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Seller's Damages from a Defaulting Buyer of Realty: The Influence of the Uniform Land Transactions Act on the Courts

Gerald Korngold*

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I. INTRODUCTION

[A] statute is not an alien intruder in the house of the common law, but a guest to be welcomed and made at home there as a new and powerful aid in the accomplishment of its appointed task of accommodating the law to social needs.

—Chief Justice Harlan Fiske Stone¹

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1. *The Common Law in the United States*, 50 HARV. L. REV. 4, 15 (1936).

The Uniform Land Transactions Act ("ULTA")² was initially approved by the National Conference of Commissioners on Uniform State Laws in 1975³ and recommended for enactment in all states. The drafters had great aspirations for the Act. It would provide uniformity in state doctrine on real estate matters, thus encouraging the growth of the secondary mortgage market, facilitating lending across state lines, and providing a national real estate law for a mobile population and expanding businesses.⁴ A second goal was the modernization of real estate law, with the legislation striking down hoary rules that courts were unable to abolish.⁵ ULTA was to be the Uniform Commercial Code ("UCC") of real estate law.⁶

The goals of uniformity and national reform through legislation were not realized, as ULTA was never enacted by any state legislature. This, however, is not the end of the story. ULTA, while not adopted, has been an influential authority for various courts facing novel issues of law or considering new rules to replace existing doctrine.⁷ There are various levels of irony here. ULTA was intended to supplant judge made law with legislation,⁸ yet it has been used to support, encourage, and even embolden judicial lawmakers. Moreover, only through the decisions of these courts have portions of ULTA's substantive reforms of real estate rules become law in some states. While this is not the script that the National Commissioners and ULTA's drafters had in mind, ULTA has played a noticeable role in law reform. The Act has proven to be, in the words of Chief Justice Stone, "a new and powerful"—albeit indirect—"aid in the accomplishment of its appointed task of accommodating the law to social needs."⁹

2. 13 U.L.A. 469 (1986). The act was extensively amended in 1977.

3. *Id.* at 470-71 prefatory note.

4. *Id.*

5. *Id.*

6. For comment on ULTA, see Marion W. Benfield, Jr., *The Future Advances Lender: Status Under Present Illinois Law and Under ULTA and USOLTA*, 1981 S. ILL. U. L.J. 451; Ronald Benton Brown, *Article 1 of the Uniform Land Transactions Act: Is Inconsistency with the UCC an Unnecessary Obstacle?*, 1981 S. ILL. U.L.J. 585; Jon W. Bruce, *An Overview of the Uniform Land Transactions Act and the Uniform Simplification of Land Transfers Act*, 10 STETSON L. REV. 1 (1980); Allison Dunham, *Reflections of a Statutory Draftsman: The Land Transaction Acts*, 1981 S. ILL. U. L.J. 549; Gerald Korngold, *Construction Loan Advances and the Subordinated Purchase Money Mortgagee: An Appraisal, A Suggested Approach, and the ULTA Perspective*, 50 FORDHAM L. REV. 313 (1981); Patrick A. Randolph, Jr., *The Mortgagee's Interest in Rents: Some Policy Considerations and Proposals*, 29 KAN. L. REV. 1 (1980).

7. See discussion *infra* part I.

8. U.L.T.A. prefatory note, 13 U.L.A. at 470-71.

9. See Stone, *supra* note 1, at 15.

This article examines the use of ULTA by the courts. It focuses on *Kuhn v. Spatial Design, Inc.*,¹⁰ which represents the boldest use of ULTA by a court in adopting a new rule of law. Moreover, *Kuhn* is an important case in real estate transactions law since it (correctly) rejects existing doctrine on the calculation of the seller's damages when the buyer breaches a contract of sale. This article uncovers the underlying substantive and policy disputes concerning seller's damages, and argues that damages should be calculated based on the value of the property at resale, rather than the date of breach. Additionally, *Kuhn* and its judicial adoption of ULTA section 2-504 provide a context to compare the advantages and disadvantages of legislative, as opposed to judicial, law reform. Although legislation, such as ULTA may be preferable, this article argues that judicial lawmaking of the type in *Kuhn* is appropriate in light of policy and tradition.

II. ULTA IN THE COURTS

Approximately twenty-five reported cases cite the Uniform Land Transactions Act.¹¹ These courts have treated the Act in different ways. On one extreme, some courts reject the statute's solution or otherwise give it little weight. For example, a number of decisions distinguish the ULTA rule on a particular issue from the jurisdiction's position and then proceed to apply existing state law.¹² While not directly rejecting the Act, one court expressed an apparent lack of enthusiasm, prefacing its summary of the ULTA approach on future advances doctrine with the following

10. 585 A.2d 967 (N.J. Super. Ct. App. Div. 1991).

11. A far fewer number cite the Uniform Simplification of Land Transfers Act ("USLTA"), 14 U.L.A. 249 (1990). USLTA is cited in *Volpe Construction Co. v. First Nat'l Bank*, 567 N.E.2d 1244, 1248 n.6 (Mass. App. Ct. 1991); *Action Heating & Air Conditioning, Inc. v. Petersen*, 429 N.W.2d 1, 3-4 (Neb. 1988); and *Haner v. Bruce*, 499 A.2d 792, 793-94 (Vt. 1985).

12. *E.g.*, *Gerdin v. Princeton State Bank*, 384 N.W.2d 868, 871 (Minn. 1986) (noting that Minnesota law does notice by mail or personal service in foreclosure actions as prescribed in ULTA § 3-508(a)); *Donovan v. Bachstadt*, 453 A.2d 160, 164-65 n.5 (N.J. 1982) (rejecting the dissent's reliance on the rule of buyer's damages in ULTA § 2-510 stating that "[n]o state has enacted this proposed law"); *Cook v. Salishan Properties, Inc.*, 569 P.2d 1033, 1036 (Ore. 1977) (finding that ULTA § 2-309 does not extend to defects in land itself as opposed to construction); *Tanenbaum v. Sears, Roebuck & Co.*, 401 A.2d 809, 814 n.4 (Pa. Super. Ct. 1979) (rejecting the position of ULTA § 2-302(c) and holding that phrase "time is of the essence" in and of itself indicates that failure to perform exposes that party to default of contract interest); *see American Mechanical Corp. v. Union Machine Co. of Lynn*, 485 N.E.2d 680, 684 n.3 (Mass. App. Ct. 1985) (indicating ULTA rule on calculation of buyer's damages differs from Massachusetts and most other jurisdictions).

qualification: "For what it may be worth, the National Conference of Commissioners on Uniform State Laws in 1975 promulgated the Uniform Land Transactions Act."¹³ The statute also has appeared in cases without judicial endorsement as part of the court's citation of a law review article that includes ULTA in its title.¹⁴

Other decisions are more embracing of ULTA, but to varying degrees. Some refer to a section of the Act to provide general background to the legal issue confronting the court.¹⁵ A number of cases cite the statute as support for a proposition of law that is otherwise established in the jurisdiction by case law or statutory provisions.¹⁶ Several opinions cite ULTA along with cases from other jurisdictions and secondary sources as a basis to declare a new rule of law. These latter cases cover a wide range of issues including the adoption of an implied warranty of fitness by a builder-vendor of a house;¹⁷ the analogy of installment land contracts to mortgages subject to the protections of the law of foreclosure;¹⁸ rejection

13. *Shutze v. Credithrift of Am., Inc.*, 607 So. 2d 55, 65 n.20 (Miss. 1992) (emphasis added).

14. See, e.g., *In re J.B. Van Sciver Co.*, 73 B.R. 838, 847 (Bankr. E.D. Pa. 1987) (citing Maureen M. Rayborn, Comment, *The Uniform Land Transactions Act: Pennsylvania Property Law and Sellers' Remedies for Breach of Contract of Real Estate*, 55 TEMPLE L.Q. 577, 591 (1982)); *In re Stardust Inn, Inc.*, 70 B.R. 888, 892 n.9 (Bankr. E.D. Pa. 1987); *Burkons v. Ticor Title Ins. Co.*, 798 P.2d 1308, 1314 (Ariz. Ct. App. 1989) (citing Korngold, *supra* note 6), *vacated* 813 P.2d 710 (Ariz. 1991).

15. See, e.g., *Miller v. Pepper*, 638 P.2d 864, 866 n.5 (Haw. Ct. App. 1982) (referring to statute of frauds); *Armstrong v. Csurilla*, 817 P.2d 1221, 1223 (N.M. 1991) (referring to inadequacy of price at foreclosure sale); *Pitchfork Ranch Co. v. Bar TL*, 615 P.2d 541, 551 n.12 (Wyo. 1980) (referring to auction bidding procedures).

16. See, e.g., *In re National Envtl. Sys. Corp. v. Long Pond Realty Trust*, 111 B.R. 4, 10 n.3 (Bankr. D.N.H. 1989) (discussing conduct of foreclosure sale); *McHugh v. Church*, 583 P.2d 210, 217 n.33 (Alaska 1978) (discussing conduct of power of sale foreclosure sale); *DeLuca v. C.W. Blakeslee & Sons, Inc.*, 391 A.2d 170, 174 (Conn. 1978) (referring to statute of frauds); *Kelly/Lehr & Assocs., Inc. v. O'Brien*, 551 N.E.2d 419, 425 (Ill. App. Ct. 1990) (discussing protection of tenants against foreclosing mortgagee); *Egbert v. Freedom Fed. Sav. & Loan Ass'n*, 440 N.E.2d 22, 27 (Mass. App. Ct. 1982) (regarding money due on sale clause); *Murphy v. Financial Dev. Corp.*, 495 A.2d 1245, 1251 (N.H. 1985) (noting notice requirements in non-judicial foreclosure); *Wartux Assocs. v. Kings College*, 616 N.Y.S.2d 417, 420 (1994) (discussing vendor's lien).

17. See, e.g., *Redarowicz v. Ohlendorf*, 441 N.E.2d 324, 330 (Ill. 1982); *Kirk v. Ridgway*, 373 N.W.2d 491, 495 (Iowa 1985); *McDonald v. Mianeki*, 398 A.2d 1283, 1289 (N.J. 1979).

18. See, e.g., *Skendzel v. Marshall*, 301 N.E.2d 641, 648 (Ind. 1973), *cert. denied*, 415 U.S. 921 (1974); *Anderson Contracting Co. v. Daugherty*, 417 A.2d 1227, 1232 (Pa. Super. Ct. 1979).

of the doctrine of merger by deed,¹⁹ permitting a party to request adequate assurance of performance where reasonable grounds for insecurity arise,²⁰ and elimination of the election of remedies doctrine in enforcing real estate contracts.²¹

III. SELLER'S DAMAGES ON BUYER'S DEFAULT

Of all the cases citing ULTA, the court in *Kuhn v. Spatial Design, Inc.*²² relied to the greatest extent on the Act as the basis for its decision. The *Kuhn* court followed ULTA to break from the general rule for calculating a seller's damages for a buyer's breach of a contract of sale.²³ This section reviews the general rule and the policies for rejecting it.

A. The Cases

Courts typically declare that the measure of a seller's damages for a buyer's failure to perform under a contract of sale for realty is the difference between the contract price and the market value of the property on the date of the breach.²⁴ Commentators echo this rule.²⁵ However, an examination of these cases indicates that despite the general statement, the timing question is not clearly settled in a good many of them. Similarly, the courts fail to explain why they supposedly prefer the value at the date of breach over the resale price.

First, in some decisions the timing of the valuation of the property is not an issue, and timing is only mentioned as part of a general statement of contract remedies.²⁶ Moreover, in some circumstances it is not important

19. See, e.g., *McSweyn v. Musselshell County*, 632 P.2d 1095, 1103 (Mont. 1981).

20. See, e.g., *Romig v. deVallance*, 637 P.2d 1147, 1151 (Haw. Ct. App. 1981).

21. See, e.g., *Head & Seemann, Inc. v. Gregg*, 311 N.W.2d 667, 670 (Wis. Ct. App. 1981), *aff'd*, 318 N.W.2d 381 (Wis. 1982).

22. 585 A.2d 967 (N.J. Super. Ct. App. Div. 1991).

23. See discussion *infra* part III.

24. See, e.g., *Telfener v. Russ*, 145 U.S. 522 (1892), *rev'd*, 162 U.S. 170 (1896); *Seppark v. Caswell Builders, Inc.*, 434 S.E.2d 502, 503 (Ga. Ct. App. 1993); *Construction Enter., Inc. v. Schaeffer*, 562 S.W.2d 799, 800 (Mo. Ct. App. 1978); *Chris v. Epstein*, 440 S.E.2d 581, 583 (N.C. Ct. App. 1994); *Olmo v. Matos*, 653 A.2d 1, 3 (Pa. Super. Ct. 1994).

25. See, e.g., ARTHUR CORBIN, *CONTRACTS* § 1098A (1964); MILTON FRIEDMAN, *CONTRACTS AND CONVEYANCES OF LAND* § 12.1(a) (5th ed. 1991); SAMUEL WILLISTON, *CONTRACTS* § 1399 (3d ed. 1968). These sources do not explain why time of breach is preferable to resale price.

26. See, e.g., *Duncan v. Rossuck*, 621 So. 2d 1313 (Ala. 1993) (failing to court does not refer to resale price); *Gordon v. Pfab*, 246 N.W.2d 283, 288 (Iowa 1976); *Brouillard v. Allen*,

which date—breach or resale—is used. Thus, where the market price on the date of the breach is the same as the contract price and the market price increases rather than decreases after that point, there is no issue of whether date of breach or resale is used since in either case the seller has no loss of bargain damages.²⁷ Alternatively, where the value of the realty at the date of breach is equal to the resale price, it would not matter which one a court uses.²⁸

Other decisions reveal a gap between a court's statements and actions concerning timing. Some courts claim that they follow the time of breach rule, but actually compare the resale price to the contract amount. These courts do not merely use the resale price as evidence of the market value at the time of the breach; rather, they simply and without discussion, plug the resale price into the equation as the market value at the time of breach.²⁹ For example, the Eighth Circuit Court of Appeals quoted the general rule, but instead of looking to the value at the time of breach, the court concluded that the seller could recover no loss of bargain damages since the seller resold the property two years later for the same amount as the original contract price.³⁰ The court appeared unaware that its action contradicted its statement of the law.

The use of resale price, despite a statement to the contrary is illustrated by a case which involved a contract of sale executed by a trustee in bankruptcy for the sale of a hotel property owned by the debtor.³¹ The contract price was \$4,840,000 and closing was set for January 5, 1990. The buyer defaulted, and on March 30, 1990, the first lienholder on the property foreclosed. The property was subsequently sold by the lienholder, at a date not specified by the court, for \$3,455,000. The court quoted the relevant

619 A.2d 988, 991 (Me. 1993).

27. See *Turner v. Benson*, 672 S.W.2d 752, 754-55 (Tenn. 1984) (noting fact that court chose date of breach did not affect seller where contract price and market value on date of breach were both \$75,000, and the property was resold one year later at \$76,000).

28. See, e.g., *Duncan*, 621 So. 2d at 1316 (relying on appraiser's express testimony that the property did not change in value).

29. See, e.g., *A-S Dev., Inc. v. W.R. Grace Land Corp.*, 537 F. Supp. 549, 558-59 (D.N.J. 1982) (stating rule but permitting seller to recover interest on its investment in land tied up until property could be resold five years after breach), *aff'd*, 707 F.2d 1388 (3d Cir. 1983); *Loda v. H.K. Sargeant & Assocs., Inc.*, 448 A.2d 812, 818 (Conn. 1982) (calculating damages by deducting price of resale which occurred over two months after breach from the contract price).

30. *Cote v. Chesley*, 577 F.2d 71, 73 (8th Cir. 1978).

31. *In re Gatlinburg Motel Enters.*, 127 B.R. 814 (Bankr. E.D. Tenn. 1991).

state law rule referring to "time of the breach"³² for calculating the fair market value of the property, but then awarded the trustee-seller damages in the amount of \$1,385,000. These damages were calculated by taking the difference between the contract price and the foreclosure sale price that took place at least two and a half months after the breach. It thus appears the court did not focus on the timing question, despite its embracing of the general rule.³³ Furthermore, the case may indicate that finding value at the time of a reasonable resale is intuitively pleasing to a court dealing with property in a soft market.³⁴

Some courts, however, squarely face the timing issue and insist on the date of breach rather than resale.³⁵ For example, in one case, *Webster v. DiTrapano*,³⁶ the court reversed the trial court's calculation of damages where the property was resold eleven months after breach, since the trier

32. *Id.* at 820 (quoting *Turner v. Venson*, 672 S.W.2d 752, 755 (Tenn. 1984)).

33. Although some courts state that the resale price might be *evidence* of the value of the property at the time of breach, *e.g.*, *Gardner v. Armstrong*, 31 Mo. 535 (1862), the *Gatlinburg* court gave no indication that it was using the foreclosure sales price for that purpose. Moreover, to be useful evidence, the resale must come within a reasonable time. *See, e.g.*, *Hazelton v. Le Duc*, 10 App. D.C. 379 (1897); *Kempner v. Heidenheimer*, 65 Tex. 587 (1886); *Glezos v. Frontier Invs.*, 896 P.2d 1230, 1235 (Utah Ct. App. 1995). The *Gatlinburg* court never stated when the foreclosure sale took place nor discussed whether that was within a "reasonable" time.

34. Sales of distressed property by definition involve a soft market. *See BFP v. Resolution Trust Corp.*, 114 S. Ct. 1757, 1761 (1994) ("[M]arket value, as it is commonly understood, has no applicability in the forced-sale context; indeed, it is the very *antithesis* of forced-sale value.").

35. *See, e.g.*, *Brett v. Wall*, 530 So. 2d 797, 798-99 (Ala. 1988) (holding trial court's use of date of trial rather than time of breach was reversible error); *Young v. Redman*, 128 Cal. Rptr. 86, 89-90 (Ct. App. 1976) (stating general rule and finding that testimony of seller and appraiser supported trial court's determination of value at time of breach); *Margaret H. Wayne Trust v. Lipsky*, 846 P.2d 904, 912 (Idaho 1993) (holding that it was error to find damages by comparing contract price and amount of resale that took place one year after breach); *Macal v. Stinson*, 468 N.W.2d 34, 35-36 (Iowa 1991) (declaring general rule and finding damages in amount equal to offer for resale received one month after breach and rejected by sellers rather than amount of the actual resale, which was made over a year later); *Regent Int'l v. Lear*, 732 P.2d 861, 861-62 (Nev. 1987); *Mohen v. Mooney*, 614 N.Y.S.2d 737, 738 (App. Div. 1994) (reversing computation of damages that used value as of May 15, 1989, rather than October 31, 1988, when breach occurred).

36. 494 N.Y.S.2d 550 (App. Div. 1985).

used the \$55,000 resale price rather than the value of the property at the time of breach, i.e., \$57,500.³⁷

As a further complication, even courts that calculate value as of the date of breach will use a subsequent resale price as evidence of the earlier value, as long as market conditions are similar and too much time has not passed.³⁸ Therefore, it is sometimes difficult to tell whether a court is using the resale price only as evidence of value at the time of breach, or as part of the damages formula.

B. *Policy Justifications*

The courts which embrace the general rule do not explain why it is sensible. Rather, the courts follow it without explanation, apparently on the belief that the rule is well established. One decision relied on *stare decisis* to reject a shift away from the time of breach doctrine:

Defendants propose that this Court should create a new standard of formulation for damages which would include the resale value. We do not deem it our place to change the formula for damages that has been set by precedent, where there has not been a plausible argument for such a change.³⁹

1. Supporting the General Rule

Although the courts do not offer reasons for preferring value at the time of breach, several policies can be offered in support of this rule. First, this result appears consistent with general damages theory. For example, assume the contract price is \$100 and the value at the date of breach is \$80, under

37. *Id.* at 551. Some New York courts, however, permit the use of the resale price. *E.g.*, *Tesmer Builders, Inc. v. Cimato*, 629 N.Y.S.2d 594 (App. Div. 1995) (upholding judgment using resale price but noting that damages claim was not controverted by buyer).

38. *See, e.g.*, *Lipsky*, 846 P.2d at 912 (rejecting use of resale price to show value at date of breach because resale came one year late); *Gryb v. Benson*, 406 N.E.2d 124, 126 (Ill. App. Ct. 1980) (holding use of resale price at later unspecified date was appropriate evidence); *Kasten Constr. Co. v. Jolles*, 278 A.2d 48, 51 (Md. 1971) (holding sale 14 months later was not probative of value at time of breach); *Glezos v. Frontier Inv.*, 896 P.2d 1230, 1235 (Utah Ct. App. 1995) (holding use of price three years after default was error as evidence was "simply too attenuated"); *cf.* *Showalter, Inc. v. Smith*, 629 N.E.2d 272, 276 (Ind. Ct. App. 1994) (holding although breach occurred in August 1990, resale price accepted in November 1991 was not too attenuated to be admissible evidence of value at time of breach); *Gerhardt v. Fleck*, 256 N.W.2d 547, 551 (N.D. 1977) (holding auction sale held after default was valid evidence even though property listed in different manner).

39. *Chris v. Epstein*, 440 S.E.2d 581, 583 (N.C. Ct. App. 1994).

the general rule the seller would receive damages in the amount of \$20. This supposedly protects the seller's expectation and puts the seller in as good of a position as the seller would have been if the buyer had performed.⁴⁰ Under this theory, the seller is left with the expected \$100, either in the form of the land now worth \$80 along with the \$20 in cash or the seller could resell the property in the marketplace at its \$80 value and, together with the \$20 in damages, have \$100 in cash.

Moreover, the result under the general rule would appear to be consistent with the mitigation of damages doctrine.⁴¹ Since the seller will only receive the value at the date of breach, the seller is at risk for further declines in the value of the property. So, the argument goes, the seller will act quickly to resell. In contrast, if the resale price was used for damages calculation, the seller would have no incentive to resell in a timely manner. Thus, the damages owed by the buyer would increase if the market continued to drop.

Finally, proponents of the time of resale rule would claim that the seller's concerns about a declining market are addressed by the specific performance remedy that is available to all sellers under real estate contracts.⁴² If the court orders the buyer to close under the contract, the seller will receive the contract price in exchange for the deed and thus obtain the full benefit of the contract.

2. Rejecting the General Rule

These arguments supporting the use of the value on the date of breach ignore many practical concerns of disappointed sellers, as well as theoretical considerations. The general rule wrongly places the risk of a declining market after breach on the seller of land. A seller of fungible goods should be able to quickly resell in the market and make himself whole since there is a clear and active market for most commodities. However, real estate is another matter. Realty is unique, with many complicated features, such as location, size, architectural style, layout, and included items. Since buyers also have their individual lists of desired attributes in a property, the process of matching buyers to properties is, therefore, complicated.

40. See E. ALLAN FARNSWORTH, *CONTRACTS* 840-41 (2d ed. 1990) (describing the expectation interest).

41. See *RESTATEMENT (SECOND) OF CONTRACTS* § 350 (1979) (describing general mitigation rule).

42. *Id.* § 360 cmt. e (discussing seller's right of specific performance); see PAUL GOLDSTEIN & GERALD KORNGOLD, *REAL ESTATE TRANSACTIONS: CASES AND MATERIALS ON LAND TRANSFER, DEVELOPMENT AND FINANCE* 138-39 (3d ed. 1993).

Moreover, the operation of the real estate market is complex. After the buyer's breach, the seller typically must go through many steps to remarket and resell the realty. For example, the seller usually must employ a new broker or make a new arrangement with the original broker. This may include consideration of various proposals, negotiations, and execution of an agreement with a broker which may require consultation with a lawyer.⁴³ The seller and broker must re-price the house in light of the current market, which involves a process requiring some study. The property must be marketed again with new advertising, multiple listings, and previews of the property for other brokers and potential buyers.

The sales process itself takes time. Buyers typically require several viewings of the property before making an offer to purchase. Often they will have a professional inspector review the realty before they make an offer, and the buyer may need other professionals, such as architects, designers, and contractors, to examine the property before purchase.⁴⁴

Additionally, the timing of the resale effort may be disadvantageous to the seller because of a cyclical market. For example, since many homes are sold in the late spring and early summer in order to allow people to move before the school year, if a buyer breaches late in that selling season there may be only a limited number of potential new buyers in the market.

All these factors reduce the likelihood of a quick resale.⁴⁵ As a result, the risk of a declining market is shifted to the seller. Thus, if the buyer breaches late in the selling season and the market value drops after the time of breach from \$80 to \$70 at the time of resale, the seller will not receive the full benefit of the bargain. The seller will end up with \$90 (\$20 in damages and \$70 obtained on resale) rather than the \$100 provided in the contract.

This result conflicts with basic policies of contract law. To the extent that we enforce contracts because we believe there is a moral obligation on

43. See John Payne, *A Typical House Purchase Transaction in the United States*, 30 CONV. & PROP. LAW 194 (1966).

44. For commercial properties, the review may be even more complex, since the viability of the location and the structure for the enterprise's operations must be ascertained.

45. See cases cited *supra* note 38 (describing delays in resale).

the promisor,⁴⁶ it is inconsistent to allow a wrongdoing buyer to pass the risk of a declining market to the innocent seller.

Moreover, using the value at the date of breach frustrates the efficiency benefits of a contract.⁴⁷ The time of breach rule creates an incentive for the buyer to breach in declining markets. If the buyer had performed as obligated and had then unloaded the property because of the declining market, the buyer would have suffered a \$30 loss (i.e., the difference between the contract price and the resale amount). The general rule, however, does not force the buyer to live with the buyer's poor prediction of the future value of the property. Rather, it permits the buyer to limit the loss to \$20 since payment of damages is based on the value at the time of breach. The additional \$10 of loss is instead shifted to the seller. Given the general rule, it is hard to see why a rational buyer would close in a rapidly declining market. The general rule, therefore, appears to weaken rather than enhance the efficient allocation of resources in the market.

Freedom of contract also permits individuals to make choices and enables them to create a network of consensual relationships that maximize their happiness.⁴⁸ We should not allow the acts of one party to the

46. See CHARLES FRIED, *CONTRACT AS PROMISE: A THEORY OF CONTRACTUAL OBLIGATION* 9-17 (1981); Morris Cohen, *The Basis of Contract*, 4 HARV. L. REV. 553, 571-85 (1933) (stating "common sense does generally find something revolting about the breaking of a promise, and this, if a fact, must be taken into account by the law"); L.L. Fuller & William R. Perdue Jr., *The Reliance Interest in Contract Damages*, 46 YALE L.J. 52, 61 (1936) (protecting expectation carries a "quasi-criminal aspect, its purpose being not so much to compensate the promisee as to penalize the breach of promise by the promisor").

47. See FARNSWORTH, *supra* note 40, § 1.7 (arguing that freedom of contract encourages individual entrepreneurial activity that benefits society as a whole); Ian Ayres & Robert Gertner, *Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules*, 94 YALE L.J. 97 (1989); ANTHONY T. KRONMAN & RICHARD A. POSNER, *THE ECONOMICS OF CONTRACT LAW* 1-2 (1979) ("The fundamental economic principle with which we begin is that if voluntary exchanges are permitted—if, in other words, a market is allowed to operate—resources will gravitate toward their most valuable resources. . . . The principle that voluntary exchange should be freely permitted in order to maximize value is frequently summarized in the concept (or slogan) 'freedom of contract.'"); Richard A. Posner & Andrew M. Rosenfield, *Impossibility and Related Doctrines in Contract Law: An Economic Analysis*, 6 J. LEG. STUDIES 88, 89 (1977) ("A law of contract not based on efficiency considerations will therefore be largely futile.").

48. See Cohen, *supra* note 46, at 571-85 (stating "[a]ccording to the classical view, the law of contract gives expression to and protects the will of the parties, for the will is something inherently worthy of respect"); Richard Epstein, *Notice and Freedom of Contract in the Law of Servitudes*, 55 S. CAL. L. REV. 1353, 1359 (1982) ("We may not understand why property owners want certain obligations to run with the land, but as it is *their* land, not ours, some very strong reason should be advanced before *our* intentions are allowed to

contract (i.e., the defaulting buyer) to destroy the free choices of the other (i.e., the seller). Consider, for example, that the seller in our hypothetical transaction was counting on the \$100 consideration from the sale of the home to purchase a new house, finance a child's education, or pay for any other lawful activity that would give the seller satisfaction. It would be troubling if the time of breach damages rule frustrated the seller's plans by leaving the seller with only \$90 total consideration for the property after a breach by the buyer.

The argument that the seller could avoid the harshness of the time of breach rule by obtaining a decree of specific performance is flawed.⁴⁹ If the buyer breaches because the buyer lacks the funding to close, an injunction action is an essentially meaningless and expensive exercise. The seller would prefer to keep the property and obtain a judgment for the full amount of damages, including the loss of value during the time preceding resale. The defaulting buyer may be able to pay that amount even if the buyer is unable to produce the entire purchase price in an injunction action.

IV. *KUHN V. SPATIAL DESIGN, INC.*

*Kuhn v. Spatial Design, Inc.*⁵⁰ presented the Appellate Division of the New Jersey Superior Court an opportunity to consider this oft stated, but logically flawed, time of breach rule for calculation of damages. *Kuhn* involved a vivid story of breach by buyers in a declining market. The Kuhns signed a contract to purchase a home from defendant Spatial Designs. The sale was contingent on the buyers obtaining financing. The Kuhns applied for a mortgage through a mortgage broker. Prudential Home Mortgage Company ("Prudential") issued a mortgage commitment but later withdrew it. The Kuhns attempted to cancel the contract of sale based on their inability to obtain financing but Spatial Design refused to return their deposit. The Kuhns commenced an action to recover the deposit and Spatial Design counterclaimed for damages for breach of contract.

The trial court found that the Kuhns, and employees of the mortgage broker, intentionally filed a mortgage application that was materially false with respect to the Kuhns' financial picture since they believed that the buyers' actual financial situation was insufficient to obtain the loan that they

control."); Gerald Korngold, *Privately Held Conservation Servitudes: A Policy Analysis in the Context of In Gross Real Covenants and Easements*, 63 TEX. L. REV. 433, 454 (1984) (discussing freedom of choice).

49. See discussion *supra* part II.B.1.

50. 585 A.2d 967 (N.J. Super. Ct. App. Div. 1991).

sought. The application indicated that Mr. Kuhn was an Air Force colonel but did not show that he had already been approved for retirement. It also stated that Mrs. Kuhn “had a substantial income from ‘Plants-R-You,’ a florist business which existed only in the minds of the Kuhns and [the mortgage brokers’] people.”⁵¹ The Kuhns knew that other key information was also shown incorrectly in order to make their mortgage application stronger.

The Kuhns developed misgivings about the deal when they found a weak market for the sale of their current home, discovered an uninviting job market for Mr. Kuhn, and heard that Spatial Design had sold a house across the street for much less than they were paying. Mr. Kuhn “therefore decided to climb down from the shaky limb he was on.”⁵² He called Prudential and informed them that he would be retiring from the Air Force and would lose \$40,000 in annual income.⁵³ Prudential then canceled the mortgage commitment because of the new information relying on an express provision permitting withdrawal if any new material facts were revealed.

The trial judge found in favor of the seller and assessed damages against the buyers of almost \$100,000, less the retained deposit of \$50,000. The appellate court upheld this award and discussed the measure of damages for loss of bargain. The contract price was \$515,000, less \$27,750 for real estate broker commission. The property was resold for \$434,000 free of commission. The opinion does not indicate how long it took to resell, but found that “[t]here was no reason suggested by the evidence to doubt the reasonableness either of the time it took to resell the house or the sale price obtained.”⁵⁴ The court also did not indicate the value of the house at the date of the Kuhns’ breach. From the data included in the opinion, the seller suffered a decline in the value of the property from the time of contract to resale in the amount of \$53,250: \$515,000 contract price (less \$27,750 for the commission), less the \$434,000 resale price.

The buyers urged that the seller’s damages should be calculated according to the difference between the contract price and the value at the time of breach. The court distinguished the New Jersey cases cited by the buyers since they did not deal with damages from a breach in a falling

51. *Id.* at 969.

52. *Id.* at 970.

53. This was inaccurate on two counts—Mr. Kuhn had already been approved for retirement when he submitted the mortgage application and almost simultaneously with his call to Prudential he wrote the Air Force seeking to withdraw his approved retirement. *Id.*

54. *Id.* at 970. At one point, the opinion indicates that resale took place “many months” after either the contract or the breach. *Kuhn*, 585 A.2d at 971.

market.⁵⁵ The court then adopted a new rule for damages in a falling market, stating: "where the seller puts the property back on the market and resells, the measure is not contract price less value at the time of breach, but rather the resale price, if it is reasonable as to time, method, manner, place and terms."⁵⁶ The court held that questions of reasonableness are for the trier of fact, and noted that the trial court found, on sufficient credible evidence, that the resale was reasonable.⁵⁷

The support and the sources cited by the *Kuhn* court to reject the general rule and adopt the time of resale approach are most interesting. The court made little use of precedent. The court did not cite cases from New Jersey or other jurisdictions following the time of resale rule.⁵⁸ The court in *Kuhn* did refer to the New Jersey statute adopting section 2-706 of the Uniform Commercial Code which permits a seller of goods to resell and recover the difference between the contract price and resale amount.⁵⁹ While section 2-504 of ULTA is expressly based on that UCC provision,⁶⁰ the UCC of course does not apply to sales of real estate.⁶¹

Moreover, there was no full discussion of the policy considerations. The *Kuhn* court merely stated: "In the usual course of things, a \$515,000 house cannot be resold the instant a contract buyer breaches, and a reasonable time for resale must therefore be allowed. . . . In a falling market, buyers take longer to find, and they buy at reduced prices."⁶² There was no development of the competing policies concerning the timing of damages.⁶³

55. The Kuhns cited *Oliver v. Lawson*, 223 A.2d 355 (N.J. Super. Ct. App. Div. 1966), and *Thomas F. Ruane Dev. Corp. v. Cullere*, 339 A.2d 229 (N.J. Super. Ct. App. Div. 1975). Subsequent to the *Kuhn* decision, both cases were overruled, on other grounds, in *Kutzin v. Pirnie*, 591 A.2d 932 (1991) (overruling on issue of seller's right to retain deposit on default of buyer). These cases are discussed *infra* note 83 and accompanying text.

56. *Kuhn*, 585 A.2d at 971.

57. *Id.*

58. As discussed below, the attempt to distinguish the New Jersey cases following the general time of breach rule is not convincing. See *infra* note 83 and accompanying text.

59. *Kuhn*, 585 A.2d at 971; U.C.C. § 2-706; N.J. STAT. ANN. § 12A:2-706 (1961) (adopting UCC). See JAMES WHITE & ROBERT SUMMERS, UNIFORM COMMERCIAL CODE § 7-6 (3d ed. 1988) (discussing U.C.C. § 2-706 and suggesting that a commercially reasonable resale may be found more easily under § 2-706 as opposed to resale under U.C.C. § 9-504(3) where secured creditor has greater power as compared to secured debtor).

60. U.L.T.A. § 2-504 cmt.

61. U.C.C. § 2-102, 1 U.L.A. 172 (1989).

62. *Kuhn*, 585 A.2d at 971.

63. See *supra* text accompanying notes 39-49 (discussing the policy choices).

Instead of precedent or policy, the court relied on the ULTA to support its decision. Unlike other cases that cite to ULTA,⁶⁴ section 2-504 is central to the court's determination in *Kuhn*. The court expressly adopted that provision, and its statement of its rule closely tracks the language of the statute.⁶⁵ Thus, resale must be reasonable as to method, manner, time, place, and terms; the defaulting buyer must have notice of the time after which resale will take place; controls are placed on public sales; and the seller will receive damages to the extent of the difference between the contract amount and the resale price plus consequential and incidental damages, less expenses avoided due to resale.

The ULTA therefore emerges as the fundamental source for the *Kuhn* court. Uniform laws have been used as sources of law in other situations, as well.⁶⁶ For example, federal courts have relied on the Uniform Commercial Code as a source of federal law, not only because the UCC has been adopted in all the states (obviously not the case with ULTA) but also because the UCC provides a modern and better approach to outdated rules.⁶⁷ Justice Traynor described the success of the UCC as a source of law for federal courts and for state courts in dealing with issues not directly covered by the Code:

Therein lies the key to the Code's success as a model for judicial lawmaking. It was the culmination of years of scholarly work. The scholars were beholden to no one and to no cause. Their project was sponsored by the American Law Institute and the Commissioners on Uniform State Laws, two groups that were likewise eminently un beholden. Everyone concerned had notice of the project and full opportunity to be heard. . . . The final draft was of a piece and it had the look of having been out in the open. . . . Even a diehard judge, resistant to the

64. See *supra* text accompanying notes 16-22 (describing the use of ULTA as background or general support for a proposition of law that is otherwise well supported).

65. Compare *Kuhn*, 585 A.2d at 971 (beginning at paragraph starting with "[w]here a buyer of real estate wrongfully rejects") with U.L.T.A. § 2-504. The *Kuhn* court also indicated that if the seller chose to resell, the damage rule of U.L.T.A. § 2-505 would apply.

66. See Richard E. Coulson, *The National Conference of Commissioners on Uniform State Laws and the Control of Law-Making—A Historical Essay*, 16 OKLA. CITY U. L. REV. 295 (1991) (stating the history of the National Conference of the Commissioners on Uniform State Laws and the various acts); James J. White, *Ex Proprio Vigore*, 89 MICH. L. REV. 2096 (1991).

67. Roger J. Traynor, *Statutes Revolving in Common-Law Orbits*, 17 CATH. U. L. REV. 401, 422-23 (1968) (discussing the use of the UCC by federal courts); see *Vitex Mfg. Corp. v. Caribtex Corp.*, 377 F.2d 795, 799 (3d Cir. 1967) (noting that the UCC "embodies the foremost modern legal thought concerning commercial transactions").

use of statutes in the formulation of common-law rules, could hardly ignore so rich a source of law.⁶⁸

The ULTA similarly emerged from an extensive drafting process with representation from many constituencies including the bar, lenders, the real estate industry, and the public, and was subject to study and comment by various organizations.⁶⁹ Moreover, the approach of ULTA section 2-504 adopted by *Kuhn* is superior to the general rule that limits damages to value as of the date of breach. The ULTA's requirement of reasonableness in the manner of resale meets the mitigation of damages concerns of supporters of the general rule.⁷⁰ At the same time, the resale price rule recognizes the practical realities and timing problems of real estate sales, and is consistent with the moral, economic, and freedom of choice theories that underpin contract enforcement.⁷¹

V. COMPARISON OF REFORM BY LEGISLATION OR JUDICIAL DECISION

In *Kuhn*, the judicial adoption of a statute, which the New Jersey Legislature did not enact, provides an interesting context to reconsider the ongoing debate over the comparative advantages and disadvantages of law reform by legislatures as opposed to courts.⁷²

A. *Benefits of Legislation*

Proponents have advanced various reasons for law reform by the legislature rather than by the courts. Legislatures are better able to fully consider an issue, engage in fact finding through testimony and study, and

68. See Traynor, *supra* note 67, at 424.

69. See U.L.T.A. prefatory note, 13 U.L.A. at 469-75; Jon W. Bruce, *The Role Uniform Real Property Acts Have Played in the Development of American Land Law: Some General Observations*, 27 WAKE FOREST L. REV. 331 (1992); Norman Geis, *Preface to Symposium on the Uniform Real Property Acts*, 27 WAKE FOREST L. REV. 325 (1992); see also Dunham, *supra* note 6.

70. See *supra* text accompanying note 41 (discussing mitigation).

71. See *supra* text accompanying notes 46-49.

72. See Roscoe Pound, *Common Law and Legislation*, 21 HARV. L. REV. 383 (1908) (describing the tension between judge made law and legislation).

then as a representative body determine public policy and priorities.⁷³ Courts, on the other hand, are limited in these endeavors.⁷⁴

Moreover, the legislature can fully consider the broad ramifications of a problem and craft a comprehensive solution to the larger issue.⁷⁵ A statute that sets clear and precise rules, addresses the full range of related issues, and indicates the outcomes in various scenarios can be relied on by people in planning their affairs.⁷⁶ In contrast, courts can only decide the particular question before them. They cannot paint in broad strokes, nor can they address related matters and provide an overall solution.⁷⁷ Because of the dichotomy between holding and dictum and the doctrine of *stare decisis*, a judicial opinion can only set the law for the particular factual situation before it.⁷⁸ It may be difficult for parties to predict the law's response when the facts are altered.

Additionally, there are concerns of retroactivity and reliance. Usually legislation applies only prospectively, so that people can plan future transactions based on the new legal environment.⁷⁹ However, when a court declares a new rule of law, it may rearrange the rights of parties under contracts executed under the prior rule, thereby causing economic reallocation and dissatisfaction with the judicial system.⁸⁰

73. See *Cosmopolitan Homes, Inc. v. Weller*, 663 P.2d 1041, 1051 (Colo. 1983) (Rovira, J., dissenting); Maurice Rosenberg, *Anything Legislatures Can Do, Courts Can Do Better?*, 62 A.B.A.J. 587, 590 (noting that courts need a new institution to provide data that litigants do not, providing information on social impact of competing rules).

74. See James A. Henderson, Jr., *Judicial Reliance on Public Policy: An Empirical Analysis of Products Liability Decisions*, 59 GEO. WASH. L. REV. 1570, 1579 (1991) (finding that "fairness" and "rightness" concerns were most cited in judicial opinions to support products liability and "efficiency" norms were not as important); Hans A. Linde, *Courts and Torts: "Public Policy" Without Public Politics?*, 28 VALPARAISO L. REV. 821, 827-28 (1994) (arguing that courts do not adequately develop public policy in their opinions).

75. See Roger J. Traynor, *Comment on the Courts and Lawmaking*, in *LEGAL INSTITUTIONS TODAY AND TOMORROW* 48-51 (Monrad G. Paulsen ed., 1959).

76. See U.L.T.A. prefatory note, 13 U.L.A. at 471 (suggesting that benefit of reduction of rules to statutory form). Often, however, statutes do not accomplish these broad goals. See Traynor, *supra* note 67, at 402.

77. See Geoffrey C. Hazard, Jr., *Law Reforming in the Anti-Poverty Effort*, 37 U. CHI. L. REV. 242, 249 (1970).

78. See Walter V. Schaefer, *Precedent and Policy*, 34 U. CHI. L. REV. 3, 12 (1968) ("A court does not select the materials with which it works. It is not self-starting.").

79. See *id.* at 15 (describing, but questioning, the reliance argument).

80. The drafters of the ULTA noted: "In spite of the fact that the inappropriateness of many existing rules to modern circumstances has been recognized for years, courts have been understandably hesitant to change by judicial decision rules on which parties will have relied in structuring the transaction before the court. Changing rules by statute, of course, does not

Finally, some commentators maintain that legislation is the only legitimate means to achieve law reform.⁸¹ The principles of separation of powers and representative democracy require that the elected legislature make important policy choices.

The *Kuhn* opinion does exhibit some of the limitations of judicial law reform as compared to legislation. First, like other judicial decisions, the *Kuhn* rule does not provide a comprehensive solution to the various possible scenarios where sellers seek remedies for breach of contract.⁸² *Kuhn* is ambiguous about whether its time of resale rule will apply in all types of markets. The court attempted to distinguish two earlier New Jersey decisions⁸³ that declared that damages should be based on the time of breach by stating that those cases did not deal with a declining market.⁸⁴ The intermediate appellate court in *Kuhn* may have felt constrained or hesitant to directly contradict another intermediate appellate decision.⁸⁵ Thus, the distinction *Kuhn* offered is meaningless, since a seller will only suffer loss of bargain damages if the market is declining.⁸⁶ So, rather than declaring a clear rule that all buyers and sellers (and their attorneys) can recognize and make bargains, the *Kuhn* court left ambiguity as to whether there may be a different rule when the market is not declining. In contrast,

have the drawback of defeating the expectation of parties to completed transactions, since the statute will operate prospectively only." U.L.T.A. prefatory note, 13 U.L.A. at 471.

81. See, e.g., Linde, *supra* note 74, at 855 ("Unless a court can attribute public policy to a politically accountable source, it must resolve novel issues of liability within a matrix of statutes and tort principles without claiming public policy for its own decision. Only this preserves the distinction between the adjudicative and the legislative function.").

82. See KARL N. LLEWELLYN, *THE BRAMBLE BUSH* 42-43 (Oceana 1951) (describing limitations on judicial opinions: "[t]he court can decide only the particular dispute which is before it").

83. *Thomas F. Ruane Dev. Corp. v. Cullere*, 339 A.2d 229 (N.J. Super. Ct. App. Div. 1975); *Oliver v. Lawson*, 223 A.2d 355 (N.J. Super. Ct. App. Div. 1966). Subsequent to the *Kuhn* decision, both cases were overruled on other grounds in *Kutzin v. Pirmie*, 591 A.2d 932 (N.J. 1991) (overruling on issue of seller's right to retain deposit on default of buyer).

84. *Kuhn*, 585 A.2d at 970-71.

85. Additionally, the facts of *Cullere*, actually indicate that the market was declining. 339 A.2d at 229. Moreover, the court awarded damages in the amount of the difference between the contract price of \$175,000 and the "market value of \$170,000, the price received . . . on resale less than a month" after breach. *Id.* at 232. This holding looks a great deal like basing damages on the time of resale.

Oliver, 223 A.2d at 357-58, discusses the timing of damages in what can most fairly be described as dictum, since the issue before the court was whether a seller may retain, as liquidated damages, buyer's deposit after buyer's default.

86. See *supra* text accompanying notes 28-29.

a statute, such as ULTA section 2-504, states a rule of resale damages without (misleading) qualification about rising, falling, or steady markets.

Similarly, it is unclear whether *Kuhn* is limited to the specific facts that the court noted. The court, as discussed above, described in detail the buyers' unsavory dealings with the mortgage lender, including misleading and false information and behavior by the buyers.⁸⁷ It is unclear whether the *Kuhn* court's rule is limited to situations of bad actors, or whether it extends to all defaulting buyers. What did the court mean when it referred to a buyer who "wrongfully"⁸⁸ fails to perform? A subsequent court could find that the *Kuhn* court meant that any breach of contract without a defense is "wrongful." Alternatively, a subsequent court could refuse to apply *Kuhn* on the theory that, given the facts of that case, a "wrongful" breach occurs only when the buyer has also failed to act in good faith and in accordance with fair dealing norms.⁸⁹

B. *Judicial Lawmaking*

Even though there may be advantages to legislative law reform as compared to judicial efforts, this does not mean, however, that the *Kuhn* court should not have reached the result that it did. Indeed, the decision illustrates some of the benefits of judicial lawmaking over the legislative process. Our common law reflects a long and beneficial tradition of courts evolving innovative solutions to new factual solutions based on emerging social needs and public policy.⁹⁰ This flexibility has enabled the courts to achieve just results in disputes among parties.⁹¹ While predictability and

87. See *supra* text accompanying notes 51-52.

88. *Kuhn*, 585 A.2d at 971.

89. U.L.T.A. § 2-504 also uses the term "wrongful" breach, but as a statute its meaning is not constrained by the specific wrongdoing of a particular buyer.

90. See OLIVER WENDELL HOLMES, *THE COMMON LAW* 31-32 (Little Brown 1963) (1881) (maintaining that common law courts have always acted in a "legislative" manner, based on the courts' view of what is expedient for the community; courts have developed new rules and provided new life for old ones in this manner); Schaefer, *supra* note 78, at 23 ("If . . . [the judge] views the role of the court as a passive one, he will be willing to delegate the responsibility for change, and he will not greatly care whether the delegated authority is exercised or not. If he views the court as an instrument of society designed to reflect in its decisions the morality of the community, he will be more likely to look precedent in the teeth and to measure it against the ideals and the aspirations of his time.").

91. See BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 103-04 (paperback version 1921) (arguing that through centuries courts have made choices as to shape of common law based on "fitness to an end"); Linde, *supra* note 74, at 822 (describing arguments for courts to make tort policy, including "courts made the law what it is, and if

reliance arguably may suffer at times when a decision is overruled,⁹² justice sometimes requires that result.⁹³

Moreover, judicial solutions have the advantage of speed, conclusiveness, and focus.⁹⁴ Judicial decision making has been praised as rational, based on reason and not on polls, a majority vote of those affected, or expediency.⁹⁵ In fact, courts must act since legislatures often fail to enact comprehensive statutes due to institutional and political pressure favoring the status quo.⁹⁶ It is further argued that even when legislatures do act, courts must still make law since "statutes can never embrace within their sweep all human activity that law is called upon to order."⁹⁷

Kuhn is an example of good judicial lawmaking; the court refused to ignore realities of the situation and hide behind the existing general rule. Rather, it declared a new rule of law, after careful consideration and reasoning, based on emerging public policies exemplified in ULTA section 2-504.

Moreover, concerns about reliance, predictability, and retroactivity are not triggered by *Kuhn*.⁹⁸ It is hard to see how many, if any, people had acted in reliance on a rule calculating damages based on the value at the time of breach as opposed to resale price. People, especially consumer home buyers, usually do not enter contracts with the thought of breaching them. It is theoretically possible that there were a few buyers under executory contracts of sale in New Jersey at the time *Kuhn* was decided who had breached based on an attorney's advice that damages would be limited to value at the time of breach. The reliance of these few, if any, people, who after all were breaching a contractual obligation, was not reason enough

they do not remake it, no one else will. The axiom that courts make law has been American orthodoxy for a century.").

92. See BENJAMIN N. CARDOZO, *THE GROWTH OF THE LAW* 122 (1924) (disputing notion that overruling a common law precedent interferes with people's expectations; "The only rules there is ever any thought of changing are those that are invoked by injustice after the event to shelter and intrench itself. In the rarest instances, if ever, would conduct have been different if the rule had been known and the change foreseen.").

93. See *United States v. Shaughnessy*, 234 F.2d 715, 719 (2d Cir. 1955) ("Great judges have said that the function of the common law was the perpetual quest for justice. I should be sorry if quest for certitude [sic] were substituted for quest of justice.").

94. Rosenberg, *supra* note 73, at 587.

95. Charles Breitel, *The Lawmakers*, 65 COLUM. L. REV. 749, 772 (1965).

96. See Linde, *supra* note 74, at 835.

97. James M. Landis, *Statutes and the Sources of Law*, HARV. LEGAL ESSAYS 213 (1934), reprinted in 2 HARV. J. ON LEGIS. 7, 8 (1965). Judges must also interpret statutes where the meaning is unclear. *Id.*

98. See *supra* notes 78-79 and accompanying text.

for the *Kuhn* court to have refrained from its decision. Additionally, the reliance issue would become moot in a brief time, since most contracts of sale of land contemplate only a short time between contract and closing (perhaps six to ten weeks), and the contracts in existence at the time *Kuhn* was decided would soon expire. Bargains in contracts signed after *Kuhn* would be made in light of the new damages rule.⁹⁹

Finally, any ambiguity about the situations to which the *Kuhn* opinion extends¹⁰⁰ does not mean that the court should have deferred the decision to the legislature. Attorneys are accustomed to making predictions from prior cases, especially well written decisions like *Kuhn*, and judges know their role in the ongoing evolution of the common law.

Would it have been better for the system of justice if the New Jersey Legislature had adopted the Uniform Land Transactions Act and the court in *Kuhn* had simply applied section 2-504 to reach its conclusion? Yes. In the absence of adoption of the Act, would it have been better for the legal system if the *Kuhn* court had applied the general rule and limited the seller's damages to the value of the land at the time of the breach? Clearly, no.

VI. CONCLUSION

Although the Uniform Land Transactions Act was not adopted by any legislature, the Act nevertheless has been an important law reform instrument. A number of courts have relied on ULTA to declare new common law rules. In this unintended way, ULTA serves as a means of modernizing the substantive law of real estate transactions.

99. In *Cook v. Salishan Properties, Inc.*, 569 P.2d 1033 (Or. 1977), the court refused to rely on U.L.T.A. § 2-309 to extend the implied warranty of fitness placed on builder-vendors of new homes by prior judicial decision to the sale of developed but unimproved land. The court stated that "[i]f this problem requires attention insofar as any serious unmet need for the protection of purchasers or lessees of subdivided land is concerned, the legislature is capable of correcting the situation." *Id.* at 1036. Other courts, however, have extended the warranty of fitness to similar lots rather than deferring to the legislature. *See, e.g.*, *Buchanan v. Scottsdale Envtl. Constr. & Dev. Co.*, 787 P.2d 1081, 1083 (Az. Ct. App. 1989); *Rusch v. Lincoln-Devore Testing Lab., Inc.*, 698 P.2d 832, 834 (Colo. Ct. App. 1984).

100. *See supra* text accompanying notes 83-90.

