled to specific performance because they have a property interest. At the base of this house of cards, of course, is the presumption that all land is unique.

If we postpone the debunking of the doctrine of equitable conversion for another day and assume that its characterization of a purchaser's interest is appropriately a property interest, then the first variable seems fairly easy to resolve. Arguing that a seller is entitled to unilaterally break his promise without any consequences would go against the most fundamental concepts of contract law. It would be difficult to even theoretically support such an entitlement in favor of the seller.[181]

We may now turn to the second variable—property rule or liability rule. What should guide a choice between these two sets of rules? That is the subject of significant academic debate. Richard Posner set forth the argument, which has become accepted as "virtual dogma," that where transaction costs are high, a liability rule is more effi-

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of rights arising under contracts from the sale of land would never have risen had this fiction never been invented."); *see also* David Frisch, *Remedies as Property: A Different Perspective on Specific Performance Clauses*, 35 WM. & MARY L. REV. 1691, 1740 (1994) ("To be sure, [the doctrine of equitable conversion] is merely a fiction . . . .").

180. *See, e.g.*, Mattlage v. Mattlage, 243 S.W.3d 763, 768 (Tex. Ct. App. 2007) ("The 'pivotal question, when determining whether an equitable conversion by contract has occurred, is whether the contract is specifically enforceable.'"); George L. Clark, *Some Problems in Specific Performance*, 31 HARV. L. REV. 271, 284 (1917) ("It seems to be settled, however, that equity regards the purchaser as having a property right from the moment of making a contract which he is entitled to enforce specifically . . . ."); Real Estate Reports, *Equitable Conversion: Which Party Bears the Risk of Loss*?, 32 REAL EST. L. REP. 3 (Aug. 2002).

> Equitable conversion is a legal fiction that permits the purchaser under an executory contract to be considered the equitable owner of the real estate and the contract seller to be regarded as a secured creditor. The legal fiction derives from the equitable right of the contract vendee to specific performance, i.e., the right to acquire the very property described in the contract rather than money damages.

Id.

181. In fact, if we accept the doctrine of equitable conversion, despite the seller's fee simple title to the land at issue, it has no real property interest to protect, merely a right to the purchase price.

cient.[182] But a number of scholars assert that the analysis cannot end there. As articulated by James Krier and Stewart Schwab: "Just as obstacles to bargaining (transaction costs) might impede efficient exchanges by the parties in property rule cases, so problems in obtaining and processing information (assessment costs) might impede efficient damage calculations by the judge in liability rule cases."[183] They continue:

> The error in [the] conventional view arises because conventional thinking idealistically ignores uncertainty about damages (due to assessment costs) at the same time that it realistically acknowledges bargaining difficulties (due to transaction costs). . . . Once we recognize that in the real world both transaction costs and assessment costs are regularly significant, the bald preference for liability rules loses its foundation.[184]

In the case of a conflict sparked by a seller's breach of a commercial real estate purchase agreement, the transaction costs related to bargaining would appear to be low. Unlike the example most often discussed in the literature (nuisance), the bargaining between the parties for a structure of remedies takes place before the breach occurs, during initial contract negotiations. There are normally two parties, a purchaser and a seller, who have recently dealt with one another to negotiate an agreement. There is a limited threat from holdouts and free-riders. On the other hand, as described in Part III, assessment costs in the real world of commercial real estate transactions can be significant. Under the approach taken by Krier and Schwab, this would argue for a property rule (specific performance) rather than a liability rule (damages) in many cases.

High assessment costs are analogous to a determination of no adequate remedy at law. With respect to any given commercial real estate transaction, the choice of property rule or liability rule under the Calabresi/Melamed paradigm would therefore track the choice between equity and law under existing doctrine. Again, that choice would presumably be made by a court after breach. But the law and economics approach is a more critical doctrine of such an inefficient solution and, in this case, where transaction costs are low, commentators should be hesitant to endorse a system which requires a court to determine whether a property rule or liability rule is appropriate on a case by case basis.

A more efficient solution would be to maintain the status quo—a property rule to protect the purchaser's entitlement. Krier and Schwab describe the "conventional argument" for property rules over liability rules is as follows: "Let the parties trade by themselves when they are able; presumably they can establish the relevant values by

182. Krier & Schwab, *supra* note 174, at 452–53 (citing RICHARD A. POSNER, ECONOMIC ANALYSIS OF THE LAW 51 (1st ed. 1972)).
183. Krier & Schwab, *supra* note 174, at 453.
184. Krier & Schwab, *supra* note 174, at 454.

bargaining more cheaply and more accurately than can the judge by weighing the evidence."[185]

The parties to a commercial purchase agreement are in a better position at the outset of a transaction to accurately identify the purchaser's intent and determine whether a property rule or a liability rule is more appropriate. Their costs of negotiating a remedies provision are undeniably cheaper than the costs of having a judge adjudicate that issue after breach. And if the parties from time to time theoretically get it wrong by granting the purchaser the protection of a property rule where assessment costs are low, what is the harm? If a seller voluntarily grants a purchaser the remedy of specific performance, how is that categorically inefficient? Doesn't such a choice simply reflect those parties' understanding of their deal and their relative risks and opportunities for profit?

A number of scholars defend property rules as generally superior to liability rules.[186] Applying the paradigm to the relocation of easements, John Lovett describes the appeal of property rules: "Scholars generally agree that the principal advantages of property rules as an entitlement protection mechanism are their simplicity and clarity, their tendency to reduce uncertainty, and their promotion of consensual bargaining as opposed to market avoidance."[187]

In addition, property rules are seen as promoting "investment, planning, and labor associated with an entitlement" because they "supposedly guarantee entitlement holders the ability to preserve their property interest without fear of that interest being taken away by opportunistic takers."[188] This view is consistent with the opinions expressed by practitioners, who worry that purchasers will be discouraged from investing in property under contract if they are not assured of the availability of specific performance.[189] "In short," writes Lovett, "the superiority of property rules seems to be demonstrated not just by theoretical advantages but by their sheer popularity as autonomously chosen entitlement protection mechanisms."[190] That is certainly the

185. Krier & Schwab, *supra* note 174, at 450.

186. *But see* Smith, *supra* note 148, at 1721–22.

> Property rules find relatively few defenders among legal economists, which is all the more surprising since property rules abound in the law. If anything, the law treats property rule protection as the norm and liability rule protection as the exception—the opposite of what the bulk of recent economic commentary would lead one to expect.

Id.

187. Lovett, *supra* note 174, at 12.

188. Lovett, *supra* note 174. "A facile resort to liability rules might actually raise transaction costs, Krier and Schwab also suggest, because they could lead to market avoidance and discourage individuals from practicing self-reliance and long-term planning." *Id.* at 15.

189. Marsh Survey, supra note 7.

190. Lovett, *supra* note 174, at 16.

case with respect to real estate purchase agreements. Recall that 97% of surveyed practitioners described specific performance as an "important remedy."[191] In 1997, Richard Epstein noted that the Calabresi/Melamed paradigm had not yet been applied to real estate contracts and criticized the potential application of a liability rule to the breach of contract:

> A damage remedy, in effect, allows a person to take the property of another individual and then pay for it with cash, an option to breach as it were. Following that sequence in effect allows one person to circumvent the property system in two easy stages. First, he does a wrong of some sort, and then he makes good on the wrong by paying for it at a price determined by some neutral third party to represent the value of the thing in question. That has not generally been the law. The sanctity of contract, it was said, made it impossible for A to change the obligation he owed to B simply by paying some damages in addition. "Where the parties have made an agreement for themselves, the Courts ought not make another for them."[192]

Viewed through the lens of the Calabresi/Melamed paradigm, there is a rationale independent of uniqueness that justifies specific performance for the breach of commercial real estate contracts. At the very least, the theory justifies permitting the parties to bargain for their own regime of remedies.

C. A Proposal

As described above, the parties to a commercial real estate purchase agreement should be permitted to contract for their own remedies regime. However, pesky doctrinal issues, such as jurisdiction, pose potential roadblocks. Rather than waiting for a court to overturn the uniqueness doctrine when the right case presents itself—a dramatic event that would upset the expectations of the real estate industry and scuttle the historical certainty of remedies jurisprudence—a preemptively adopted statute would provide a uniform, stable, and efficient solution. The proposed model statute reads as follows:

Section 000.000

1. Definitions.
   (a) A "Commercial Real Estate Contract" shall mean an agreement to transfer the fee simple interest in real property other than a residential dwelling intended to be occupied by the purchaser.
   (b) "Refusal to Convey" shall mean the seller's refusal or inability, without legal excuse, to convey marketable title to the subject property to the purchaser in accordance with the terms and conditions of the Commercial Real Estate Contract.

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191. *See supra*, note 9.

192. Richard A. Epstein, *A Clear View of the Cathedral: The Dominance of Property Rules*, 106 YALE L. J. 2091, 2097–98 (1997) (citing Hoare v. Rennie, (1859) 157 Eng. Rep. 1083, 1087 (Ex. D.)).

2. Choice of Remedies. A Commercial Real Estate Contract may provide that in the event of seller's Refusal to Convey, a purchaser's remedy will be:
   (a) all remedies at law or equity (although the parties may agree to limit money damages);
   (b) specific performance; or
   (c) limited to money damages, either as awarded by the trial court (subject to limits imposed in the contract, if any) or liquidated damages as set forth in the contract.
3. Specific Performance. If a Commercial Real Estate Contract provides for the remedy set forth in subsection 2(a) or (b), the trial court shall have the discretion to award specific performance without the requirement of a finding that the purchaser has no adequate remedy at law. The trial court retains its discretion at common law to deny specific performance if it finds that it would otherwise be inequitable to do so.
4. Remedy at Law. If the Commercial Real Estate Contract limits a purchaser's remedy to money damages, then the trial court shall not have the discretion to award specific performance.

The goal of the proposed model statute is to preserve the current regime of remedies, and the current balancing of risk and investment, by granting trial courts the statutory authority to award specific performance to the purchaser if the parties to the contract agreed that it should be an available remedy. As one practitioner asked, "particular locations have special, even intangible, value to buyers in some cases. Why should they not have the benefit of the bargain they struck?"[193] Recognizing that every deal is different, the statute also provides that if the parties to the contract agree to limit a purchaser's remedy to money damages, specific performance will not be an available remedy. Steven Shavell argues that it makes economic sense to permit the parties to a contract to choose the most appropriate remedy:

> [C]ontracting parties should in principle agree ex ante to choose the remedy that would maximize the joint value of the contract to them—where the joint value is the value gained by the parties less any expenses, cost of bargaining, and risk-associated disutility. The parties should want to maximize joint value essentially because if a proposed remedy does not lead to the highest joint value, *both* parties can be made better off by agreeing to another remedy, generally after making a suitable price adjustment. If, for instance, they were contemplating specific performance but that remedy would lead to lower joint value than a damage measure, both the seller and the buyer can be made better off by changing from specific performance to the damage measure, after lowering the price to compensate the buyer if the buyer is made worse off because the seller no longer guarantees performance.[194]

193. Marsh Survey, *supra* note 7, at Respondent 27-b

194. Shavell, *supra* note 25, at 832–33.

Subsection 1(a) defines commercial real estate as all real property other than residential dwellings intended to be occupied by the purchaser. It is important to distinguish between "owner occupied" dwellings and dwellings intended to be occupied by the purchaser. As discussed by the trial court in *Real Estate Analytics*,[195] it is the purchaser's intent with respect to the property that dictates whether it is commercial real estate or not. If a developer has contracted to acquire a single-family dwelling with the intention of tearing it down and building a commercial structure, that transaction is properly regarded as a commercial real estate transaction. If, on the other hand, a family contracts to purchase a new condominium unit from a developer with the intention of making it their home, that transaction is properly regarded as a residential real estate transaction.

Subsection 1(b) describes "Refusal to Convey" as seller's refusal or inability, without legal excuse, to convey marketable title to the property in accordance with the terms and conditions of the purchase agreement. Although many remedies provisions are sloppily drafted and make no distinction between material and non-material defaults, specific performance is appropriate only if the seller fails to close the transaction. There may be other non-material defaults—such as a violation of a representation and warranty—where money damages are the only appropriate remedy. The statute does not address those defaults.

Subsection 2 empowers the parties to a commercial real estate contract to choose what regime of remedies is most appropriate to their transaction. They may give the purchaser a choice between a suit for damages or the right to specific performance, or they may choose only equity or only remedies at law. If the parties agree that the purchaser should have the remedy of specific performance, either as an option or its sole remedy, then Subsection 3 trumps the common law and grants the trial court the authority to award equity without a finding that the purchaser has no adequate remedy at law. However, Subsection 3 still grants the trial court its traditional powers at equity to deny specific performance if it would be inequitable to grant it.[196] Finally,

195. Real Estate Analytics, LLC v. Vallas, 72 Cal. Rptr. 3d 835, 843 (Cal. Ct. App. 2008).

196. For example, *see* MacRae v. MacRae, 112 P.2d 213, 215 (Ariz. 1941) ("It is a cardinal rule of equity that [one] who comes into a court of equity seeking equitable relief must come with clean hands."); Smith & Marrs, Inc. v. Osborn, 180 P.3d 1183, 1189 (N.M. Ct. App. 2008) (interpreting the maxim "he who seeks equity must do equity" as requiring a court to use its broad equitable powers to create a remedy which ensures both parties to a lawsuit receive justice to the fullest extent possible); Arena v. City of Providence, 919 A.2d 379, 395 (R.I. 2007) (quoting Puleio v. Vose, 830 F.2d 1197, 1203 (1st Cir. 1987) ("The law ministers to the vigilant not to those who sleep on perceptible rights.")); Aaron v. Mahl, 674 S.E.2d 482, 487 (S.C. 2009) (quoting Ingram v. Kasey's Assocs., 531 S.E.2d 287, 292 n.2 (S.C. 2009)) ("The doctrine of 'unclean hands' 'precludes a plaintiff from

Subsection 4 provides that the parties to a commercial real estate contract may choose to limit purchaser's remedies to money damages.

D. Where Do We Go From Here?

The model statute assumes that the remainder of the jurisprudence of remedies will remain unchanged—that specific performance will continue to be a secondary remedy available only to plaintiffs who can demonstrate that they have no adequate remedy at law. But these well-settled rules of law and equity potentially suffer a broader doctrinal instability. At the root of this instability is a simple question—why are money damages preferred to specific performance in the Anglo-American legal system? The prevailing and unsatisfying answer provided by the common law itself appears to be "because that is how it has always been."[197] As Allan Farnsworth explains:

> The early common law courts did not know specific relief, for many of the first suits after the Norman Conquest were proprietary in nature, designed to regain something of which the plaintiff had been deprived. Even the action of debt was of this character, since it was based on the notion of an unjust detention of something belonging to the plaintiff. But it became the practice in these actions to allow money damages for the detention in addition to specific relief, and with the development of new forms of action, such as assumpsit, that were in no way proprietary, substitutional relief became the usual form.[198]

Farnsworth defends the system, arguing that "the preference for substitutional rather than specific relief is peculiarly appropriate in an economy where it is assumed that markets make substitutes freely available."[199] Edward Yorio agrees that the "flexible and responsive array of monetary remedies that the law has developed over time" works well "as a way of balancing the dual goals of compensating the promisee for his loss and of imposing on the promisor that amount of damages which is appropriate in light of any facts or circumstances that may explain or justify his breach."[200]

The debate is far from resolved, however, and the case for making specific performance routinely available has been made forcefully by

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recovering in equity if he acted unfairly in a matter that is the subject of the litigation to the prejudice of the defendant.'").

197. *See* Benjamin Taibleson, *Forgiving Breach: Understanding the Preference for Damages Over Specific Performance*, 27 QUINNIPIAC L. REV. 541, 542 (2009) ("While the distinction between courts of law and equity (which lies at the root of the damages/specific performance dichotomy) is very old, it cannot stand without rational justification.").

198. Farnsworth, *supra* note 11, at 1151.

199. *Id.* at 1216.

200. Yorio, *supra* note 169, at 1424. Anthony Kronman and Richard Posner both argue that damages are more efficient than specific performance, and have lower transaction costs. *See* RICHARD POSNER, ECONOMICS ANALYSIS OF LAW 130–35 (5th ed. 1998); Kronman, *supra* note 120, at 367.

Alan Schwartz, who argues "the damage remedy is undercompensatory more often than is generally supposed" and that "promisees have economic incentives not to elect specific performance unless the damage remedy is likely not to provide adequate compensation."[201] A full discussion of this subject is beyond the scope of this Article, and the literature is well described and analyzed in a recent article by Benjamin Taibleson.[202]

The struggle between damages and specific performance for supremacy is not limited to a debate among scholars. The *Restatement (Second) of Contracts* notes that the adoption of the Uniform Commercial Code is leading to a "liberalization" of equitable remedies.[203] It would be ironic indeed if as the general preference for damages begins to soften to permit wider equitable relief, the failure of the uniqueness doctrine led to the opposite result for commercial real estate.

V. CONCLUSION

Given the historical context in which it developed, the uniqueness doctrine makes perfect sense. But that world no longer exists, and in the modern commercial real estate industry, the reality is that Blackacre sometimes *is* a widget. Despite its fundamental flaws, the uniqueness doctrine serves an important role in the commercial real estate industry by providing a reliable and certain regime of remedies that gives both parties needed security. But given the instability of the doctrine, and its one-size-fits all approach, the proposed model statute offers a practical, theoretically and doctrinally sound solution that finally allows the common law to acknowledge that the uniqueness doctrine is a fallacy without undermining one of the most significant sectors of the American economy.

201. Alan Schwartz, *The Case for Specific Performance*, 89 YALE L. J. 271, 271 (1979).
202. Taibleson, *supra* note 197.
203. *See* RESTATEMENT (SECOND) OF CONTRACTS § 359 cmt. a (1981) ("There is, however, a tendency to liberalize the granting of equitable relief by enlarging the classes of cases in which damages are not regarded as an adequate remedy.").