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Appraising a Presumption: A Modern Look at the Doctrine of Specific Performance in Real Estate Contracts

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APPRAISING A PRESUMPTION: A MODERN LOOK AT THE DOCTRINE OF SPECIFIC PERFORMANCE IN REAL ESTATE CONTRACTS

INTRODUCTION

When two people agree to legally bind themselves to a contract, and one of these parties subsequently violates that agreement, the law has a difficult question to answer. It must determine whether the breaching party should be forced to go through with the deal as originally intended, or instead compensate the wronged party monetarily. The established common law of contract remedies in U.S. jurisdictions treats specific performance as discretionary.[1] Thus, courts may, in special circumstances, force the breaching party to go through with the bargain, but the default rule is cash payment to put the aggrieved party in as good a position as she would have been had the contract been completed.[2] This preference for cash payment, however, is reversed when the contract deals with a parcel of land. A land transaction triggers an almost automatic

1. *See* RESTATEMENT (SECOND) OF CONTRACTS § 357 (1981) ("[S]pecific performance of a contract duty will be granted in the discretion of the court ....").

2. *See id.* § 347 (stating that "the injured party has a right to damages based on his expectation interest"). There is some debate in the academic literature with respect to the wisdom of this default rule. Some commentators have argued that specific performance should, in fact, be the default measure of damages. *See* Peter Linzer, *On the Amorality of Contract Remedies—Efficiency, Equity, and the Second* Restatement, 81 COLUM. L. REV. 111, 112 (1981); Alan Schwartz, *The Case for Specific Performance*, 89 YALE L.J. 271, 271 (1979); Thomas S. Ulen, *The Efficiency of Specific Performance: Toward a Unified Theory of Contract Remedies*, 83 MICH. L. REV. 341, 343 (1984). *But see* Jeffrey Standen, *The Fallacy of Full Compensation*, 73 WASH. U. L.Q. 145, 171 (1995) (arguing that, because specific performance "governs behavior by coercion," it is "market diminishing" and courts should use it carefully); Edward Yorio, *In Defense of Money Damages for Breach of Contract*, 82 COLUM. L. REV. 1365, 1366 (1982) (contending that specific performance is both less efficient and less flexible than a well-structured system of money damages). Much of the argument in favor of specific performance is its superior protection of subjective value. *See* Linzer, *supra*, at 116-17; Schwartz, *supra*, at 296-98. This intriguing debate, however, is not the primary concern of this Note, which takes for granted that contract law's general reliance on purely objective valuations is proper. *See infra* Part II.B.

presumption that specific performance is appropriate.[3] This presumption, although longstanding and respected in the law, stands on some rather shaky logical grounds.[4]

First, in some areas of the specific performance doctrine, the application of the presumption is illogical and inconsistent. Based on the unique properties of the land in question, it makes some sense on historical and equitable principles that aggrieved buyers should be able to demand specific performance of a real estate contract.[5] In some jurisdictions, however, the law offers specific relief to sellers as well, forcing the buyer to take the property and give the seller a cash payment.[6] Cash, of course, is the most fungible property imaginable, and yet the magic of land's favored status allows specific performance to produce it.

Second, the automatic availability of specific performance tends to overcompensate parties harmed by the breach.[7] This occurs because once a breach materializes, the aggrieved party has an option either to force completion at the contract price via specific performance, or to seek compensation based on her expectations when the deal was made.[8] Real estate markets have been known to vary greatly over relatively short periods, and litigation over contract disputes often takes many months. Plaintiffs, then, have the luxury of observing the market for a period of time after the contract has been finalized to decide which remedy to pursue. This option confers upon a plaintiff a guarantee that she will be compensated at least in the full amount of her expectation, but it also

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3. *See, e.g.*, Miedema v. Wormhoudt, 123 N.E. 596, 596-97 (Ill. 1919) ("[T]he specific performance of a contract to convey land is as much a matter of course as an action of damages for its breach."); RESTATEMENT (SECOND) OF CONTRACTS § 360 cmt. e (1981) ("Contracts for the sale of land have traditionally been accorded a special place in the law of specific performance.").

4. *See generally* 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, 389 (2004) (arguing that the law's special treatment of land owes more to societal conceptions of the meaning of land ownership than to any intrinsic uniqueness inherent in real property).

5. *See infra* Part II.A-B.

6. *See* Lawrence V. Berkovich, Note, *To Pay or to Convey?: A Theory of Remedies for Breach of Real Estate Contracts*, 1995 ANN. SURV. AM. L. 319, 319-20 (1995).

7. *See* Jonathan Levy, *Against Supercompensation: A Proposed Limitation on the Land Buyer's Right to Elect Between Damages and Specific Performance as a Remedy for Breach of Contract*, 35 LOY. U. CHI. L.J. 555, 555 (2004).

8. *See id.* at 559.

creates a significant chance that she can improve her situation.[9] Overcompensation is a problem in contract law, which operates most efficiently when the damages awarded match the actual harm done.[10]

Last, specific performance provides compensation that necessarily includes a party's subjective valuations of property.[11] Apart from these transactions in land and a few other specialties such as heirlooms, contract law does not take these idiosyncratic viewpoints into account.[12] Wherever possible, valuations in contract law are based upon objective market-driven observations to preserve predictability and to allow for efficient breach.[13] A party seeking to breach efficiently could still use some of her breach savings as a payoff to prevent the other party from seeking specific enforcement,[14] but the increased transaction costs of this post-breach negotiation will tend to make contract formation more costly and inefficient.

The approach of general contract law, in which the party seeking specific performance must establish why it is logically justified, should be applied equally to contracts in land. Developments in the field of professional real estate appraisal have made it possible to ascertain accurately the market value of real property. For cases in which appraisers' methods fail, doctrines already in place to govern

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9. For example, assuming for the moment that the aggrieved party is a buyer, she will seek specific performance if the market price of the property has either remained constant or increased because she will get the property at its current, higher value while only paying the price for which she originally contracted. If the value of the property falls in the interim, however, she can choose to ignore her right to performance and sue for damages based on her expectations as of the date of the breach. Thus, she can capture any appreciation in the property's price, while passing the risk of depreciation to the seller. *See id.* at 560-61.

10. Specifically, overcompensatory damages deter potentially efficient breaches. *See* RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 119-21 (6th ed. Aspen 2003) (1973).

11. *See* Linzer, *supra* note 2, at 116-17.

12. *See infra* notes 42-55 and accompanying text.

13. *See* 11 ARTHUR LINTON CORBIN, CORBIN ON CONTRACTS § 1004, at 42-43 (interim ed. 2002) ("Sentimental value is something that cannot be considered in the law of contracts.... In the process of determining values, market prices will always be used if such prices are available."); Charles J. Goetz & Robert E. Scott, *Liquidated Damages, Penalties and the Just Compensation Principle: Some Notes on an Enforcement Model and a Theory of Efficient Breach*, 77 COLUM. L. REV. 554, 573-74 & nn.53-54 (1977) (finding that the difficulty of valuation and lack of foreseeability usually prevent courts from awarding damages based on the parties' idiosyncratic valuations).

14. *See* POSNER, *supra* note 10, at 131.

specific performance in general contract law can be utilized in favor of the aggrieved party. In a world in which land ownership is often seen as an investment in nearly fungible properties, in which real estate appraisers have increasingly scientific techniques, and in which judges have increased discretion in granting specific performance when the merits of the case actually require it, land's favored status is an increasingly undesirable relic of the Middle Ages.

Part I of this Note summarizes the existing state of the doctrine of specific performance, for nonland contracts and for real estate contracts. Part II addresses the historical and logical reasons that land is treated differently than other objects of contract actions, concluding that the only relevant justification for this disparate treatment that is consistent with the goals of modern contract law is the idea that land tends to be difficult to value and replace. Part III addresses this difficulty by surveying the predominant valuation methods in the field of real estate appraisal, and concludes that appraisal is sufficient for all cases that would not otherwise merit specific relief on equitable grounds. Part IV addresses the concern of increased judicial transaction costs.

I. CONTRACT LAW'S APPROACH TO SPECIFIC PERFORMANCE

A. Nonland Contracts

A party who, following a breach by the promisor, seeks specific performance of a nonland contract faces an uphill battle in American courts. In these situations, the presumption in favor of money damages can be overcome only if the court, in its equitable capacity, deems that monetary reimbursement is inadequate.[15] In making this decision, courts examine the difficulty in accurately calculating a party's expectation interest,[16] the problems, if any,

15. 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.").

16. *See, e.g.*, Oglebay Norton Co. v. Armco, Inc., 556 N.E.2d 515, 521 (Ohio 1990) (finding the value of a long-term shipping contract in a market with widely fluctuating rates too speculative to reasonably estimate expectation damages); *see also* RESTATEMENT (SECOND) OF CONTRACTS § 360(a) (1981) (stating that one factor used in determining the adequacy of money damages is "the difficulty of proving damages with reasonable certainty").

that an aggrieved party may have in finding substitute performance,[17] and the likelihood that a cash award could not be collected.[18] Additionally, a court may choose to deny equitable relief if such relief would require excessive court supervision.[19] Other grounds of judicial efficiency are occasionally considered in this determination as well.[20] Of course, as with any decision a court makes in its equitable capacity, defenses addressing concerns of fairness and justice, such as inadequate consideration, lack of security for performance, and unilateral mistake, may be raised by the party seeking to prevent specific performance.[21]

It is also important to note that the general trend in U.S. contract law favors increased latitude for trial courts to grant specific performance as a redress for breach.[22] The drafters of the Second

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17. RESTATEMENT (SECOND) OF CONTRACTS § 360(b) (1981). This factor is often redundant with the difficulty in valuing a party's expectation interest. If substitute performance is unavailable, it is usually the case that there are no reliable estimates of what that performance would cost. Cases in which both factors are present tend to be decided on some combination of the two. *See, e.g.*, Triple-A Baseball Club Assocs. v. Ne. Baseball, Inc., 832 F.2d 214, 224 (1st Cir. 1987) (allowing specific relief in an action for breach of a contract for sale of a baseball franchise because value was uncertain and because it would have been impossible to find substitute performance).

18. *See, e.g.*, Roberts v. Brewer, 371 S.W.2d 424, 425 (Tex. Civ. App. 1963) (approving of trial court's grant of specific performance on the ground that the promisor was insolvent and could not pay money damages); *see also* RESTATEMENT (SECOND) OF CONTRACTS § 360(c) (1981). Some jurisdictions, however, find this factor insufficient if not abetted by other grounds for specific performance. 25 SAMUEL WILLISTON, A TREATISE ON THE LAW OF CONTRACTS § 67:10 (Richard A. Lord ed., 4th ed. 2002) [hereinafter WILLISTON]; *see also* Smith v. Howell, 176 P. 805, 812 (Or. 1918) (noting that "insolvency alone is not a ground for equitable relief"). A few courts even bar all consideration of insolvency in their decisions regarding specific relief. *See, e.g.*, Blank v. La Montagne-Chapman Co., 205 N.Y.S. 45, 46-47 (N.Y. Sup. Ct. 1924) (holding that insolvency may not be a basis for specific performance under New York law).

19. *See, e.g.*, N. Del. Indus. Dev. Corp. v. E.W. Bliss Co., 245 A.2d 431, 433 (Del. Ch. 1968) (denying an injunction to order the hiring of additional workmen at a mill because such a ruling would require the court to continually supervise the operation of the mill to ensure compliance).

20. *See, e.g.*, Walgreen Co. v. Sara Creek Prop. Co., 966 F.2d 273, 275-76 (7th Cir. 1992) (ordering specific performance of a commercial lease to force the parties into private negotiations on the theory that such negotiations would be less costly and more accurate than a judicial determination of the amount of damages).

21. *See* Schwartz, *supra* note 2, at 273.

22. *See, e.g.*, Cumbest v. Harris, 363 So. 2d 294, 297 (Miss. 1978) ("There is also considerable authority, old and new, showing liberality in the granting of an equitable remedy."); WILLISTON, *supra* note 18, § 67:1, at 186 ("There is generally seen a trend favoring liberality in the granting of an equitable remedy such as specific performance.").

Restatement of Contracts, drawing on the comments to the Uniform Commercial Code, incorporated this view in 1981 as an appropriate description of the direction of contract law.[23] Thus, even in nonland contracts, judges have been increasingly likely during the past several decades to grant specific relief in cases in which the circumstances meet the rational justifications of such relief, despite the fact that the presumption remains in favor of money damages.

B. Land Contracts

As mentioned above, plaintiffs suing for breach of a land contract are almost always given the option of receiving specific performance. In many jurisdictions, this is a flat rule.[24] Other jurisdictions phrase it as a presumption, but the result is usually the same.[25] On rare occasions, courts have given this presumption some teeth and denied specific performance when the underlying justifications for such enforcement were not present.[26] These insightful decisions

23. *See* U.C.C. § 2-716 cmt. 11 (1997) ("The purpose of UCC § 2-716 is to liberalize the right to specific performance, and the trend has been to grant specific performance with increasing liberality." (citations omitted)); RESTATEMENT (SECOND) OF CONTRACTS ch. 16, topic 3 introductory note, at 162 ("[T]here has been an increasing disposition to find that damages are not adequate and the commentary to the Code reflects this 'more liberal attitude.'").

24. *See, e.g.*, Brown v. E. Van Winkle Gin & Mach. Works, 39 So. 243, 244-45 (Ala. 1904) ("The principle was early recognized and is now generally adopted that in contracts for the sale of lands ... the remedy by suit at law for damages is not adequate ...."); Bharodia v. Pledger, 11 S.W.3d 540, 544 (Ark. 2000) ("[W]e have allowed both the buyers and the sellers of land to seek specific performance on real estate contracts throughout our case law ...."); Schumacher v. Ihrke, 469 N.W.2d 329, 335 (Minn. Ct. App. 1991) ("If real property is involved, specific performance is a proper remedy, even if other remedies would be adequate."); Ludwig v. William K. Warren Found., 809 P.2d 660, 663 (Okla. 1991) ("Land is unique. Equity will grant specific performance rather than substitute damages therefore.").

25. *See, e.g.*, Friendship Manor, Inc. v. Greiman, 581 A.2d 893, 897 (N.J. Super. Ct. App. Div. 1990) (citing a "virtual presumption" in favor of specific performance of land contracts); Gleason v. Gleason, 582 N.E.2d 657, 661 (Ohio App. 1991) (holding that the plaintiff in a breach suit is under no burden to establish the appropriateness of specific performance if the contract deals primarily with land). *See generally* Spyke, *supra* note 4, at 393 (describing the various terms used by courts).

26. *See, e.g.*, Suchan v. Rutherford, 410 P.2d 434, 438 (Idaho 1966) (holding that a contract for "irrigated farm land common to the general area in which it is located" does not merit specific performance because the land is not sufficiently unique or difficult to value); Paddock v. Davenport, 12 S.E. 464, 464-65 (N.C. 1890) ("The true principle upon which specific performance is decreed does not rest simply upon a mere arbitrary distinction as to different species of property, but it is founded upon the inadequacy of the legal remedy by way of pecuniary damages.").

denying specific performance have not, however, been widely followed or expanded.[27]

There is also some dispute regarding who may take advantage of this presumption in favor of specific relief. It is fundamental that aggrieved buyers may demand specific performance of land contracts.[28] Some courts have also held that the principle of mutuality of remedies[29] requires that aggrieved sellers are afforded the same presumption.[30] Other courts, however, find this justification insufficient and will deny specific performance to sellers unless other factors compel such relief.[31] As previously mentioned, the idea that some special characteristic of land gives a person selling it the right to compel the buyer to take the land and pay the price is odd indeed.

II. REASONS FOR THE SPECIAL TREATMENT OF REAL ESTATE

A. Historical Justifications

The special treatment of real estate in contract law has its origins in the development of the English common law. In premodern England, land was both an economic asset and the primary indicator of a person's status.[32] During that period, "the contractual expectations of purchasers of real property consisted, in

27. *See* Spyke, *supra* note 4, at 397-98; Berkovich, *supra* note 6, at 319-20.

28. *See, e.g., Friendship Manor*, 581 A.2d at 897 ("[S]pecific performance is the buyer's appropriate remedy ...."); Berkovich, *supra* note 6, at 319 (explaining that "buyers cannot be adequately compensated with money damages").

29. The traditional principle is that, for contracts to be fair, any remedy available to one party must also be available to the other. *See* WILLISTON, *supra* note 18, §§ 67:39-40 (noting that, although the traditional view requiring mutuality has been largely discredited, modern courts see a denial of a remedy to one party as insufficient to deny it to the other).

30. *See, e.g.*, Bharodia v. Pledger, 11 S.W.2d 540, 544 (Ark. 2000).

31. *See, e.g.*, Centex Homes Corp. v. Boag, 320 A.2d 194, 197-98 (N.J. Super. Ct. Ch. Div. 1974) ("[M]utuality of remedy is not an appropriate basis for granting or denying specific performance.... [S]pecific performance relief should no longer be automatically available *to a vendor* of real estate, but should be confined to those special instances where ... equitable considerations require that the relief be granted." (emphasis added)).

32. *See* David Cohen, *The Relationship of Contractual Remedies to Political and Social Status: A Preliminary Inquiry*, 32 U. TORONTO L.J. 31, 39 (1982) ("[T]he discontinuity between the legal treatment of land contracts and all others, may rest to a large degree on the political attributes of land ownership—ownership which, for over four centuries, was inextricably entwined with political power and identity.").

whole or in part, of political identity, political authority, a number of legal privileges, and social status, which may or may not have been transferred together with a valuable economic commodity."[33]

Courts of law simply could not value expectations like "social status" or the right to vote for a representative in Parliament.[34] Even if they could do so, substitute performance would have been virtually impossible for an aggrieved buyer to find, as, at that time, land was rarely bought and sold.[35] It is thus eminently sensible that the law developing at the time would treat contracts dealing with transactions in land entirely differently than it would treat contracts for the sale or exchange of chattels or services. Because the courts of law were so ill-suited to consideration of issues pertaining to land, litigants took the other route offered to them: the courts of equity.[36] Equitable courts, of course, could address these problems through the use of their power to grant injunctions or performance when the plaintiff could get no satisfaction in the courts of law.[37]

B. Modern Justifications

Of course, the law/equity split in courts has been largely abolished in the United States.[38] Although some would argue that there remains a status element to land ownership,[39] it is clearly no longer a primary focus in the expectations of most buyers of real estate.[40] Ancient roots alone cannot serve to justify the continuance of a

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33. *Id.* at 54.

34. *See id.* at 55.

35. *See id.*

36. *See* 1 JOHN NORTON POMEROY, A TREATISE ON EQUITY JURISPRUDENCE § 23, at 31-32 (Spencer W. Symons ed., 5th ed. 1994).

37. *See generally id.* § 112 (enumerating the types of remedies traditionally available in courts of equity).

38. *See id.* § 40 (listing jurisdictions in which the separation of law and equity tribunals has been abolished).

39. *See* Spyke, *supra* note 4, at 394 (noting the social and emotional importance of home ownership).

40. It could be argued that the ownership of certain real estate—penthouses on Fifth Avenue, for example—is pursued primarily for status-based reasons. Such transactions, however, are the exception rather than the rule and are really no different than the status component in the conspicuous consumption of goods such as designer clothing or imported luxury sedans.

doctrine, so modern, valid justifications must be found if the practice is to continue.[41] Modern law continues to treat real property differently for several reasons. As summarized by Loren Smith, a former chief judge of the U.S. Court of Federal Claims,

> [f]irst, the law considers each parcel of land unique. Unlike money, or most personal property, it 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.... 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 ... the whole of civilized society.[42]

Putting the "uniqueness" explanation aside for a moment,[43] many of these other justifications are out of place in the specific sphere of contract law.

Land as "part of a community," for example, can be dismissed. Contract law operates most efficiently when it is uniform so that parties do not have to incur additional costs in researching the law in other jurisdictions where they may do business.[44] Communities by definition are small areas, and thus any power to influence the law of contract at the community level would make it increasingly difficult for parties to engage in business over a wide area because they would need to expend resources in investigating and complying with the appropriate governing law in each district in which they, or the entities with which they do business, operate. These

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41. As Oliver Wendell Holmes famously noted,

> [i]t is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past.

O.W. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 469 (1897).

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

43. *See infra* notes 57-60 and accompanying text.

44. *See* Feng Chen, *The New Era of Chinese Contract Law: History, Development and a Comparative Analysis*, 27 BROOK. J. INT'L L. 153, 168 (2001) ("When examining the contract law systems of the world, it is clear that uniformity is the inherent requirement arising out of a market economy.").

increased costs would greatly discourage contract formation and dramatically reduce the efficiency of the economy.[45] Communities certainly may treat land in a special fashion with regard to use regulations and taxation, but the high costs involved make contract law inappropriate for control by community interests.

Similarly, what Judge Smith calls "emotional attachment" can be captured in the concept of subjective value. Any person who continues to possess any piece of property inherently must subjectively value that property more highly than does the market as a whole.[46] The instant that the owner's subjective value drops below the market value, the owner will be best served by selling the property. This divergence between market value and subjective value may be due to any number of reasons, including better knowledge about the property's quality, a personal insight that its value will rise or fall in the future, or some emotional attachment.

The law, however, is inconsistent in deciding whether this subjective value is relevant in valuing property interests. A general theme of contract law is the rejection of moral concerns in favor of determinable economic realities.[47] As an example, punitive damages are not allowed in contract actions unless a related tort claim is attached.[48] If contract law truly took subjective value into account, specific performance would be justified in every situation, due to the incredible difficulty in determining the prices that individual owners place on their possessions.[49] It is for this reason that the law

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45. Indeed, some commentators go further to state that the existing state-based common law system is a poor vehicle for contract law due to its lack of national uniformity. *See, e.g.*, Llewellyn Joseph Gibbons, *Stop Mucking Up Copyright Law: A Proposal for a Federal Common Law of Contract*, 35 RUTGERS L.J. 959, 963 (2004) (arguing that the goal of a uniform copyright law is undercut by individual state court decisions based on the common law of contracts).

46. Or at least more highly than its market price, minus any transaction costs that would be incurred in selling it.

47. Holmes was a major proponent of this theme in American law. He wrote that "[n]owhere is the confusion between legal and moral ideas more manifest than in the law of contract.... The duty to keep a contract at common law means a prediction that you must pay damages if you do not keep it,—and nothing else." Holmes, *supra* note 41, at 462. *But see* Linzer, *supra* note 2, at 117 ("Any economic analysis that assigns no value to [subjective interests of property owners] is incapable of measuring the true costs and benefits of breach.").

48. *See* RESTATEMENT (SECOND) OF CONTRACTS § 355 (1981).

49. *See supra* note 2. Some commentators have used this very argument to advocate specific performance as the default remedy in all contract actions. *See* Linzer, *supra* note 2,

governing compensation for property taken by government action,[50] which, in practice, deals most commonly with real property, ignores subjective value entirely.[51]

There are, however, commonly cited exceptions when subjective value is an important concern for courts. The most prominent examples are specific performance cases involving family heirlooms or other highly sentimental items.[52] Even if a piece of property is not physically unique,[53] courts will sometimes grant specific relief due to the emotional involvement of the plaintiff.[54] Thus, subjective value is an appropriate consideration in contract law if a case falls into the exception carved out for plaintiffs with a deep emotional attachment to a piece of property.[55] It is probably true, as Judge Smith notes, that this emotional attachment develops more often with land than with chattels, but it cannot be the case that such a

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at 116-17.

50. *See* U.S. CONST. amend. V ("[N]or shall private property be taken for public use, without just compensation.").

51. *See* Olson v. United States, 292 U.S. 246, 255 (1934) ("Just compensation [for government takings] includes all elements of value that inhere in the property, but *it does not exceed market value fairly determined.*" (emphasis added)); *cf.* Head v. Amoskeag Mfg. Co., 113 U.S. 9, 12 (1885) (quoting a New Hampshire statute that authorized compensation for takings by mill owners at market value plus fifty percent); ERIC C.E. TODD, THE LAW OF EXPROPRIATION AND COMPENSATION IN CANADA 116-18 (1976) (describing the Canadian system of repayment for government takings, which includes market value plus "disturbance costs" incurred in vacating, interest, and any "special value" that the owner has in the property not captured by market determination).

52. *See* RESTATEMENT (SECOND) OF CONTRACTS § 360 cmt. b (1981). ("Some types of interests are by their very nature incapable of being valued in money. Typical examples include heirlooms, family treasures and works of art that induce a strong sentimental attachment.").

53. Uniqueness, of course, would justify specific performance in its own right. *See supra* note 17 and accompanying text.

54. *See, e.g.*, Burr v. Bloomsburg, 138 A. 876, 881 (N.J. Ch. 1927) (ordering specific relief of a diamond ring that, to the plaintiff, "is endowed with a sentimental fancy, which, even though imaginary, can no more be estimated in dollars and cents than can mother love or the guileless and trusting affection of the child").

55. Most property of emotional importance may also be deserving of specific performance because it is physically unique and substitutes cannot be purchased. Subjective value is only considered in that small category of cases in which the court recognizes that the replaceable property bears such emotional significance that the expectations of the plaintiff are based on the associated emotion rather than the economic significance of ownership. *See, e.g., id.*

correlation by itself can justify a flat presumption for all land contracts.[56]

The most commonly cited reason for the special treatment of real property, however, is the simple statement that "land is unique."[57] 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.[58] There is something else below the surface. As one might infer from reading the Second Restatement,[59] a breach of a contract involving unique property is grounds for specific relief for two closely related reasons: there is no possibility of adequate replacement on the open market, and the determination of expectation damages is too uncertain.[60]

The possibility of replacing a piece of real property depends entirely on its type and location. In many instances, the presumption in favor of specific relief will seem completely justified on these grounds. But, there are legions of other situations in which an interest in real estate could be easily replaced on the open market. Stable markets exist in many areas for farmland, vacant lots, single-family homes, condominiums, commercial office space, and many other common forms of real property.[61] For these property

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56. If it were true that any type of property with which people are anecdotally more likely to develop deep emotional attachments should be given a presumption in favor of specific performance, property such as diamond rings, baby clothes, and household pets have an arguably stronger claim to the presumption than does real estate.

57. *See* Spyke, *supra* note 4, at 387 ("For centuries courts have told us that land is unique. Hundreds of judicial opinions rely on this principle.").

58. *See, e.g.*, Frensley v. Mills, 746 S.W.2d 427, 428 (Mo. Ct. App. 1988) (granting damages for breach of a contract for the sale of cattle, without considering the possibility of specific performance).

59. *See* RESTATEMENT (SECOND) OF TORTS § 360(a)-(b) (1981).

60. In essence, the "uniqueness" phraseology serves as a proxy for both the availability of substitute performance and the certainty of damages. *See supra* Part I.A.; *see also* Spyke, *supra* note 4, at 394 ("[T]he impossibility of acquiring a duplicate parcel of land and difficulties in valuing the land are the reasons that courts presume [money damages to be inadequate].").

61. *See, e.g.*, Suchan v. Rutherford, 410 P.2d 434, 438 (Idaho 1966) (finding a strong market for farmland in rural Idaho); Jill Andresky Fraser, *Where Investors Would Rather Be*, INSTITUTIONAL INVESTOR, Oct. 2002, at 133, 133-34 (discussing the market for commercial office space in Philadelphia); Dennis Hevesi, *Not Even Terror Attack Dims Manhattan Market*, N.Y. TIMES, Feb. 1, 2002, at B2 (discussing the market for residential living space in

interests, the difficulty in finding a replacement cannot carry the presumption. Therefore, the methods that courts and professionals use to value real estate warrant some serious investigation.

III. REAL ESTATE APPRAISAL AND THE PROBLEMS IN VALUING ESTATES IN LAND

A. Appraisals in the Law

In most cases, if a party needs to establish the value of a piece of real property before a court, a professional real estate appraiser is used. Appraisers are admitted as expert witnesses under the Federal Rules of Evidence,[62] and have professional organizations,[63] both governmental[64] and private[65] certifications, and government-

Manhattan).

62. *See* FED. R. EVID. 702 (governing the admissibility of testimony by expert witnesses). For a discussion of how individual states allow the admission of expert testimony, see generally Robert McGrath & Paula R. Moore, *Taller and Better Looking Judges in Texas*, 3 TEX. WESLEYAN L. REV. 367, 369-78 (1997).

63. The Appraisal Foundation is a private, nonprofit umbrella organization encompassing the major North American associations of professional appraisers. Appraisal Found., Foundation FAQs, http://www.appraisalfoundation.org/s_appraisal/doc.asp?CID=69&DID=172 (last visited Oct. 12, 2005). Specifically for real estate appraisers, the recognized leader is the 18,000-member Appraisal Institute. *See* Sofia Adrogué & Alan Ratliff, *Kicking the Tires After* Kumho*: The Bottom Line on Admitting Financial Expert Testimony*, 37 HOUS. L. REV. 431, 504 (2000); Appraisal Inst., Who We Are, http://www.appraisalinstitute.org/about/default.asp (last visited Oct. 12, 2005).

64. States have licensing and certification programs that conform to nationally approved standards. *See* J.D. EATON, REAL ESTATE VALUATION IN LITIGATION 531 & n.2 (2d ed. 1995). Federal law assigns the job of promulgating these standards to the Appraisal Foundation. *See* 12 U.S.C.A. § 3345(b) (West Supp. 2001) ("No individual shall be a State certified real estate appraiser ... unless such individual has achieved a passing grade upon a suitable examination ... that is consistent with and equivalent to the Uniform State Certification Examination issued or endorsed by the Appraiser Qualification Board of the Appraisal Foundation."); Appraisal Found., *supra* note 63.

65. The Appraisal Institute offers the most widely recognized appraiser certifications, which generally complement the state certification requirements. *See* Adrogué & Ratliff, *supra* note 63, at 504; Appraisal Inst., About Our Designations, http://www.appraisalinstitute.org/about/designations.asp (last visited Oct. 12, 2005).

ally regulated standards of practice[66] to buttress their testimony as sufficiently scientific.[67]

Moreover, the law often requires that professional appraisers value properties before courts. Consider that, although contract law assumes that it is *impossible* to determine a property's true value, the law regarding eminent domain compensation *requires* a judicial determination of fair market value whenever a property owner challenges a governmental taking.[68] Similarly, local ad valorem property taxes rely on appraisal methods to determine the taxes paid by landowners.[69] Courts also frequently use appraisal testimony in cases involving business valuations,[70] divorces,[71] foreclosures,[72] and estates.[73]

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66. Improving appraisal standards was a major focus of the reforms passed following the savings and loan crisis of the late 1980s. *See* Adrogué & Ratliff, *supra* note 63, at 503; Alison K. Bailey Seas, *Evolution of Appraisal Reform and Regulation in the United States*, 62 APPRAISAL J. 26, 33-35 (1994). Congress, as part of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989, Pub. L. No. 101-73, 103 Stat. 183, bound federal agencies to the appraisal standards promulgated by the Appraisal Foundation. *Id.*§ 1110 (codified at 12 U.S.C. § 3339 (2000)) (requiring agencies to "prescribe appropriate standards for the performance of real estate appraisals .... These rules shall require, at a minimum ... generally accepted appraisal standards as evidenced by the appraisal standards promulgated by the Appraisal Standards Board of the Appraisal Foundation"); *see also* APPRAISAL FOUNDATION, UNIFORM STANDARDS OF PROFESSIONAL APPRAISAL PRACTICE (2005), *available at* http://commerce.appraisalfoundation.org/html/USPAP2005/toc.htm (last visited Oct. 12, 2005).

67. *See* Adrogué & Ratliff, *supra* note 63, at 503-13 (analyzing the factors courts should weigh in admitting expert testimony by appraisers); Richard W. Hoyt & Robert J. Aalberts, *Implications of the* Kumho Tire *Case for Appraisal Expert Witnesses*, 69 APPRAISAL J. 11, 17-18 (2001) (concluding that appraisers must be careful to adhere to established and generally accepted appraisal practices, or risk their testimony being excluded); *see also* FED. R. EVID. 702 (governing the admissibility of testimony by expert witnesses); Kumho Tire Co. v. Carmichael, 526 U.S. 137, 149-50 (1999) (holding that technical evidence offered by expert witnesses must have "a reliable basis in the knowledge and experience of [the relevant] discipline") (alteration in original) (citation omitted).

68. *See* Olson v. United States, 292 U.S. 246, 255 (1934); *supra* note 51.

69. *See, e.g.*, Bailey County Appraisal Dist. v. Smallwood, 848 S.W.2d 822, 824 (Tex. App. 1993).

70. *See, e.g.*, McCormick v. Brevig, 96 P.3d 697, 702 (Mont. 2004) (valuing a partnership's real estate holdings).

71. *See, e.g.*, Watters v. Watters, 959 S.W.2d 585, 588 (Tenn. Ct. App. 1997).

72. *See, e.g.*, Allied Steel Corp. v. Cooper, 607 So.2d 113, 119-20 (Miss. 1992).

73. *See, e.g.*, *In re* Estate of Jones, 93 P.3d 147, 153 (Wash. 2004).

B. Criticisms of Appraisals in Court

Courts, however, have been critical of real estate appraisal in the past. The Supreme Court stated in *United States v. Miller*,[74] a Takings Clause case decided in 1943, that the determination of market value for a property with no recent sales in the surrounding area amounts to "at best, a guess by informed persons."[75] At the time, that point was probably true, but appraisal has grown dramatically as a profession since that decision was handed down.[76] One measure of this growth is that, in recent decades, several prominent colleges and universities have initiated real estate programs that include instruction in appraisal techniques.[77]

More recent critics, such as Professor John Shampton, focus on the subjective elements of professional real estate appraisal.[78] Subjective factors, Shampton argues, tend to lead a case into a wasteful "'battle of the experts.'"[79] He contends that objective statistical valuation should eventually replace professional appraisers as a court's main tool in establishing property values.[80] There are two key weaknesses to his argument. First, Shampton ignores the fact that many real estate appraisers already incorporate statistical modeling into their analysis when it is appropriate.[81] In doing so, he compares past appraisal practices with the potential of statistical models that are not yet fully formed.[82] Second, statistical evidence is not so authoritative that it would preclude a

74. 317 U.S. 369 (1943).

75. *Id.* at 375.

76. *See* Norman G. Miller & Sergey Markosyan, *The Academic Roots and Evolution of Real Estate Appraisal*, 71 APPRAISAL J. 172, 173 (2003) (finding that, prior to the 1950s, appraisal methods were limited to "fairly simple calculations," but have become dramatically more sophisticated since that time); Seas, *supra* note 66, at 27-28 (same).

77. *See* Miller & Markosyan, *supra* note 76, at 181-82.

78. *See* John F. Shampton, *Statistical Evidence of Real Estate Valuation: Establishing Value Without Appraisers*, 21 S. ILL. U. L.J. 113, 115 (1996) ("Appraisals are ultimately products of opinion rather than pure calculation.").

79. *See id.*

80. *Id.* at 147-48.

81. *See, e.g.*, Max Kummerow, *A Statistical Definition of Value*, 70 APPRAISAL J. 407, 408 (2002) (encouraging appraisers to supplement their value estimates with statistical confidence intervals).

82. Shampton, *supra* note 78, at 148.

battle between opposing statisticians.[83] Shampton's approach would likely replace a battle of expert appraisers with a battle of expert statisticians who use competing valuation models.

C. Appraisal Techniques

Commonly accepted appraisal practice typically involves three valuation approaches.[84] The appraiser uses every approach that is suitable for the type of property being valued.[85] She then reconciles the estimates of the different approaches into a final value.[86] Regardless of the approach or approaches used, however, the first step is always to determine the property's "highest and best use," which is defined as "[t]he reasonably probable and legal use of vacant land or an improved property that is physically possible, appropriately supported, and financially feasible and that results in the highest value."[87] Thus, all appraisal approaches operate under the theory that the market value of a parcel of land will reflect the most economically productive use of that land. This viewpoint is consistent with contract law's focus on economically determinable values and its rejection of subjective valuation.[88]

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83. *See, e.g.*, Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, 340 (1977) ("[S]tatistics are not irrefutable, they come in infinite variety and, like any other kind of evidence, they may be rebutted.").

84. *But see* McCloud B. Hodges, Jr., *Three Approaches?*, 61 APPRAISAL J. 553, 553-54 (1993) (arguing that judicial and legislative action have hindered the development of real estate appraisal by institutionalizing the three main approaches and discouraging innovation).

85. *See* EATON, *supra* note 64, at 160-61 ("The appraiser who does not use all applicable approaches to value has simply not made an analysis that is thorough enough for trial purposes.").

86. *See* APPRAISAL INSTITUTE, THE APPRAISAL OF REAL ESTATE 597 (12th ed. 2001). This reconciliation is done by evaluating the factors that may have made the application of the various approaches used more or less accurate and weighing their results accordingly. For a list of factors typically considered in this process, see *id.* at 598.

87. *Id.* at 305. For a summary of the techniques that appraisers use to determine highest and best use, see *id.* at 305-27.

88. *See supra* notes 13, 46-56 and accompanying text.

1. Sales Comparison Analysis

The first major method of real estate appraisal is the sales comparison analysis. Quite simply, this approach surveys sales of similar properties in the surrounding area, adjusts their prices for differences between the sale and the subject, and integrates the data into a final estimate.[89] "The sales comparison approach usually provides the primary indication of market value in appraisals of properties that are not usually purchased for their income-producing characteristics."[90] Furthermore, this approach is quite flexible and can be applied to all types of property, as long as there are a sufficient number of recent transactions involving similar properties in the relevant real estate market.[91]

For most types of properties, sales comparison is the dominant approach to value whenever it is feasible, and courts often prefer it over other appraisal methods.[92] The primary weakness of this method is that it fails when the appraiser cannot find a sufficient number of adequately comparable sales.[93] A secondary flaw is that, for properties sought chiefly as income-producing investments, comparisons with other pieces of land are far more difficult to make because obtaining information concerning the economic variables in which a buyer is most interested can be difficult.[94]

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89. *See* APPRAISAL INSTITUTE, *supra* note 86, at 417. For examples and a summary of the analytical techniques involved in sales comparison, see *id.* at 429-68.

90. *Id.* at 419.

91. *See id.*

92. *See* EATON, *supra* note 64, at 223 ("The sales comparison approach is widely accepted by the courts, at times to the exclusion of any other approach to value."); *see also* United States v. 47.14 Acres of Land, 674 F.2d 722, 726 (8th Cir. 1982) (rejecting the trial court's reliance on income capitalization when comparable sales data was the "best evidence" of value); Correia v. New Bedford Redev. Auth., 377 N.E.2d 909, 911 (Mass. 1978) (expressing the court's preference for the determination of value by either comparable sales or income capitalization before resorting to a replacement cost analysis).

93. *See* APPRAISAL INSTITUTE, *supra* note 86, at 419.

94. *See id.* at 420 ("Thoroughly analyzing comparable sales of large, complex, income-producing properties is difficult because information on the economic factors influencing the decisions of buyers is not readily available from public records or interviews with buyers and sellers.").

2. Income Capitalization Analysis

An approach to valuation based on income capitalization is of primary importance for commercial and industrial properties. This approach analyzes the potential future net income of the property[95] and uses asset capitalization techniques to derive present value.[96] Of course, this approach is limited to properties that "generate income."[97] The key weakness of the income approach is that it requires the estimation of future income and costs, which are usually highly dependant on external market conditions.[98] It is important to note, however, that the appraiser need not actually forecast the direction of financial markets, but must instead ascertain what investors currently predict these markets will do in the future, as these expectations determine what a willing buyer would pay on the current market.[99]

Courts tend to view income capitalization evidence with less trust than they view sales comparisons.[100] It is true, however, that "[i]n all jurisdictions the courts appear to accept evidence developed through the income capitalization approach when the property in question is income-producing and sufficient market data to develop the sales comparison approach are not available."[101] Even in cases in which comparable sales are available, it is considered good appraisal practice to also use an income analysis to double-check and confirm the sales comparison conclusions.[102] The income approach is far more mathematically complex than the other two approaches, however, and courts may limit its admissibility to

95. These determinations are, in essence, analogous to the sales comparison approach, because the appraiser must derive the rental rates and operating expenses the property will command via comparisons with similar, commercially rented properties. *Id.* at 499-502 (discussing market rental rates and income and expense data). For general methods appraisers use to predict future incomes and expenses, see *id.* at 497-528.

96. For capitalization techniques used by appraisers, see *id.* at 529-93.

97. *See id.* at 472.

98. *See id.* at 491.

99. *See id.*

100. *See, e.g.*, United States v. 47.14 Acres of Land, 674 F.2d 722, 726 (8th Cir. 1982) (rejecting the trial court's reliance on income capitalization when comparable sales data was the "best evidence" of value).

101. EATON, *supra* note 64, at 174.

102. *See supra* note 85.

avoid confusion or waste of time when better data, such as sales comparisons, are also available.[103]

3. Cost Analysis

The final major approach, cost analysis, attempts to determine how much it would cost to physically replace the existing property. This is done by separately valuing the land[104] plus the cost of building all improvements on the property,[105] minus an adjustment for the amount of depreciation that the improvements have undergone since they were first installed.[106] This approach is best suited for properties such as proposed construction and specialty properties not frequently exchanged in the market.[107] Apart from these cases, it is still useful as a last resort if the other two approaches are not applicable to the subject property.[108] Last, the cost approach is the only major method that values land separately from improvements, which is useful for many accounting and insurance purposes.[109]

Despite these features, the cost approach is the most criticized of the commonly used approaches to valuation.[110] With respect to residential properties, research has shown it to be significantly less accurate than a sales comparison approach.[111] One key weakness of

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103. *See* EATON, *supra* note 64, at 174-75.

104. For methods appraisers use to value land as if it were vacant, see APPRAISAL INSTITUTE, *supra* note 86, at 331-47.

105. For methods appraisers use to value property improvements, see *id.* at 367-81.

106. For methods appraisers use to calculate depreciation, see *id.* at 383-414.

107. *See id.* at 354; Bradley R. Carter, *Reviewing an Appraisal: An Attorney's Guide to Preparing for Battle*, 25 REAL EST. L.J. 28, 38 (1996).

108. *See* APPRAISAL INSTITUTE, *supra* note 86, at 353-54 ("The cost approach is particularly important when a lack of market activity limits the usefulness of the sales comparison approach and when the properties to be appraised—e.g., single-family residences—are not amenable to valuation by the income capitalization approach."); Hodges, *supra* note 84, at 558.

109. *See* APPRAISAL INSTITUTE, *supra* note 86, at 354-55.

110. *See, e.g.*, Mark G. Dotzour & Mark R. Freitag, *The Cost Approach in Residential Appraising: Make It Optional*, 63 APPRAISAL J. 182, 184 (1995) (finding that most users of residential appraisals rarely find cost-based analyses helpful); Gregory A. Iwan, *The Cost Approach—Inflexible or Infeasible?*, 61 APPRAISAL J. 136 (1993) (arguing that the cost approach "seldom aids appraisers in arriving at proper, supportable valuation results").

111. *See* Mark G. Dotzour, *An Empirical Analysis of the Reliability and Precision of the Cost Approach in Residential Appraisal*, 5 J. REAL EST. RES. 67, 72 (1990) ("On average, the appraisal error from the cost approach was nearly 3.8% greater than the error from the sales

this method is that it assumes that a replacement property would be available instantly and thus does not take into account potential construction delays.[112] Also, depreciation calculations become more difficult as the property improvements increase in age, making the cost approach difficult to apply to older buildings.[113]

Courts have also criticized the cost approach, often viewing it as a last resort[114] and, occasionally, as irrelevant and prejudicial.[115] Of course, when the other approaches are impossible or inadequate and a value has to be reached—as it does, for example, in eminent domain cases if there is no market in which to compare sale prices—the cost approach is accepted reluctantly.[116]

D. Appraisal Techniques and Judicial "Uniqueness"

Professional appraisal techniques do have difficulty in valuing a few categories of properties. Specifically, appraisals are least reliable when forced to rely solely upon the cost approach.[117] This occurs when the data is not sufficient to support either the sales comparison approach or the income capitalization approach.[118] Sales comparisons fail when the real estate market in the surrounding

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comparison approach on the same property.").

112. *See* APPRAISAL INSTITUTE, *supra* note 86, at 355.

113. *See id. But see* Dotzour, *supra* note 111, at 71 (finding no empirical correlation between the age of residential homes and the relative accuracy or inaccuracy of the cost approach).

114. *See, e.g.*, Correia v. New Bedford Redev. Auth., 377 N.E.2d 909, 911 (Mass. 1978) ("[T]he introduction of evidence concerning value based on [depreciated reproduction cost] computations has been limited to special situations in which data cannot be reliably computed under the other two methods.").

115. One particularly insistent federal district judge put it this way:

> No matter how carefully a judge attempts to instruct a jury ... the impact of direct testimony of dollars and cents of "reproduction cost less depreciation" will tend to mislead a jury in fixing, as they should, what the willing buyer and the willing seller would arrive at in the market place, and would divert them from their consideration of comparable sales as to the best evidence of value.

United States v. 70.39 Acres of Land, 164 F. Supp. 451, 489 (S.D. Cal. 1958).

116. *See* EATON, *supra* note 64, at 228 ("Some jurisdictions have excluded cost approach testimony unless it can be proven to the court's satisfaction that the property in dispute is a special-purpose property.... One significant criterion of a special-purpose property is ... the lack of comparable sales data.").

117. *See supra* Part III.C.3.

118. *See supra* note 114 and accompanying text.

area has not produced sufficient recent sales of similar properties.[119] Income capitalization fails either when the property is not income-producing or when the income produced or associated costs are so unpredictable that they cannot provide a reliable base for value.[120]

As previously noted, the only logically pertinent reasons why land contracts warrant a presumption of specific performance are the difficulty in valuation due to land's inherent uniqueness and the problems plaintiffs may have in finding substitute performance.[121] These justifications correspond closely with the weaknesses in professional appraisal practice. If a professional appraiser can find no comparable sales for a property, it is because that property is unique, and a plaintiff will almost certainly be unable to find substitute performance.[122] Investment properties that produce wildly varying income streams are also probably quite unique, or at least not readily replaceable.

Therefore, if the presumption in favor of specific performance of land contracts was removed, the least unique properties would be the easiest for appraisers to value, because the availability of substitute performance necessarily means that there are comparable sales in the area that can be a good basis for a sales comparison analysis. In such cases, the availability of comparable properties on the market means that money damages can adequately compensate the aggrieved party for that party's loss. For properties that are more obviously unique, though, a court can avoid the difficulty in ascertaining value through less reliable methods, like the cost approach, by granting specific performance in its equitable capacity, just as it would if the property was a unique or otherwise irreplaceable piece of personal property.[123] In short, the equitable discretion

119. *See supra* note 93 and accompanying text.

120. *See supra* notes 97-101 and accompanying text.

121. *See supra* Part II.B. For a discussion on the unavailability of substitute performance as essentially redundant with the property's unique nature, see *supra* note 17.

122. It is true that comparable sales analysis depends on whether there were sales conducted *prior to* the date of valuation, while the search for substitute performance takes place *after* the court's determination of value. However, absent sudden, sweeping shifts in local real estate markets, it would be difficult to find a case where a property that can be suitably valued for trial via sales comparison analysis later has insufficient replacement properties on the open market after the case has been litigated.

123. In this way, the general increased latitude that judges have gained in granting specific relief, *see supra* notes 22-23 and accompanying text, saves the court and its professional appraisal witnesses from struggling to value the most difficult properties. In fact, it is likely

that courts utilize in all other specific performance cases is well-suited to dealing with cases where the contract involves a transfer of land.

V. TRANSACTION COSTS

One key drawback to removing the presumption that land contracts always merit specific performance is that to do so would add more appraisal issues into disputes, requiring parties to hire valuation experts and potentially prolonging litigation.[124] This concern is well-founded, but the harm would be less widespread than one would initially expect. This is because in cases in which value is uncertain, definitive appraisal is unnecessary. Appraisers only need to present an opinion that valuation would be difficult, so that the judge could decide in her equitable capacity that specific performance is the proper remedy. With the judge functioning to screen out the difficult cases, appraisers would be asked to fully value only "easy" properties where the chances of widely varying appraisals on either side are low. Thus, few contentious expert "battles" would occur.

The judge's decision on this matter would weigh the same factors that judges have been considering for centuries in nonland specific performance cases.[125] It is true that parties to litigation would find experts to make their argument on this point, however tenuous that argument may be, but the increased regulation and certification of real estate appraisers[126] makes it easier for a judge or jury to distinguish qualified appraisal professionals from less scrupulous expert witnesses. Furthermore, the judge's power to exclude any

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that many of the judicial criticisms of professional real estate valuation, *see supra* Part III.B, were shaped by cases similar to *United States v. Miller*, 317 U.S. 369 (1942), in which the property had to be valued, despite the lack of any reliable sales or income information, *see id.* at 374-75.

124. *See* Shampton, *supra* note 78, at 114 (arguing that estimation by experts "usually result[s] in a competing 'battle of experts'").

125. *See, e.g.*, RESTATEMENT (SECOND) OF CONTRACTS § 360 (1981) (listing as significant factors the difficulty in proving damages to a reasonable certainty, the difficulty in obtaining substitute performance, and the likelihood that damage awards could be collected).

126. *See supra* notes 64-66.

expert testimony that does not qualify as sufficiently scientific can keep the discussion centered on established appraisal techniques.[127]

There are also some offsetting factors. The consideration and grant of specific performance, which would become less common in a world without this presumption, consumes judicial resources. Decrees requiring specific relief are more expensive than the enforcement of a reward of money damages because the court must monitor the losing party and make sure that the decreed performance is carried out.[128] Also, as an equitable remedy, specific performance is subject to a series of equitable defenses not available in suits for contract damages.[129] The consideration and adjudication of these concerns prolongs litigation and leads to increased costs.[130] Removing the presumption in favor of specific relief in land contracts would also remove these litigation and enforcement concerns from a wide swath of cases.

CONCLUSION

The presumption in favor of specific performance in suits for breach of real estate contracts has stood for centuries. However, it has grown increasingly distant from its logical basis in recent decades. Indeed, it proves inconsistent with itself by sometimes granting specific relief to aggrieved sellers.[131] It also proves inconsistent with contract law by overcompensating aggrieved parties[132] and by taking into account and protecting the subjective valuations of individual landowners.[133] Historically, these inconsistencies were well-founded in a logic of their own—land was very difficult to value accurately, particularly due to the social status it conferred.[134] The only justifications that stand up to a modern

127. *See supra* note 67.

128. *See* POSNER, *supra* note 10, at 132; Berkovich, *supra* note 6, at 355.

129. These defenses include adequacy of damages, uncertainty of terms, unfairness, public policy, difficulty in enforcement, and the presence of a power of termination. *See* RESTATEMENT (SECOND) OF CONTRACTS §§ 359, 362, 364-366, 368 (1981).

130. *See* Berkovich, *supra* note 6, at 356.

131. *See supra* text accompanying notes 5-6.

132. *See supra* notes 7-10 and accompanying text.

133. *See supra* notes 13, 46-56 and accompanying text.

134. *See supra* Part II.A.

analysis are the difficulty in valuing land and the problem of finding an adequate replacement.[135]

The question then becomes whether these reasons are sufficient to support the imposition of a blanket presumption in favor of specific performance. To understand this question, however, it is necessary to look at the alternative—what the state of the law would be without the presumption. This Note has argued that the removal of this presumption would be more fitting, largely because of the dramatic improvements in real estate appraisal techniques. Courts would determine land values via professional real estate appraisal, and judges would retain their equitable discretion to grant specific relief in those cases that merit such relief. Virtually all cases in which the accurate valuation and reasonable substitutability would be prohibitively difficult are cases where specific relief would already be available under the basic rules of contract law. In all other cases, real estate appraisal can divine value with sufficient accuracy to protect the expectation interests of the parties.

Jason S. Kirwan

135. *See supra* Part II.B.