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# No Help for Jilted Sellers as Court Sticks With Precedent

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In *White v. Farrell*,[1] the New York Court of Appeals ruled that the measure of damages for a buyer's breach of a contract to sell real property, where the contract does not contain a liquidated damages clause as the seller's exclusive remedy,[2] is the difference between the contract price and the fair market value of the property on the date of the breach. In so ruling, the court, citing to Williston on Contracts, professed to follow the rule of decision adhered to by the "majority of jurisdictions" and what it found to be the "longstanding rule in New York" that "the four departments of the Appellate Division…have consistently endorsed," even though the court itself had "never considered the measure of damages for a buyer's breach of a contract to sell real property."

This article will question the basis for the court's ruling and show that the concurring opinion, which disagreed with the majority's rationale, set forth what would have been a better rule of damages in buyer default cases. It will also posit that the court's preferred rule renders the measurement of damages in such cases an almost irrelevant issue with unfair results for a seller victimized by a buyer's default.

The buyers in *White* had sued to recover a $25,000 down payment that the sellers retained after the buyers defaulted on the $1,725,000 contract of sale for a parcel of lakeside property. The sellers counterclaimed seeking actual damages of $348,450—the difference between the contract price and the $1,376,550 price for which the property was eventually sold. The sellers also sought consequential damages totaling $217,636.88 for mortgage and tax payments made after the buyers' default until the closing with the ultimate purchaser. The parties' contract did not contain a liquidated damages provision.

## 'Date of the Breach' Rule

In deciding cross-motions for summary judgment, the Supreme Court ruled that the buyers had breached the contract and were not entitled to recover their $25,000 down payment. However, the Supreme Court found that the fair market value of the property on the date of the breach was the same as the contract price, and, therefore, by applying the "date of the breach" rule to the sellers' damages claim, it held that the sellers had not suffered any actual damages. The Supreme Court's ruling, which also rejected the sellers' claim for consequential damages as "not valid,"[3] was unanimously affirmed by the Appellate Division without opinion.


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The Court of Appeals chose to adopt the "date of the breach" rule, which it held to be "settled law," and it declined to adopt "a new rule whereby a seller's damages for a buyer's breach of contract to sell real property is the difference between the contract price and the resale price (assuming, of course, the property is resold in an arm's-length transaction sometime before the conclusion of the lawsuit for breach of the contract)."

The court advanced the following three reasons for adopting the "date of the breach" rule as the measure of damages for a buyer's breach of a real estate contract: first, that it "seems to be the rule everywhere"; second, that it is "consistent with the general contract principles that damages 'are properly ascertained as of the date of the breach,' and 'the injured party has a duty to mitigate'" (citing *Brushton-Moira Central School District v. Thomas Associates*,[4] an earlier decision of the court, involving breach of a construction contract, in which damages were measured from the date of the breach rather than from the date of the damages trial 13 years later); and third, that "adherence to tradition" is "particularly apt in cases involving the legal effect of contractual relations." Respecting this latter point, the court elaborated by noting that, "when contractual rights are at issue," and "it can reasonably be assumed that settled rules are necessary and necessarily relied upon, stability and adherence to precedent are generally more important than a better or even a 'correct' rule of law."[5]

Nevertheless, the court observed that "resale price" will not always be irrelevant to the determination of damages. It noted that "the resale price, in a particular case, may be strong evidence of fair market value at the time of the breach." The court said that "[t]his is especially true where the time interval between default and resale is not too long, market conditions remain substantially similar, and the contract terms are comparable."

The court's adoption of the "date of the breach" measure of damages is problematical. Despite it seeming, in the court's view, to be the rule "everywhere," there was no necessity or reason of comity for the court to adopt a rule applied to sales of real property located in other States and not within New York. Likewise, the fact that the four departments of the Appellate Division had also "consistently endorsed" the rule need not have been a determining factor if the court itself deemed the policy behind the rule outdated, unworkable, or unworthy. The chief ground for adopting the rule appears, therefore, to have been the court's desire to adhere to tradition and maintain "stability" in contractual relations under "settled law."

However, the "date of the breach" measure of damages for a buyer's default does little to maintain stability in real property sales transactions. On the contrary, it facilitates, if it does not actually promote, instability in real estate transactions because the buyer need never fear incurring a large money judgment for defaulting on the contract. As Judge Eugene Pigott Jr. noted in his concurring opinion, [t]he end result [of the "date of the breach" measure of damages] is that a seller will rarely be damaged by a purchaser's breach for any reason," because the "fair market value" at the time of the breach "would almost always mean the actual contract price, for the simple reason that a willing seller and willing buyer had estab-

lished that price at arms length." To emphasize the point, Pigott stated that "[a]ny other measure [other than the difference between the contract price and the subsequent resale price] is a fiction."

Moreover, the court's reliance upon the contract measure of damages stated in cases not involving real estate, like the construction contract in *Brushton-Moira*, was misplaced. As Pigott also noted,

> [T]he majority is blurring an important distinction between the measure of damages for breach of real estate contracts and the measure of damages in other sales. Real property is and has always been treated differently from other sales, mainly because real property, by its very nature, is unique.
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> [R]eal property, unlike window panels, is not fungible. While there are usually extensive and active markets for fungible goods, thereby making it relatively less difficult for the seller to mitigate or cover in the event of a breach, the sale of real estate is clearly different because each parcel is unique. As a result, the pool of buyers is plainly smaller for real estate than goods, and when a buyer breaches a real estate purchase agreement, the seller must then commence anew, which may require a reassessment of the list price and more showings of the property to new buyers, who may or may not find the property's location, amenities or architectural style desirable. This may take a substantial amount of time and effort on the seller's part, and the seller's efforts may not readily succeed, because once the house has been on the market for a significant period of time, the market may have declined or prospective purchasers may be wary of the amount of time the house has been on the market, leading them to conclude that the property is tainted in some fashion. Meanwhile, under [the court's] holding today, the breaching buyer will walk away indifferent to the hardship caused to the seller by his conduct.

The court's majority obviously gave short shrift to the hardship factors noted by Pigott. Except for the court's stated concern for the stability of contractual relations and adherence to precedent—without caring, as noted above, to apply "a better or even a 'correct' rule of law"—the court's preference for the "date of the breach" measure of damages is inexplicable. The court's decision assumes that buyers will either always, or more often than not, agree to pay contract prices that are above fair market value. There is no basis for such an assumption. If the contract price is negotiated at arm's length and a buyer is not duped by the seller, but performs due diligence and is advised by a knowledgeable broker and represented by counsel, there is hardly any chance that the buyer will ever agree to pay a contract price that exceeds the fair market value of the property.

**Other Points**

The court's other points, regarding the seller's duty to mitigate, the possible relevance of the seller's resale price in determining the fair market value at the time of the breach, and the relevance of any differing terms between the buyer's contract and that of the subsequent sale, are equally at odds with how the "date of the breach" measure of damages is likely to apply in practice.

As Pigott also noted, "mitigation is irrelevant under the majority's rule since the only calculation that matters is the difference between the fair market value at the time of the breach and the contract price." For example, if the contract price was the fair market value of the property, then, under the "date of the breach" measure of damages, any loss suffered by the seller on a subsequent resale is irrelevant, except to the extent the resale price itself may be deemed to be evidence of the fair market value on the date of breach.

Under the stated rule, any lower resale price would not be a basis for measuring the seller's damages. Therefore, it really does not matter whether the seller does or does not do anything to "mitigate" the damages incurred on the date of breach. Because, where the resale price is equal to the date-of-breach fair market value, the rule mandates a finding of no damages; and, where the resale price is lower than the buyer's contract price, the rule bars any consideration of that lower price in determining the seller's damages, and there is nothing to mitigate.

Likewise, whether or not the terms of the buyer's contract and those of any subsequent contract for the property are comparable should be irrelevant in determining a seller's damages from the buyer's default. If the terms of the two contracts are different, that fact should not affect the seller's right to recover the difference in the price realized for the property caused by the buyer's breach.

Given the hardship reasons, which Pigott summarized, that would tend to drive the seller to sell to a new buyer at a lower contract price, it is just as likely that the seller may also be compelled to make other concessions to the new buyer, to the seller's detriment, that are equally driven by the same factors caused by the original buyer's default. Therefore, any different terms that might be found in the subsequent contract should not be deemed to offset the injury suffered from the buyer's default, the subsequent delay entailed thereby, and the seller's renewed efforts to get the property sold. Indeed, different terms in the subsequent contract will probably be the further result of the default.

**Conclusion**

In sum, as Pigott so aptly noted, under the court majority's "date of the breach" measure of damages rule, "it is the innocent sellers and not the breaching buyers, who must bear the cost of the buyers' breach." If the rule of contract damages is to give the sellers the benefit of their bargain, a rule that inevitably leads to a finding of "no damages," when there is an admittedly blatant buyer default, can hardly be said to give victimized sellers the benefit of their bargain. So long as there are areas in New York State where liquidated damages provisions are routinely not included in the contracts of sale of real property, *White v. Farrell* is a decision that cries out for a legislative reversal.

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Endnotes:

1. 20 NY3D 487 (2013).
2. The court quoted Williston's observation that the "date of the breach" damages rule does not apply where "the vendor has elected to accept, as the exclusive remedy, liquidated damages representing the purchaser's deposit." Therefore, in those areas of the State in which the prevailing practice is for real estate contracts of sale to include a liquidated damages provision, the *White* decision may be of academic interest only. However, for any real estate transaction in which the contract of sale does not include a liquidated damages provision, the *White* decision will now govern the determination of damages in all cases involving a buyer's contract default.
3. The Court of Appeals noted that the question to what extent the sellers were entitled to recover consequential damages was not a matter to be properly decided on the sellers' appeal.
4. 91 NY2d 256 (1998).
5. See *Maxton Builders v. LoGalbo*, 68 NY2d 373 (1986).