COMMERCIAL REAL ESTATE TRANSACTIONS GROUP:
REVISITING COMMERCIAL REAL ESTATE REMEDIES IN TROUBLING TIMES

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TRENDS IN COMMERCIAL REAL ESTATE LITIGATION:
OR HOW TO AVOID REMEDIES PITFALLS IN TROUBLING TIMES

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Monica K. Gilroy, a founding principal of Dickenson Gilroy (one of the largest woman owned law firms in the Southeast), serves as Managing Partner and leads the Litigation Group along with the Commercial Default and Creditor's Rights Groups. Born in Syracuse, New York, she received her Bachelor of Arts in Political Science from the University of Wisconsin in 1990 and a J.D. from the University Of South Carolina School Of Law in 1993. She also attended the Ealing College of Higher Education in the United Kingdom. The focus of her litigation practice includes all aspects of real estate litigation, including lender liability defense, civil and commercial contract disputes, commercial foreclosure and title disputes, regulatory claims, real estate related insurance defense and mortgage fraud-related litigation.

Ms. Gilroy has served as the litigation liaison for leading national lending institutions as well as managed national bankruptcy and foreclosure litigation programs for national investors. Ms. Gilroy continues to serve as counsel for many national banks, lenders, mortgage companies and national and international real estate industry leaders. Ms. Gilroy has extensive lead counsel trial experience and frequently appears in state and federal courts across the United States on behalf of her clients, including the Federal and State Appellate Courts.

A member of the State Bar of Georgia since 1993, she currently serves on the Executive Committee of the Real Property Law Section of the State Bar of Georgia, a section serving over 2500 member of the State Bar of Georgia, and serves as its Educational Chairperson and Newsletter Editor. She is a contributing writer to ***Foreclosure Law and Related Remedies: a State-by-State Digest*** which is published by the American Bar Association. She speaks and teaches on a regular basis at the state and national level to attorneys, lenders and Federal and State Regulators on real estate litigation and real estate related topics. Ms. Gilroy holds an AV-peer review rating with Martindale Hubbell. She resides in Atlanta, Georgia with her family and practices in the firm's Corporate Office in Alpharetta, Georgia.

I. Introduction-Where are we???

Lenders, servicers and investors have always found themselves in the state, federal and bankruptcy courts, defending aspects of the commercial real estate and lending process. The current market conditions have changed some aspects of this but not as much as one would think. The root of most commercial litigation in today's real estate litigation world still relates to simple defaults in commercial real estate transactions and the commercial lending which accompanies the same.

Compared with previous times, this current climate can be more complicated and the liability of potential defendants murkier. Typically when a contract or commercial lending document falls into default, plaintiffs' lawyers are not shy about rushing to court, suing first and asking questions later. The litigation process and discovery process extracts the documents and evidence necessary to prove the allegations of the claims. Now, the outcome of commercial real estate litigation is often uncertain and even if successful, does not yield the recovery or fruit which it used to. The very complexity of the current economic climate means many real estate participants have not yet begun to sort out their losses or create a path for recovery. This presentation will explore current trends in commercial real estate litigation and the effectiveness of typical remedies in that arena.

II. Overcoming the Volume of Problems

Perhaps the most problematic aspects of the current commercial real estate arena is the simply volume of default. It is not possible, or practical, to litigate each matter as was common. Now, loss mitigation efforts must be instituted on the grass roots level with commercial real estate matters as remedies are just not what they were.

Reviewing all documents at the beginning of a default situation is key to see what may have been left out at the time of drafting when default was nary a question.

When dealing with real estate matters, institute good due diligence at the time of execution or drafting. Be sure to invest in strong title examinations and good attorney opinion letters. Think to yourself, " what is this going to look like five years from now if something goes wrong?". For example, a common problem faced in Georgia is the bifurcation of the Declarant's rights to a subdivision or other commercial property, such as strip shopping center, from the underlying lending documents. Commercial lenders are finding themselves suing or foreclosing on commercial property only have to battle with the defaulting borrower over collecting rent, as under the Declarant provisions of the covenants, this right remains with the borrower, and not the lender. Tightening up both covenants and real estate documents to account for the automatic rights of the lender/borrower to assume the Declarant position is key to avoiding this problem.

III. Remedies in Commercial Leasing

When a tenant defaulted under a commercial lease, which usually meant the simple failure to timely pay rent, the landlord would usually attempt to negotiate some resolution to collect the rents owed. This is slowly becoming harder to effectuate as even the largest of companies who are commercial tenants, struggle to stay afloat in this current climate and monetary remedies are scare. If you are faced with advising a client on how best to approach commercial lease default, consider some "back to basics" to aid in your collection and remedy efforts.

Review the lease. Unlike residential tenancies, most commercial leases are negotiated and will contain special provisions specifically drafted and peculiar to the lease. The provisions providing for notice and an opportunity to cure must be reviewed in depth before any litigation is commenced for eviction or collection. Eliminate, or at least reduce, any potential counterclaims by the tenant before instigating any litigation. If you know the tenant has complained about something of a material nature, fix it or otherwise address the issue before you institute any litigation.

Send all requisite notices properly and demand, and practice, strict compliance with lease terms._ Providing all basic notes in a timely and compliant fashion is key to keeping a commercial eviction or default collection action on track. If you have used informal procedures such as email, in person discussions or telephone calls, be sure to send notice of the need for the tenant to strictly comply with all aspects of the lease including notice provisions. If asked to consider forbearance of rent or modification to payments, be sure all steps are taken to preserve your right to collects all sums due if success loss mitigation is unsuccessful. Watch carefully when consent can be withheld as the standards for "wrongful withholding" have weakened in today's tenant friendly courts.

Address potential default problems on the front end. When drafting commercial leases, consider obtaining more rent upfront, mandate personal guarantees or other security, including letters of credit. Making it more painful for a tenant to walk away from a commercial lease is key-do not permit LLCs or partnerships to lease until you have reviewed and approved business plans, financial statements and consider implementing underwriting criteria to aid in finding lower risk commercial tenants.

Shift the burden of up front improvements away from the landlord and make the tenant more responsible for such improvements. Don't forget that tenants have a deep upper hand with the glut in most areas of the country of commercial space and walking away from a lease is no longer the barrier to releasing property as it once was.

IV. Commercial Real Estate Financing Litigation Trends

Lawyers who represent commercial lenders and creditors have seen an increase in lawsuits to stop foreclosures and evictions. MERS is under national scrutiny as are the default processes and practices of many lenders. There has been a rise in pro se filings in both state and federal courts, often utilizing theories of recovery found on the internet or on consumer websites or organization.

A recent trend of an increase in foreclosure related lawsuits which are referred to as "Blue Ink" or "Original Note" or "Produce the Note" lawsuits has caught the attention of many lenders as well as Freddie Mac and Fannie Mae. The concept behind these suits is to demand, via a lawsuit, that the "true owner of the loan" i.e. the "true owner of the note", produce the note for inspection by the borrower. The inability to "produce the note" forms the basis of the borrowers' argument that the foreclosure or eviction must be stayed pending the production of the same.

Plaintiffs in these suits often seek that the Court finds that the lender Defendants have committed fraud, tortuous interference of contract, slander of title, and often seek declaratory judgment. However, the suits at their core, are really asking Courts to legislate from the bench. There is no statutory or legal authority in most states to support claims that a lender must produce the original promissory note prior to foreclosure, even in judicial foreclosure states. Plaintiffs argue that if the lender/servicer

cannot produce the original Note, then they are barred from foreclosing on the Property. Some even go as far to argue that the legal instruments securing the loan are void. The "produce the note" strategy for preventing a foreclosure is a fairly new concept. California provides the leading authority on this issue as its Courts have made several rulings on the "produce the note" theory. California has repeatedly found the "produce the note" theory to be meritless. Specifically, in Phillips v. "MERS" Mortg. Elec. Registration Sys., 2009 U.S. Dist. LEXIS 93277 (E.D. Cal. Oct. 2, 2009), the Court stated, "[L]ike many other borrowers subject to foreclosure, the Plaintiffs appear to argue DHI [lender therein] needs to possess the original promissory note to permit foreclosure. This is not the law in California and a totally discredited claim within the meaning of Rule 11 of the Federal Rules of Civil Procedure." Further, the Court in Phillips stated, "[I] it is well established that non-judicial foreclosures can be commenced without producing the original promissory note." The Phillips Court found the "produce the note" claim to be incongnizable and failed as a matter of law. *See also* Candelo v. NDEX West, LLC, 2008 U.S. Dist. LEXIS 105926, 2008 WL 5382259 (E.D. Cal. Dec. 23, 2008) ("No requirement exists under statutory framework to produce the original note to initiate non-judicial foreclosure."); Putkkuri v. ReconTrust Co., 2009 U.S. Dist. LEXIS 32, 2009 WL 32567 (S.D. Cal. Jan 5, 2009) ("Production of the original note is not required to proceed with a non-judicial foreclosure."); *see also* Vargas v. Recontrust Co., 2008 U.S. Dist. LEXIS 100115 (E.D. Cal. Dec. 1, 2008). In California, there is no statutory authority to produce the original note in order to initiate foreclosure proceedings and

therefore the California Courts have continuously found that these claims are meritless.

Plaintiffs usually rely on a line of cases from Ohio including In re Foreclosure Cases, 2007 U.S. Dist. LEXIS 84011 (N.D. Ohio Oct. 31, 2007) and Deutsche Bank Nat'l Trust Co. v. Steele, 2008 U.S. Dist. LEXIS 4937 (S.D. Ohio Jan. 8, 2008) in support of contentions that the original note must be produced prior to instituting a foreclosure. Likewise, a recent case from Nevada found that, as a non-judicial foreclosure state, there was no authority in Nevada that required that a lender produce the original note prior to foreclosure. In Ernestberg v. Mortgage Investors Group, 2009 U.S. Dist. LEXIS 4560 (D. Nev. Jan. 22, 2009), the District Court in Nevada distinguishes Ernestberg from In re Foreclosure Cases for this very reason. The Court in Ernestberg found that the Plaintiff therein had failed to cite to any authority under Nevada law that a power of sale is tied to the presentment of the original note to the debtor. Specifically the Court in Ernestberg states, "[I]n support of Plaintiff's argument that Defendants lacked standing to proceed with the nonjudicial foreclosure of the Subject Property because they failed to provide the original Note, Plaintiff cites to a nonbinding opinion from Ohio federal court, In Re Foreclsoure Cases (citations omitted). However, the referenced case is distinguishable as it dealt with judicial foreclosure proceedings brought by lenders, in contrast to the present situation. The present lawsuit involves a nonjudicial foreclosure, as expressly allowed under Nevada law. Plaintiff fails to convince the Court why the holding is applicable here". As explained above, Nevada law articulates the procedures by which a nonjudicial foreclosure may be conducted, which Defendants followed in relation

to Plaintiff's Loan and Deed of Trust." Id. The Court in Ernestberg went on to cite a string of cases from California, again a non-judicial foreclosure state, also holding no original note is needed in order for a lender to initiate foreclosure proceedings.

In Re Foreclosures was also distinguished by an Arizona District Court in the case of Goodyke v. BNC Mortg., Inc., 2009 U.S. Dist. LEXIS 89331 (D. Ariz. Sept. 10, 2009). The Court in Goodyke found that district courts have routinely held that "show me the note" arguments lack merit. *Citing* Diessner v. Mortgage Elec. Registration Sys., 618 F. Supp. 2d 1184, 1187-88 (D. Ariz. 2009) and Mansour v. Cal-Western Reconveyance Corp., 618 F. Supp. 2d 1178, 1181 (D. Ariz. 2009).

By contrast, default lawyers watched closely the Massachusetts Supreme Court case of U.S. Bank National Association vs. Antonio Ibanez. The Ibanez Court held that a bank pursuing foreclosure on certain property had no legal standing to do so. After foreclosing on two properties and purchasing the properties back at the foreclosure sale, U.S. Bank National Association (U.S.Bank), as trustee for the Structured Asset Securities Corporation Mortgage Pass-Through Certificates, Series 2006-Z; and Wells Fargo Bank, N.A. (Wells Fargo), as trustee for ABFC 2005-OPT 1 Trust, ABFC Asset Backed Certificates, Series 2005-OPT 1 filed separate complaints asking a judge to declare that they held clear title to the properties in fee simple. The Court agreed with the trial judge that the Plaintiffs, who were not the original mortgagees, failed to make the required showing that they were the holders of the mortgages at the time of foreclosure in regards to assignments and other documents. As a result, they did not

demonstrate that the foreclosure sales were valid to convey title to the subject properties, and their requests for a declaration of clear title were properly denied.

Traditional defenses to a commercial foreclosure are being utilized more frequently and accepted more by courts. Contractual, equitable, statutory and lender liability defenses are still the main source of weapon by defaulting borrowers. Borrowers are clinging to equitable remedies such as estoppel, waiver, merger, and unclean hands. Laches has become a double edge sword as the time lenders are using to work out commercial loss mitigation matters is being thrown back at the time of lawsuit, with arguments that the lender has not initiated its default remedies in a timely fashion.. Documenting all aspects of default negotiations is key. Also, having strong documentation of reinstatement amounts is key when having to fight the battle at court of "tender" in order to stave off requests for injunctive relief.

Contractually, the loan terms still dictate. If the loan terms are challenged, more scrutiny is given to areas such as notice, consideration, sufficiency of the acceleration, and defenses such as accord and satisfaction are often raised. Problematic as well is the "two trains leaving the station" concept of pursuing loss mitigation efforts simultaneously with foreclosure proceedings commencing. Which train gets to the station first dictates often times success or future litigation. Claims for detrimental reliance on the success of their loss mitigation efforts are successfully raised by borrowers every day. Most states have strong statutory authority on issues such as notice statute of frauds and statute of limitations. Considering drafting language which tolls statute of limitations in the event of default such that the time frame to institute litigation does not arise until or unless the parties reach an impasse in the default

curative process. Lastly, as discussed above, lender liability claims are on the rise, alleging breach of fiduciary duty and breach of the duty of good faith. The subjective nature of these claims often makes defense very difficult and borrower success more plausible.

The final reality is simply, even if you overcome various defenses and your remedies withstand legal scrutiny, are you able to collect anything at the end of the day. Practitioners need to use caution if asked by clients to exceed their legal fiduciary duties to act as property manager, eviction crews or repossessors of personal property. This area opens up additional liability to lenders, as well as the attorneys who choose to serve in those roles.

V. Conclusion

As defaults continue to rise, so will, inevitably, litigation to stop or challenge such defaults and commercial real estate remedies will be put to the test. The litigation arena will surely be crowded for years in an attempt to untie the knots of the past years of lending practices and commercial transactional documents. Only time will tell which remedies will withstand this crisis and permit commercial real estate to resume its "regular" course.

Revisiting Commercial Real Estate Contract Remedies in Troubling Times

by Tanya D. Marsh

The current economic crisis has created a myriad of legal and business problems for our clients and those they do business with. Some of those problems negatively impact their ability to meet contractual obligations and may lead to defaults on real estate purchase agreements, leases, and financing arrangements. During these troubling times, attorneys are well-advised to rethink our traditional approach to the remedies provisions generally found in standard commercial real estate contracts.

Some of the issues that we should consider include: (1) does the contract adequately address potential defaults that my client could suffer?; (2) what is the most attractive remedy for my client in this transaction – damages awarded by a court, liquidated damages, or equitable remedies?; and (3) does the contract have enforcement mechanisms to protect against a judgment proof defendant. This paper will briefly examine those questions in the context of commercial real estate purchase agreements.

Although commercial real estate transactions are certainly less common today than three years ago, deals are still getting done. But the remedies provisions in commercial real estate purchase agreements have traditionally been lightly negotiated, and attorneys generally rely upon form provisions. Changing economic circumstances demand a fresh look at our forms. The following "Purchaser's Default" provision is fairly typical:

> *Example 1:*
>
> <u>Purchaser's Default.</u> If Purchaser breaches this Agreement, then Seller shall receive distribution of the Earnest Money, which shall paid to and retained by Seller as full, agreed, and liquidated damages. The parties expressly agree that Seller's actual damages in the event of such default by Purchaser would be extremely difficult to ascertain and that the amount of the Earnest Money represents the parties' reasonable estimate of such damages. Seller shall have no other remedy whether at law or equity.

1. Addressing Potential Defaults

When re-evaluating remedies provisions, we should first consider the nature of possible defaults by the other party. In a real estate purchase agreement, the Purchaser's most obvious possible default refusal to close. But an attorney should carefully examine the contract to determine if Purchaser may default in other ways, either before or after closing (through post-closing clauses that survive). For example, what if Purchaser properly terminated the agreement and received a refund of the Earnest Money, but then refused to return the original due diligence materials provided

by Seller? In such a default, the language in Example 1 would not be meaningful.

A better provision will identify and address different categories of default. For example, specify the remedy that will apply in the event that Purchaser "fails to consummate this transaction," and then provide an alternative remedy structure for a breached representation and warranty discovered post-closing. Here's one example:

Example 2:

> Purchaser's Default. If Purchaser fails to consummate this transaction for any reason *other than* Seller's intentional and willful default, failure of a condition to Purchaser's obligation to close, or the exercise by Purchaser of an express right of termination granted herein, Seller shall be entitled, as its sole remedy hereunder, to terminate this Agreement and to receive and retain the Earnest Money as full liquidated damages for such default of Purchaser, the parties hereto acknowledging that it is impossible to estimate more precisely the damages which might be suffered by Seller upon Purchaser's default, and that said Earnest Money is a reasonable estimate of Seller's probable loss in the event of default by Purchaser. Seller's retention of said Earnest Money is intended not as a penalty, but as full liquidated damages. The right to retain the Earnest Money as full liquidated damages is Seller's sole and exclusive remedy in the event of default hereunder by Purchaser, and Seller hereby waives and releases any right to (and hereby covenants that it shall not) sue the Purchaser: (a) for specific performance of this Agreement, or (b) to recover actual damages in excess of the Earnest Money. If Purchaser breaches any another obligation under this Agreement, Seller shall have all remedies at law or at equity.

The same consideration needs to be applied to provisions dealing with Seller's default. Most form provisions focus on the Purchaser's remedies if the Seller refuses or fails to close, but do not adequately deal with other kinds of defaults. For example:

Example 3:

> Seller's Default. If Seller fails to perform *any of its obligations* under this Agreement for any reason other than Purchaser's default or the permitted termination of this Agreement by Seller or Purchaser as expressly provided herein, Purchaser shall be entitled, as its sole remedy, and at its option, either (a) terminate this Agreement and seek such damages as may be available to Purchaser under applicable state law, or (b) to enforce specific performance of Seller's obligation to execute and deliver the documents required to convey the Property to Purchaser in accordance with this Agreement. [emphasis added]

By failing to distinguish between refusal to convey the real estate and other kinds of defaults, this form language fails to meaningfully protect the Purchaser from typical Seller defaults, including breached representations and warranties, failure to timely deliver due diligence materials, and various post-closing obligations. The nature of Seller's default may make the choice between termination of the Agreement and the enforcement of specific performance moot, or undesirable.

2. Evaluating Potential Remedies

After determining the types of defaults possible in a particular contract, the attorney should determine whether the proposed remedies structure will produce a meaningful remedy. The two options, of course, are remedies at law (money damages) and remedies at equity (such as specific performance). The following, which is excerpted from an article published in the Nebraska Law Review in 2010,[1] provides an overview of the remedies available in commercial real estate contracts:

----- Excerpt ----

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. 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."[2] 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."[3] 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."[4] As every first-year law student learns, the most significant exception to this rule is for contracts for the conveyance of real property.

> 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.[5]

Despite the 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.[6] This measure is variously referred to as general or "loss of bargain" damages.[7] For example, if the seller agreed to convey Blackacre for $2.5 million and the fair market value on the date of the breach was $3 million, the purchaser's damages would be $500,000.[8] 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.[9] "In a rough sense," wrote one commentator, "general damages represent the non-breaching party's lost profit on the transaction."[10]

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.[11] 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.[12] A non-breaching party is required to mitigate reliance damages and will not be reimbursed for damages incurred after the breach.[13] 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.[14]

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.[15] 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."[16] Expectation damages are subject to the foreseeability rule set forth in Hadley v. Baxendale,[17] 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."[18] To receive expectation damages, the plaintiff's injury "must be proved with reasonable (although not total) certainty."[19] In most commercial real estate transactions, these two requirements make expectation damages very difficult for purchasers to obtain.[20] 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.[21] 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."[22]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.'"[23]

The continuing hesitancy to award expectation damages is in line with the 1776 decision Flureau v. Thornhill[24] 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."[25]

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[26] the 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."[27]

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."[28] 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)."[29]

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.

----- Conclusion of Excerpt ----

We need to carefully consider what kinds of remedies are most appropriate for our clients in a particular context. In my view, liquidated damages and specific performance are far better choices in the typical commercial real estate purchase agreement because they provide certainty and avoid the kinds of issues in the determination of damages discussed above.

3. Enforcement Mechanisms

A chosen remedies regime will fulfill a client's expectations only if the enforcement mechanism is designed well. In the current economic climate, damages awarded by a court are potentially problematic because of collection issues. However, this type of remedy is flexible and best suited for a "catch all" default provision.

If the Seller is essentially relying on liquidated damages, then it is important to keep that in mind while negotiating the Earnest Money amount. In many deals, particularly residential real estate deals, the Earnest Money has been reduced to such a token amount that it provides an unsatisfactory remedy in the event of default.

Finally, both parties should consider the costs of enforcement mechanisms and ensure that they include provisions that call for the payment of attorneys fees and related costs. Many form

provisions that permit a Purchaser to enforce specific performance fail to require the Seller to reimburse the Purchaser's costs in enforcing that remedy.

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[1] Tanya D. Marsh, Sometimes Blackacre is a Widget: Rethinking Commercial Real Estate Contract Remedies, 88 Neb. L. Rev. 635 (2010). Many of the footnotes have been truncated or removed for purposes of these materials.

[2] 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.

[3] Oliver Wendell Holmes, The Path of the Law, 10 Harv. L. Rev. 457, 462 (1897).

[4] Restatement (Second) of Contracts § 359(1) (1981).

[5] 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).

[6] 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.").

[7] 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).

[8] 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).

[9] 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).

[10] 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.

[11] Farnsworth, supra note 2, at 153.

[12] 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).

[13] Powell, supra note 70, at §81.04[1][c].

[14] 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 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.').

[15] 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.")

[16] 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.")

[17] (1854) 9 L.R. Exch. 341, 156 Eng. Rep 145.

[18] 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').

[19] 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 damages 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.').

[20] 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.") 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.

[21] 810 N.Y.S.2d 532, 533 (N.Y. App. Div. 2006).

[22] Id. at 533.
[23] Id. (quoting Kenford Co. v. County of Erie, 502 N.Y.S.2d 131 (1986)).
[24] (1776) 96 Eng. Rep. 635 (K.B.).
[25] Id. at 635.
[26] C.A. No. 2742-VCN, 2009 WL 458779 (Del. Ch. Feb. 23, 2009).
[27] Id. at *2.
[28] Id. at *7.
[29] Id. at *8 (emphasis added).