COMMERCIAL LANDLORD’S REMEDIES

Has the Property Paradigm Been Replaced by Contract Rules?

By

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Over the Past 30 Years, A Trend to Treat Leases As Contracts Rather Than Conveyances has Developed

The traditional view is that the lease is a conveyance of a “non-freehold” estate in land to the tenant with the landlord retaining a “reversion.” The essence of the relationship is that the landlord transfers the right to possession which the tenant is acquiring by purchase. This obligates the tenant to pay for the interest upfront, or more frequently now, over the term of the lease. Few if any implied conditions, terms or covenants will be read into the lease. The express covenants are as independent of each other, that is, the breach by the landlord of a covenant does not excuse performance by the tenant. Instead, the tenant must sue separately for breach of the particular covenant. The landlord is entitled to full rent from the tenant. And, absent an express provision to the contrary, upon breach by the tenant, the landlord has no obligation to minimize the loss incurred or to mitigate the damages. (Indeed the lease often expressly provides that the owner may accelerate payments under the lease if the tenant is in default.) There is no duty, absent an express covenant to the contrary, for the parties to act in good faith or reasonably as they perform under the lease. The owner’s ability to collect the full rent was not diminished, except by the owner’s recovery of possession upon default by the tenant or by the owner’s reletting of the premises.

2 Id. §3.11 at 203.
3 Id.
4 AMERICAN LAW OF PROPERTY, supra note 1.

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The contract paradigm views the lease, and the resulting tenancy, as reflecting a contractual relationship between the landlord and tenant. Thus, the lease can be construed to contain both express and implied terms, including a warranty of fitness for a purpose.\(^5\) The covenants are interdependent so that the breach by the landlord of a material term of the lease excuses the tenant from performing its duties.\(^6\) The non-breaching landlord is under an affirmative duty to mitigate damages unless the lease expressly provides otherwise; the non-breaching landlord’s right of recovery for losses is reduced unless it shows attempts to minimize the damages.\(^7\) Also, absent an express agreement to the contrary, the landlord and tenant are under obligations to act reasonably and in good faith.\(^8\) If the premises are totally useless to the tenant or the tenant is ousted (even by an outsider), then the tenant’s obligations under the lease are excused.\(^9\) And, perhaps, the contract doctrine of anticipatory repudiation would permit the landlord to sue for all the rent under certain circumstances, even where the lease has no acceleration clause.\(^10\)

In the past 30 years, first with respect to residential tenancies\(^11\) and now increasingly as to commercial tenancies, the courts view the lease more as a contract than as a conveyance of an interest in land. Cases and legislation incorporate contract principles requiring mitigation of damages by the landlord\(^12\) and invalidate rent acceleration clauses if the latter amount to “penalties.”

These changes in landlord remedies in commercial leases vary considerably from state to state. The goal of this article is to examine the recent case law and legislation in several key jurisdictions to indicate the issues presented by the developing law and the refusal of some courts

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\(^6\) Id. § 8.46.
\(^7\) Id. § 12.12-13.
\(^8\) Id.
\(^9\) Id. §8.9.
\(^10\) See Roberta R. Kwall, Retained Jurisdiction in Damage Actions Based on Anticipatory Breach: A Missing Link in Landlord-Tenant Law, 37 Case W. Res. L. Rev. 173, 277 (1986). However, adoption of this doctrine would likely also include other aspects of “reform” including retained jurisdiction by the Court to ascertain “reasonable damages” and mitigation by the landlord. Robert H. Kelly, Any Reports of the Death of the Property Law Paradigm for Leases Have Been Greatly Exaggerated, 41 Wayne. L. Rev. 1563, 1602-1604 (1995).
\(^12\) By 1995, all but 15 states required mitigation of damages by commercial landlords. Jennings, supra note 11 at 295.
to accept the paradigm shift. Hopefully, this information will provide the basis for careful drafting.

The question remains whether there is any argument for retaining the real property law paradigm, especially as business increasingly treats real estate as a commodity, susceptible of recharacterization as stock in a REIT or as a securitized interest behind a mortgage.

**Landlord’s Duty to Mitigate Damages**

It is beyond the scope of this presentation to review the rules in all jurisdictions on the issue of the duty of commercial landlords to mitigate damages. This article will focus on recent cases in New York, Pennsylvania and Texas and the statutory requirements in Illinois and California.

**Recent Cases in New York, Pennsylvania and Texas**

The property paradigm is writ large in New York. The highest court in the state reaffirmed its adherence to the non-mitigation rule in *Holy Properties Limited, L.P.*[13] in a commercial lease case. Three years before the ten-year lease of office space was to expire, following the change in ownership of the building and a general deterioration in the level and quality of building services, the tenant vacated. The landlord brought summary eviction proceedings against the tenant for non-payment of rent. It obtained a warrant of eviction and then instituted an action for rent arrears and damages. The trial court found for the landlord, rejecting the tenant’s affirmative defense of the failure of the landlord to mitigate damages. This order was affirmed by the Appellate Division and by the Court of Appeals. The opinion cited the property law paradigm that leases historically have been recognized as a present transfer of an interest in land and the importance of following “settled rules” to those who engage in business transactions. Indeed, the opinion states that there is no mitigation duty even where the landlord sues to evict; in most jurisdictions, the landlord’s getting possession back would limit damages to the period before the eviction. Subsequent decisions have followed this no mitigation directive even in residential landlord tenant situations.[14]

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Interestingly, neither *Holy Properties* nor its progeny comments on the fact that by the express provisions in that commercial lease, the landlord was “under no duty to mitigate damages and that upon (tenant’s) abandonment of the premises or eviction, the tenant would remain liable for all monetary obligations arising under the lease.” And, the cases in most jurisdictions allow a landlord to collect rent as it accrues only where tenant has abandoned the premises, not where the landlord evicts the tenant. In fact, under a strict common law property view, the landlord would have no right to repossess the premises before the end of the term. Even upon tenant’s non-payment of rent or other breach, landlord’s only remedy is to sue for damages. Here, the rationale for the result is ascribed entirely to the property law paradigm and the importance of following precedents to meet the expectations of the parties. Moreover, the ability of the landlord to recover damages seems to be extended to cases where the landlord evicts.

In a widely anticipated decision on landlord’s duty to mitigate, the Pennsylvania Supreme Court provided a history of the law of leases from prior to the Thirteenth Century to the current period. It traced the tenant’s interest from one “personal and contractual, not a real property interest protected by a recovery of possession” to one that between the 13th and the 16th centuries gradually came to be regarded as an interest in land giving the tenant a possessory action. With the “pendulum” swinging back in the last 150 years, the Court noted that “important contractual elements have once again assumed a role of importance in leases.” The Court concluded “that in modern landlord-tenant law, leases have a dual nature, both as conveyances of protected property interests and also as contracts.”

Then, after citing a 1979 residential case that recognized that “in a case involving the implied warranty of habitability, a lease is in the nature of a contract and is controlled by principles of contract law,” the Court declined to apply contract law to the issue of mitigation of damages. It held that a non-breaching landlord whose tenant has abandoned has no duty to mitigate. It gave five reasons for holding on to the common law property principle. Leases have been “bargained for in reliance on this rule” and there is a “fundamental unfairness in allowing the breaching...

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18 *Id. at* 1083.
tenant to require the non-breaching landlord to mitigate the damages caused by the tenant.” Moreover, the Pennsylvania legislature had reformed landlord-tenant law generally and did not change the common law rule.\(^{21}\) The opinion of the majority referred to the ability of the tenant to mitigate its own damages because the lease permitted the tenant to assign or sublease the premises. Also, the established rule was simple – it avoided new issues that arise when mitigation is imposed.

Two judges filed concurring opinions. One opinion, joined by a second jurist, agreed with the result but did not believe this was an appropriate case in which to consider the general issue of whether commercial landlords have a duty to mitigate. The action was based on an acceleration clause in the lease. “The parties thus provided in the lease for their respective rights, obligations, and remedies in the event of a breach. Under the terms of the lease, the landlord may relet the premises but is not obligated to do so.”\(^{22}\) The other concurring opinion supported the broadest reading of the majority opinion: “a tenant’s ability to sublease, and thus reduce its liability for breaching the lease, is of no import: whether the tenant has such a power or not, the landlord would not be under a duty to mitigate damages.”\(^{23}\)

None of the justices discussed the basic policy question of “if”, and in Pennsylvania now “when,” the contract rules should apply. Nor did they provide a rationale for retaining the property paradigm. There is no recognition that even if leases are contracts, they are special ones because they involve a unique asset. Even if future Pennsylvania courts approve warranties of habitability and a duty to mitigate for residential leases, they could do so on the basis of broad consumer protection principles, that distinguish residential tenants from tenants involved in business, rather than shifting from the property rules to the contract ones.

In contrast, the Supreme Court of Texas recently joined the majority of states and adopted contract rules requiring mitigation of damages in certain situations.\(^{24}\) In *Austin Hill Country Realty, Inc. v. Palisades Plaza, Inc.*, the landlord received conflicting directives regarding the leasehold improvements from the three real estate brokers who executed a five-year office lease.

\(^{21}\) *Supra*, footnote 18 at 1084.

\(^{22}\) *Id.* at 1085.

\(^{23}\) *Id*.

\(^{24}\) *Austin Hill Country Realty, Inc. v. Palisades Plaza, Inc.*, 948 S.W. 2d 293 (Tex. 1997).
When the date for possession passed without resolution of the differences among the tenants, the landlord sued for an anticipatory breach. The tenant requested a jury instruction to reduce the damage award by the amount that could have been avoided by reasonable care by the landlord. The trial judge’s statement, “Last time I checked the law, it was that a landlord doesn’t have any obligation to try to fill the space,” prompted the Supreme Court’s review of the history of the legal treatment of leases and an up-to-date survey of the rules in other jurisdictions.

The Court announced the change in the law as reflecting the fact that the covenants in leases have become more complex and significant in the relationship so that “the lease is not a complete conveyance to the tenant for a specified term such that the landlord’s duties are fulfilled upon deliverance of the property to the tenant.” Rather, leases have contractual elements. Public policies of avoiding economic waste and encouraging productive use of the property, of avoiding destruction of or damage to the leased premises, and of disfavoring penalties in contracts support the mitigation requirement. Also, the Court rejected what it identified as a “traditional justification” for the no-mitigation rule, namely that the landlord-tenant relationship is a personal one.

The Court only indirectly dealt with the view that special rules of property should apply because real estate is involved. It considered and adopted the analysis of previous Texas case law that a duty to mitigate arises “when the landlord seeks a remedy that is contractual in nature, such as anticipatory breach of contract, rather than a real property cause of action.” As to a landlord’s other available causes of action, the landlord must mitigate if the landlord actually reenters or the lease allows the landlord to reenter the premises without accepting surrender, forfeiture of the lease or being construed as evicting the tenant. If the landlord maintains the lease and sues for rent as it becomes due, there is no duty.

25 Id. at 296.
26 Id. at 298.
27 Id.
28 Id. at 300.
29 The Court lists the four causes of action a landlord has against a tenant who breaches and abandons: 1) maintain the lease and sue for rent as it becomes due; 2) treat the breach as an anticipatory repudiation, repossession, and sue for the present value of future rentals reduced by the reasonable cash value of the property for the remainder of the terms; 3) treat the breach as anticipatory, repossession, release the property and sue for the difference between the contractual rent and the amount from the new tenant; and 4) declare the lease forfeited and relieve the tenant of liability for future rent. 948 S.W. 2d 293, 300.
Finally, the Court attempted to provide practical guidance for dealing with the new issues which a mitigation rule creates: 1) only “objectively reasonable efforts” are required; 2) landlord’s failure to mitigate damages bars the landlord’s recovery “only to the extent that damages reasonably could have been avoided;” 3) the tenant “bears the burden of proof to demonstrate that the landlord has mitigated or failed to mitigate damages and the amount by which the landlord reduced or could have reduced its damages.”

**Statutory Schemes: Illinois and California**

The statutes in Illinois and California that deal with mitigation by the landlord give more, or less, certainty to the rule in these jurisdictions. In Illinois, after January 1, 1984, a landlord “shall take reasonable measures to mitigate the damages recoverable against defaulting lessee.” This rule has been held to apply to both residential and commercial landlords. In *St. George Chicago, Inc. v. George J. Murges & Associates*, the Court applied this statutory requirement to a commercial lease for office space for a law firm in downtown Chicago. As was somewhat typical in 1988 with the high office vacancy rate, the ten-year lease provided for a rent abatement for the first 33 months, obligating the tenant to pay only its pro rata share of taxes and operating expenses during that period. Three and one-half years later, the firm dissolved and the partners vacated. The landlord terminated the lease four months later, reserving its right to sue for damages under the lease. Tenants pleaded mitigation as an affirmative defense.

The Court looked at two periods: first, the date of vacating to the date the landlord terminated the lease and second, the termination date through the end of the lease term. The Court held that a lease provision that entitles landlord to recover the present value of the lease rent over the unexpired lease term, less the present value of the fair market rent over that period, meets the statutory duty to mitigate damages because it is the “best result that a defaulting tenant can expect.” For that period, the landlord’s actual efforts, or not, are irrelevant. However, as to the four-month pre-termination period, the burden is on the landlord to demonstrate “actual reasonable measures to mitigate damages.” The Court cites *Snyder v. Ambros* for the

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30 Id. at 298.
33 Id. at 290, 695 N.E.2d at 507.
34 Id. at 291, 695 N.E.2d at 507.
departure from the general rule that mitigation must be pleaded and proved by the tenant. Moreover, the Court discovered nothing in the legislative intent to forfeit landlord’s right to recovery. As the New Jersey court ruled in the *Harrison Riverside Limited Partnership*, the Illinois court held that failure to mitigate will not bar landlord’s recovery, but only reduces the damages.

The California Legislature, especially by its 1989 amendments, provides a comprehensive scheme of landlord’s remedies after tenant’s default. It deals with the common situation where the lessor wishes to “terminate” the lease either when lessee breaches the lease and abandons the property before the end of the term or when the lessor takes action upon the breach to terminate the right to possession. The lessor may recover damages for all of the following: 1) the unpaid rent which had been earned at the time of termination; 2) the “worth at the time of award” of the amount by which unpaid rent after termination until the time of the award exceeds the amount of “rental loss that the lessee proves could have been reasonably avoided; 3) if the lease so provides or If the lessor relets the property prior to the time of the award and “proves that lessor acted reasonably and in good faith effort to mitigate the damages” the “worth at the time of award of the amount by which the unpaid rent for the balance of the term … exceeds the amount of such rental loss that the lessee proves could be reasonably avoided; (emphasis added)” (emphasis added) and 4) any other amount “necessary to compensate the lessor for all the detriment proximately caused by the lessee’s failure to perform” or which “in the ordinary course of things” would likely result. Additionally, the statute protects the landlord in its efforts to mitigate damages by providing that such efforts “do not waive the lessor’s right to recover.”

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36 *Infra*, footnote 53.
38 *Id*. 1951.2.
39 *Id*. 1951.2(a)(1).
40 *Id*. 1951.2(a)(2).
41 *Id*. 1951.2(c)(1).
42 *Id*. 1951.2(c)(2).
43 *Id*. 1951.2(a)(3)
44 Sec. 1951.2(c)(2), *See* Sanders Construction Company, Inc. v. San Joaquin First Federal Savings and Loan Association, 186 Cal. Rptr. 218, 136 Cal. App 3d 387 (1982). (Lessor was entitled to damages caused by breach of agreement to erect building on leased premises including cost for cleaning property; brokerage and legal fees incurred in seeking new tenant; permit fees; evaluation of security interest under former lease for payment of rent as against security for payment of rent in new lease; and any other special damages.)
45 *Id*. §1951.2(d).
Under Section 1951.2, the lessor may simply rescind or cancel the lease of the breaching tenant without seeking any relief or treat the lease as continuing in force and seek damages for the detriment caused by the breach while the tenant remains in possession. \(46\)

Most importantly, the 1989 Amendments to Section 1951.4 provide a safe harbor of specific language so that the landlord can avoid the duty to mitigate damages. \(47\) Even though the lessee has breached and abandoned the property, the statute permits the lessor to treat the lease as continuing so long as the lessor does not terminate the lessee’s right to possession if any of the following conditions is met:

- the lease permits the lessee, or does not prohibit or otherwise restrict the right of the lessee to sublet, assign, or both \(48\)

- the lease permits the lessee to sublet…. assign the lessee’s interest or both, subject to express standards or conditions, provided [they are] reasonable at the time the lease is executed and the lessor does not require compliance with any standard… that has become unreasonable at the time lessee seeks to sublet or assign. [AND] an express standard is presumed to be reasonable [AND] this presumption affects “the burden of proof” \(49\)

- the lease permits the lessee to sublet…assign… or both with the consent of lessor and the lease provides that the consent shall not be unreasonably withheld \(50\)

Also, the statute clarifies that none of the following constitutes a termination of the lessee’s right of possession: 1) acts of maintenance or preservation or efforts to relet the property; 2) appointment of a receiver upon initiative of the lessor 3) withholding of consent to subletting or assignment if the withholding does not violate Section 1951.4(b). \(51\)

The Legislature intended that this allocation of the burden of minimizing the loss and relieving the landlord of a duty to mitigate under Sec 1951.4 would be most useful where the landlord “does not have the desire, facilities, or ability to manage the property and to acquire a suitable tenant.” \(52\)

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\(46\) See, Legislative Committee Comment – Assembly 1970 Addition, CAL. CIV. CODE §1951.2.
\(47\) CAL. CIV. CODE §1951.4(a).
\(48\) Id. §1951.4(b)(1).
\(49\) Id. §1951.4(b)(2).
\(50\) Id. §1951.4(b)(3).
\(51\) Id. §1951.4(b)(c).
\(52\) See, Legislative Revision Commission 1970 Addition, CAL. CIV. CODE §1951.4.
CONCLUSION

Even in the majority of states that impose a duty to mitigate on commercial landlords, questions remain (1) Does landlord’s failure to mitigate preclude the recovery of any damages? (2) Which party has the burden of proof and what is the test of conduct? What are the guidelines that determine whether or not the landlord has mitigated? (4) What is the effect of an express provision to the contrary in the lease?

In *Harrison Riverside Limited Partnership v. Eagle Affiliates, Inc.*[^53] a New Jersey appellate court restated the rule that a commercial landlord must make reasonable efforts to mitigate damages after a tenant breaches a lease. It affirmed the Trial Court’s ruling that failure to mitigate did not preclude any recovery by the landlord. There, three years into a five-year lease for a 50,000 square foot warehouse, the tenant defaulted. The landlord did not make any effort to mitigate for a one-year period after the default. Then, the landlord relet the premises for the final year at a rate ($2.15 per sq. ft.) much lower than the lease provided ($4.85 per sq. ft.) and lower than the fair market rental value established at trial ($3.00 per sq. ft).

The trial court entered a partial summary judgment in favor of the landlord awarding him damages of the difference between the $4.85 and the $3.00 fair market value for the first year and of the difference between the $4.85 and the $2.15 relet rate for the second year. The appellate court modified the measure of damages for the second year to the difference between the agreed upon rent and the fair market value. It held that “even if the plaintiff 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.”[^54] The Court reasoned that the duty to mitigate precludes the non-breaching party from collecting damages that could have been avoided reasonably but does not preclude the non-breaching party from collecting any damages at all. Interestingly, the Court referred to the Uniform Commercial Code measure of damages in sale of goods as New Jersey has applied this to damages for breach of a

[^54]: Id
real estate sales contract in a declining market: the difference between the agreed upon price and the subsequent sales price instead of the market value at the time of the breach.\textsuperscript{55}

The New Jersey court’s approach to the effect of landlord’s failure to mitigate seems to be fairly standard.\textsuperscript{56} Variation in results are due to the resolution of the issue of which party has the burden of proving mitigation by the landlord, or lack thereof. And, even when the burden of proof is clear, there are usually no clear guidelines except for “reasonable efforts.”\textsuperscript{57} The “reasonable efforts” standard does not clarify whether the landlord may make improvements for a new tenant or must make concessions for a new tenant and whether the costs for these will be born by the landlord or by the breaching tenant.\textsuperscript{58}

Generally, an express provision of no mitigation will relieve the landlord of this obligation.\textsuperscript{59} Sometimes, even where there is an express waiver, case law or statutes (cf. California) may require that the tenant must have a right to “mitigate” by subletting or assigning its interest in the lease.

**LANDLORD’S ABILITY TO COLLECT RENT FOR THE ENTIRE TERM AT THE TIME OF DEFAULT: ACCELERATION CLAUSES**

From the common law property perspective, we should expect that the landlord is entitled to full payment for the “conveyance” of the leasehold interest. In commercial leases, the rent often is stated for the entire term and installment payments, often monthly payments, are provided as a method of collecting the “purchase price.” If the tenant defaults in payment and the lease has an acceleration clause\textsuperscript{60} the landlord should have an action for damages measured by the future rent, at least where the tenant remains in possession or the landlord has made no attempt to retake possession for his own benefit.\textsuperscript{61}

\textsuperscript{58} See, Harris Ominsky, *Leasing: Landlord Must Mitigate Damages*, PHILADELPHIA LAWYER, Vol. 59, No. 3 at 72 (Fall 1996).
\textsuperscript{61} See e.g., Grove Restaurant and Bar, Inc. v. Razook, 16 Fla. L. Weekly 90, 571 So. 2d 596 (Fla. Dist. Ct. App. 1990) (holding that if lessor retakes possession of premises, the lessor may not accelerate).
Indeed, a New York appellate court, in its enthusiasm for the *Holy Properties* court’s continuation of the property paradigm, held in a residential lease case that even if the landlord evicted the tenant, the landlord could enforce the express acceleration clause in the written lease, and the landlord had no duty to mitigate damages!

A 1995 decision of the Superior Court of Pennsylvania was probably more true to the property law analysis when it held that the landlord could not confess judgment both for possession and for all monies for the entire term. It forced the landlord to elect between the remedies even where the lease expressly provided that “all of the remedies hereinbefore give to Landlord and all rights and remedies given to Landlord by law, shall be cumulative and concurrent”, even where the lease expressly provided that measure of damages under the acceleration clause should be “less an adjustment for interest at the legal rate, and the fair rental value of the demised premises for that period determined as of the date of such termination.” The Court thus indirectly rejected the contract analysis of accelerated damages of future rents as liquidated damages that follows below.

Courts in other jurisdictions have looked at the express acceleration provisions in light of liquidated damages principles. A Virginia court in *The Teachers’ Retirement System of the State of Illinois v. American Title Guaranty Corporation* reviewed the acceleration clause in a commercial lease. The Court noted that “there is no provision for discounting the future rent to its present value, nor is the tenant entitled to any offset or credit if the landlord relets the property.” While it refused to decide whether or not an acceleration clause was generally enforceable (especially in light of the fact that the Virginia Supreme Court had declined to explicitly address the issue), the Court held that an agreement that provides for a liquidated amount that is “grossly in excess of actual damages” or where actual damages can be definitely determined, will be “deemed a penalty.” Because the lease provided for no benefit to the tenant upon reletting by the landlord, the Court ruled that the clause provides the landlord with a

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64 *Id.* at 547, 622 A.2d at 1096.
65 *Id.* at 547, 622 A.2d at 1096.
66 *Id.* at 547, 662 A.2d at 1095.
67 See Discussion *infra* at note 67.
69 *Id.* at 1.
“potential windfall.” The lease’s “failure to take into consideration future market conditions or the probability or reletting the property…” was deemed fatal to enforceability of the clause. Because the acceleration clause was the exclusive remedy under the termination provision of the lease, the Court entered summary judgment for the tenant on liability for any damages beyond the amount due as of the date of termination!

An Illinois appellate court reversed a directed verdict in favor of the tenants on landlord’s claim for accelerated rent. The lease contained a liquidated damages clause whereby tenant forfeited its security deposit. However, a subsequent clause provided that the liquidated damages were “in addition to and not in lieu of all other rights and remedies afforded landlord.” After reciting the basis on which Illinois courts will find liquidated damage clauses valid, the Court reviewed the acceleration clause that reduced landlord’s damages by “the fair rental value of the Leased Premises…” Although the tenant did not contend that the accelerated clause was a penalty, the case probably reflects the Illinois view to apply liquidated damages tests to such clauses.

The Iowa Supreme Court enforced an express acceleration clause in *Aurora Business Park Associates, L.P. v. Michael Albert, Inc.* About two and one-half years into the lease of office and warehouse space in an office park, the tenant vacated the premises and stopped paying rent. The landlord retook the premises, but its efforts to relet the premises were not successful. The landlord brought suit to recover past unpaid rent and the balance of rent for the remaining term. The tenant claimed that the acceleration clause was an unenforceable penalty or, alternatively, that the court should offset any future rent by the reasonable value of the premises to the landlord or a reasonable amount for rent the landlord would actually receive during the remainder of the lease term.

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69 Id. at 2.
70 Id.
72 Id. at 244, 625 N.E.2d at 964.
73 Id.
74 Id.
75 See also, Raffel v. Medallion Kitchens of Minnesota, Inc. 139 F.3d 1142 (7th Cir. 1998). (Held that a commercial lease provision requiring lessee to pay full amount of seven months of abated rent upon failing to pay final month’s rent of a 5-year lease was an unenforceable penalty under Illinois law because the lease had a 10% penalty for late payment and the amount of damages “is invariant to the gravity of the breach” in that the seven months of rent is to be paid whether the rent is 30 days late or a year late.)
76 547 N.W.2d 153 (Iowa 1996).
The *Aurora* court reviewed the conflicting case law in other jurisdictions on the enforceability issue, cited the Restatement of Property (Second) Landlord & Tenant general position treating acceleration clauses as a “valid expansion of a landlord’s remedy,” and adopted the Restatement test for enforcing an acceleration clause where the tenant abandons the premises and fails to pay rent: the clause is enforced “so long as the provision does not constitute a penalty.” Comment i requires the landlord to mitigate the damages in situations where the tenant abandons, the landlord accepts the surrender and notifies the tenant of such acceptance but will hold the tenant liable for the balance of the term for the difference between the stated amount and what the landlord receives from a new tenant. However, the tenant is not liable for such an amount *unless* the lease gives the landlord this option. Here, the Iowa court approves the language in the lease and thereby suggests the exact language that should be used in future leases (at least where the landlord is able to negotiate this remedy).

Still the court had to respond to tenant’s charge that the acceleration clause is an unenforceable penalty. Citing the Restatement (Second) of Contracts for enforcement of liquidated damages clauses where “it approximates the loss anticipated at the time of making of the contract,” the court rejected the measure of damages suggested by the tenant of the remaining rent due minus the reasonable fair market value of the premises for the rest of the term that is the normal formula for damages in such cases. Moreover, although usually the validity of a liquidated damages clause is determined *as of the date of the execution of the contract*, here, the court looks at the two and one-half years remaining *at the time of breach* as being too long a period to ascertain actual damages. Because the lease here expressly takes into consideration the landlord’s duty to mitigate by offsetting any claim by rent received in reletting the property, the court ruled that the acceleration clause itself “reasonably approximates the anticipated or actual damages.”

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77 RESTATEMENT (SECOND) OF PROPERTY: LANDLORD TENANT §12.1 cmt. k. (1977)
78 Aurora Business Park Assoc., *supra*, note 75 at 155.
79 *Id.* at 156.
80 RESTATEMENT (SECOND) OF PROPERTY, *supra* note 76, cmt. i.
82 See, 49 AM.JUR.2d Landlord & Tenant §100, 103.
83 Aurora Business Park Assoc., *supra* note 75 at 157.
Surprisingly, the court did not require an adjustment of the accelerated claim to present value. And, it provided no guidance as to the process by which the tenant would get any new rents collected by the landlord after the judgment for accelerated rents is entered. Does the court retain jurisdiction until the end of the lease term? Or will the tenant have to litigate again – this time for the amount the landlord recovered on reletting? The opinion fails to indicate how the mitigation duty works in this context.

**FINAL REMARKS**

The author hesitates to characterize this section as a “conclusion” when the state of the law on acceleration and mitigation varies so drastically among the states. The desired goal of analyzing cases and legislation to reach a rational description of states as adopting either the property law or contract law paradigm has been an exercise in frustration.

The cases and the laws yield no consistent pattern, unless sheer inconsistency from one jurisdiction to another can be termed a pattern. The localism of the law on these topics drives national landlords and tenants wild. Unfortunately, it has the same effect on authors trying to find logic in the morass.

Perhaps, now is the time to consider seriously a Uniform Commercial Leasing Act that would at least have the virtue of providing more certainty and uniformity in some major aspects of the relationship between commercial landlords and tenants. After all, Article 2A of the Uniform Commercial Code – Leases allows parties to leases of personal property to contract as they see fit.\(^8\) It provides default remedies where the parties have failed to so provide. The goal of these remedies is to put the non-breaching party in as good a position as it would have been in had the contract been performed.\(^8\) Realizing that goal would have the dual benefit of providing justice to the parties and a level of predictability to all in the commercial real estate industry.

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\(^8\) UCC 2A §501.
\(^8\) *Id.* §253.