IN THE SUPREME COURT OF MISSOURI

Case No. SC91951

FIRST BANK,
Plaintiff/Respondent,
v.
FISCHER & FRICHTEL, INC.,
Defendant/Appellant

Appeal from the Circuit Court of St. Louis County, 21st Judicial Circuit
Case No. 08SL-CC04789
Honorable John F. Kintz, Judge

Amicus Brief for The Business Bank of St. Louis

John L. Davidson #25847
13975 Manchester Road, Suite 19
Saint Louis, Missouri 63011
314.725.2898
636-527-9395 (facsimile)
jldavidson@att.net

Attorney for Amicus Curiae
The Business Bank of St. Louis

Table of Contents

Table of Authorities

Cases

Other Authorities

Statement of Facts

Fischer & Frichtel's Statement omits the most important facts, including:

1. Fischer & Frichtel agreed to a stipulated amount or liquidated damage formula.

Fischer & Frichtel promised—in its deed of trust—"to pay upon demand any ***deficiency*** remaining after the enforcement of the lien of this Deed of Trust (whether by power of sale or otherwise) with interest thereon at the Repayment Rate." Fischer & Frichtel's Deed of Trust, ¶ 12, at 8.

2. "Deficiency" is a term of art.

"Deficiency," has the following meaning:

> **DEFICIENCY**. A lack, shortage, or insufficiency. The difference between the total amount of the debt or payment meant to be secured by a mortgage and that realized on foreclosure and sale when less than the total. A judgment or decree for the amount of such deficiency is called a "deficiency judgment" or "decree." ***Goldsmith v. Brown***, 35 Barb. (N.Y.) 492[1]

3. Fischer & Frichtel knew of the formula to which it had agreed.

Fischer & Frichtel, an expert real estate speculator, is presumed to knows that trade's practices, customs, and usages.[2] The custom and usage in Missouri has always been that the deficiency would be measured by the bid at the public foreclosure auction. Fischer & Frichtel knew Missouri's rules when it choose default.

---

[1] **BLACK'S LAW DICTIONARY** 543 (3rd ed. 1933).

[2] ***Heyworth v Miller Grain & Elevator Co***., 73 S.W.498, 502 (Mo. 1903).

Further, Fischer & Frichtel is presumed to have had the opportunity to read the deed of trust and know its contents before signing.[3]

4. No negotiation by Fischer & Frichtel over the formula.

Fischer & Frichtel never sought to negotiate over the terms of the liquidated damage formula, which was an acknowledgement by Fischer & Frichtel that the formula was fair and reasonable.[4]

5. No negotiation by Fischer & Frichtel over how auction was to be conducted.

Fischer & Frichtel never asked for negotiation over the terms of the auction. For example, Fischer & Frichtel never sought a longer period of public notice or advertisement in trade publications or that the bidders be allowed time to arrange financing or that First Bank offer a bidder an owner's policy of title insurance.

6. Other businesses negotiate over liquidated damage formulas.

Other firms have negotiated a liquidated damage formulas not unlike the one Fischer & Frichtel wants this Court to impose.[5]

7. Fischer & Frichtel was the first party to materially breach the contract.

---

[3] ***Bearden v. Countryside Cas. Co***., 352 S.W.2d 701, 706 (Mo. App. 1961).

[4] ***City of Richmond Heights v. Waite***, 280 S.W.3d 770, 778 n. 3 (Mo. App. 2009).

[5] ***Irving Trust Co. v. A.W. Perry, Inc***., 293 U.S. 307, 310 (1934) ("Lessor shall forthwith upon such termination be entitled to recover damages for such breach in an amount equal to the amount of rent reserved in this lease for the residue of the term hereof less the **fair rental value** of the premises for the residue of said term.").

Fischer & Frichtel was the first to breach the contract when it failed to pay the promissory note at maturity.

8. It was impossible to fix First Bank's damages at the time the note was made, but Fischer & Frichtel should have known well before final maturity that it needed to engage in short sales and take other steps to avoid damage to itself.

First Bank made its loan to Fischer & Frichtel in 2000. Michael Lewis has written and talked about individuals in the financial community, who "By early 2005 … shared a sense that a great many people working on Wall Street couldn't possibly understand what they were doing." **THE BIG SHORT** 23 (2010). Noble Laureate Paul Krugman wrote in the New York Times on August 29, 2005:

> How bad will that aftermath be? The U.S. economy is currently suffering from twin imbalances. On one side, domestic spending is swollen by the housing bubble, which has led both to a huge surge in construction and to high consumer spending, as people extract equity from their homes. On the other side, we have a huge trade deficit, which we cover by selling bonds to foreigners. As I like to say, these days Americans make a living by selling each other houses, paid for with money borrowed from China.

9. Fischer & Frichtel failed to mitigate its damages by choosing not to bid at the foreclosure auction.

No evidence was offered by Fischer & Frichtel showing or tending to show any lack of money, resources, or assets to pay off First Bank's loan when the note became due. Thus, it must be "taken as true" that Fischer & Frichtel could have paid off its note at maturity, Fischer & Frichtel having failed to present any evidence, evidence which was peculiarly within its knowledge, of its financial condition.[6]

Fischer & Frichtel had both the burden of production and the burden of proof on this issue, for such information was within Fischer & Frichtel's peculiar knowledge[7] and Fischer & Frichtel had "positive and complete knowledge" concerning its ability to pay the First Bank note at maturity.[8]

10. Any appraisal of the property by First Bank was meaningless for its appraiser would not even have accurate information, such as offers made to Fischer & Frichtel and refused when Fischer & Frichtel was unwilling to short sell.

11. Fischer & Frichtel chose not to mitigate its damages by deciding not to follow the statutory redemption procedures.

12. Fischer & Frichtel chose not to advertise the sale on its own.

Fischer & Frichtel knew long before the sale date that it was going to default and that First Bank would ask the trustee to foreclose. Fischer & Frichtel failed to avoid its own damage by not advertising and seeking buyers on its own. For example, Fischer & Frichtel could have advertised in national publications or trade publications or on the

---

[6] ***Swinhart v. St. Louis & S. Ry. Co***., 105 S.W. 1043, 1046 (Mo. 1907).

[7] ***E.g., Bean v. Riddle***, 423 S.W.2d 709,720–21 (Mo. 1968); ***Pasternak v. Mashak***, 428 S.W.2d 565, 568 (Mo. 1967).

[8] ***E.g., In Re Monning***, 638 S.W.2d 782, 786 (Mo. App. 1982)

Internet that the lots were going to be sold at a absolute public auction in the near future and that interested bidders should contract it for the exact date of the trustees sales.

It was Fischer & Frichtel's fault if time was limited for bidders to arrange financing or check title, after the trustee published notice. Fischer & Frichtel's inaction shows that the default was strategic: Fischer & Frichtel had the money; it just doesn't want to honor its moral obligations and pay its debts.

13. Fischer & Frichtel presented no evidence that First Bank "did in fact avoid" losses.[9]

Fischer & Frichtel's entire case is built on a hypothetical: that First Bank resold the lots for an amount in excess of its bid and carrying cost. But Fischer & Frichtel never offered proof of such.

[9] Dan B. Dobbs, **HANDBOOK ON THE LAW OF REMEDIES**, § 3.7, 187 (1973).

Argument

1. The judgment of the trial court should be affirmed because, for consideration, Fischer & Frichtel voluntarily agreed to a reasonable liquidated damage formula by which Fischer & Frichtel promised to pay any "deficiency."

Question Presented. In deciding this appeal, the Court is presented with a single straight forward issue of contract law:

> Fischer & Frichtel was offered an interest only commercial loan of $2,576,000 with lower interest and fees, if Fischer & Frichtel agreed to secure the loan with a deed of trust which permitted a trustee, acting as agent of both Fischer & Frichtel and First Bank, to sell the land at a open cry public foreclosure auction and use the proceeds of the sale to repay the loan. A second term was Fischer & Frichtel's promise "to pay upon demand any ***deficiency*** remaining after the enforcement of the lien of this Deed of Trust (whether by power of sale or otherwise) with interest thereon at the Repayment Rate."
>
> Enjoying the freedom to contract, Fischer & Frichtel voluntarily agreed to the two terms. Between 2000 and 2008, Fischer & Frichtel enjoyed the benefit of this bargain. When the loan matured, Fischer & Frichtel did not pay it according to its terms. The trustee properly advertised and sold the real property at a public cry auction. Fischer & Frichtel did not bid at the auction although it must be presumed that Fischer & Frichtel had the assets to pay off the loan. First Bank, the secured lender, did bid (making the only bid). The deed of trust provided, "In the event the

net proceeds of such sale or sales shall not be sufficient to pay in full the Indebtedness secured by this Deed of Trust, unless prohibited by law, Grantor hereby promises and agrees to pay any deficiency thereon on demand, with interest."

Question: Is Fischer & Frichtel's promise to pay an agreed amount calculated by applying the proceeds of a regularly conducted trustee's sale an unenforceable penalty or was this clause a permitted liquidated damages forumula?

Introduction. The Business Bank of St. Louis submits this amicus brief supporting First Bank because neither the facts nor law were adequately presented to the court of appeals, nor have either been adequately presented to this Court:

- Never stated is that Fischer & Frichtel agreed in its deed of trust to a liquidated damage formula so that it could borrow more money at a lower rate of interest. The deed of trust reads, "Borrower [Fischer & Frichtel] agrees to pay upon demand any **deficiency** remaining after the enforcement of the lien of the Deed of Trust (whether by power of sale or otherwise) …" Deed of Trust ¶ 12, at 8.
- Never stated is Fischer & Frichtel could have (but didn't) bargain for the liquidated damage formula like the one it urges this Court to adopt.[10]

[10] ***City of Richmond***, 280 S.W.2d at 778 n. 3

- Never stated is that Missouri has already found the liquidated damage formula to which Fischer & Frichtel agreed to be valid.[11]

Fischer & Frichtel opposed the Business Bank appearing as amicus because Fischer & Frichtel does not wants this Court to be fully informed on the facts and law.

Fisher and Frichtel wishes to impose upon banks and other lenders a legal responsibility for achieving a sale price far higher than the borrower itself could achieve and far higher than the public was willing to pay. Moreover Fischer & Frichtel's argument discounts entirely the reality that buyers, including professional buyers like Fisher and Frichtel, consider unsatisfied development obligations, sales commissions, marketing costs, holding periods, insurance costs, tax liabilities and uncertainties concerning future sales, and the supply of similar product before a sale is made. Fischer & Frichtel proved by its own failure that it was unable or unwilling to sell the collateral at any price. Yet it would enlist the Court to disregard the liquidated damage provision in the deed of trust and to impose upon the Bank and all future lenders a duty to bid a greater price at foreclosure than the borrower itself could have achieved with all its own knowledge, motivation and resources.

The court of appeals should have summarily affirmed on the ground that Fischer & Frichtel voluntary agreed to a liquidated damage formula or term in its deed of trust by which the deficiency was to be measured by the bid at the open cry public foreclosure auction.

---

[11] ***Universal C.I.T. Credit Corp. v. Byers***, 299 S.W.2d 559, 561 (Mo. App. 1957).

Fischer & Frichtel has never mentioned that its deed of trust (attached to the original petition) included a liquidated damage formula held valid more than fifty years ago in ***Universal C.I.T. Credit Corp. v. Byers***.[12] Fischer & Frichtel never plead facts showing the term was invalid. This case should not have been transferred.

The Business Bank has an interest in this issue because by practice, custom, and usage when offering business loans its asks commercial borrower to agree to the liquidated damage formula approved in ***Universal C.I.T***. This permits the Bank to offer borrowers larger loans at lower costs, benefiting all Missourians.

This is a commercial contract case. The terms of the liquidated damage formula or term in Fischer & Frichtel's deed of trust and the material facts concerning Fischer & Frichtel's non-performance are not in dispute. Fischer & Frichtel's principal claim is that its damages should be measured by fair market value of the property on the date of the foreclosure. But, the undisputed record shows that Fischer & Frichtel borrowed more money, at lower cost, because it agreed to a liquidated damage clause in its deed of trust measuring damages by the bid at the foreclosure sale.

And, Fischer & Frichtel's course of conduct shows that its default was strategic; Fischer & Frichtel is trying to profit by breaching its promise to pay its debts and attempting to make itself better off by breaching rather than by performing.

First, during the long course of the loan, Fischer & Frichtel's duty to avoid damages required Fischer & Frichtel to engage in "short sales," reducing lot prices and

---

[12] ***Id***.

using its own funds to secure releases from the deed of trust, when the price for lots started to go down. It is black letter law that, "If he retains the goods and the price goes down, the subsequent loss is one he must bear, it being caused by his own failure to act reasonably in the premises in minimizing his damage." [13] Fischer & Frichtel engaged in no "short selling," thus being the first to breach the contract, long before refusing to pay the note at maturity. This inequitable conduct hid true market conditions from First Bank.

Second, Fischer & Frichtel did not either pay off the note or bid at the public auction. This inactivity precludes any defense by Fischer & Frichtel to First Bank's claim for a deficiency. A party to a contract cannot remain inactive and fail to take reasonable steps to minimize its losses, ***Id***. at 402, yet that is what Fischer & Frichtel choose to do when it choose not to replay the note at maturity and when it choose not to bid at the foreclosure.

This was a strategic default. Fischer & Frichtel did neither, even though this Court must presume Fischer & Frichtel had the resources to pay the entire balance of principal and interest (otherwise, it has no standing to appeal for the case against it, practically speaking, "moot"). Fischer & Frichtel's failure to bid also precludes Fischer & Frichtel from offering in evidence its alleged proof of fair market value, for its conduct—its unwillingness to act on the basis of the information available to it—speaks louder than its attorneys' words and impeaches the veracity of that evidence.

---

[13] Laurence P. Simpson, **Law Of Contracts** § 199, 403 (1965).

Interest of the Business Bank of St. Louis. The Business Bank is a Missouri chartered bank, located in St. Louis, Missouri, concentrating on loans to small and medium size businesses.

The Bank's practice, custom, and usage is to ask the customer to agree to a deed of trust that contains a term providing for a private power of sale and a term providing for liquidated damages, measured by the bid at the foreclosure sale. The later terms enforces the borrower's duty to avoid strategic default. Older principles classify the term as a liquidated damage clause but the better label may be "contracting for cooperation in recovery."[14]

These two terms substantially reduce the Bank's costs (and time) and risks of loss, permitting the Bank to make borrowers larger loans at lower costs.[15] This enhanced lending capacity promotes efficiency, economic growth, and overall availability of credit in Missouri.

Measuring damages by the bid at the foreclosure sale is important to the Bank for an additional reason: it is the measure of damages in many other kinds of cases. For

---

[14] Gregory Klass, **Contracting For Cooperation In Recovery**, 117 Yale L.J. 2 (2007).

[15] Atif Mian, et al. ***Foreclosures, House Prices, and the Real Economy,*** passim (2011) (nominal house prices fell 35% from 2005 to 2009) ("[a] large body of evidence suggests that costs to lenders is substantially higher for judicial versus non-judicial foreclosures") available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1722195

example, the Business Bank (and other lenders) routinely protects the priority of its deeds of trust by obtaining title insurance loan policies or construction loan policies.

The Business Bank is presently involved in litigation with Old Republic National Title Insurance Company regarding coverage against mechanic's liens in the amounts of $270,937.67 , $58,791.96 and $3,359.56 under an Old Republic commitment for a 1992 ALTA loan policy. ***Business Bank of St. Louis v. Beaker, LLC***, et al, Cause No. 11JE-CC00209 (Jefferson County, Missouri). Counsel for Fischer & Frichtel represent Old Republic in that case.

The measure of damages on a 1992 ALTA loan policy is determined by the bid at public foreclosure sale. This has been the law since at least 1917.[16] The Ohio Supreme Court recently reasoned:[17]

> The appropriate measure of damages [to an insured lender] is based upon what the buyer actually paid at the foreclosure sale and what the lender actually received, not a hypothetical valuation based on speculation had the property been sold on the open market.... We believe that the use of the actual sales price of the secured

---

[16] ***Chicago Title Ins C. v. Huntington Nat'l Bank***, 719 N.E.2d 955, 960 (Ohio 1999) citing ***Title Ins. Co. of Richmond v. Indus. Bank of Richmond***, 156 Va. 322, 157 S.E. 710 (1931) and ***Fox Chase Bank v. Wayne Junction Trust Co.***, 258 Pa. 272, 101 A. 979 (1917). ***See generally*** James L. Goslin, **Title Insurance: A Comprehensive Overview** 83–84 (ABA 2000) (discussing measure of damages under 1992 ALTA loan policy)

[17] ***Chicago Title***, 719 N.E.2d at 274–75.

property to measure loss instead of an estimated fair market value provides the parties with a conclusive method of valuation that is not based on opinion or speculation. It is determined at a certain point in time, based upon actual events rather than opinions using hypothetical circumstances ...

Further, a lawsuit on a loan policy is premature and to be dismissed without prejudice, if filed before the foreclosure, because the damages are to be measured by the bid at the sale.[18]

Issues Not Adequately Presented. Even a cursory reading of the opinion of the court of appeals shows that the issue as to the measure of damages was not adequately presented by the parties. The briefs of Fischer & Frichtel and the opinion of the court of appeals never mention the liquidated damage formula agreed to by Fischer & Frichtel.

Contracts law requires every court to, ***first***, ascertain whether the parties have contracted and agreed to a measure of damages. In this case, although overlooked by the parties and the court of appeals, they did. When making the promissory note and deed of trust, Fischer & Frichtel was free to bargain for the measure of damages it now urges but instead choose to borrow more money at lower costs, promising to pay liquidated damages on default. Further, Fischer & Frichtel was free to bargain for additional time and notice of any foreclosure sale.

[18] ***Wedgewood Square Center Ltd. P'ship v. Lincoln Land Title Co***., 217 S.W.3d 308, 311 (Mo. App. 2007); ***Wedgewood Square Center Ltd. P'ship v. Lincoln Land Title Co***., No. SD 30899, — S.W.3d—, No. (Mo. App. June 30, 2011).

Missouri will benefit from a judgment in favor of First Bank for loans will be larger and cost less. A win by Fischer & Frichtel will only mean denial of credit and lost opportunities, higher loan costs and smaller loans and decrease property values. And, given the thousands of foreclosures now taking place, the public has an interest in avoiding the clogged dockets that could arise, if suits for deficiencies must await jury trials.

This is a case of a strategic default by a commercial borrower[19] who opportunistically is attempting to use the courts to profit from its breach of contract, to put itself in a better position than it would have been in had Fischer & Frichtel performed its contract. Missouri borrowers will be able to borrow less money and will have to pay higher rates of interest, if Fischer & Frichtel succeeds in its opportunism. Federal Reserve research shows that "defaulter friendly foreclosure laws are correlated with a four to six percent decrease in loan size."[20] The Federal Reserve's study warns this Court:

---

[19] The question of the measure of damages for a consumer mortgage loan is not before the Court. The standard form HUD or VA or Fannie Mae or Freddie Mac deed of trusts, now used in almost all consumer mortgage loans, do not contain a liquidated damage formula.

[20] Karen M. Pence, ***Foreclosing on Opportunity: State Laws and Mortgage Credit*** 2 (May 13, 2003) available at http://www.federalreserve.gov/pubs/FEDS/2003/200316/200316pap.pdf

> These findings suggest that policymakers face a tradeoff. They can facilitate the availability of low-priced mortgage credit, or they can provide protections to homeowners [or other borrowers] who experience financial difficulties, but they cannot do both.[21]

In sum, this is nothing more or less than an attempt by Fischer & Frichtel to privatize profits and socialize losses.

Our General Assembly has had ample opportunity to change the law in this area, but has refused. In 2002 the National Conference of Commissioners on Uniform State Laws proposed to Missouri the Uniform Nonjudical Foreclosure Act, which in Section 608 would have measured the deficiency at 90 percent of the fair market value because the Restatement approach, urged by Fischer & Frichtel, "does not approximate the probable cost to the foreclosure purchaser of holding and liquidating the collateral, and to reflect the sense that it is usually unrealistic to expect foreclosure amounts significantly higher than 90 percent of fair value."[22]

The UNFA has considered by the Missouri Bar. It has, to our knowledge, never been considered by a Committee of the Bar. The Act has never been filed as a bill with the General Assembly, even though Professor Dale Whitman of the University of Missouri-Columbia served as Reporter for the drafting committee for four years.

[21] ***Id***. at 3.

[22] The UNFA , including Section 608 and its comments, are available at http://www.law.upenn.edu/bll/archives/ulc/ufbposa/2002final.pdf

Professor Whitman admits, in writing about the propose d Act, that the UNFA approach of socializing losses is radical and "that there is only a remote likelihood that it will be adopted."[23] This was written before the start of the present financial crisis. Fischer & Frichtel makes no citation to Professor Whitman's work for, in addition to showing that the Restatement liquidated damage formula is unfair to lenders, Professor Whitman admits that nonjudical foreclosures will result in smaller loan and higher costs to borrowers and a decrease in property values.The UFNA relied greatly on earlier work by Debra P. Stark, who concluded, "Borrowers as well as lenders have an interest in an efficient foreclosure process because lenders will pass along the costs associated with delinquent mortgages to new borrowers in the form of higher loan fees or higher interest rates."[24]

Whitman further admits, "Professor Stark observes, that most debtors, most of the time, are not treated unfairly in foreclosure"[25] and that the outlier hypothetical offered by Fischer & Frichtel is "very small."

Neither Whitman nor Stark consider a case like the one at bar, where a commercial borrower has the money, assets, and resources to avoid damage but chooses

---

[23] Grant S. Nelson and Dale A. Whitman, ***Reforming Foreclosure: The Uniform Nonjudicial Foreclosure Act***, 53 Duke L.J. 1399, 1402 (2004).

[24] Debra P. Stark, ***Facing the Facts: An Empirical Study of the Fairness and Efficiency of Foreclosures and a Proposal for Reform***, 30 U. Mich. J.L.Ref. 639, 641 (1997).

[25] Whitman, ***supra*** n. 23, at 1428.

not to bid at the foreclosure sale. In fact, Whitman could not see this case even occurring. He saw danger only in a consumer loan where there is a"physical or mental illness, difficulty coping with marriage or family problems, or a temporary or seasonal falloff in demand for real estate, perhaps combined with a very quick foreclosure process that gives the debtor little time to expose the property to the market."[26]

By contrast in this case, Fischer & Frichtel had eight years to expose the property to market and 3 years to short sell, once market conditions started down.

To their credit, the drafters of the UNFA recognized that the Act was a liquidated damage formula itself and they admit that the open cry public foreclosure auction "can drastically reduce [bank's] carrying costs--property taxes, insurance, security, management expense, and, most significantly, the loss of income from the seller's capital if the property is vacant or is producing only a below-market income." [27]

The liquidated damage term was valid and enforceable under Missouri law, which follows the Section 356 of the Restatement (Second) of Contracts.[28] Two factors are "combined;" (1) "reasonable[ness] in the light of the anticipated or actual loss caused by the breach and (2) the difficulties of proof of loss.[29]

---

[26] Whitman, ***supra*** n. 23, at 1429.

[27] Id. at 1417 n. 90.

[28] ***City of Richmond,*** 280 S.W.3d at 775; ***Norman v. Durham***, Mo., 380 S.W.2d 296, 304 (Mo. 1964) (adopting **RESTATEMENT (FIRST) CONTRACT**§ 339).

[29] **RESTATEMENT (SECOND) OF CONTRACTS** § 356 (1981).

"If the difficulty of proof of loss is great, considerable latitude is allowed in the approximation of anticipated or actual harm. If, on the other hand, the difficulty of proof of loss is slight, less latitude is allowed in that approximation."[30]

An unreasonably low bid by a lender during the auction will send the wrong "signal" to third party buyers, making post foreclosure negotiations for the sale of the property less likely to be successful for the lender. Therefore, a lender's bid at an open cry public foreclosure auction is reasonable in light of the anticipated or actual loss.

Proving a lender's loss will always involve difficulties of proof. First, when a lender uses its capital it has an unknown lost opportunity cost. Second, in addition to , it has an unknown lost opportunity cost because its employees, who are not hired and trained, must spend time away from profitable activities for which they have be hired and trained.

B. Underlying Legal Principles. The following principles are important for the Court to keep in mind in deciding this appeal.

1. This is "an action of debt" of "indebitatus assumpsit,"[31] which the English courts call an action for an agreed sum."[32] "It is an action to force the defendant to do precisely what he has contracted to do—that is, to pay over a specific sum of money."[33]

---

[30] ***Id.***at cmt. b.

[31] 17 ***Boatman's Sav. Inst. v. Missouri Bank***, 33 Mo. 497, 518–19 (Mo. 1863).

[32] P.S. Atiyah, **LAW OF CONTRACT** 431– 34 (5th Ed. 1995).

[33] ***Id.***

The action "differ[s] from claims for damages."[34] Debt differs from the common law action of assumpsit, although special assumpsit also concurrently lies for Fischer & Frichtel breached a simple contract.[35]

2. "[I]t is morally wrong to make a promise one does not intend to perform."[36] The mere act of contracting "necessarily carries with it an implied assertion of an intent to perform."[37]

3. Strategic "breach is morally problematic because it degrades contracts as well as the social cooperation and mutual trust that are necessary for individuals to voluntarily commit to do or not do something. Further, an efficient breach, as traditionally defined, is not efficient at a micro level, because a non-breaching party is not fully compensated for his losses, and is not efficient at a macro level, because such a strategic breach leads to a discounting of goods, services, and entitlements in the market due to the possibility that a contracting party may not perform in order to take advantage of a new, "better" deal. In

---

[34] ***Id.***

[35] Benjamin J. Shipman, **HANDBOOK OF COMMON-LAW PLEADING** 148 (3rd ed. 1923).

[36] Ian Ayres and Gregory Klass, **INSINCERE PROMISES** 5 (2005); Curtis Bridgemen, ***The Morality of Jingle Mail: Moral Myths about Strategic Default***, 46 **WAKE FOREST L. REV**. 123 (2011).

[37] **RESTATEMENT (SECOND) OF TORTS** § 530 cmt. c (1976).

other words, even assuming that morality is immaterial to an assessment of the doctrine, the doctrine is inefficient on its advocates' own economic terms."[38]

4. "[F]rom the perspective of the promisee [First Bank], he contracts for performance, not for a law suit through which he may collect damages."[39]

5. The first principle of contract law is that a defendant cannot be placed in better position "if he breaches his contract than if he does not."[40] "When a contract is breached, the law will not place the breaching party in better position than he would have been had the contract been completed on both sides."[41]Any rule which improves the defendant's position, if he breaches, removes the moral hazard of deterrence.[42]

6. If there is a doctrine of efficient breach, it has no place here for Fischer & Frichtel was in a better position to market and sell the property than First Bank.[43]

---

[38] Dawinder S. Sidhu, ***A Crisis of Confidence and Legal Theory: Why the Economic Downturn Should Help Signal The End of the Doctrine of Efficient Breach***, 24 Geo. J. Legal Ethics 357, 359 (2011) (foot notes omitted).

[39] Ayres, ***supra*** n. 36, at 217 n. 13.

[40] P.S. Atiyah, supra n.32, at 436.

[41] ***Janss v. Pearman***, 863 S.W.2d 643, 651 (Mo. App. 1993).

[42] ***Bailey v. Alabama***, 219 U.S. 219, 246 (1911) (Holmes, J. dissenting) ("any legal liability for breach of a contract is a disagreeable consequence which tends to make the contractor do as he said.").

[43] ***E.g., S.J. Groves & Sons Co. v. Warner Co***., 576 F.2d 524, 530 (3rd Cir. 1978).

7. First Bank had no duty or obligation to bid at the foreclosure sale, not even under the doctrine of avoidable consequences because that doctrine "does not require a party to incur extraordinary expense and risk;" thus, First Bank was not required to take on the costs and expenses of hold the lots until they could be liquidated.[44]

8. If Fischer & Frichtel desired that First Bank "elect to bid on the property in foreclosure or otherwise take affirmative steps to prevent the property from being sold at a loss" Fischer & Frichtel should have insisted upon terms in the deed of trust requiring First Bank "to bid or otherwise assume the burdens and obligations of ownership for the sole purpose of minimizing damages caused by" Fischer & Frichtel's "breach." "If [a borrower] . . . wants its [lender] . . . to be obligated to mitigate damages by purchasing the secured property in a foreclosure situation in order to recover under" [the promissory note] . . ., this should be made a condition precedent to recovery.[45]

9. The "primary duty" for selling the lots and bearing the losses of any short sales was on Fischer & Frichtel which "cannot be heard to say that" First Bank "should have performed" for it.[46]

10. Contract law imposed no obligation on First Bank to bid or to bid any amount to protect Fischer & Frichtel for "Where a choice has been required between two reasonable courses, the person whose wrong forced the choice can not complain that one rather than

---

[44] ***Chicago Title,*** 719 N.E.2d at 961[10].

[45] ***Chicago Title,*** 719 N.E.2d at 961[9].

[46] ***Hiss v. Friedberg***, 112 S.E.2d 871, 875 (Va. 1960).

the other was chosen. **McCormick on Damages**, § 35 (1935). The rule of mitigation of damages may not be invoked by a contract breaker as a basis for hypercritical examination of the conduct of the injured party, or merely for the purpose of showing that the injured person might have taken steps which seemed wiser or would have been more advantageous to the defaulter. . . . One is not obligated to exalt the interest of the defaulter to his own probable detriment."[47]

11. The promise by was a liquidated damages provision in that its purpose was "to avoid the problem of calculating damages after there has been a dispute between parties to the contract."[48] The promise was a "measure of compensation for contract breach."[49]

12. In considering the term, it is important that the Court not confuse the familiar with the necessary. Liquidated damage terms frequently call for the payment of a fixed sum. That characteristic is not controlling. The question is whether the term is a "reasonable formula for ascertaining damages."[50]

13. "[T]he presumption should favor the enforcement of liquidated damages clauses."[51]

---

[47] ***In re Kellett Aircraft Corp***., 186 F.2d 197, 198-99 (3d Cir. 1950).

[48] Howard O. Hunter, **Modern Law of Contracts Breach and Remedies** ¶10.02[1] at 10-3 (1986).

[49] ***Goldberg v. Charlie's Chevrolet, Inc***., 672 S.W.2d 177, 179 (Mo. 1984).

[50] ***Irving Trust Co.,*** 293 U.S. 307at 311; ***In re Outfitters Operating Realty Co***., 69 F.2d 90, 91–92 (2nd Cir. 1934) (L. Hand, J.)

[51] Hunter, ***supra*** n. 48, ¶10.02[7], at 10-15.

14. And, "[t]he most compelling point …is that [liquidated] damage provisions reduce the time and complexity of litigation and thus benefit other users of the courts as well as the litigants themselves."[52]

15. It must be presumed that the liquidated damage term permitted Fischer & Frichtel to borrow more money at a lower cost because it is presumed that Fischer & Frichtel received value or consideration for having agreed to the liquidated damages term, for "when parties of equal sophistication negotiate a loan agreement, courts should presume that the creditor gave value, in the form of some other term of the agreement or otherwise, for terms favorable to the creditor" in measuring damages on default.[53]

16. The reasonableness of the estimate of the loss is to be considered both as of the time of the contract and as applied, at the time of the loss; there is no penalty if the measure is "unreasonable in the light of both the anticipated and actual loss."[54]

17. "[T]he difficulties of proof of loss are to be determined at the time the contract is made, not at the time of the breach."[55]

---

[52] ***Id.***

[53] ***In Re United Merchants & Mfrs. Inc***., 674 F.2d 134, 137 (2nd Cir. 1982); ***accord TMG Life Ins Co. v. Ashner***, 898 P.2d 1145, 1161 (Kan. App. 1995).

[54] **RESTATEMENT (SECOND) OF CONTRACTS** § 356 Ill.5 (1981); Hunter, ***supra*** n. 48, at ¶10.02[6], at 10-13.

[55] **RESTATEMENT (SECOND) OF CONTRACTS** § 356 cmt. b (1981).

18. A liquidated damage clause will be upheld when it is apparent, when the contract was made, that "it will be difficult to calculate damages or in which it was impossible to pre-estimate damages with any certainty at the time of contracting."[56]

19. "Damages for breach by either party may be liquidated in the agreement but only at an amount which is reasonable in the light of the anticipated or actual harm caused by the breach, the difficulties of proof of loss and the inconvenience or non-feasibility of otherwise obtaining an adequate remedy."[57]

20. Penalties in contracts were first adopted to evade canonical prohibition of interest on loans, which was regarded as usury.[58] There is a moral dilemma in a legal doctrine that one cannot free one's self from literal performance, immortalized in ***The Merchant of Venice***, but no court would hold that Fischer & Frichtel's promise in this case was a penalty, for Fischer & Frichtel must admits it is impossible to do more than estimate First Bank's damages when the loan was made.

21. That First Bank limited the amount its bid does not make the liquidated damage formula invalid, for First Bank had no duty to Fischer & Frichtel to bid at all (or in any amount), especially because Fischer & Frichtel never negotiated for such a contract promise.[59]

---

[56] Hunter, *supra* ¶10.02[1] at 10-4 (1986).

[57] ***Id.*** at 10-5.

[58] ***E.g.***, William H. Loyd, ***Penalties and Forfeitures***, 29 **HARV. L. REV**. 117, 119 (1915).

[59] ***City of Richmond***, 280 S.W.3d at 778 n. 3.

22. First Bank was entitled to a presumption that its acts were in good faith and that the transaction was fair and regular for the presumption is that "ordinary and usual method of transacting business" was followed."[60] Fischer & Frichtel presented no facts rebutting these presumptions.

23. If Fischer & Frichtel was not satisfied with these presumptions or was concerned with the discretion that First Bank would have in bidding, Fischer & Frichtel should have negotiated for terms that conditioned or controlled First Bank's bid. For example, Fischer & Frichtel could have countered First Bank's offer with a request that First Bank a percentage of the most recent appraisal that First Bank had in hand.[61]

24. Fischer & Frichtel failure to bargain does not make the liquidated damage formula unreasonable.[62]

25. By the time that First Bank bid, Fischer & Frichtel had already materially breached its contract by failing to pay the note at maturity, thus discharging First Bank from any further obligations to Fischer & Frichtel by reason of the first to breach doctrine.[63]

26. Fischer & Frichtel had a duty to use its own assets to pay off First Bank's note because, "When both parties have the same opportunity to reduce damages, a defendant cannot later contend that the plaintiff failed to mitigate."[64]

---

[60] ***White v. Ingram***, 110 Mo. 474, 19 S.W. 827, 829 (1892).

[61] ***City of Richmond,*** 280 S.W.3d at 778 n. 3.

[62] ***Id.***

[63] ***Janss,*** 863 S.W.2d at 651.

27. "[T]he duty to mitigate damages is not applicable where the party whose duty it is primarily to perform a contract has equal opportunity for performance and equal knowledge of the consequences of nonperformance."[65]

28. "Where … it is equally reasonable to expect the defendant to minimize damages, the defendant will not be heard to say that the plaintiff should have minimized, and the plaintiff's award will not be reduced on account of damages the defendant could have avoided as easily as the plaintiff."[66]

29. "However, a plaintiff has no "duty" to mitigate when the defendant has equal opportunity to do so. ***Wartzman v. Hightower Productions, Ltd***., 456 A.2d 82, 88 (1983); ***Shea-S & M Ball v. Massman-Kiewit-Early***, 606 F.2d 1245, 1249 (D.C.Cir.1979); quoting ***S.J. Groves & Sons Co. v. Warner Co***., 576 F.2d 524, 530 (3d Cir.1978); ***Unverzagt v. Young Builders, Inc.***, 215 So.2d 823, 828 (1968); ***Parker v. Harris Pine Mills***, 291 P.2d 709, 717 (1955); ***Hiss v. Friedberg***, 201 Va. 572, 112 S.E.2d 871, 875 (1960); ***Alexander v. Brown***, 646 P.2d 692, 695 (Utah 1982); ***Schneidt v. Absey Motors, Inc.***, 248 N.W.2d 792, 796-97 (N.D.1976); 22 **AM.JUR.2D** ***Damages*** § 37 (1965). Where both the plaintiff and the defendant have equal opportunity to reduce the damages by the same act or expenditure, and it is equally reasonable to expect the

---

[64] ***Chicago Title,*** 719 N.E.2d at 960.

[65] ***Shea-S & M Ball v. Massman-Kiewit-Early***, 606 F.2d 1245, 1249 (D.C. Cir.1979) quoting ***Parker v. Harris Pine Mills***, 291 P.2d 709 (Or. 1955).

[66] Dobbs, *supra* n. 9, § 3.17, at 186.

defendant to minimize damages, the defendant will not be heard to say that the plaintiff should have minimized. D. Dobbs, **REMEDIES** § 3.7 at 186 (1973).”[67]

30. In such cases, while the contract is subsisting and in force, the defendant cannot be heard to say that plaintiff might have performed for him."[68] In sum, if Fischer & Frichtel had the ability to perform, it could not breach its contract and shift to First Bank it primary duty to perform.

31. In bidding, First Bank’s sole obligation was to bid such amount as fulfilled the duties to its officers and directors to First Bank and its shareholders not to waste a corporate asset, ***i.e***., not to bid so low that the property was struck off to a third party if acquisition of the property offered First Bank some reasonable likely hood of recovery, given the time, energy, and capital that would have to be invested to hold and market the property foreclosed.

32. In effect, Fischer & Frichtel is asserting that First Bank had a duty to mitigate its damages in the face of a liquidated damage term, but that has never been the law.[69]

33. Non-breaching parties, like First Bank, have no ***duty*** to mitigate their damages.[70]

---

[67] ***Walker v. Transamerica Tit. Ins. Co***., 828 P.2d 621, 625 (Wash. App. 1992) (footnotes omitted).

[68] ***Parker***, 291 P.2d at 717.

[69] ***NPS, LLC v Minihane***, 886 N.E.2d 670, 675 (Mass. 2008) (collecting cases).

[70] **RESTATEMENT (SECOND) OF CONTRACTS** § 350 cmt. b (1981); Steven J. Burton & Eric G. Andersen, **CONTRACTUAL GOOD FAITH: FORMATION, PERFORMANCE,**

34. The mitigation doctrine simply precludes the non-breaching party from recovering damages that could have been avoided by reasonable effort,[71] "without investing further capital."[72]

35. The validity of the liquidated damage formula in the deed of trust is not before the Court because invalidity was an affirmative defense[73] not plead by Fischer & Frichtel, which was required by Rule 55.08 to plead "facts" showing the liquidated damage term was invalid.[74]

BREACH, ENFORCEMENT § 5.3.2, at 175 (1995); Charles L. Knapp et al., **PROBLEMS IN CONTRACT LAW: CASES AND MATERIALS** 851 (5th ed. 2003); 24 Samuel Williston & Richard A. Lord, **A TREATISE ON THE LAW OF CONTRACTS** § 64:27 (4th ed. 2002); E. Allan Farnsworth, ***Legal Remedies for Breach of Contract***, 70 COLUM. L. REV. 1145, 1184 (1970); ***Recent Case Note, Damages—Mitigation by Injured Party on Breach of Contract***, 34 YALE L.J. 553, 554 (1925).

[71] **RESTATEMENT (SECOND) OF CONTRACTS** § 350 cmt. b (1981).

[72] Simpson, ***supra*** n. 13, § 199, at 401 n. 66.

[73] ***See Sides Const. Co. v. Arcadia Valley R-II School Dist.***, 565 S.W.2d 761, 770 (Mo. App. 1978); ***see generally, e.g., Urban Television Net. Corp. v. Creditor Liquid. Solutions, L.P.***, 277 S.W.3d 917, 919 (Tex. App. 2009).

[74] ***State ex rel.Harvey v. Wells***, 955 S.W.2d 546, 547 (Mo. 1997).

36. The trustee who conducted the foreclosure auction was the agent and trustee of Fischer & Frichtel.[75] As Fischer & Frichtel's agent, the corporate trustee had (Blackstone's) duties of "integrity, diligence, and skill" to Fischer & Frichtel.[76] And, the corporate trustee who conducted the sale made the Story warranty and representation to Fischer & Frichtel that the persons who conducted the sale would be "competent and fitted to be trusted." The trustee, as principal "holds out the agent . . . and thereby, in effect, he warrants his fidelity and good conduct in all matters within the scope of his agency."[77] Fischer & Frichtel has presented no evidence that the trustee violated any of these warranties and representations when conducting the auction.

37. Even if the trustee breached a duty to Fischer & Frichtel, First Bank would have no liability for that breach.[78]

38. First Bank could have sued first and had the sheriff levy on and sell Fischer & Frichtel's property to satisfy the judgment, in which case Fischer & Frichtel would have only had the same 20 days to find a lender.[79]

---

[75] ***Butler Bldg & Inv. Co. v. Dunsworth***, 48 S.W. 449, 451 c. 1(Mo. 1899).

[76] ***State v. Ogden***, 172 S.W. 1172, 1174 (Mo. App. 1915).

[77] ***Maniaci v. Interurban Express Co.***, 182 S.W. 981, 985 (Mo. 1916); ***Doyle v. Scott's Cleaning Co***., 31 S.W.2d 242, 245 (Mo. App. 1930); ***Usher v. Western Union Tel. Co***., 98 S.W. 84, 86 (Mo. App. 1906).

[78] ***Hull v. Pace***, 61 Mo. App. 117, 122 (1895).

[79] **RSMo** § 513.205 (2000).

C. Analysis. This is a case of strategic default by a commercial borrower. By taking an appeal, Fischer & Frichtel has implicitly represented to the Court that it has the money to pay the agreed sum which it promised to pay First Bank. Fischer & Frichtel made the strategic decision that defaulting would put Fischer & Frichtel in a better position than would performance. If Fischer & Frichtel had performed its contract promise when its loan matured it would know own the property, with all its costs and burdens.

And, Fischer & Frichtel would be incurring the lost opportunity costs—monies that First Bank is paying for taxes, insurance, management and supervision, as it holds and attempts to sell the property. First Bank's costs (managers and employees, insurance, taxes, lost opportunities, brokerage fees and commissions) are so uncertain enough that, alone, they justify a liquidated damage term.

If (1) Fischer & Frichtel lacked the resources to pay its note and (2) the value of the ground truly exceeded the bid by First Bank, then Fischer & Frichtel could have filed a Chapter proceeding in bankruptcy within 90 days of the foreclosure sale and moved to have set aside the sale. [80] Fischer & Frichtel failure to avoid damages by this step estops its positions.

---

[80] ***In Re: Whittle Dev. Inc***., 2011 WL 3268398 (Bankr. N.D.Tex. July 27, 2011) (debtor in possession can avoid a pre-petition real property foreclosure on the grounds that the foreclosure constituted a preferential transfer, even though the foreclosure sale complied with state law and was non-collusive).

The court of appeal's belief that this case presented an important question proceeded on several fundamental errors.

First.—In this case, Fischer & Frichtel failed to pay its note at maturity. Thus, the foreclosure sale reflected the fact that Fischer & Frichtel had promised and agreed that the property would be worth less, because it had to be sold "at maturity," if the loan was not repaid. "An appraiser's reconstruction of 'fair market value' could show what similar property would be worth if it did not have to be sold within the time and manner strictures of state-prescribed foreclosure. But property that must be sold within those strictures is simply worth less. No one would pay as much to own such property as he would pay to own real estate that could be sold at leisure and pursuant to normal marketing techniques."[81]

Fischer & Frichtel's appeal is, in effect, a prayer for this Court to rewrite the contract of the parties, which this Court cannot do. Fischer & Frichtel wants this Court to, in effect, extend the maturity date of Fischer & Frichtel's loan indefinitely into the future to some hypothetical point where Fischer & Frichtel, at its leisure, would choose to sell the real estate under "normal" conditions return. This was not the contract between Fischer & Frichtel and First Bank, which provided for repayment of the loan on a date certain.

The Supreme Court reasoned well, fifteen years ago, "Market value cannot be the criterion of equivalence in the foreclosure-sale context.…. An appraiser's reconstruction

[81] ***BFP v. Resolution Trust Corp.***, 511 U.S. 531, 539 (1994).

of "fair market value" could show what similar property would be worth if it did not have to be sold within the time and manner strictures of state-prescribed foreclosure. But property that must be sold within those strictures is simply worth less. No one would pay as much to own such property as he would pay to own real estate that could be sold at leisure and pursuant to normal marketing techniques. And it is no more realistic to ignore that characteristic of the property (the fact that state foreclosure law permits the mortgagee to sell it at forced sale) than it is to ignore other price-affecting characteristics (such as the fact that state zoning law permits the owner of the neighboring lot to open a gas station)."[82]

This is a simple case in which Fischer & Frichtel did not want to own the real estate which it could sell at leisure, using normal marketing practices. Judges cannot "exclude from their minds realities of which fair decision would call for judicial notice."[83] Accordingly, this Court must take judicial notice that foreclosure by private power of sale results in greater credit availability in Missouri, at a lower cost and that the public will not benefit from Fischer & Frichtel desire to change the rules when the game turns against it.

---

[82] ***Id.***

[83] ***Silver Chrysler Plymonth, Inc. v. Chrysler Mot. Corp***., 518 F.2d 871, 753 (2nd Cir. 1976).

In ***Universal C.I.T. Credit Corp. v. Byers***. a car buyer agreed in a chattel mortgage to a liquidated damage formula no different than the formula agreed to by Fischer & Frichtel:[84]

> The car may be sold with or without notice, at private or public sale … with or without having the car at the sale; the proceeds less all expenses shall be credited on the amount payable hereunder; Customer shall pay any remaining balance forthwith ***as liquidated damages***[85] for the breach of this mortgage ….

On default the lender repossessed and the car was offered for sale on and sold two weeks later from a used car lot for $225 by private sale.[86] The lender sued for a deficiency measured by the terms of the chattel mortgage and recovered a directed verdict. The buyer then appealed complaining the sale "price obtained was less than the market value of the automobile."[87] On appeal the borrower asserted "the property sold for one one-third, which we accept as true,"[88] however:

> Mere inadequacy of price is insufficient to impeach a sale of property under the power contained in a chattel mortgage, 14 C.J.S., ***Chattel Mortgages***, § 381, p.

[84] 299 S.W.2d at 561.

[85] "In construing contracts in which such a term is introduced, the courts will not be guided by the name given to the sum to be paid." Simpson, ***supra*** n. 13, at 399.

[86] 299 S.W.2d at 562.

[87] 299 S.W.2d at 562.

[88] 299 S.W.2d at 562.

1034, unless it is so gross as to shock the moral sense or raise the inference of fraud or imposition, or unless it is accompanied by fraud or unfair dealing. ***Kingman v. Hill***, 71 Mo.App. 666. In ***Yellow Mfg. Acceptance Corporation v. American Taxicabs***, 344 Mo. 1200, 130 S.W.2d 601, it was held that a foreclosure sale of automobiles at 40% of their reasonable value was an insufficient allegation of inadequate price to state a case for setting aside the sale on the sole ground of inadequacy of price. In ***Oakey v. Bond***, Mo.Sup., 286 S.W. 27, 28, a trustee's sale of real estate which brought a little more than one-third of its alleged value was regarded as an inadequacy which was "not so gross as to shock the moral sense and justify setting the sale aside solely on that ground." In ***Harlin v. Nation***, 126 Mo. 97, 27 S.W. 330, the Supreme Court said, 27 S.W. loc. cit. 331:

> "[W]hile this property sold for only $100, when it was worth $500 cash, still we cannot say the price was so grossly inadequate as to raise the inference of fraud."

In ***Roby v. Smith***, 261 Mo. 192, 168 S.W. 965, the Supreme Court said, 168 S.W. loc. cit. 967:

> "It is to be regretted that the property in controversy brought at most not more than one-fourth of its value at the trustee's sale, but such things frequently happen, and will continue to happen as long as people incumber property."

Universal implicitly holds that the liquidated damages formula was reasonable, also holding:

- First, “mere inadequacy of price is insufficient to impeach a sale” because while “to be regretted. … such things frequently happen and will continue to happen as long as people incumber property.”[89]
- Second, an implied in fact term of the formula is that the creditor will not act with “fraud or imposition” “or engage in “unfair dealing.”[90] Missouri courts have always been on guard to protect borrowers from abuses by creditors. For example, more than a century ago in ***Axman v. Smith*** this Court set aside a foreclosure sale of lots when the trustee, in connivance with the lender, chilled the bidding for lots by offering them for sale in a “most unattractive form.”[91] The trustee subdivided the parcel into lots fronting on a residential street instead of offering lots fronting on a busy commercial street. This enabled the lender “to buy in the property as cheaply as possible.”[92]
- Third, “mere inadequacy of price” “unless it is so gross as to shock the moral sense [does not] raise the inference of fraud or imposition” or “unfair dealing.”[93]

Fischer & Frichtel presented no evidence but an argument based on appraisals, which was only “speculative … that a better price could have been obtained.”[94]

---

[89] 299 S.W.2d at 562.

[90] 299 S.W.2d at 562.

[91] Axman v. Smith, 57 S.W. 105 (Mo. 1900).

[92] ***Id***.

[93] Id.

The liquidated damages provided for in Fischer & Frichtel's deed of trust were not in excess of any loss likely to be sustained and therefore were not a penalty. Hunter recently wrote, "The standard test for approval applies three criteria:

> 1. The parties must have intended the clause to be a means to calculate damages, not a penalty or forfeiture.
>
> 2. The contract must be one in which it will be difficult to calculate damages or in which it was impossible to pre-estimate damages with any certainty at the time of contracting.
>
> 3. Damages figured according to the damage clause in the contract must be reasonable in terms of what they would be if they were measured by the standard rules of common law.[95]

Standard Rule of the Common Law. The standard rule of the common law ("by far the most important of the three" criteria[96]) as conceded by Fischer & Frichtel, is that damages are measured by the bid at the foreclosure auction. Fischer & Frichtel's entire argument is that the standard rule of the common law should be changed or abandoned for a measure of damages based on the fair market value (when there is in fact no market), albeit Fischer & Frichtel cites no economic or finance research showing that such a rule would be better for all borrowers or the public.

---

[94] 299 S.W.2d at 563.

[95] Howard O. Hunter, **MODERN LAW OF CONTRACTS** § 17:2 (Westlaw 2011).

[96] ***Id.***

The test for a penalty is whether the damages measured by the liquidated damage clause are "in excess of any loss likely to be sustained."[97] When the deed of trust was made it was impossible to know the answer to this question. But Fischer & Frichtel knew it was highly leveraged and speculating in subdivision lots , a very risky business.

The Errors in Restatement Section 8.4. The Restatement rests upon three basic errors which reach to the heart of this case.

First.—The drafters of the Restatement were flying blind. How best to measure damages in this case is a policy question, in the absence of agreement by the parties. Such a judgment has to be informed by the best available economic and finance literature, looking for what promotes economic efficiency. Experience since the Restatement was drafted has forced both Economics and Finance to reject the underlying premise of the Restatement: that there is a "normal" in highly leveraged real estate markets.

It has been a bitter lesson but we have all come to understand wide swings in value are to be expected in highly leveraged assets. The only protection against socialization of losses is requiring higher and more responsible levels of capitalization by lender and borrower. Imposing liability on borrowers under the current law will force borrowers to raise more capital, ending the policy debate.

It is also now recognized that Fischer & Frichtel was not engaged in a solid business; Fischer & Frichtel was engaged in speculation without sufficient capital. Fischer & Frichtel's directors and officers failed to manage its risks.

---

[97] Simpson, ***supra*** n. 13, at § 198 at 399.

The Restatement makes no citation to and there is no evidence that the economics literature and finance studies now available were even considered by the drafters of the Restatement 15 years ago.

Further, the writers of the Restatement have Pence's work showing the costs to borrowers of the regime proposed.

Second.—The Restatement writers were flat wrong on the law, perhaps because they were not contracts professors.

Section 8.4 contradicts the common law, of contracts, the Restatement of Contracts,[98] and the UCC.[99] All three recognize that it is appropriate for the non-breaching party to profit from a breach of the contract, to come out "in a better position as a result of defendant's breach than he would have been in had the contract been fully performed."[100] This can happen because, for example, "a plaintiff's damages are not mitigated in an action against a breaching purchaser of goods or services simply because the plaintiff has been able to sell the goods or services to another."[101] What is controlling

---

[98] **Restatement** (Second) **Contracts**, § 347, Reporter's Note Comment f. (1981).

[99] RSMo § 400-2.708(2).

[100] Dobbs, *supra* n.9, at § 12.6, 827–28.

[101] ***Massengale v Transitron Elec. Corp***., 385 F.2d 83, 87 (1st Cir. 1967).

is the "separateness of the subsequent transactions."[102] "The Defendant is entitled to no credit for earnings or profits made by plaintiff in his new contract."[103]

Olds v. Mapes-Reeves Const. Co.[104] is the classic text book case and is cited by the Reporter of the Restatement of Contracts as a leading case on "the situation in which the breach enables the injured party to make a new contract."[105] A general contractor quit a job. A subcontractor brought suit on wrongful termination and then contracted with the owner to complete the subcontract. Even though the subconstractor "was able to do the job only because of the defendant's breach" he was nonetheless entitled to his profits on both jobs.[106]

The test is whether a third party could have earned the income. In ***Olds*** a third party could have made the contract with the owner, earning a profit. In this case a third party could have bought the lots at foreclosure and resold for a profit.

The second error of law in Section 8.4 is that it is contrary to the rule that a Plaintiff's "award will not be reduced on account of damages the defendant could have avoided as easily as the plaintiff."[107] The drafters never contemplated the strategically

---

[102] ***Id***.

[103] Dobbs, *supra* n.9, at § 12.6, at 827.

[104] ***Olds v Mapes-Reeves Const. Co***, 177 Mass. 41, 58 N.E. 478 (1900).

[105] **Restatement** (Second) **Contracts**, § 347, Reporter's Note Comment f. (1981).

[106] Dobbs, *supra* n. 9, at § 12.6 at 827.

[107] Dobbs, *supra* n. 9, at § 3.7, at186.

defaulting borrower that we have in this case. In effect, what Fischer & Frichtel argues is that First Bank "should have perfomed for" it."[108] This is contrary to the doctrine of avoidable consequences.[109]

The final error of law in the Restatement is that it deprives First Bank of "recovery for expenditures reasonably made in an effort to avoid or minimize damages caused by defendant's conduct."[110]

Third.—The Restatement is contradictory. The foreclosure auction is a open cry public auction. Lenders know their opening bids are a "signal," both to those present at the auction and to buyers who may approach afterwards.[111]

A high opening bid, as admitted by the Restatement "may remove a significant impetus to higher bidding by third parties."[112] Fischer & Frichtel cannot, especially having failed to bid, have its cake and eat it too. First Bank's opening bid, if low, benefitted Fischer & Frichtel for it did not discourage other bidders and it made it significantly harder for First Bank to negotiate a sale, after the foreclosure, for the bid was public signal of the First Bank's estimate of value.

---

[108] 17 C.J. ***Damages*** § 99, 774 (1919).

[109] ***Crough v Dept. of Gen. Serv.***, 572 A.2d 457, 466–67 (D.C. 1990).

[110] Dobbs, ***supra*** n. 9, at § 3.7, at 187.

[111] Paul Klemperer, ***Auction Theory: A Guide to the Literature***, 13 J. Econ. Surv. 227 (1999).

[112] **RESTATEMENT (THIRD) OF PROPERTY-MORTGAGES** § 8.4 Rpt. Note (1997).

No evidence to the contrary is in this case: First Bank's bid was an attempt to entice other bidders. What to bid is obviously a private business confidence of great value to lenders. Asking lenders to disclose these kinds of trade secrets and business confidences in a jury trial is the equivalent of asking Coca Cola to publish its formula.

There is a well known psychology of open cry public auctions. Some of our most sophisticated business people have stated that they attend, so as to protect themselves against over bidding: "Ten: Then the Warren Buffett rule for open-outcry auctions: Don't go." [113]

Charles T. Munger, Buffet's partner, who created the science of standard thinking errors with his Harvard (1995) speech on ***Psychology of Human Misjudgment,*** has further explained:

> Finally, the open outcry auction. Well the open-outcry auction is just made to turn the brain into mush: you've got social proof, the other guy is bidding, you get reciprocation tendency, you get deprival super-reaction syndrome, the thing is going away… I mean it just absolutely is designed to manipulate people into idiotic behavior.[114]

---

[113].Charles T. Munger, ***The Psychology of Human Misjudgment***, **POOR CHARLIE'S ALMANACK** 474 (2d. Ed. 2006).

[114] Confirmed by http://en.wikipedia.org/wiki/Charlie_Munger (last visited Sept. 12, 2011).

Fischer & Frichtel had the benefit of an open outcry public auction where the brains of other bidders might turn into mush and a high bid made. Every fact in this case shows that First Bank's course of conduct in making its bid benefitted Fischer & Frichtel because it encouraged third party bidders instead of deterring higher bidding by third parties.

According to Fischer & Frichtel, the First Bank bid was too low. Fischer & Frichtel does not explain how this is possible. Fischer & Frichtel does not offer and cannot offer any explanation (which is substantial, compelling, and controlling evidence that First Bank's bid was not a fair approximation of the value of the property). The cases used to talk about "distress." We now know this explanation is incorrect. The established concept of "Winner's Curse," where bidders systematically overbid, as applied to progressive auctions establishes that the high bid is also too high.[115] The accurate bid is the next to last bid, the "winner" being "cursed" by overbidding.

Fischer & Frichtel was protected by First Bank's interest in not making such a low bid that it would impair its future negotiations. A lender's public bid at a foreclosure sale is a signal to potential buyers about the lender's intent. Fischer & Frichtel charges First Bank's bid was too low. But Fischer & Frichtel agreed that First Bank could bid without any limits on its discretion. Fischer & Frichtel had no need to bargain for limits for First Bank could not bid the property for One Dollar for such a bid would substantially impair its future ability to negotiate a successful sale to a third party.

[115] Papers are collected on the Social Science Research Network on the Internet.

2. The liquidated damage formula in the deed of trust should be construed, "not with a hostile eye" but "to save the clause."[116]

Judge Learned Hand considered how a liquidated damage formula was to be construed when the ***Irving Trust*** case was before the Second Circuit.[117] In the ***Irving Trust*** case the parties to a lease had agreed on a liquidated damage formula by which, on bankruptcy of the tenant, the landlord was "to recover damages for such breach in an amount equal to the amount of the rent reserved in the lease for the residue of the term hereof, less the fair rental value of the premises for the residue of said term."[118] The tenant argued this could be construed as a penalty because "the future payments are not discounted to their present values."[119]

Hand rejected the argument reasoning, "we are not bound to view the language with a hostile eye, we shall construe it to save the clause."[120] The term to which First Bank agreed can and should be construed in the same manner, so as to save the clause. A deficiency judgment against Fischer & Frichtel could be unfair in only one instance: a resale for cash—i.e, not financed—by First Bank promptly after the sale for a an unfair

---

[116] ***In Re Outfitters' Operating Realty Co.***, 69 F.2d 90, 92 (2nd. Cir. 1934) (Hand, J.).

[117] 69 F.2d 90 (2nd Cir. 1934).

[118] 69 F.2d at 91.

[119] 69 F.2d at 92.

[120] 69 F.2d at 92.

price for an amount substantially in excess of First Bank's bid to a buyer know to First Bank at the time of the sale.

In considering this problem is important to recall that, as soon as title passes, First Bank ought to be entitled to any profits from a sale because it is bearing all the risk of a decline price below its bid.

All that is necessary is for this Court to consider if there a duty part of First Bank to tell Fischer & Frichtel, through foreclosure, if it has learned of any potential buyers. Once the loan was made, and if First Bank had this continuing duty (Missouri implies a duty to cooperate in to achieve the twin objects of the contract: (1) the sale of the lots; and (2) the repayment of the loan.

Fischer & Frichtel has never charged First Bank with not cooperating, prior to the sale. In fact, although any sale by First Bank would have been a matter of public record,[121] no evidence was presented at trial about when, where, and to whom the property was sold by First Bank (if ever).

3. The General Assembly's inaction is powerful evidence against changing the law.

The UNFA was proposed as a model law in 2002 . The Act recognized that the Restatement was unfair to lenders and proposed, in the alternative, a 90% rule. No one, not even the UNFA reporter has publicly urged adoption of the UNFA in Missouri, according to our investigation.

[121] **RSMo** § 442.380 (2000) ("Every instrument … shall be recorded ….").It is presumed that First Bank and the buyer recorded the deed, as required by law.

Since 2002, we have been able to find only one bill about foreclosures has been filed with the legislature: HB 721, filed March 1, 2011, proposed a new section in Chapter 443 reading:

> 443.457. When a lending institution forecloses on real property and purchases such property at a foreclosure sale for less than the amount owed and sells such property within one year, any amount of the sale price in excess of the amount paid by such lending institution at the foreclosure sale shall be applied to any deficiency of the owner that was foreclosed upon or to the judgment for such deficiency if a judgment exists. Any amounts in excess of such deficiency shall remain the property of the lending institution.

After second reading and referral to committee no action was taken on the Bill by the House. This legislative inaction shows that the General Assembly does not see a problem and wants no part of increasing loans costs, reducing loan size, or socializing losses and privatizing profits.

4. First Bank's rights under the liquidated damage formula are vested and cannot be impaired by this Court.

The Missouri Constitution forbids this Court from impairing a vested right: "That no .… law impairing the obligation of contracts can be enacted."[122] Similarly, the

---

[122] **MO. CONST**. Art. I, § 13.

Constitution prohibits this Court from impairing a vested right [123] This Court cannot "make" law which the General Assembly cannot "make."[124]

These propositions are so well settled that few cases have been decided under Section 13. The case most on point, *State ex rel. Phillip v. Public School Retirement System of City of St. Louis,*[125] invalidated statutes that changed terms of retirement plans. The question is pretty simple: Was there a contract term that the new law attempts to change?

Given that First Bank and Fischer & Frichtel made a valid contract which included a valid term providing for a liquidated formula, this Court may not constitutionally declare that provision invalid, for such would impair the obligation of Fischer & Frichtel to First Bank and it would impair First Bank's vested right in damages measured by the formula to which Fischer & Frichtel agreed. The General Assembly could not pass a law declaring the liquidated damage term invalid, since such was

---

[123] **U.S. CONST.** art.I, §10, c. 1***; see generally Energy Reserves Group v. Kansas Power & Light,*** 459 U.S. 400 (1983).

[124] ***Bouie v. City of Columbia***, 378 U.S. 347, 353–54 (1964) ("If a state legislature is barred by the Ex Post Facto Clause from passing such a law, it must follow that a State Supreme Court is barred by the Due Process Clause from achieving precisely the same result by judicial construction.").

[125] 364 Mo. 395, 262 S.W.2d 569 (banc 1953).

approved by the court of appeals in ***Universal C.I.T. Credit Corp. v. Byers***, 299 S.W.2d 559, 561 (Mo. App. 1957).

Inexplicably, First Bank has never mentioned the liquidated damage formula, even though the deed of trust was attached to its petition and incorporated for all purposes.[126] Instead, First Bank presented it case relying on the identical measure of damages of the common law.

However, First Bank is free to argue that the judgment be affirmed for any reasons appearing in the record.[127] Since the deed of trust has been part of the record from the outset, this Court should affirm the judgment on the ground that

Conclusion

The Board of Governors of the Federal Reserve System has carefully researched and documented that this Court faces "a tradeoff." It can facilitate the availability of large long at lower prices and protect property values or it can can provide protections to real estate speculators who financial difficulties, but it cannot do both.[128]

What are the tradeoffs?

- First, "lenders respond to costly foreclosure laws by reducing loan supply" [129]

[126] **MO. R. CIV. P.** 55.12

[127] ***E.g., Rocha v. Metro Property and Cas. Ins***., 14 S.W.3d 242 (Mo. App. 2000).

[128] Pence, supra n.20, at 3.

[129] *Id.*

- Second, Fischer & Frichtel wants this Court to privatize its profits and socialize its losses which will include no less than "a four to six percent decrease in loan size."[130]
- Third, "[s]maller loan sizes may also reflect, in part, an effect of the [defaulter-friendly foreclosure] laws on house prices: buyers may not be willing to pay as much for a house if they have difficulty obtaining financing."[131]
- Last, "defaulter-friendly foreclosure laws impose costs on borrowers at the time of loan origination."[132]

It has been settled Missouri doctrine for over a century that:

> However strongly our sympathies may be enlisted for the unfortunate victim of hard times, they cannot furnish a basis for equity jurisdiction; and such courts cannot and ought not to be made the instruments of speculation in future values of property, even for the benefit of the unfortunate.[133]

A panel of the Court of Appeals transferred this case without recognizing the wisdom against "speculation in future values of property." That same panel lacked familiarity with the record and never discussed the liquidated damage formula agreed to by Fischer & Frichtel when it signed the deed of trust.

---

130 *Id.* at Abstract, at 2.

131 *Id*. at 3.

132 *Id*. at abstract.

133 ***Axman,*** 57 S.W. at 106.

Last, that panel showed no knowledge of or appreciation about the economic and finance literature on the damage that will be done to every property owner in Missouri by adoption of the rule urged by Fischer & Frichtel: adoption of the measure of damages in **RESTATEMENT (THIRD) OF PROPERTY SECTION** 8.4 (1997). This measure of damages is a liquidated damage formula based entirely upon expert testimony speculating about the future value of property when markets return to normal:

> c. Defining "fair market value." For purposes of this section, "fair market value" is defined in the same manner as in § 8.3: "the price which would result from negotiation and mutual agreement, **after ample time to find a purchaser**, between a vendor who is willing, but not compelled to sell, and a purchaser who is willing to buy, but not compelled to take a particular piece of real estate." See § 8.3, Comment b. "Fair market value" is not "fair foreclosure value" and **should not be affected by the impact of the foreclosure proceedings**. The determination of fair market value may appropriately utilize a variety of approaches including (1) the "market data" approach indicated by recent sales of comparable properties; (2) the "income approach," or the value which the real estate's net earning power will support based upon a capitalization of net income; and (3) the current cost of reproducing the property less depreciation.[134]

The Restatement is a deterrent to lenders even thinking about pursuing deficiencies because it turns every case into a battle of experts with uncontrolled costs of expert

[134] Reporters Note on Comment C.

witness fees. If one reads the Restatement it is pretty plain that the drafters were engaged in "social engineering," not the making of sound public policy. The drafters wrote, "This section also protects the mortgagor from the **harsh** consequences of **suffering** both the loss of the real estate and the burden of a deficiency judgment." This is not the language of a neutral umpire.

It is pretty simple math that reducing future mortgage loans by four to six percent will pretty likely reduce real estate values in Missouri, immediately, by four to six percent. This one time knowing destruction of wealth being urged by Fischer & Frichtel is unprecedented to any American court.[135] In deciding this case, this Court will be acting with the legislative power to create law. Fischer & Frichtel is not asking this Court to "discover" law. Fischer & Frichtel, for its private profit, wants this court to reverse about 200 years of settled doctrine that has served Missouri well.

Fischer & Frichtel has not proved a single instance in Missouri where a lender has actually profited by the "unfair" action it says is possible. Further, this Court does not have the fact finding tools to reject the amount bid at the open cry public auction as unfair. The Court has no facts or information about the bidders who did or did not attend

[135] We know that others have in the past changed the rules but they did such unknowingly, without the benefit of the now available research, only some of which we have presented. We doubt homeowners in Florida now, for example, appreciate the judicial activism of their courts, given what has happened in that State during this Lesser Depression.

the sale, their capacity, motives, and insights. In the absence of such evidence this Court must presume that the bid reflected reality (since 2008, we have been in what many call a Lesser Depression).

The subdivision lots offered at the open cry public auction had none of the shortcomings that some argue negatively impact foreclosure prices. The lots were unimproved and available for inspection. Any restrictions on future improvement, as well as the complete status of title, were of public record. Because the property was "commercial," potential buyers had access to the World's capital markets.

Fisher and Frichtel wishes to impose upon banks and other lenders a legal responsibility for achieving a sale price far higher than the borrower itself could achieve and far higher than the public was willing to pay. Moreover Fischer & Frichtel's argument discounts entirely the reality that buyers, including professional buyers like Fisher and Frichtel, consider unsatisfied development obligations, sales commissions, marketing costs, holding periods, insurance costs, tax liabilities and uncertainties concerning future sales, and the supply of similar product before a sale is made. Fischer & Frichtel proved by its own failure that it was unable or unwilling to sell the collateral at any price. Yet it would enlist the Court to disregard the liquidated damage provision in the deed of trust and to impose upon the Bank and all future lenders a duty to bid a greater price at foreclosure than the borrower itself could have achieved with all its own knowledge, motivation and resources.

In sum, we believe this Court is being asked to devalue all real estate in Missouri by more than five percent. What possibly justifies such a wholesale destruction of wealth? The circuit court judgment should be affirmed.

Respectfully submitted,

/s/John L. Davidson

John L. Davidson MB#25847
% John L. Davidson P.C
13975 Manchester Road, Suite 19
Saint Louis, Missouri 63011
314.725.2898
636.527.9395
jldavidson@att.net

Attorney for Amicus Curiae
The Business Bank of St. Louis

Tuesday, October 11, 2011

Certificate Of Service

The undersigned hereby certifies that on Tuesday, October 11, 2011, the original and a was filed with the Court and served upon the following parties of record of means of the Court's electronic filing system

Robert D. Blitz, #24387 R. Thomas Avery, #45340 Jason K. Turk, #58606 120 South Central Avenue, Suite 1650 St. Louis, MO 63105-1742 Telephone No.: (314) 863-1500 Facsimile No.: (314) 863-1877 rblitz@blitzbardgett.com rtavery@blitzbardgett.com jturk@blitzbardgett.com Attorneys for Appellant Fischer & Frichtel, Inc.	Thomas B. Weaver Matthew Reh Sara Finan Melly 7700 Forsyth Blvd., Ste. 1800 St. Louis, MO 63105 Attorneys for Respondent First Bank

/s/ John L. Davidson
John L. Davidson

Rule 84.06(c) Certificate

Pursuant to Rule 84.06(c), the undersigned hereby certifies that this Amicus Brief contains no more than 12,925 words, exclusive of the cover, certificate of service, this certificate, Table of Contents and Table of Authorities, according to Word 2007and thus, complies with Supreme Court 84.06(b).

/s/John L. Davidson
John L. Davidson