

RESEARCH MEMORANDUM

To: Members of the URLTA Drafting Committee

From: Alice Noble-Allgire, Reporter

Date: February 12, 2012

Re: Mitigation of Damages

This memorandum provides an overview of the current law regarding mitigation of damages by a landlord upon a tenant's breach. Part I summarizes the existing statutory and common law authorities regarding the existence of a duty to mitigate. Part II examines the divergence among the jurisdictions as to which party bears the burden of proof on the issue of mitigation. Part III examines the scope of the duty in jurisdictions that require mitigation and attempts to identify patterns that would be useful if the drafting committee attempts to include a "safe harbor" provision in the revised URLTA. Part IV discusses the authorities that have addressed the consequences of the landlord's duty to mitigate. Finally, Part V discusses the parties' ability to waive the duty.

I. Does the Landlord Have a Duty to Mitigate Damages?

Under traditional property law, a landlord had no duty to mitigate damages upon a tenant's abandonment of the leased premises. Having conveyed the possessory interest in the land to the tenant, "[i]t was of no concern to the landlord whether the tenant chose to occupy the property or not."¹ Thus, the landlord has three options upon the tenant's abandonment:

One was to accept a surrender of the lease and thereby terminate the tenancy. . . . The [second was to] reenter the premises for the account of the tenant, attempt to re-let the property for the tenant's benefit, and hold the tenant liable for any rent that had accrued at the time of the reentry as well as any future deficiency if the premises were unable to be re-let or were re-let at a lower rent than was reserved under the lease. Finally, . . . the landlord could do nothing and hold the tenant liable for the entire amount of rent payable during the remaining term of the lease.²

There is considerable variation among the states regarding the status of the traditional rule today, but the vast majority of states appear to follow the approach adopted by the Uniform

¹*Stonehedge Square Ltd. P'ship v. Movie Merchants, Inc.*, 715 A.2d 1082, 1083 (Pa. 1998).

²*Circuit City Stores, Inc. v. Rockville Pike Joint Venture Ltd. P'ship*, 829 A.2d 976, 988-89 (Md. 2003).

Residential Landlord and Tenant Act in requiring a landlord to mitigate damages.³ Twenty-eight jurisdictions have enacted statutes requiring mitigation.⁴ Four additional states have applied the duty to mitigate to residential leases as a matter of common law,⁵ and five others have applied the duty in cases involving commercial leases with broad language from which one could infer the same rule would apply in residential leases.⁶ [See Exhibit D – Duty to Mitigate Chart for an overview of some of the differences between the states.]

Four states appear to firmly retain the traditional common law rule of no-duty to mitigate.⁷ Five other jurisdictions generally follow the traditional view, but recognize exceptions to the rule if the landlord has re-entered the premises, either to re-let the premises on the tenant's

³In fact, the URLTA requires both parties to mitigate damages. *See* URLTA 1.105 (“The aggrieved party has a duty to mitigate damages.”).

⁴Alabama, Alaska, Arizona, California, Connecticut, Delaware, Hawaii, Illinois, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Montana, Nebraska, Nevada, New Mexico, North Dakota, Oklahoma, Oregon, Rhode Island, South Carolina, Tennessee, Texas, Virginia, Washington, Wisconsin. ALA. CODE § 35-9A-105; ALASKA STAT. § 34.03.320; ARIZ. REV. STAT. ANN. § 33-1305; CAL. CIV. CODE § 1951.2; CONN. GEN. STAT. § 47a-11a; DEL. CODE ANN. tit. 25 § 5507; HAW. REV. STAT. § 521-70; 735 ILL. COMP. STAT. 5/9-213.1; IOWA CODE ANN. § 562A.4; KAN. STAT. § 58-2565; KY. REV. STAT. ANN. § 383.520; LA. REV. STAT. ANN. § 9:3260 (applies to constructive eviction cases and for breach of the warranty of habitability), LA. CIV. CODE ANN. art. 2002 (general mitigation statute, which was found applicable to leases in *Gray v. Kanavel*, 508 So. 2d 970, 973 (La. Ct. App. 1987)); ME. REV. STAT. tit. 14, § 6010-A; MD. CODE ANN., REAL PROP. § 8-207; MONT. CODE ANN. § 70-24-401; NEB. REV. STAT. § 76-1405; NEV. REV. STAT. ANN. § 118.175; N.M. STAT. ANN. § 47-8-6; N.D. CENT. CODE ANN. § 47-16-13.5; OKLA. STAT. tit. 41, § 105; OR. REV. STAT. ANN. § 90.125; R.I. GEN. LAWS § 34-18-5; S.C. CODE ANN. § 27-40-50; TENN. CODE ANN. § 66-28-515; TEX. PROP. CODE ANN. § 91.006; VA. CODE ANN. §§ 55-248.33, 55-248.35; WASH. REV. CODE § 59.18.310; WIS. STAT. ANN. § 704.29. Michigan's statute, by comparison, does not impose a duty to mitigate, but prohibits the parties from entering into a rental agreement that releases a party from a duty to mitigate damages. MICH. COMP. LAWS ANN. § 554.633(k).

⁵Indiana, New Jersey, Ohio, and Vermont. *Nylen v. Park Doral Apartments*, 535 N.E.2d 178, 183 (Ind. Ct. App. 1989); *Sommer v. Kridel*, 378 A.2d 767 (N.J. 1977); *Dennis v. Morgan*, 732 N.E.2d 391, 394 (Ohio 2000); *Aaron v. Stern*, 2002 WL 34422299 (Vt. Dec. 99, 2002).

⁶Colorado, Idaho, North Carolina, Utah, and Wyoming. *Schneiker v. Gordon*, 732 P.2d 603, 611 (Colo. 1987); *Consol. AG of Curry, Inc. v. Rangen, Inc.*, 912 P.2d 115, 117 (Idaho 1996); *Isbey v. Crews*, 284 S.E.2d 534, 538 (N.C. Ct. App. 1981); *Reid v. Mut. of Omaha Ins. Co.*, 776 P.2d 896, 906-09 (Utah 1989); *Sys. Terminal Corp. v. Cornelison*, 364 P.2d 91, 95 (Wyo. 1961).

⁷Arkansas, Minnesota, Mississippi, and Pennsylvania. *Weingarten/Arkansas, Inc. v. ABC Interstate Theatres, Inc.*, 811 S.W.2d 295, 297 (Ark. 1991); *Control Data Corp. v. Metro Office Parks Co.*, 208 N.W.2d 738, 740-41 (Minn. 1973); *Alsup v. Banks*, 9 So. 895 (Miss. 1891); *Stonehedge Square Ltd. P'ship v. Movie Merchants, Inc.*, 715 A.2d 1082 (Pa. 1998).

behalf⁸ or after accepting a surrender.⁹ Finally, the status of the law in five states (MA, NH, NY, SD, WV) is uncertain, either because the courts have not addressed the issue or the cases within that jurisdiction are in conflict.¹⁰

The weight of authority would suggest that there is no reason to deviate from the URLTA's current requirement that "[t]he aggrieved party has a duty to mitigate damages."¹¹ However, as discussed further below, the drafting committee should consider whether to provide further guidance regarding the duty, particularly with respect to which party bears the burden of proof, and perhaps to include a "safe harbor" provision to guide landlords as to what actions would satisfy the mitigation requirement.

II. Who Bears the Burden of Proving Mitigation?

The URLTA, like most statutes, is silent regarding which party bears the burden of proving mitigation of damages. Where jurisdictions have addressed the issue – either through legislation or as a matter of common law – they have reached differing results. Generally, in a contract action, the breaching party has the burden of proving mitigation. Some courts, however, have shifted the burden to the landlord, reasoning that "the landlord will be in a better position to demonstrate whether he exercised reasonable diligence in attempting to re-let the premises."¹²

Among states that have addressed the issue, four (IA, NJ, UT, VA) have held that the

⁸D.C., Florida, and Missouri. *Satin v. Buckley*, 246 A.2d 778, 780-81 (D.C. 1968); FLA. STAT. § 83.595 (codifying traditional common law options but providing that if landlord retakes possession, landlord has a duty to exercise good faith in attempting to relet the premises); *MRI Nw. Rentals Invs. I, Inc. v. Schnucks-Twenty-Five, Inc.*, 807 S.W.2d 531, 534 (Mo. Ct. App. 1991).

⁹Georgia and Michigan. *Sirdah v. N. Springs Associates, LLLP*, 696 S.E.2d 391, 394 (Ga. App. Ct. 2010) (landlord is required to make reasonable efforts to re-lease the premises and mitigate damages if the landlord accepts the tenant's surrender or the tenant successfully terminates the lease); *M & V Barocas v. THC, Inc.*, 549 N.W.2d 86, 87-88 (Mich. 1996) ("[i]n an action for rent, the landlord has no duty to mitigate, and, unless he accepts surrender of the premises, he has a right to collect the full amount of the rents due under the breached lease") (quoting *Winshall v. Ampco Auto Parks, Inc.*, 417 F. Supp. 334, 336 (E.D.Mich., 1976).

¹⁰See *Arrowhead Ridge I, LLC v. Cold Stone Creamery, Inc.*, 800 N.W.2d 730, 736 (S.D. 2011) (declining to address the question of whether there is a common duty to mitigate in the absence of a lease provision). In New York, the Court of Appeals refused to recognize a duty to mitigate in a commercial case. *Holy Properties Ltd., L.P. v. Kenneth Cole Prods., Inc.*, 87 N.Y.2d 130, 637 N.Y.S.2d 964, 661 N.E.2d 694 (N.Y. 1995). Lower courts in New York have disagreed whether that holding governs residential leases as well. *29 Holding Corp. v. Diaz*, 775 N.Y.S.2d 807, 813-14 (Sup. Ct. 2004) (discussing cases).

¹¹URLTA § 1.105(a).

¹²*Sommer v. Kridel*, 378 A.2d 767, 773 (N.J. 1977).

burden of proof falls on the landlord.¹³ Thirteen states (AZ, CA, HI, KS, MI, NE, NC, ND, OH, RI, SC, TN, TX) held that the burden of proof falls on the tenant.¹⁴ Illinois,¹⁵ New York,¹⁶ and Oregon¹⁷ have conflicting holdings that place that burden of proof on the landlord and the tenant. In Indiana, the burden of proof is placed on the tenant unless the lease contains a mandatory reletting clause, in which case the landlord bears the burden of proof.¹⁸

Maine and Wisconsin are unique in that they employ a shifting burden of proof. Their statutes initially place the burden on the landlord to prove that the landlord “has made reasonable efforts to comply” with the statute’s duty to mitigate.¹⁹ The burden then shifts to the tenant to prove:

that the efforts of the landlord were not reasonable, that the landlord's refusal of any

¹³ *D.R. Mobile Home Rentals v. Frost*, 545 N.W.2d 302 (Iowa 1996) (residential); *Sommer v. Kridel*, 378 A.2d 767 (N.J. 1977); *Reid v. Mutual of Omaha Ins. Co.*, 776 P.2d 896 (Utah 1989)(commercial case); *Branning Mfg. Co. v. Norfolk-Southern R. Co.*, 121 S.E. 74 (Va. 1924)(commercial case).

¹⁴ *Stewart Title & Trust of Tucson v. Pribbeno*, 628 P.2d 52 (Ariz. Ct. App. 1981)(commercial case); *Lu v. Greval*, 130 Cal. App. 45th 841 (2005)(commercial case); *MarcoKona Warehouse v. Sharmilo, Inc.*, 768 P.2d 247 (Haw. App. 1989)(commercial case); *Steinman v. John Hall Tailoring Co.*, 163 P. 452 (Kan. 1917)(commercial case); *Froling v. Bischoff*, 252 N.W.2d 832 (Mich. Ct. App. 1977)(commercial case); *Properties Inv. Group of Mid-America v. JBA, Inc.*, 495 N.W.2d 624 (Neb. 1993); *Isbey v. Crews*, 284 S.E.2d 584 (N.C. Ct. App. 1891)(commercial case); *Ruud v. Larson*, 392 N.W.2d 62 (N.D. 1986)(commercial case); *Hines v. Riley*, 717 N.E.2d 1133 (Ohio Ct. App. 1998); *Saunders Real Estate Co. v. Landry*, 769 A.2d 1277 (R.I. 2001)(commercial case); *Brendle's Stores, Inc. v. OTR on Behalf of Bd. of Trustees of State Teachers Retirement System of Ohio*, 978 F.2d 150 (4th Cir. 1992) (applying South Carolina law)(commercial case); *Hailey v. Cunningham*, 654 S.W.2d 392 (Tenn. 1983)(commercial case); *Austin Hill Country Realty, Inc. v. Palisades Plaza, Inc.*, 948 S.W.2d 293(Tex. 1997)(commercial case).

¹⁵ *Compare Snyder v. Ambrose*, 639 N.E.2d 639 (Ill. Ct. App. 2d Dist. 1994)(commercial case) and *Manufacturers Life Ins. Co. (U.S.A.) v. Mascon Information Techs. Ltd.*, 270 F. Supp. 2d 1009 (N.D. Ill. 2003)(commercial case) with *Hinde v. Madansky*, 161 Ill. App. 216 (4th Dist. 1911)(commercial case); *Chicago Title and Trust Co. v. Hedges Mfg. Co., Inc.*, 414 N.E.2d 232 (Ill. Ct. App. 2d Dist. 1980)(commercial case).

¹⁶ *Compare Lefrak v. Lambert*, 390 N.Y.S.2d 959 (City Civ. Ct. 1976) and *Paragon Indus., Inc. v. Williams*, 473 N.Y.S.2d 92 (App. Term 1983) with *Parkwood Realty Co. v. Marciano*, 353 N.Y.S.2d 623 (City Civ. Ct. 1974); *Wallis v. Falken-Smith*, 523 N.Y.S.2d 827 (1st Dep't 1988); *Home Owners' Loan Corp. v. Baldwin*, 37 N.Y.S.2d 822 (2d Dep't 1942).

¹⁷ *Compare Kulm v. Coast-to-Coast Stores Central Org., Inc.*, 432 P.2d 1006 (Or. 1967)(commercial case) and *Portland Gen. Elec. v. Hershisier, Mitchell, Mowery & Davis*, 738 P.2d 593 (Or. Ct. App. 1987)(commercial case) with *Davis v. Wilson*, 493 P.2d 31 (Or. 1972)(commercial case); *Amvesco, Inc. v. Key Title Co. of Bend*, 713 P.2d 614 (Or. Ct. App. 1986)(commercial case).

¹⁸ *Waffle v. Ireland*, 155 N.E. 513 (Ind. Ct. App. 1927)(unknown); *Carpenter v. Wisniewski*, 215 N.E.2d 882 (Ind. Ct. App. Div. 1 1966)(commercial case); *Hirsch v. Merchants Nat. Bank & Trust Co. of Indiana*, 336 N.E.2d 833 (Ind. Ct. App. 1st Dist. 1975)(commercial case); *Grueninger Travel Service of Ft. Wayne, Indiana, Inc. v. Lake County Trust Co.*, 413 N.E.2d 1034 (Ind. Ct. App. 4th Dist. 1980)(commercial case).

¹⁹ ME. REV. STAT. tit. 14, § 6010-A; WIS. STAT. ANN. § 704.29.

offer to rent the premises or a part thereof was not reasonable, that any terms and conditions upon which the landlord has in fact rerented were not reasonable, and that any temporary use by the landlord was not part of reasonable efforts to mitigate²⁰

The Maine and Wisconsin statutes further provide that tenant has the burden of proving the amount that could have been obtained by reasonable efforts to mitigate by re-renting the premises.²¹

III. Efforts that Satisfy the Duty of Mitigation

A. General Standard for Mitigation. In states where landlords are required to mitigate damages, the normal standard applied by the courts is “due diligence,” but the standard may be labeled differently depending on the state.²² Indiana, Iowa, Maryland, New Jersey, North Carolina, and Virginia apply a “reasonable diligence” standard,²³ while Arizona, Connecticut, Hawaii, Kansas, Louisiana, Maine, Nevada, New York, Oregon, Texas, Vermont, Washington and Wisconsin use a “reasonable efforts” standard²⁴ and Illinois requires “reasonable

²⁰ME. REV. STAT. tit. 14, § 6010-A(3); WIS. STAT. ANN. § 704.29(3).

²¹ME. REV. STAT. tit. 14, § 6010-A(3); WIS. STAT. ANN. § 704.29(3).

²²*MXL Industries, Inc. v. Mulder*, 623 N.E.2d 369 (Ill. Ct. App. 1993) (“reasonable measures” under 735 Ill. Comp. Stat. 5/9–213.1)(commercial case); *Carpenter v. Wisniewski*, 139 Ind. App. 325, 215 N.E.2d 882 (Ind. Ct. App. 1966) (due diligence)(commercial case); *S.N. Mart, Ltd. v. Maurices Inc.*, 451 N.W.2d 259 (Neb. 1990) (“all reasonable steps”)(commercial case); *Ruud v. Larson*, 392 N.W.2d 62 (N.D. 1986) (good-faith effort to mitigate damages)(commercial case); *Snell v. Salem Ave. Assocs.*, 675 N.E.2d 555 (Ohio Ct. App. 1996) (“ordinary and reasonable care, diligence and prudence”)(commercial case); *Reid v. Mutual of Omaha Ins. Co.*, 776 P.2d 896 (Utah 1989) (“objective commercial reasonableness”)(commercial case); *Lu v. Greval*, 130 Cal. App. 4th 841(2005) (“reasonably”)(commercial case); *Summers v. Crestwood Apts.*, 236 P.3d 586 (Mont. 2010) (“reasonable under the circumstances”); *Kahn v. Penczner*, 2008 WL 2894827 (Tenn. Ct. App. 2008) (“reasonable care and due diligence”)(commercial case).

²³*Finish Line, Inc. v. Jakobitz*, 557 N.W.2d 914 (Iowa Ct. App. 1996) (“reasonable diligence to relet the property at the best obtainable rent”)(commercial case); *Wilson v. Ruhl*, 356 A.2d 544 (Md. 1976) (“reasonable diligence” under Md. Code Ann., Real Prop. § 8–207); *Isbey v. Crews*, 284 S.E.2d 534 (N.C. Ct. App. 1981)(commercial case); *Branning Mfg. Co. v. Norfolk-Southern R. Co.*, 121 S.E. 74 (Va. 1924)(commercial case).

²⁴*Stewart Title & Trust of Tucson v. Pribbeno*, 129 Ariz. 15, 628 P.2d 52 (Ct. App. Div. 2 1981)(commercial case); *Thorne v. Broccoli*, 39 Conn. Supp. 289, 478 A.2d 271 (Super. Ct. 1984) (“reasonable efforts” under Conn. Gen. Stat. Ann. § 47a–11a); *Hershorin v. LaVista, Inc.*, 110 Ga. App. 435, 138 S.E.2d 703 (1964) (where the lease itself apparently required “reasonable effort”); *Marco Kona Warehouse v. Sharmilo, Inc.*, 7 Haw. App. 383, 768 P.2d 247 (1989)(commercial case); *Gordon v. Consol. Sun Ray, Inc.*, 195 Kan. 341, 404 P.2d 949 (1965)(commercial case); *Shank-Jewella v. Diamond Gallery*, 535 So. 2d 1207 (La. Ct. App. 2d Cir. 1988)(commercial case); ME. REV. STAT. tit. 14, § 6010-A-A; NEV. REV. STAT. ANN. § 118.175; *Wallis v. Falken-Smith*, 136 A.D.2d 506, 523 N.Y.S.2d 827 (1st Dep’t 1988) (“reasonable efforts”); *Portland Gen. Elec. v. Hershisier, Mitchell, Mowery & Davis*, 86 Or. App. 40, 738 P.2d 593 (1987) (reasonable effort to find suitable tenant)(commercial case); *Austin Hill Country Realty, Inc. v. Palisades Plaza, Inc.*, 948 S.W.2d 293 (Tex. 1997) (“objectively reasonable efforts”)(commercial case); *O’Brien v. Black*, 162 Vt. 448 (1994) (“reasonable effort to relet”)(commercial case); *Myers v. Western Farmers Ass’n*, 75 Wash. 2d 133, 449 P.2d 104 (1969) (“honest and reasonable effort”)(commercial case); *Decade 80-I, Ltd.*

measures.”²⁵

The URLTA – and the vast majority of state statutes – provide no guidance as to the specific types of action required of the landlord to satisfy the duty to mitigate. Thus, the issue has been left largely to the courts, which have reached differing results even on substantially similar facts. The two exceptions to this trend are Maine and Wisconsin, which have included the following definition of “reasonable efforts” to mitigate:

"Reasonable efforts" means those steps which the landlord would have taken to rent the premises if they had been vacated in due course, provided that those steps are in accordance with local rental practice for similar properties.²⁶

These statutes make it clear, however, that the landlord is *not* required to give the abandoning tenant’s unit priority over the landlord’s other vacant stock. The statutes provide that “[i]f the landlord has other similar premises for rent and receives an offer from a prospective tenant not obtained by the defendant, it shall be reasonable for the landlord to rent the other premises for his own account in preference to those vacated by the defaulting tenant.”²⁷ Alabama has a similar provision, but Maryland’s statute goes even further in stating that the landlord has no obligation to *show* or lease the unit in preference to other available units.²⁸

B. Conduct That Has Satisfied the Duty. A review of the case law suggests some common themes among decisions finding that the landlord has satisfied the duty to mitigate. Successfully re-renting the property for the remainder of the term is an obvious way to mitigate damages.²⁹ However, even if the landlord has not been successful in securing a new tenant, courts have found that the landlord satisfied the duty by actively seeking new tenants, which has been demonstrated by showing the property, sending mailings to potential tenants, hiring a real estate agent, placing “for rent” signs on the property, or advertising in a newspaper.³⁰ Courts have also

v. *PDQ Food Stores*, 208 Wis. 2d 371, 561 N.W.2d 350 (Ct. App. 1997)(commercial case).

²⁵735 ILL. COMP. STAT. 5/9-213.1.

²⁶ME. REV. STAT. tit. 14, § 6010-A(2); WIS. STAT. ANN. § 704.29(2).

²⁷ME. REV. STAT. tit. 14, § 6010-A(2); WIS. STAT. ANN. § 704.29(2).

²⁸ALA. CODE § 35-9A-105 (“provided, the duty of a landlord shall not take priority over the landlord's right to first rent other vacant units”); MD. CODE ANN., REAL PROP. § 8-207(duty to mitigate “do[es] not impose an obligation to show or lease the vacated dwelling unit in preference to other available units”).

²⁹ *Manley v. Keller*, 47 Del. 511 (1952); *MaroKona Warehouse v. Sharmilo, Inc.*, 768 P.2d 247 (Haw. Ct. App. 1989)(commercial case); *Camplin v. Rizzo*, 585 A.2d 817 (Me. 1991)(unknown).

³⁰ *Stewart Title & Trust of Tucson v. Pribbeno*, 628 P.2d 52 (Ariz. Ct. App. Div. 2 1981)(commercial case); *Wingate v. Gin*, 714 P.2d 459 (Arz. Ct. App. Div. 2 1985)(commercial case); *Lu v. Greval*, 130 Cal. App. 4th 841 (2005)(commercial case); *MXL Indus., Inc. v. Mulder*, 623 N.E.2d 369 (Ill. Ct. App. 2d Dist. 1993)(commercial case); *Carpenter v. Wisniewski*, 215 N.E.2d 882 (Ind. Ct. App. Div. 1 1966)(commercial case); *Nylen v. Park Doral*

found that securing the space and furnishing the premises are ways to mitigate damages.³¹ Landlords typically have performed more than one of the preceding acts, but courts have held in some cases that just performing one of the acts is enough to mitigate damages.³²

C. Conduct That May or May Not Satisfy the Duty. A few patterns also are apparent among decisions in which courts found the landlord had not satisfied the duty to mitigate damages. This conduct typically includes minimal efforts to attract a new tenant, such as little to no newspaper advertising, unnoticeable “for rent” signage, only placing a “for rent” sign in the window, only accepting phone inquiries about the abandoned premises, or by listing the property for sale, but not for rent.³³ Courts have also found that landlords failed to mitigate by refusing to rent to other suitable tenants (particularly when the landlord’s motivation is to sue the abandoning tenant for damages), and waiting for over a year to re-rent the property.³⁴ The decisions are far from uniform, however; as the following discussion indicates, courts have reached differing conclusions about whether particular types of conduct were sufficient to satisfy the duty.

(1) Showing the Abandoned Premises. Several courts have found that as long as landlords are showing the abandoned property to potential tenants, they are mitigating their

Apts., 535 N.E.2d 178 (Ind. Ct. App. 3d Dist. 1989); *Harmesen v. Dr. MacDonald's, Inc.*, 403 N.W.2d 48 (Iowa Ct. App. 1987)(commercial case); *Lindsley v. Forum Rests., Inc.*, 596 P.2d 1250 (Kan. Ct. App. 1979)(commercial case); *Richard v. Broussard*, 482 So. 2d 729 (La. Ct. App. 1st Cir. 1985), *judgment aff'd as amended*, 495 So. 2d 1291 (La. 1986)(commercial case); *Myers v. Foster*, 610 So. 2d 192 (La. Ct. App. 3d Cir. 1992)(commercial case); *Fox v. Roethlisberger*, 85 N.W.2d 73 (Mich. 1957)(commercial case); *Matter of TIE/Commc'ns, Inc.*, 163 B.R. 435 (Bankr. D. Del. 1994)(commercial case); *Weiss v. I. Zapinsky, Inc.*, 167 A.2d 802 (N.J. Ct. App. Div. 1961)(commercial case); *H. Naito Corp. v. Quest Entertainment Ventures, LP*, 58 Fed. Appx. 778 (9th Cir. 2003) (applying Oregon law)(commercial case); *Property Inv. Group of Mid-America v. IBA, Inc.*, 495 N.W.2d 624 (Neb. 1993)(commercial case); *Hines v. Riley*, 717 N.E.2d 1133 (Ohio App. 1998); *Saunders Real Estate Co. v. Landry*, 769 A.2d 1277 (R.I. 2001)(commercial case).

³¹ *Quanes v. Shoemaker*, 978 S.W.2d 551 (Tenn. App. 1998).

³² *Hershorin v. LaVista, Inc.*, 138 S.E.2d 703 (Ga. Ct. App. 1964)(Lease required residential landlord to mitigate.); *Hirsch v. Merchants Nat. Bank & Trust Co. of Indiana*, 336 N.E.2d 833 (Ind. Ct. App. 1st Dist. 1975)(commercial); *Friedman v. Colonial Oil Co.*, 18 N.W.2d 196 (Iowa 1945)(commercial); *Parkwood Realty Co. v. Marciano*, 353 N.Y.S.2d 623 (City Civ. Ct. 1974); *Stark v. National Research & Design Corp.*, 110 A.2d 143 (N.J. Ct. App. Div. 1954)(commercial).

³³ *Fanarjian v. Moskowitz*, 568 A.2d 94 (N.J. Ct. App. Div. 1989)(commercial case); *Thorne v. Broccoli*, 478 A.2d 271 (Conn. Super. Ct. 1984); *Vawter v. McKissick*, 159 N.W.2d 538 (Iowa 1968)(commercial case); *Wilson v. Ruhl*, 356 A.2d 544 (Md. 1976); *In re Blondheim Modular Mfg., Inc.*, 65 B.R. 856 (Bankr. D.N.H. 1986)(commercial case); *Wichita Props. v. Lanterman*, 633 P.2d 1154 (Kan. Ct. App. 1981)(commercial case); *Anderson v. Andy Darling Pontiac, Inc.*, 43 N.W.2d 362 (Wis. 1950)(commercial case).

³⁴ *McCormick v. Loomis*, 165 Ill. App. 214 (Ill. Ct. App. 1st Dist. 1911)(commercial case); *Harmon v. Callahan*, 214 Ill. App. 104, (Ill. Ct. App. 1st Dist. 1919) (unknown); *Vawter v. McKissick*, 159 N.W.2d 538 (Iowa 1968)(commercial case); *Lawson v. Callaway*, 293 P. 503 (Kan. 1930); *Greenstine v. Srere*, 222 Mich. 25, 192 N.W. 676 (1923)(unknown); *Sommer v. Kridel*, 378 A.2d 767 (N.J. 1977); *Fitch v. Armour*, 59 N.Y. Super. Ct. 413 (1891); *Strauss v. Turck*, 222 N.W. 811 (Wis. 1929) (unknown);

damages.³⁵ As indicated above, Maryland goes even further, providing in its statute that the landlord has no obligation “to show or lease the vacated dwelling unit in preference to other available units.”³⁶ In contrast, a landlord who promised the abandoning tenant that he would do all that he could to rent the property failed to mitigate damages by refusing to show the abandoned apartment before other empty spaces in the building were rented.³⁷

(2) Refusing to Rent to a New Tenant. Courts have found that landlords failed to satisfy the duty of mitigation when they: refused to rent to potential tenants who were ready, willing, and financially able to rent the premises; failed to contact potential tenants who showed interest in the property; or demanded a higher rental rate than what the default tenant paid.³⁸ Using the property for personal parties or storage and refusing to rent to a new tenant who offered to pay a higher rental amount than the previous tenant are also breaches of the duty to mitigate damages.³⁹

In contrast, other courts have found that the landlord had satisfied the burden to mitigate damages even though the landlord refused to rent to a prospective tenant.⁴⁰ More specifically, courts concluded that a landlord does not have to rent to tenant whose planned use of the property would violate the terms of the lease.⁴¹ Landlords can also refuse to rent to potential tenants because they are not financially stable or have bad credit ratings.⁴² Additionally, landlords do not have to rent to tenants referred to them by defaulting tenants if prospective tenants would require the property to be remodeled or would require a longer lease than the defaulting tenant, alter the landlords’ responsibilities, or violate rental agreements that landlords have with other tenants.⁴³

³⁵ *Shank-Jewella v. Diamond Gallery*, 535 So. 2d 1207 (La. Ct. App. 2d Cir. 1988)(commercial case); *Hirsch v. Merchants Nat. Bank & Trust Co. of Indiana*, 336 N.E.2d 833 (Ind. Ct. App. 1st Dist. 1975)(commercial case).

³⁶MD. CODE ANN., REAL PROP. § 8-207.

³⁷ *Sears v. Curtis*, 189 Ill. App. 420, (Ill. Ct. App. 1914)(commercial case).

³⁸ *Marmont v. Axe*, 10 P.2d 826 (Kan. 1932)(commercial case); *Scheinfeld v. Muntz TV, Inc.*, 214 N.E.2d 506 (Ill. Ct. App. 1st Dist. 1966)(commercial case); *S.N. Mart, Ltd. v. Maurices Inc.*, 451 N.W.2d 259 (Neb. 1990)(commercial case); *Benton v. Jacobs*, 3 La. App. 274 (Orleans 1925).

³⁹ *Froling v. Bischoff*, 252 N.W.2d 832 (Mich. Ct. App. 1977)(commercial case); *Consol. Sun Ray, Inc. v. Oppenstein*, 335 F.2d 801 (8th Cir. 1964)(commercial case).

⁴⁰ *Isbey v. Crews*, 284 S.E.2d 534 (N.C. Ct. App. 1981)(commercial case).

⁴¹ *Consumers Market House Co. v. Powers*, 192 Ill. App. 89 (1st Dist. 1915)(commercial case).

⁴² *Reget v. Dempsey-Tegler & Co.*, 216 N.E.2d 500 (Ill. Ct. App. 5th Dist. 1966)(commercial case); *Superior Woolen Co. Tailors v. M. Samuels & Co.*, 293 S.W. 1078 (Ky. 1927)(commercial case); *Edmands v. Rust & Richardson Drug Co.*, 77 N.E. 713 (Mass. 1906)(commercial case).

⁴³ *Arrowhead Ridge I, LLC v. Cold Stone Creamery, Inc.*, 800 N.W.2d 730 (S.D. 2011) (commercial case); *Brennan Assocs. v. OBGYN Specialty Group, P.C.*, 15 A.3d 1094 (Conn. Ct. App. 2011)(commercial case); *Connecticut Gen. Life Ins. Co. v. Melville Realty Co., Inc.*, 591 So. 2d 1376 (La. Ct. App. 4th Cir. 1991)(commercial case); *Wallis v.*

(3) Leasing to New Tenants at a Higher Rental Rate. Courts have found that landlords breached the duty to mitigate damages by seeking a higher rate of rent, by failing to solicit or accept tenants that offer to pay a lower rate of rent, or by setting the rent so high that it deters potential tenants from renting the property.⁴⁴ Conversely, some courts have found it appropriate for the landlord to lease to a new tenant at a higher rental rate when the rate is commercially reasonable.⁴⁵

(4) Leasing to New Tenants at a Lower Rental Rate. Courts have found that landlords failed to mitigate their damages by renting abandoned property to new tenants at a lower rental that is intended to enhance or create damages for the suit against the abandoning tenant or the landlord fails to attempt to receive rent at the best available rate.⁴⁶ Conversely, courts have found that some circumstances warrant acceptance of a lower rate of rent. Allowing new tenants to rent a property at a lower cost was appropriate when the previous tenant has left the property in ill-repair or when the new tenant is needed to maintain or insure the property upon the previous tenants abandonment.⁴⁷ Lower rent has also been found to satisfy the landlord's duty to mitigate when a new commercial tenant would generate sales at a much lower rate per square foot than the previous tenant or when the new commercial tenant needed to remodel the property before it could begin business.⁴⁸

(5) Failure to Repair or Maintain the Premises After Abandonment. Whether a landlord repairs or maintains the premises after abandonment can also affect whether the landlord has satisfied his or her duty to mitigate damages. Remodeling leased premises has been viewed

Falken-Smith, 523 N.Y.S.2d 827 (1st Dep't 1988); *Carpenter v. Wisniewski*, 139 Ind. App. 325, 215 N.E.2d 882 (Div. 1 1966)(commercial case); *Apex Co. v. Grant*, 276 S.W. 445 (Tex. Civ. App. Dallas 1925)(commercial case); *Robinson Seed & Plant Co. v. Hexter & Kramer*, 167 S.W. 749 (Tex. Civ. App. Dallas 1914)(commercial case).

⁴⁴ *Thorne v. Broccoli*, 478 A.2d 271 (Conn. Super. Ct. 1984); *Benton v. Jacobs*, 3 La. App. 274 (Orleans 1925); *Consol. Sun Ray, Inc. v. Oppenstein*, 335 F.2d 801 (8th Cir. 1964)(commercial case); *MAR-SON, Inc. v. Terwaho Enters., Inc.*, 259 N.W.2d 289 (N.D. 1977)(commercial case).

⁴⁵ *Easterling v. Halter Marine, Inc.*, 470 So. 2d 221 (La. Ct. App. 4th Cir. 1985)(commercial case); *American Nat. Bank and Trust Co. of Chicago v. Hoyne Indus., Inc.*, 738 F. Supp. 297 (N.D. Ill. 1990), *aff'd* on other grounds, 966 F.2d 1456 (7th Cir. 1992)(commercial case); *Drutman Realty Co. Ltd. Partnership v. Jindo Corp.*, 865 F. Supp. 1093 (S.D.N.Y. 1994)(commercial case); *Ruud v. Larson*, 392 N.W.2d 62 (N.D. 1986)(commercial case).

⁴⁶ *T.A.D. Jones Co. v. Winchester Repeating Arms Co.*, 55 F.2d 944 (D. Conn. 1932), *aff'd*, 61 F.2d 774 (C.C.A. 2d Cir. 1932)(commercial case); *Finish Line, Inc. v. Jakobitz*, 557 N.W.2d 914 (Iowa Ct. App. 1996)(commercial case).

⁴⁷ *Coffin v. Fowler*, 483 P.2d 693 (Alaska 1971)(commercial case); *Levy v. Burkstrom*, 191 Ill. App. 478 (1st Dist. 1915)(unknown); *Radio Distrib. Co., Inc. v. National Bank and Trust Co. of South Bend*, 489 N.E.2d 642 (Ind. Ct. App. 3d Dist. 1986)(commercial case).

⁴⁸ *JMB Props. Urban Co. v. Paolucci*, 604 N.E.2d 967 (Ill. Ct. App. 1992)(commercial case); *Grueninger Travel Service of Ft. Wayne, Indiana, Inc. v. Lake County Trust Co.*, 413 N.E.2d 1034 (Ind. Ct. App. 4th Dist. 1980)(commercial case).

as a way a landlord can mitigate damages.⁴⁹ However, the remodeling should be related to the use of the premises.⁵⁰ Landlords have been found to satisfy the duty to mitigate damages even though they failed to have the building examined for fire code damages or have failed to expedite repairs of the building.⁵¹ However, landlords have been found to breach the duty when they failed to make repairs that would have made the premises easier to rent.⁵²

IV. What Are the Consequences of Landlord's Failure to Mitigate?

Jurisdictions have taken one of two approaches in handling the landlord's failure to comply with the duty to mitigate. The current version of the URLTA provides that if the landlord fails to use reasonable efforts to mitigate, "the rental agreement is deemed to be terminated by the landlord as of the date the landlord has notice of the abandonment."⁵³ In effect, this provision precludes the landlord from recovering any damages past the date of the abandonment. About half of the jurisdictions that have URLTA-based statutes (AK, AZ, CT, IA, KS, KY, MT, OK, OR, RI, SC) have retained this provision in their statutes,⁵⁴ while the other half (AL, FL, HI, MI, MS, NE, MN, TN, VA, WA) have omitted it. Nevada has a similar provision in its non-URLTA statute.⁵⁵

The alternative approach is to reduce the landlord's recovery by the amount of damages that could have reasonably been avoided had the landlord mitigated his losses.⁵⁶ Courts have

⁴⁹ *Reid v. Mutual of Omaha Ins. Co.*, 776 P.2d 896 (Utah 1989)(commercial case).

⁵⁰ *Aaron v. Stern*, 2002 WL 34422299 (Vermont 2002).

⁵¹ *MXL Indus. Inc. v. Mulder*, 623 N.E.2d 369 (Ill. Ct. App. 2d Dist. 1993)(commercial case); *Brendle's Stores, Inc. v. OTR on Behalf of Bd. of Trustees of State Teachers Retirement System of Ohio*, 978 F.2d 150 (4th Cir. 1992)(commercial case); *Tripps Rests. of North Carolina, Inc. v. Showtime Enters., Inc.*, 595 S.E.2d 765 (N.C. Ct. App. 2004)(commercial case).

⁵² *Snell v. Salem Ave. Assocs.*, 675 N.E.2d 555 (Ohio Ct. App. 1996)(commercial case).

⁵³ URLTA § 4.203(c).

⁵⁴ ALASKA STAT. § 34.03.230(c); ARIZ. REV. STAT. ANN. § 33-1370(c); CONN. GEN. STAT. § 47a-11(b); IOWA CODE ANN. § 562A.29(3); KAN. STAT. § 58-2565(c); KY. REV. STAT. ANN. § 383.670(3); MONT. CODE ANN. § 70-24-426(3); OKLA. STAT. tit. 41, § 129(b); OR. REV. STAT. ANN. § 90.410(3); R.I. GEN. LAWS § 34-18-40; S.C. CODE ANN. § 27-40-730(c).

⁵⁵ NEV. REV. STAT. § 118.175.

⁵⁶ *See St. George Chicago, Inc. v. George J. Murges & Associates, Ltd.*, 296 Ill. App. 3d 285, 294, 695 N.E.2d 503, 509 (1998) (if landlord fails to mitigate, landlord's damage claim is not barred, but instead "the damages otherwise recoverable will merely be reduced"); *Harrison Riverside Ltd. P'ship v. Eagle Affiliates, Inc.*, 309 N.J. Super. 470, 474, 707 A.2d 490, 492 (App. Div. 1998) (in a commercial lease, "[e]ven if [landlord] did not act reasonably, it would nevertheless be entitled to recovery of the difference between the net square footage rate under the lease and the fair market value in a declining market"); *Austin Hill Country Realty, Inc. v. Palisades Plaza, Inc.*, 948 S.W.2d 293, 299 (Texas 1997) (in a commercial lease, "landlord's failure to use reasonable efforts to mitigate damages bars

applied this rule in several ways. In North Carolina, for example, a court held that if the landlord fails to use reasonable diligence to mitigate, “his recovery as against the tenant will be limited to the difference between what he would have received had the lease agreement been performed, and the fair market value of what he could have received had he used reasonable diligence to mitigate.”⁵⁷ A New York court concluded that the landlord’s failure to mitigate limited his damages “to a reasonable period of time in which to re-rent” the premises.⁵⁸ A federal bankruptcy court in Idaho asserted that upon the landlord’s failure to prove mitigation, “it becomes the lessee’s duty to introduce evidence establishing how much the lessor would have received had it made a reasonable attempt to mitigate its damages.”⁵⁹

In light of the conflicting authorities on this issue, the drafting committee should consider whether to retain or modify URLTA Section 4.203 regarding the consequences of a landlord’s failure to mitigate.

V. Can the Duty to Mitigate be Waived?

Section 1.403 of the URLTA provides that a rental agreement may not require a tenant to “waive or forego rights or remedies” under the Act,⁶⁰ which would include the duty to mitigate damages. This provision has been retained by most of the states that have adopted the URLTA.⁶¹ Three states have eliminated the general mitigation requirement from their URLTA-based

landlord’s recovery against the breaching tenant only to the extent that damages reasonably could have been avoided”); *Carisi v. Wax*, 471 A.2d 439 (Dist.Ct.1983) (in commercial setting where lease does not excuse duty to mitigate the “landlord’s recovery against tenant for unpaid rent has been diminished by the sum which landlord would have received had he mitigated damages”); *Whitehorn v. Dickerson*, 419 S.W.2d 713, 714 (Mo. Ct. App. 1967) (in commercial lease, failure to mitigate “would not have destroyed [the landlord’s] cause of action . . . or barred her entirely from recovery, but only would have prevented the recovery of such damages as might have been avoided by reasonable efforts on her part”).

⁵⁷*Isbey v. Crews*, 284 S.E.2d 534, 537 (N.C. App. Ct. 1981)(commercial lease).

⁵⁸*Lefrak v. Lambert*, 390 N.Y.S.2d 959, 965 (N.Y. Civ. Ct. 1976) (in case involving a residential lease, three months was reasonable time), *modified on appeal*, 93 Misc. 2d 632, 403 N.Y.S.2d 397 (App. Term 1978) (finding landlord sufficiently mitigated damages).

⁵⁹*In re Super Thrift Drugs, Inc.*, 01-01251, 2002 WL 33939741 (Bankr. D. Idaho Mar. 12, 2002)(commercial lease).

⁶⁰URLTA § 1.403(a)(1).

⁶¹ALASKA STAT. 34.03.040(a)(1); ARIZ. REV. STAT. ANN. § 33.1315; CONN. GEN. STAT. § 47a-4; FLA. STAT. § 83.47; KAN. STAT. ANN. § 58-2547; KY. REV. STAT. ANN. § 383.570; MONT. CODE ANN. § 70-24-202; NEB. REV. STAT. § 76-1415; N.M. STAT. ANN. § 47-8-16; OKLA. STAT. tit. 41, § 113(a); OR. REV. STAT. § 90.245; R.I. GEN. LAWS ANN. § 34-18-17; S.C. § 27-40-330; TENN. CODE ANN. § 66-28-203; VA. CODE ANN. § 55-248.9; WASH. REV. CODE § 59.18.230.

statutes,⁶² however, and Alabama has only a limited prohibition against waivers that does not appear to include a prohibition against waiving the duty to mitigate.⁶³

Two non-URLTA states – Maryland and Texas – also statutorily prohibit waiver of the duty to mitigate in residential leases,⁶⁴ and New Jersey has asserted a similar prohibition by common law.⁶⁵ Other courts have permitted waiver of the duty to mitigate in commercial leases, but have not expressly addressed the issue with respect to residential leases.⁶⁶

In short, Section 1.403 of the URLTA seems to be consistent with the weight of authority, and probably does not require modification.

CONCLUSION

The vast majority of states agree with the URLTA's basic premise that a landlord is required to mitigate damages upon the abandonment or default of a tenant. The drafting committee should consider, however, whether modifications of the Act are desirable to address some or all of the following issues:

1. Which party bears the burden of proving mitigation.
2. Whether to include a “safe harbor” provision to identify specific efforts that would satisfy the obligation to mitigate damages.
3. Whether to modify the remedy provided in Section 4.203 for a landlord's failing to comply with the mitigation requirement when a tenant abandons the premises.

⁶²Hawaii, Michigan, and Mississippi have removed the general prohibition against mitigation in URLTA section 1.105. Hawaii has included, however, a mitigation requirement in its provision regarding the landlord's remedies upon tenant abandonment. HAW. REV. STAT. § 521-70.

⁶³ALA. CODE § 35-9A-163.

⁶⁴MD. CODE ANN., REAL PROP. § 8-207; TEX. PROP. CODE ANN. § 91.006.

⁶⁵*Carisi v. Wax*, 192 N.J. Super. 536, 542, 471 A.2d 439, 443 (Dist. Ct. 1983) (parties to a residential lease may not waive the tenant's right to have the landlord mitigate damages, but may do so in a commercial lease); *Sommer v. Kridel*, 378 A.2d 767 (N.J. 1977) (residential lease).

⁶⁶*Sylva Shops Ltd. P'ship v. Hibbard*, 623 S.E.2d 785, 791 (N.C. App. Ct. 2006) (holding that the parties may waive the duty in a commercial lease, but declining to address whether waiver was permitted for a residential lease); *New Towne L.P. v. Pier 1 Imports (U.S.), Inc.*, 680 N.E.2d 644, 647 (Ohio Ct. App. 1996) (stating, in commercial context, that “[p]arties of equal bargaining power are free to enter into any agreement the terms of which are enforceable at law”).