Minimizing Harm or Maximizing Profit

A Search for Harmony in Texas Between a Landlords's Duty to Mitigate and Right to Maximize Profit

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I. Introduction

Assume Abe abandons his two-bedroom apartment, breaching his lease. The landlord currently has 3 vacant two-bedroom apartments available – two on the first floor and one on the second floor – in addition to Abe's second-floor abandoned unit. All the two-bedroom apartments are similar in layout, square footage, and amenities. The only differences between the apartments are their location within the complex and location on the first or second floor. In essence, the units are non-unique cookie-cutter apartments[1] designed for simple and quick construction.

The next day, Betty, a potential tenant, comes to the apartment complex looking for a two-bedroom apartment. The landlord shows her the "model unit" for their two-bedroom layout.[2] Betty, impressed with the unit, decides to lease. The landlord then shows a diagram of the complex to Betty and highlights the four available units, including the abandoned unit, from which Betty can pick which unit and location she prefers. Betty selects the abandoned unit. Are Betty's payments now used to mitigate the damages resulting from Abe's breach? Is the result different if Betty selects one of the units other than the unit Abe abandoned?

In 1997 the Texas Supreme Court recognized the common law duty to mitigate damages.[3] The Texas Legislature quickly followed suit, codifying the duty to mitigate. Under the 1997 Texas statute, a landlord has a duty to mitigate damages upon a tenant's abandonment of the premises.[4] This section provides: A landlord has a duty to mitigate damages if a tenant abandons the leased premises in violation of the lease, and a provision of a lease that purports to waive a right or to exempt a landlord from a liability or duty under this section is void.[5] Therefore, the subsequent rental of an abandoned unit will be used to offset the damages owed by the breaching tenant.[6] Landlords, however, are in business for profit just like any other seller of goods.[7] As such, landlords want to rent as many units as possible, knowing that each additional rental directly affects the bottom line.[8]

Yet had the landlord highlighted the three vacant units and not the abandoned one, Betty would not have known about the abandoned unit and thus would have chosen a different apartment. In these circumstances, the landlord would rent an additional unit and would therefore benefit by making two sales rather than one. But at the same time is the landlord failing in his mitigation duty? To what extent is a landlord obligated to forego additional profits in an effort to satisfy his duty to mitigate?

Part II of this Comment provides insight into the trends affecting lease agreements and shows how the current interpretation is based on contract principles. Part III briefly discusses a landlord's duty to mitigate and highlights the ambiguity that still exists

attempting to define specific acts that satisfy this duty. Part IV explores the contractual concept of the lost-volume seller and explains how this principle applies to landlords. Part V balances the landlord's duty to mitigate with the landlord's right to profit in a residential apartment setting and offers a solution for reconciling these competing principles. This Comment concludes that economic efficiency and policy concerns demand that the Texas Legislature depart from the stance taken by other states and enact a statute clarifying that the duty to mitigate supersedes a landlord's right to profit in the residential apartment context.

II. Historical Trends of Landlord-Tenant Law: The Swinging Pendulum from Contract to Conveyance to Contract

At early common law, a tenant's rights were solely contractual in nature.[9] In England, most workers provided agricultural or other manual services to the manorial lord in exchange for shelter and a small parcel of land.[10] Under these conditions, the serfs were in no position to negotiate any terms of the relationship.[11] Likewise, the lords relied upon the serfs for the work they provided and could therefore not afford to alienate this workforce.[12] Because these social and economic conditions were interrelated, serfs could expect to hold their land from year to year on seemingly permanent terms.[13] Frequently, a serf could even pass his interest in the land along to his heirs upon death.[14] Landlords were regarded as having sold the land for the lease term, in the interim having no further obligations to the lessee.[15] Thus, the serf's rights to the land were "just as complete as those of the owner of the estate,"[16] and the serf could obtain specific performance of his contractual right to possess the land.[17] The lease was viewed primarily of contractual significance,[18] and courts concluded that there was no duty to mitigate damages.[19]

Gradually, the courts acknowledged more rights in the tenant until, by the sixteenth century, this contractually-viewed lease shifted to one more closely resembling a conveyance of land.[20] This shift was mainly attributable to a desire to protect the interests of the lessees because of the importance agriculture played in the economy.[21] At this time, few urban areas existed.[22] Most of the population instead was engaged in agricultural pursuits that were the foundation of the contractually viewed leasehold.[23] Thus, tenants primarily leased the land in order to plant, cultivate and harvest crops.[24] Structural improvements were not only rare, but were unimportant to those possessing the land.[25] Rather, an enforceable right to the land *was* important to the leaseholders as a way to secure and protect their interests.[26] But because of the *significant* emphasis placed on protecting the lessee's interests, the lease came to be regarded purely as a conveyance rather than a contract.[27]

Then, as society moved inward towards urbanization, the structures on the land gradually came to be more important than the land itself.[28] The new focus on structures led to the inclusion of "numerous and complex covenants in leases in order to accommodate the intricacies of complex urban societies."[29] Including these covenants permitted courts to "cast aside technicalities in the interpretation of leases" and instead focus on the intent of the parties.[30] Thus, many courts began to recognize that a lease was no longer a complete conveyance in which the landlord's duties were wholly satisfied upon delivering the property.[31] Rather, leases began to require continuing obligations from both the landlord and tenant throughout the lease term.[32]

Basing their reasoning on the concept of mutually dependent covenants, as well as basic contract principles, courts came to view the promise to pay in a lease as essentially the same as a promise to pay in any other contract.[33] These changing expectations, coupled with the need of landlords and tenants for a more flexible framework for solving lease problems than that provided by property law, forced a shift full-circle back to applying contract principles in lease agreements.[34]

III. A Landlord's Duty to Mitigate Damages Upon Abandonment

A. Texas's Adoption, Reasons, Rationale

One contract-based principle that has been adapted to some degree by at least forty-five states is the landlord's duty to mitigate damages.[35] In fact, because of the many judicial decisions and legislative enactments now imposing a duty to mitigate on residential landlords, only five states do not require residential landlords to mitigate damages.[36]

Under common law, a landlord in Texas was under no duty to mitigate and instead has four options upon a tenant's abandonment of the premises.[37] First, the landlord could let the premises remain vacant and continue to collect the rent due.[38] Second, the landlord could treat the tenant's conduct as a breach of contract and retain the property for his own purposes.[39] Under this option, the landlord could collect the present value of rent due, minus the reasonable cash value of the lease for the unexpired term of the lease.[40] Third, the landlord could treat the tenant's conduct as a breach of contract, repossess the property, and re-let it to a new tenant.[41] Under this option, the landlord could collect the contractual rent due minus the amount of rent received from the new tenant.[42] Fourth, the landlord could declare the lease forfeited, thus relieving the breaching tenant of any future liability for rental payments.[43]

But in 1997, Texas moved away from these common law remedies and joined the states that require mitigation. The Texas Supreme Court, in overruling one hundred years of precedent in *Austin Hill Country Realty, Inc. v. Palisades Plaza, Inc.,*[44] held that a landlord owes a duty to make reasonable efforts to mitigate damages.[45] Under this duty, when a tenant defaults on a lease by moving before the lease term ends, a landlord can no longer just let the premises lie idle and expect to collect full rent.[46] In response to *Austin Hill Country*, the Texas Legislature codified this duty.[47]

Strong policy reasons underlie the duty to mitigate. Most prominent is the theory of efficient breach. Under this principle, the parties should aim for "pareto efficiency" in resolving damages, meaning the aggrieved landlord should be in no worse a position than he would have been had the original contract played out, and the breaching party should be in the same or better position than he was under the original agreement.[48] In theory, a duty to mitigate damages helps to achieve pareto efficiency by allowing the landlord to re-let the premises without suffering any detriment, while permitting the breaching tenant to obtain more favorable accommodations without being forced to pay the entirety of the breached lease.[49] This approach promotes an efficient result. It allows the landlord, who is not only in a better position than the tenant to re-let the premises but who can also do so at a lower cost, to cover for the breaching tenant.[50] Thus, resources are put to their highest use and the combined effect creates the most efficient result for both parties.

Not only does this duty discourage injured parties from "exacerbating their otherwise avoidable injury,"[51] but it also discourages economic and physical waste by demanding productive use of the property.[52] Further, the possibility of harm to the property through vandalism or accident increases when the property is abandoned.[53] Striving to fill vacant units minimizes the likelihood of such harm.

Lastly, the duty prevents angry landlords who may have a personal distaste for the breaching tenant from refusing to accept

alternative tenants merely to ensure the breaching party's damages are as great as possible.[54] The duty to mitigate thus promotes efficient use of the economic and physical assets of the property, whereas the common-law rule gave landlords an easy way out and encouraged letting valuable property sit idle.[55]

B. Defining the Duty to Mitigate: Ambiguity Prevails

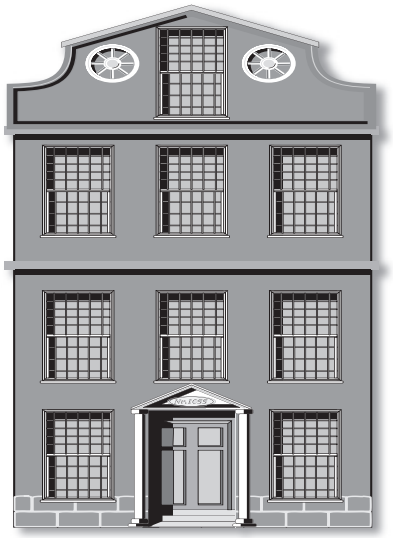
Despite the imposition of a duty to mitigate by the Texas Legislature and Texas Supreme Court, little guidance was provided to characterize the type of action necessary to satisfy this duty.[56] Not only did this lack of guidance lead to speculation by landlords, but it guaranteed additional litigation.[57] In the nine years since the *Austin Hill Country* decision, however, some attempts have been made to define what type of action landlords must take to satisfy their duty to mitigate.[58]

Under general contract law, the duty to mitigate damages, also known as the doctrine of avoidable consequences, merely requires "reasonable efforts" to mitigate damages.[59] Thus, there can be no recovery for consequences that *reasonably* could have been avoided.[60] Damages that the plaintiff might have avoided with reasonable efforts without undue risk, expense, burden or humiliation will not normally be charged to the breaching party,[61] and efforts to mitigate need not even be successful so long as they are reasonable.[62] Ultimately, the burden is on the breaching party to prove that the aggrieved party failed in its duty to mitigate.[63] Whether the landlord made adequate attempts to mitigate is determined from all the facts and circumstances of the case.[64]

Once the landlord determines that he has an affirmative duty to mitigate the damages of an abandoning tenant, it is widely accepted that the landlord must make "reasonable efforts" to mitigate these damages.[65] Yet despite the limited and generalized guidelines provided by courts and academics, ambiguity exists as to what *specific actions* might qualify as reasonable efforts and what efforts clearly don't satisfy this duty.[66]

Typically, the proof offered by the landlord to illustrate reasonable diligence evinces multiple actions designed to procure a new tenant.[67] In evaluating a landlord's efforts, courts might look to whether the landlord advertised the premises for rent, showed the premises to interested prospective tenants, or employed a real estate agent.[68] Courts will then balance these proactive efforts to re-let with inconsistent actions, such as the landlord's failure to re-let to a possible replacement tenant, raising the price on the rental unit, or permitting rent-free occupancy.[69]

Yet despite these academic inquiries into the sufficiency of specific efforts to mitigate, many questions still remain as to what this duty truly encompasses.[70] Often, defining what constitutes a reasonable effort and, for example, what is undue expense, is to be determined by the fact-finder.[71] The hypothetical presented at the beginning of this Comment is one of those inquiries: If a landlord has more than one vacancy and a new tenant is located, does that tenant occupy one of the vacant units or is the landlord obligated to use the new tenant to mitigate the breaching tenant's unit?[72] Should it matter which unit the new tenant chooses if they are all the same?



Until individual cases are brought forth to be decided by the courts or the state legislature further codifies the sufficiency of mitigation efforts, academic speculation and common sense provide the only guidance upon which to base assessments. Under present law, each allegation of a landlord's failure to mitigate will be a factual inquiry based on the totality of those individual circumstances in order to assess the landlord's sufficiency of compliance. With accepted ambiguity as the standard, any specific situations where the legislative branch can clarify what is expected of landlords would greatly help in cutting down on litigation costs and provide much needed guidance to landlords and tenants. One such situation where these concerns can be met is that of an apartment landlord's duty to mitigate in instances of multiple available units.

IV. The Lost-Volume-Seller Principle

A. Understanding the Conceptual Requirements

A "lost-volume seller" is one who can prove that other sales would have been made in the ordinary course of the seller's business, despite the buyer's breach.[73] Under this theory, the seller will not be deprived of the profit from additional sales, and the breaching party will not be permitted to count the proceeds from additional sales towards mitigation.[74] That is, the seller has not been made whole by the resale because he had his total number of sales reduced by the original breached contract.[75] The lost-volume-seller principle is primarily derived from two sections of the Uniform Commercial Code ("U.C.C.").[76] Section 2-708(b) frames the lost-volume scenario:

> If the measure of damages . . . is inadequate to put the seller in as good a position as performance would have done, then the measure of damages is the profit (including reasonable overhead) which the seller would have made from full performance by the buyer, together with any incidental damages . . . due allowance for costs reasonably incurred and due credit for payments or proceeds of resale.[77]

This principle is more completely understood when coupled with the underlying objective of the U.C.C. remedy provisions,[78] stated in section 1.106(a): "The remedies provided by this title shall be liberally administered to the end that the aggrieved party may be put in as good a position as if the other party has fully performed."[79]

Thus, the aggrieved promisee in a breach of contract case should not suffer for ensuing losses that he cannot prevent by contracting with a substitute party and where traditional remedies such as resale or market price differential are inadequate for compensating the seller in accordance with the U.C.C.[80] Simply put, if the injured party *could* and *would* have entered into the subsequent contract, and could have realized the economic benefit from supplying both contracts, he is said to be a lost-volume seller and the additional transaction is not treated as a substitute for the breached contract.[81] This principle, however, has been interpreted subject to several restrictions. One example articulated by the Court of Appeals of New York applies the rule only where the seller has an "unlimited supply of standard-priced goods."[82] In other words, there must have been sufficient capacity to supply both the breach and the resale contact. Additionally, the second contract must be profitable.[83] Thus, in order to qualify under the lost-volume-seller theory, the seller must have expected to profitably enter into the additional sale.

B. *Texas Interpretations*

Texas courts have not addressed the lost-volume-seller issue as thoroughly as other jurisdictions. In one of the only cases that explores what type of good qualifies under this theory, the First Court of Appeals in Houston held that to qualify as a lost-volume seller, one must demonstrate both an intent to take on additional contracts and the capacity to take on these new contracts without incurring additional expenses.[84] The Houston appeals court makes no mention of an unlimited-supply prerequisite, but by requiring that no additional cost be expended, the court presumably adopts a minimal requirement of at least multiple available items.[85] Under this broad definition, a seller must only possess the ability and desire to make another sale in the regular course of its business.[86] Thus, multiple vacant apartments seem to fit within this definition, and apartment landlords should qualify as lost-volume sellers when a lease is breached and they have multiple, similar vacant units available.

V. Analysis Balancing Act

A. *The Lost-Volume Principle Applies to Leases*

With the trend towards applying contract principles to leases comes the parallel effect of viewing the lease similarly to purchasing any other good or service. Some federal and state courts have applied this analysis and treated the lease as a contract between a merchant and a consumer for goods and services.[87] The D.C. Circuit, for one, plainly indicates that it believes that leases of "urban dwelling units should be interpreted and construed like any other contract."[88] When viewed in the context of the shift from conveyance to contract doctrine, it becomes apparent that the lease has come to resemble a sale and that the "landlord cannot divorce himself from the effects of the transaction."[89] Leases are no longer conveyances of space; rather, they are service contracts as much as rental contracts and differ little from agreements for other goods.[90]

Because residential leases are viewed as contracts between the landlord and tenant, contract principles, including the lost-volume-seller rule, should apply.[91] The lost-volume principle is further relevant because the lease is now characterized like a typical sale of any other good or service.[92] Once a lease is characterized as both a sale and a contract, then the principles governing those substantive areas apply. Here, the lost-volume-seller principle applies to leases that involve sellers (landlords) who have multiple similar goods (units) instantly available. Thus, a landlord is no different than a merchant who hopes to sell multiple goods, producing a higher profit for himself. Applying the lost-volume-seller principle to landlord and tenant relationships therefore permits landlords to pursue their business goal of maximizing profits.

B. *The Broadening Definition of Goods: Inclusion of Apartments*

Because of the modern trend applying contract principles to lease agreements, the contract principle of the lost-volume seller seemingly applies in lease-abandonment cases.[93] But whether the lost-volume theory pertains specifically to apartment landlords with multiple available units must still be explored. Resolving this question rests upon (1) whether units are viewed as readily available goods within the context of the lost-volume-seller principle and (2) how courts will balance a landlord's right to maximize profits with public policy concerns for breaching tenants.

When defining the type of goods intended to be encompassed by the lost-volume principle, at least one jurisdiction has broadened the approach from the seemingly restrictive confines of "standard-priced" and of "unlimited capacity," mentioned earlier.[94] In *Neri*, a retail dealer sued to recover lost profits and incidental damages upon a buyer's repudiation of a contract governed by the U.C.C.[95] Specifically, the buyer contracted to buy a new boat of a specified model from the dealer.[96] After the dealer ordered the boat from the manufacturer, the buyer notified the dealer that he would be unable to make any payment on the boat because he had to pay for an unexpected surgery.[97] Some four months later, the dealer sold the boat to another buyer for the same price as negotiated with the original buyer.[98] The defendant buyer argued that the dealer's loss on the contract was recouped through this resale; the dealer argued that *but for* the plaintiff's default, it would have sold two boats and therefore doubled its profit.[99] The Court of Appeals of New York sided with the dealer, finding that the boat fell within the definition of an "unlimited supply of standard-priced goods."[100]

The *Neri* court thus expanded the definition for the type of good to be included under the lost-volume-seller principle. Specially-ordered boats, which have to be ordered from the manufacturer upon sale, are not, strictly speaking, "unlimited" in the readily-available sense of the term nor "standard-priced."[101] For one, boats, like vehicles and real property, have a variable price that is contingent upon multiple factors such as the cost of the next-best alternative, the seller's interest in maintaining customer good will, market rates, and the existence and amount of any down payment.[102] Thus, by considering a specific boat "standard-priced" for lost-volume-seller analysis, a court also has to consider similar cars, similar trucks, and similar property "standard-priced" for consistency.

Further, are specially-ordered boats really of unlimited capacity? If a dealer is permitted to order additional goods to meet demand, it appears a landlord could likewise acquire additional units or property to meet the needs of additional tenants. It seems, however, that the *Neri* court strictly followed the statutory language that includes specially-manufactured goods within the definition of a "good."[103]

Analyzing this situation under the statutory language, though an apartment is not movable within the definition of § 2A-103, a landlord who already has alternative units available certainly seems to fall under the working definition used for lost-volume-seller analysis. A landlord is no different in his capacity to provide a good than a seller who must special-order an additional good each time one is purchased. In fact, a landlord with vacant units seems to be in an even better position to provide for the next sale, given that the good (the vacant apartment) is immediately available for sale (rent). Therefore, the lost-volume-seller principle, though generally thought of as applying to goods in the commodity sense, also applies to landlord-tenant situations because of the shift to applying contract principles to leases.[104] The lost-volume principle can be visualized in the landlord-tenant case where the commodity (the apartment unit) is readily available and of similar size, layout, and quality as the alternative unit that was previously leased. Additionally, many jurisdictions, in rejecting the common-law conveyance theory discussed previously, now view the leasehold agreement as a contract for goods and services.[105] Thus, the lost-volume-seller principle, as a contract theory, applies to premises abandoned by a residential tenant before the end of the lease just as the duty to mitigate does.[106]

One central argument against broadly applying the lost-volume principle fails in its reasoning when applied to the residential apartment circumstances discussed here. It has been offered that because businesses try to operate at optimum capacity, additional transactions would not be profitable and the injured party would not have chosen to undertake the additional

transaction without the initial breach.[107] Therefore, a business may not qualify under the lost-volume theory if it is run at optimum efficiency. Though this question is "one of fact to be resolved according to the circumstances of each case," the argument has little merit when applied to residential lease agreements.[108] In a residential-apartment setting, if an apartment owner has vacant apartments similar to the abandoned unit, then the owner clearly has the capacity to handle an additional contract. On the other hand, if the landlord has no vacant units, a landlord cannot build or acquire additional units in a timely manner to fit the needs of additional tenants. Thus, in the scenario where the landlord has only the abandoned unit available, the landlord would clearly not lose any additional sales because of the breach and the re-letting of the abandoned unit would therefore count towards mitigation.

The duty to mitigate is required by statute and is applicable to both residential and commercial landlords without language to the contrary.

C. At Odds: Finding a Medium Between Minimizing Damages and Maximizing Profits

1. Commercial and Residential Tenancies Merged for Analysis: No Difference in the Law

Though the following case examples offered by this Comment are primarily focused on commercial tenancies, the same analysis should apply to residential tenancies. Residential disputes over abandoned property are less likely to be litigated because they often involve significantly smaller sums of money than commercial transactions.[109] But the duty to mitigate damages, and the subsequent interpretation and application of this duty, applies to both commercial and residential tenancies because neither the Texas Supreme Court nor the Texas Legislature differentiated between the two.[110]

In effect, the Texas statute supersedes that section of *Austin Hill Country* allowing a commercial landlord to waive or modify its duty to mitigate.[111] Thus, the duty to mitigate is required by statute and is applicable to both residential and commercial landlords without language to the contrary.[112] But because of the leeway courts have given in commercial-tenancy cases when multiple, similar vacant units exist in addition to the abandoned unit, it appears that the trend is to allow an exception to the general rule for lost-volume situations.[113] The Texas Legislature should address this ambiguity for the benefit of all residential landlords. Failure to clarify this position will leave landlords and tenants with an ambiguous structure to govern their disputes. As a result, additional litigation will be required to flesh out the framework.

2. Texas Examples Explored

Texas courts since the *Austin Hill Country* decision have done little to clarify the ambiguity surrounding what action is sufficient to satisfy a landlord's duty to mitigate damages. No cases have specifically addressed the issue of multiple available units. The few cases that have relied on or cited to *Austin Hill Country* on the mitigation issue, however, have indicated that the courts will loosely apply the reasonableness standard when choosing to impose a burden upon the landlord.[114] Though the Texas Supreme Court has yet to further interpret its original ruling, several appeals courts have handled issues at least tangentially related to interpreting how the mitigation issue might be addressed in the instance of multiple available units.[115]

In a ruling based on the law after *Austin Hill Country* was decided, but before the Texas Legislature codified the duty to mitigate, the Dallas Court of Appeals held that a landlord could avoid the duty to mitigate by including a disclaimer in the contract; in this scenario, the tenant would not be relieved of breach even if the landlord made no effort to re-let the premises.[116] This holding strictly adheres to the ruling in *Austin Hill County* by permitting the parties to contract around the duty to mitigate.[117]

After the Texas Legislature passed Texas Property Code § 91.006 imposing a duty to mitigate damages upon landlords,[118] the Fort Worth Court of Appeals held that it was reversible error not to submit jury questions on mitigation when the failure to mitigate is pleaded and proof is offered during trial.[119] The court's opinion left the inquiry of whether mitigation was satisfied up to the jury. It continued the general trend of the courts strictly applying the mitigation duty, but doing so within the context of the applicable circumstances.

Most recently, the Fourteenth Court of Appeals in Houston held that a landlord is not liable for failure to mitigate when the commercial tenant, without the landlord's knowledge, moved across the hall for several months before moving back to the original space.[120] In *Cole*, the landlord, trying to collect overdue rent on the original space, made several telephone calls producing no results.[121] Finally, the landlord sent someone to the property and learned for the first time that the tenant had moved out of the space and across the hall.[122] At that time, the landlord had the locks changed on the old space, but the payment dispute continued.[123] Four and a half months later, the landlord and tenant reached an agreement to mitigate damages by allowing the tenant to reoccupy the leased space for the remainder of the term.[124] The Houston Court of Appeals ruled that that the trial court erred in finding that the landlord did not make reasonable efforts to mitigate during those four months because even assuming the landlord's efforts were inadequate, the tenant failed to prove the amount of damages that could have been avoided had the landlord mitigated.[125] Thus, there was no evidence regarding the amount by which the landlord could have reduced its damages.[126] This holding seems to undercut the duty to mitigate by providing that landlords are not required to immediately attempt to mitigate if the circumstances so dictate. Furthermore, in this instance, the landlord owned both spaces,[127] and thus was in the position to rent two units rather than just one. With the tenant effectively preventing the landlord from exercising this option by constructively utilizing both units, the landlord was deprived of potential rental profits.[128]

Though the correlations are slight between this final example and that of a residential apartment landlord, the Houston Court of Appeals balanced the landlord's ability to maximize his profits against the duty to mitigate.[129] The court ruled for the landlord.[130] This demonstrates that the lost-volume principle, when applied against the duty to mitigate, better encompasses a just result according to at least one court. With this holding, other Texas courts might be persuaded by this balancing analysis and value the right to business profits ahead of the duty to mitigate in other related scenarios, including ones involving residential landlords.

3. Other Jurisdictions

Jurisdictions outside Texas have more clearly balanced the competing principles of the duty to mitigate damages and a landlord's right to rent all of its available units. Some have

determined that landlords have no obligation to rent abandoned spaces before they attempt to rent vacant units.[131] The Supreme Court of Vermont even held that a landlord is certainly not expected to "exalt the interests of the tenant above its own."[132] Maine and Wisconsin specifically provide by statute that it is reasonable for a landlord to rent alternate vacant space before abandoned space if the new tenant has not been provided by the breaching tenant.[133] Similarly, Florida, though not imposing a duty to mitigate, provides a "safe-harbor" to landlords who do not give preference in leasing the abandoned premises over vacant units.[134] These statutes indicate that the landlord's ability to profit when multiple similar units are available supersedes the landlord's duty to mitigate damages so long as the landlord acts reasonably.

Further, other jurisdictions, though not yet having codified this principle, have shown a similar inclination in court decisions.[135] In Missouri, a landlord cannot be expected to forego renting available vacant spaces if the abandoned space does not meet the needs of the prospective tenants.[136] This principle was likewise illustrated in the Louisiana case of *Shank-Jewella v. Diamond Gallery*.[137] In *Shank-Jewella*, a commercial landlord was left with a vacant slot in a shopping center after one tenant breached.[138] The landlord later rented all the other spaces in the shopping center, but was unable to lease the abandoned slot.[139] The court held that the landlord's actions were reasonable because each prospective tenant desired a larger space than the one vacated and thus the abandoned slot did not meet their needs.[140]

A Hawaii court of appeals faced a variation on this problem that required it to analyze whether an abandoning tenant's liability could be shifted with subsequent vacancies.[141] In *Marco Kona Warehouse v. Sharmilo, Inc.*, a tenant abandoned three warehouse bays, numbered 2, 4 and 6.[142] Ameritone Painting expressed an interest in moving into the abandoned bays.[143] The landlord agreed and Ameritone Painting moved out of bays 7, 9, and 10 into bays 2, 4 and 6.[144] After this shuffling, another tenant, Hawaii Pipe and Supply, decided to lease bays 7, 9, 10 and 11.[145] But because another tenant occupied bay 11, the landlord paid that tenant to switch bays so that Hawaii Pipe and Supply could move in.[146] The trial court awarded damages to the landlord only for the rent lost during the time bays 2, 4 and 6 were vacant.[147] The landlord appealed, seeking damages for the time bays 7, 9, and 10 were vacant after Ameritone Painting moved.[148] Thus, the court had to determine whether a tenant who wrongfully abandoned the premises could also be liable for rents lost on the landlord's other warehouse bays that were vacated with permission.[149] The court held that the abandoning tenant was only liable for the rent on the specific bays it abandoned – bays 2, 4, and 6 – and not for any additional costs because the tenant did not consent to the additional liability.[150] By not allowing a landlord to shift an abandoning tenant's liability from one unit to another,[151] the court placed parameters on a landlord's ability to profit by preventing the landlord from shifting responsibility in order to burden the abandoning tenant with liability beyond that of the specific units he had abandoned.

4. A Contrary View: Sommer v. Kridel

Most similar to the inquiry at issue, however, is a slightly antiquated case decided by the New Jersey Supreme Court.[152] Though decided before New Jersey imposed a duty to mitigate the damages caused by a defaulting tenant, the *Sommer* opinion nevertheless balances the apartment landlord's duty to mitigate damages in multiple-unit-vacancy scenarios against social policy concerns.[153] Though actually two cases brought on appeal together, the court resolves both through the same reasoning.[154]

In *Sommer*, a tenant entered into a two-year rental contract for apartment 6-L.[155] Before the tenant moved in, he encountered personal family problems and notified the landlord that he would not be moving in, but would surrender his initial deposit and first month's rent as penalty, which he had already paid.[156] Later, a third-party went to the apartment complex and inquired about renting apartment 6-L.[157] This person was ready, willing and able to rent the apartment, but the landlord told her that the apartment was not being shown because it was already rented (to the original breaching tenant).[158] Ultimately, the landlord did not show or enter the apartment until he ultimately re-let it 18 months after the date that the original tenant's lease was to start.[159]

The companion case controversy arose in a similar manner. There, a tenant entered into a two-year agreement to rent apartment 5-G at an apartment complex.[160] The tenant lived in the apartment for one year before vacating.[161] The landlord filed a complaint demanding the second year's rent and the tenant countered that the landlord had failed to mitigate damages.[162]

In handling both claims, the New Jersey Supreme Court relied on the justification of "basic fairness" and applied the contract rule requiring mitigation of damages to a residential lease.[163] The court held that a duty to mitigate damages when a landlord seeks to recover rents due from a defaulting tenant must be governed by more modern notions of equity and fairness.[164] Specifically, if the landlord has other vacant apartments in addition to the one that the tenant abandoned, the landlord's duty to mitigate entails making reasonable efforts to re-let that apartment, treating the abandoned unit as if it were one of the landlord's vacant stock.[165] Thus, there is no standard formula for measuring the landlord's efforts; rather, each case must be judged upon its own facts.[166] Though *Sommer* fails to declare outright that landlords ought to always mitigate damages before making additional sales, this is certainly the message the court implicitly conveys.

The *Sommer* court additionally, almost in passing, states that "each apartment may have unique qualities which make it attractive to certain individuals."[167] This statement seems to imply that this court viewed apartments as unique items, not something standard-priced and unlimited. But it is also worth noting that the nature of apartment complexes has undoubtedly changed since the 1970s and thus some views in the opinion might be antiquated themselves. Though *Sommer* does not specifically apply a lost-volume-seller analysis to the multi-unit hypothesis, it still provides a thoughtful analysis that articulates the importance equity plays in evaluating such cases.

5. A Texas Trend Towards Maximizing Profit

The lost-volume-seller principle and the duty to mitigate damages are at odds with each other.[168] The lost-volume-seller doctrine aims to maximize a landlord's profits by entitling him to all the possible rentals he makes and not penalizing him when a tenant breaches a contract and abandons the premises. To the

contrary, the duty to mitigate damages doctrine aims to further social goals by having the landlord minimize some damage because he is presumably in a better position to do so. Yet despite the policy goals the duty to mitigate achieves, requiring the landlord to mitigate rather than maximize profits seems to place "an unfair burden on the landlord and unnecessarily restricts [the landlord's] right to manage his property as he sees fit."[169] Ultimately, both principles cannot coexist in the apartment-housing market without one principle being limited in some respect.

Though many jurisdictions have distinctly recognized that a landlord's right to profit in multi-dwelling situations supersedes the landlord's duty to mitigate,[170] Texas courts have yet to definitively decide the issue. But the language used in several Texas court of appeals cases,[171] coupled with the persuasive authority offered by other jurisdictions,[172] suggests that Texas courts might eventually join in this view.

6. *Factoring Economic Analysis and Policy Concerns into the Decision*

Texas courts would be wrong to adopt this policy putting a landlord's right to profit above the duty to mitigate. The same arguments that are continually made to support the mitigation duty likewise apply in favoring mitigation over maximizing profits: demanding productive use of the property, avoiding personal vendettas, and putting resources to their highest social use.[173] Permitting landlords to recover additional rents behind the lost-volume pretext contradicts these social goals.

In addition to these policy concerns, practical concerns must be considered. It is economically less efficient for a breaching tenant to bear the cost of breach than for the landlord to do so. Landlords are in a better position to absorb the costs of the breach, and to do so more efficiently, because they better understand the magnitude of potential damages when a sale occurs.[174] Most residential buyers do not understand the extent of their commitment when entering into this type of contract,[175] and a lost-profits award thus increases the buyer's liability unpredictably.[176] Experience teaches sellers, however, that some statistically-probable number of buyers will breach their contracts.[177] The seller's actions going into a contract thus compensate for this potential, be it in the form of a higher rent or a higher security deposit.[178] Because of the position of the seller, the loss borne by the seller is significantly less than if the same is endured by the breaching buyer.[179] In reality, the loss will probably either produce only "insignificant amounts of profit or be unprofitable."[180]

Victor Goldberg offers a useful analogy of a fisherman to explain how the seller better absorbs the costs of a breach:

> Think of the customers as fish and the retailer as a fisherman. The fisherman makes decisions on boat size, crew, equipment, et cetera, on the basis of the relationship between these inputs and expected catch. For a given combination of inputs (a given level of fishing – or retailing – expense) on a normal day the fisherman might anticipate a catch of, say, 1000 pounds. On a good day he might land 2000 pounds and on a bad day he might do no more than drown a lot of worms. The fisherman's optimal level and mix of expenditures depends upon the distribution of expected outcomes and their relationship to the input mix. There is no unique marginal cost concept in this formulation. But if we had to have a single, summary marginal cost measure, it would almost surely be the cost of increasing the *expected* catch by one pound. Thus, if on a particular day, a fish is hooked and then is lost, the fisherman loses the revenue from that fish and avoids virtually no costs – the ex post marginal costs are roughly zero. The fish that got away . . . constitutes a net loss of revenue for the business. So long as the probability of a fish getting away is not positively correlated with the probability of hooking the next fish, the lost fish constitutes a net loss to the fisherman. Likewise, so long as the customer's reneging does not increase the likelihood of making the next sale, the breach results in a net loss of revenue to the business.[181]

This analogy captures the notion that the typical seller can expand sales in the short run with little cost beyond the wholesale price.[182] Thus, the loss imposed on the seller is approximately the gross margin – the difference between wholesale and retail price[183] – of the lost sale, as opposed to the entire retail price the buyer would experience.[184]

Goldberg suggests the appropriate remedy to this problem is to have the seller bear the loss.[185] If customers bear the burden of liability, customers will value the good less than before, and the seller will have to adjust – by working harder or lowering the price – to persuade the customers to buy the good.[186] Effectively, placing the burden of breach on the seller has a much smaller economic effect on the seller's bottom line than originally thought – rather than harming the seller, it actually keeps the price higher than it would be if the customer were liable for damages resulting from breach.[187] Further, sellers are able to spread the risk of breach over multiple transactions, further minimizing costs.[188] Each of these reasons contributes to the seller being in a considerably better position – both economically and socially – to bear the loss of a breach. The same analysis applies to the landlord-tenant scenario because the modern treatment of leases is no different than the sale of goods. Thus, the landlord becomes the "seller" under our analysis, with the "buyer" being the tenant.

Yet another difficulty that is alleviated by permitting the mitigation principle to supersede the landlord's lost-volume recovery is the complexity of calculating actual damages incurred by the landlord. It is virtually impossible to know "when a seller has lost *actual* volume because of a breach."[189] Landlords who react to changes in demand by adjusting rent should be able to replace contract losses on the spot market.[190] Landlords who have a pre-set number of vacant units available at a fixed price will lose a sale because of a breach; but under these selling conditions, a breaching tenant can argue that the sale would have been lost even had the tenant performed and thereafter sub-let the apartment to a potential tenant of the landlord.[191] In either case, the tenant's action would not affect the seller's *actual* volume.[192] Rather,

what the seller loses is *expected* volume.[193] The loss then must be determined in light of the market price and selling costs attributed to the breach, which themselves can be difficult to isolate.[194] Further, a significant portion of these "profits" cover sale-completion costs and overhead that the breaching buyer does not consume.[195] Permitting the recovery of lost profits, then, without a careful inquiry that is likely to be both time-consuming and expensive, will result in a windfall gain for the seller and place him a *better* position than full performance would have done.[196]

7. A Proposed Solution

In the context of these concerns, a policy limiting the landlord's recovery to one rental period's rent when the landlord has multiple vacancies is attractive for reasons of simplicity and economic efficiency. In addition, if the landlord should lease all the vacant units before the end of the additional month, then the landlord should be required to return any rent for those days. Thus, if a breach occurs, a landlord could recover any sums the tenant owes under the lease before abandoning the unit, any sums the tenant owes for damages beyond normal wear and use, and one additional month's rent. The landlord would off-set any security deposit paid by the tenant against these sums.

This solution works for several reasons. First, it is simple. It eliminates problems courts have in trying to reconcile the lost-volume principle and the mitigation of damages doctrine.[197] Second, it is cheap. It specifically outlines damages ahead of time and therefore saves litigation costs. By limiting damages to one additional month's rent, landlords are handed an effective tool for establishing damages without the need for judicial adjudication.[198] Third, it avoids a scenario in which the tenant is surprised by the monetary amount due by ensuring he has been apprised of the full extent of his liability at the time he signs the lease.[199]

It is highly unlikely that such a policy would result in an increased number of tenants abandoning their units before the end of the lease term. For one, moving is hard – it has financial, emotional, and physical costs.[200] It can be expensive.[201] It is a hassle.[202] Tenants may have to withdraw their children from one school and enroll them in another school. Moving may mean the tenant is further from his established social network -- family, friends, employment, medical care providers, or his or her church or synagogue. All of these considerations serve as a deterrent, in addition to the financial liability for an additional month's rent, discouraging tenants from moving before the lease ends. In addition, when a tenant breaches, landlords give a less than favorable reference, thus making it more difficult for the breaching tenant to find another willing landlord. These factors combine to suggest that tenants are unlikely to breach merely because their liability to the landlord will be limited to one month's rent.

In contrast, the current system requiring courts to balance the duty to mitigate with the lost-volume principle produces the opposite result.[203] A tenant's liability for double rent for an extended period of time,[204] though a hefty deterrent, in reality seems inadequate to prevent breach by a party who is compelled to breach because of employment, illness, death, family emergencies, etc. In reality, allowing the landlord to recover lost profit may be counter-productive – rather than pay the increased financial penalty, breaching tenants may deny liability, forcing judicial intervention and therefore additional costs in order to enforce the provision. Thus, it is counter-intuitive to suggest that that there will be an increase in the number of breaching tenants if the Legislature enacts legislation codifying this policy.[205]

This proposed solution benefits both landlords and tenants by providing a clear framework within which to calculate damages in the event the tenant abandons the premises. Take the following scenario for example: Suppose tenant Casey abandons his apartment on February 10 without having paid February's rent. Under the proposal, *if* the landlord at the time of breach had multiple similar units available for lease, the landlord could recover the February rent, plus one additional month's rent (March), and any amounts owed for damages beyond normal wear and tear. If Casey paid a security deposit, the landlord would off-set Casey's security deposit against these sums.

But, say, for example, that the landlord leases all of the vacant units by March 15, including the one vacated by Casey. In this situation, the landlord would be required to return to the tenant rent for fifteen days in March. Though landlords would typically incur some minimal loss in most of these scenarios, the landlord's loss would be offset by the savings in time, convenience, and litigation costs he avoids in attempting to recover lost rent. The tenant, on the other hand, in all scenarios will be in a better position than under the current damage provisions. In this way, Pareto efficiency is achieved and both the landlord and tenant benefit by adding certainty to this convoluted damages analysis.

VI. Conclusion

Using the hypothetical offered at the start of this Comment, it is now clear how Abe's breach and Betty's subsequent lease should be balanced. Because the landlord has multiple similar units available, Abe will be liable for any sums he owes before abandoning the lease, any sums he owes for damages beyond normal wear and use, and one additional rental period's rent. This is the extent of Abe's liability, regardless of how many months were left on his lease agreement. The landlord can then lease any apartment to Betty, including the unit Abe vacated, without having to worry about how Betty's rent will affect Abe's damages. But if the landlord leases *all* of his available comparable units within a month after Abe's breach, the landlord must return to Abe the rent for the remaining days of that "month" period.

The Texas Legislature should enact legislation limiting a residential landlord's recovery to one rental period's rent when the tenant abandons the unit before the end of the lease term and the landlord has multiple available units.[206] When Texas placed a duty on landlords to mitigate damages, it did so for social concerns and followed the lead set by many other states. Balancing this duty with that permitting a landlord to maximize his profits like any other business is a much murkier decision – and is what Texas courts are currently bound to apply. To rectify this situation, the Texas legislature should apply the same social concerns that motivated it to enact legislation requiring landlords to mitigate damages. Texas should ignore the lead taken by other jurisdictions and place public policy ahead of a residential landlord's business goals. Economic principles dictate that this solution best achieves economic efficiency, and the contrary view leaves little to be attained for either party. Ultimately, this change would add certainty to the tension that now exists between the landlord's duty to mitigate damages and the landlord's right to maximize profits.

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1. *See generally* Costas Kondylis, *Design Takes the Lead in the Residential Market*, Residential Real Estate Weekly, Sept. 4, 2004, at S2 (contrasting cookie-cutter apartments with the current trend to create distinctive units within a complex).

2. This procedure is customary in the rental business. *See generally* Beverly Bryant, *Renters Given More Choice, Report Says*, The Sunday Oklahoman, May 22, 2005, at 1I; Annemarie Mannion, *Willowbrook Complex is Kid-friendly*, Chicago Tribune, July 11, 2004, at 7A; Doresa Banning, *Renal Lifestyles in Reno-Sparks*, Reno Gazette-Journal, Nov. 22, 2003, at 46H (illustrating that model apartments are shown to potential tenants).

3. *See* Texas Hill Country Realty, Inc. v. Palisades Plaza, Inc., 948 S.W.2d 293 (Tex. 1997).

4. Texas Prop. Code Ann. §91.006 (West 2006).

5. *Id.*

6. *See* Samuel Williston, A Treatise on the Law of Contracts, §64:27 (4th ed., West Group 2002) (precluding the recovery of damages that could have been avoided).

7. *See* Bryan Mashian, *Strategies for Assignment and Subletting in Commercial Leasing*, 22-JAN L.A. Law. 14, 16 (2000) (stating that landlords are in the real estate business and are therefore in pursuit of profit).

8. *See* Comment, *A Theoretical Postscript, Microeconomics and the Lost-Volume Seller*, 24 Case W. Res. L. Rev. 712, 715 (1973) (contending that most businesses will make decisions with the objective of maximizing their profits). This Comment operates under the basic assumption that landlords (as sellers) aim to maximize profits. For a discussion of the validity of the profit-maximization assumption as a tool for analyzing business behavior, see R. Caves, American Industry: Structure, Conduct, Performance, 2-6 (2d ed. 1967). Theoretical Postscript at note 7.

9. *See* Ian Davis, *Note: Better Late than Never: Texas Landlords Owe a Duty to Mitigate Damages When a Tenant Abandons Leased Property:* Austin Hill Country Realty, Inc. v. Palisades Plaza, Inc., 40 Tex. Sup. Ct. J. 228 (Jan. 10, 1997), 28 Tex. Tech L. Rev. 1281, 1282 (1997); Thomas A. Treadwell, Comment, Austin Hill Country Realty, Inc. v. Palisades Plaza, Inc.: *The Commercial Landlords' Duty to Mitigate Upon Tenants' Breach*, 22 Am J. Trial Advoc. 695, 699 (1999).

10. Edwin Smith, Jr., *Extending the Contractual Duty to Mitigate Damages to Landlords When a Tenant Abandons the Lease*, 42 Baylor L. Rev. 553, 555 (1990).

11. *Id.*

12. *Id.* at 556.

13. *Id.*

14. *Id.*

15. Jeremy K. Brown, Comment, *A Landlord's Duty to Mitigate in Arkansas: What it Was, What it Is, and What It Should Be*, 55 Ark. L. Rev. 123, 124 (2002).

16. Thomas A. Lucarelli, *Application of the Avoidable Consequence Rule to the Residential Leasehold Agreement*, 57 Fordham L. Rev. 425, 429 (1988).

17. Smith, *supra* note 10, at 556; Treadwell, *supra* note 9, at 699.

18. Davis, *supra* note 9, at 1282.

19. Brown, *supra* note 15, at 124.

20. Davis, *supra* note 9, at 1283.

21. Smith, *supra* note 10, at 556; Lucarelli, *supra* note 16, at 433.

22. Smith, *supra* note 10, at 556.

23. *Id.*

24. *Id.*

25. *Id.*

26. *Id.*

27. *Id.*

28. Davis, *supra* note 9, at 1283; Treadwell, *supra* note 9, at 699.

29. Davis, *supra* note 9, at 1283.

30. Lucarelli, *supra* note 16, at 434 (quoting Sommer v. Kridel, 378 A.2d 767, 771 (1977)).

31. Mark S. Dennison, *Sufficiency of Landlord's Efforts to Mitigate Damages Following Tenant's Abandonment of Leased Premises*, 72 Am. Jur. Proof of Facts 3d 155, *14 (2005).

32. Davis, *supra* note 9, at 1286.

33. Davidow v. Inwood North Professional Group—Phase I, 747 S.W.2d 373, 377 (Tex. 1988); Dennison, *supra* note 31, at *14; *see also* Joseph M. Perillo, Calamari and Perillo on Contracts § 14.15, at 587 (5th ed., West Group 2003).

34. Smith, *supra* note 10, at 557.

35. Dennison, *supra* note 31, at *9 (2005). For purposes of this Comment, it is sufficient to understand that the duty to mitigate is widely imposed on landlords. *See also* Smith, *supra* note 10, at 553.

36. Dennison, *supra* note 31, at *9. The five states are Alabama, Georgia, Minnesota, Mississippi, and New York. *Id.*

37. Jerry D. Johnson, *Landlord Remedies in Texas: Confusion Reigns Where Certainty Should Prevail*, 33 South Tex. L. Rev. 417, 419 (1992).

38. *Id.*

39. *Id.* at 420.

40. *Id.*

41. *Id.*

42. *Id.*

43. *Id.*

44. *Austin Hill Country*, 948 S.W.2d at at 294.

45. *Id.* Texas first adopted the common law no-mitigation rule in Texas in 1897 in *Racke v. Anheuser-Busch Brewing Ass'n*, 42 S.W. 774 (Tex. Civ. App.—Galveston 1897, no writ).

46. *Id.* at 298.

47. *See* Texas Prop. Code Ann. §91.006. The Texas Supreme Court stated that a landlord's failure to mitigate does not give rise to a cause of action by the tenant. *Austin Hill Country*, 948 S.W.2d at 299. Rather, the landlord's failure to use reasonable efforts to mitigate damages merely bars the landlord from recovering lost rent from the breaching tenant. *Id.*

The statutory language used by the Texas Legislature appears to be at least partially derived from the Uniform Residential Landlord and Tenant Act. *See* Unif. Residential Landlord and Tenant Act §4.203, 7B U.L.A.632 (2005) ("If the tenant abandons the dwelling unit, the landlord shall make reasonable efforts to rent it at a fair value").

But see Texas Prop. Code Ann. §91.005, which prohibits the tenant from sub-letting the leasehold to any other person without the prior consent of the landlord. The adoption of the duty to mitigate seems to narrows the restrictive nature of this provision by making it more likely for a landlord to be under an obligation to accept the prospect offered by the abandoning tenant. *See generally* Dennison, *supra* note 31, at *20-21. But courts are split on whether a landlord's failure to rent to this prospective tenant breaches the landlord's duty to mitigate damages. *Id.* at *20.

48. Lucarelli, *supra* note 16, at 437.

49. *Id.*

50. *Id.*

51. Stephanie G. Flynn, *Duty to Mitigate Damages Upon a Tenant's Abandonment*, 34 Real Prop. Prob. & Tr. J. 721, 730 (2000).

52. *See id.*; Dawn R. Barker, Note, *Commercial Landlords' Duty*

Upon Tenants' Abandonment — To Mitigate?, 20 Iowa J. Corp. L. 627, 645 (1995). Under the common law no-mitigation rule, the landlord may simply do nothing and collect rent while the leased premises remain vacant. Davis, *supra* note 9, at 1297. As long as the landlord does not take action affecting the tenant's right to possess the property, he is assured full recovery. *Id.* But by allowing the landlord to sit idle, and the property to remain vacant, "the general public ultimately suffers the repercussions of this inefficiency by experiencing a diminution in available private resources to replace the 'lost' property." *Id*.

53. Barker, *supra* note 52, at 646.

54. Lucarelli, *supra* note 16, at 438.

55. Barker, *supra* note 52, at 646.

56. *See* Davis, *supra* note 9, at 1301; *Austin Hill Country*, 948 S.W.2d at 299. The Texas Supreme Court required the landlord to use "objectively reasonable" efforts to fill the premises, but stressed that this duty is not absolute. *Austin Hill Country*, 948 S.W.2d at 299. With this vague standard, the court set forth general guidelines for future efforts to be considered against, but failed to provide any specific examples of actions that might qualify. *Id*.

57. Davis, *supra* note 9, at 1301

58. *See infra* Part V.C.2; *see also, e.g.,* Christopher Vaeth, *Landlord's Duty, On Tenant's Failure to Occupy, or Abandonment of, Premises, to Mitigate Damages by Accepting or Procuring Another Tenant*, 75 A.L.R. 5th 1 (2005).

59. Perillo, *supra* note 33, §14.15, at 585.

60. Williston, *supra* note 6, §64:27, at 198.

61. *Id.* at §64:27, at 193.

62. Perillo, *supra* note 33, §14.15, at 585. Many rules explore the reasonableness of specific actions. *Id*.

63. *Id*.

64. Dennison, *supra* note 31, at *17. *See also Dushoff v. The Phoenix Co.*, 528 P.2d 637, 641 (Ariz. Ct. App. 1974) (stating that reasonableness is determined by an examination of the "totality of circumstances giving due regard to the efforts of the landlord in renting the abandoned premises, and the number of units he has for rent").

65. *See* Flynn, *supra* note 51, at 755. Other jurisdictions use the alternative standard of "reasonable diligence," but each wording is aimed at the same objective. *Id*.

66. Only a limited number of Texas cases have even indirectly addressed this question. *See infra* Part V.C.2.

67. Dennison, *supra* note 31, at *17.

68. *Id.*

69. *See id.* Dennison's article provides an in-depth analysis of the sufficiency of each of these efforts, as well as analysis of additional mitigation efforts. *See id.* For purposes of this Comment, individual analysis of specific mitigation efforts is not necessary. I instead hope to demonstrate merely that this area of law remains undeveloped, and that analysis is often based solely on reason and logic. The ambiguity in this area serves as the underlying basis for this Comment's investigation into the application and balancing of the duty to mitigate with the seemingly contrary principle of lost-volume damages.

70. *See* Marianne M. Jennings, *From the Courts*, 26 Real Est. L.J. 294, 300 (1998). Must the landlord do more than advertise? *Id.* Must the landlord hire a leasing agent? *Id.* If the abandoning tenant brings a new tenant to the landlord, must the landlord accept the new tenant or is the landlord permitting some discretionary screening? *Id.* What type of flexibility does a landlord have in adjusting the new rental fee? *Id.* How much does the landlord have to spend to mitigate? *Id.*

Most sources conclude that each case must be decided upon its own facts and that no procedure can be formulated to effectively and methodically answer each specific inquiry. *See, e.g.,* Dennison, *supra* note 31, at *17-22. Interestingly, nothing I could find has been written attempting to quantify the economic burden that must be shouldered by the landlord to satisfy the duty to mitigate – specifically, how much should the landlord be required to spend in mitigation?

71. Williston, *supra* note 6, §64:27, at 195. The Colorado common law, for one, holds that a party under a duty to mitigate damages it not required to undertake extraordinary measures or make expenditures beyond his or her financial means. William S. Silverman, *The Commercial Landlord's Duty to Mitigate Damages*, 21 Colo. Law. Rev. 1401, 1402 (1992).

72. *See* Jennings, *supra* note 70, at 300.

73. Williston, *supra* note 6, §64:28, at 200.

74. *Id.*

75. *See* John M. Breen, *The Lost Volume Seller and Lost Profits Under U.C.C. 2-708(2): A Conceptual and Liguistic Critique,* 50 U. Miami L. Rev. 779, 793 (1996).

76. *See* U.C.C. §§2-708, 1-106 (2004).

77. Tex. Bus. & Com. Code Ann. §2.708 (Tex. UCC) (Vernon Supp. 1986).

78. *Stewart & Stevenson Services, Inc. v. Enserve, Inc.*, 719 S.W.2d 337, 343 (Tex. App.—Houston [14th Dist.] 1986, no writ).

79. Tex. Bus. & Com. Code Ann. §305(a). *See also Fertico Belgium S.A. v. Phosphate Chemicals Export Assoc.*, 70 N.Y.2d 76, 84 (N.Y. 1987) (applying Uniform Commercial Code § 1-106 to New York law).

80. *See Fertico Belgium S.A.*, 70 N.Y.2d at 88 (dissent, J. Titone).

81. Williston, supra note 6, §64:28, at 202.

82. *Fertico Belgium*, 70 N.Y.2d at 87. *See also Krafsur v. UOP* (*In re El Paso Refinery, L.P.*), 196 B.R. 58 (Bankr. W.D. Tex. 1996) (demanding that the seller be able to demonstrate that it could have made a "second sale"); *R.E. Davis Chem. Corp. v. Diasonics, Inc.*, No. 85 C 4636, 1986 U.S. Dist. LEXIS 24187 (N.D. Illinois 1986) (stating that the lost-volume-seller theory assumes that most sellers have a virtually unlimited capacity of goods to sell to potential buyers).

83. Williston, *supra* note 6, §64:28, at 202. *See also* Breen, *supra* note 75, at 794 (arguing that the seller must demonstrate the "profitability of the alleged volume of sales"). An extra sale is not always profitable. *Id.* Frequently, an increase in the number of units produced by a manufacturer or sold by a retailer will result in increased marginal costs. *Id.* The point at which the cost of producing or selling one additional unit of goods equals the amount of income generated by that one additional unit represents the optimal point at which the seller should seek to operate. *Id.* Any sales made beyond this point will not be profitable. *Id. See also* Theoretical Postscript, note 7, at 714-719 (providing an economic argument for determining the optimal level of output, and reasoning that even one sale over this optimal amount will reduce the business's total profits below a normal rate of return).

See also John Hackley, Note, *UCC Section 2-714(1) and the Lost-Volume Theory: A New Remedy for Middlemen?*, 77 Ky. L.J. 189, 193 (1989), which states that these provisions provide a practical framework for the courts to adjudicate lost-volume claims.

84. *Lone Star Ford, Inc. v. McOrmick*, 838 S.W.2d 734, 740 (Tex. App.—Houston [1st Dist.] 1992, no writ.); *see generally Malone v. Carl Kisabeth Co.*, 726 S.W. 188 (Tex. App.—Fort Worth 1987, no writ.). The Texas Supreme Court has not defined "lost-volume seller."

85. *See Lone Star Ford*, 838 S.W.2d at 740-41.

86. *See generally id.*

87. *See, e.g.,* Javins v. First Nat'l Realty Corp., 428 F.2d 1071, 1074 (D.C. Cir. 1970) ("When American city dwellers . . . seek 'shelter' today, …they seek a well known package of goods and services – a package which includes not merely walls and ceilings, but also adequate heat, light and ventilation, serviceable plumbing facilities, secure windows and doors, proper sanitation, and proper maintenance."); Green v. Superior Court, 517 P.2d 1168, 1175 (Cal. 1974) ("[T]he modern urban tenant is in the same position as any other normal consumer of goods."); Kline v. Burns, 276 A.2d 248, 251 (N.H. 1971) ("The importance of a lease of an apartment today is not to create a tenurial relationship between the parties, but rather, to arrange the leasing of a habitable dwelling."); Marini v. Ireland, 265 A.2d 526, 532-33 (N.J. 1970) (*citing* 1 American Law of Property (1952), §3.78 p. 347). ("The guidelines employed to construe contracts have been modernly applied to the construction of leases."); *Riverview Realty Co. v. Perosio, 350 A.2d 517, 519 (N.J. Super. Ct. App. Div. 1976) (quoting* 57 E. 54 Realty Corp. v. Gay Nineties Rlty Corp., 335 N.Y.S. 2d at 873-74.) ("Leases are no longer conveyances of space for a stated period; today they partake of service contracts as much as of rental contracts. They call for mutual obligations; they differ little, if at all, from other agreements. In modern times, rules of law applicable to other agreements should also apply to leases.").

88. *Javins*, 428 F.2d at 1075. One commentator reasons that leases should be treated like other contracts to correct inequities due to bargaining imperfections. Alex M. Johnson, *Correctly Interpreting Long-Term Leases Pursuant to Modern Contract Law: Toward a Theory of Relational Leases*, 74 Va. L. Rev. 751 (1988).

89. *See* Lucarelli, *supra* note 16, at n53.

90. *See supra* Part II; *Riverview Realty*, 350 A.2d at 519 (quoting 57 E 54 Realty, 335 N.Y.S. 2d 623 at 873-74).

91. Lucarelli, *supra* note 16, at 435. *See also* Brown, *supra* note 15, at 125, stating that "if 'contract' rather than 'conveyance' principles control the essential nature and duties of a landlord, then basic contract principles should also govern breach."

92. *See* cases cited *supra* note 87.

93. *See supra* Part V.A.

94. *See* cases cited *supra* note 75.

95. Neri v. Retail Marine Corp., 30 N.Y.2d 393, at 395.

96. *Id.* at 396.

97. *Id.*

98. *Id.*

99. *Id.*

100. *Id.* at 400.

101. *But see* U.C.C. §2A-103(n), defining goods as "all things that are movable at the time of identification to a lease contract or that are fixtures. The term includes future goods [and] specially manufactured goods . . . . The term does not include information, the money in which the price is to be paid, investment securities under Article 8, or choses in action." *Id.*

102. *See* Victor P. Goldberg, *An Economic Analysis of the Lost-Volume Retail Seller*, 57 S. Cal. L. Rev. 283, 289 (1984).

103. *See* U.C.C. §2A-103(n).

104. *See supra* Part II. *See generally* Smith, *supra* note 10, at 555-57; Davis, *supra* note 9, at 1281-86.

105. Davidow, 747 S.W.2d at 377; Lucarelli, *supra* note 16, at 427.

106. Lucarelli, *supra* note 16, at 427-28.

107. Williston, *supra* note 6, §64:28, at 202.

108. *Id.*

109. *See* Davis, *supra* note 9, at 1305 ("The simplest explanation for this anomaly is that residential lease agreements typically involve significantly smaller rental payments than commercial leases. Consequently, residential lease agreements are more likely to settle or, present such substantial legal fees and costs on appeal that they are not profitable to pursue.").

110. Brown, *supra* note 15, at 133.

111. *Id.*

112. *Id.*

113. *See infra* Part V.C.3.

114. *See, e.g.,* Cash America Int'l, Inc. v. Hampton Place, Inc., 955 S.W.2d 459, 461 (Tex. App.—Fort Worth 1997, no pet.); Cole Chemical & Distributing, Inc. v. Gowing, No. 14-03-01092-CV, 2005 Tex. App. LEXIS 2109, *18 (Tex. App.—Houston [14th Dist.] 2005, no pet. h.).

115. *See Cash America*, 955 S.W.2d at 461; *Cole Chemical*, 2005 Tex. App. LEXIS 2109, at *18.

116. Regency Realty Corp. v. The Carriage Shop, Inc., No. 05-00-01763-CV, 2002 Tex. App. LEXIS 1623 (Tex. App.—Dallas 2002) (unpublished opinion). Here, the landlord had entered into negotiations with another potential tenant about possibly renting the abandoned space. *Id.* at *7. During these negotiations, other prospective tenants inquired about the space, but they were told the space was not available because of the negotiations that were already ongoing. *Id.* But because the landlord had contracted that it would have no duty to mitigate damages, these actions could not constitute accepting or assuming a duty to mitigate and were thus irrelevant to the damage inquiry. *Id.*

117. Unfortunately, the court did not offer any explanation on how it would have decided this issue had the parties not contracted around the mitigation duty. *See generally id.*

118. Added by Acts 1997, 75th Leg., ch. 1205, § 8, eff. Sept. 1, 1997.

119. *Cash America*, 955 S.W.2d at 461. In this case, the commercial tenant abandoned the premises one year before the end of the lease. *Id.* The landlord did not list the property for lease with a commercial broker, but instead placed a sign in the window of the premises for one year and ran some newspaper ads. *Id.*

120. *Cole Chemical*, 2005 Tex. App. LEXIS 2109, at *18.

121. *Id.* at *1.

122. *Id.* at *2.

123. *Id.*

124. *Id.*

125. *Id.* at *10.

126. *Id.*

127. *Id.* at *1-2.

128. *Id.* at *18.

129. *Id.* at *4-12.

130. *Id.* at *18.

131. *See, e.g.,* ME. REV. STAT. ANN. tit. 14, §6010-A(2) (West Supp. 1998); WIS. STAT. ANN. §704.29(2) (West Supp. 1998).

132. O'Brien v. Black, 648 A.2d 1374, 1377 (Vt. 1994) (citing Danpart Assocs. v. Somersville Mills Sales Room, Inc., 438 A.2d 708, 710 (Conn. 1980)).

133. *See* Flynn, *supra* note 51, at 762.

Maine's statute states: "If 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." ME. REV. STAT. ANN. tit. 14, §6010-A(2).

Wisconsin's statute similarly reads, in part: "If the landlord has other similar premises for rent and receives an offer from a prospective tenant not obtained by the defendant, it is reasonable for the landlord to rent the other premises for the landlord's own account in preference to those vacated by the defaulting tenant." WIS. STAT. ANN. §704.29(2).

134. Flynn, *supra* note 50, at 762 (paraphrasing FLA. STAT.

ANN. §83.595(2) (West Supp. 1997). The Florida statute states: "Good faith in attempting to relet the premises . . . does not require the landlord to give a preference in leasing the premises over other vacant dwelling units that the landlord owns or has the responsibility to rent." FLA. STAT. ANN. § 83.595(2).

135. *See, e.g.,* Shank-Jewella v. Diamond Galler, 535 So. 2d 1207 (La. Ct. App. 1988); Marco Kona Warehouse v. Sharmilo, Inc., 768 P.2d 247 (Haw. App. 1989).

136. Flynn, *supra* note 51, at 762 (referring to Brywood Ltd. Partners, L.P. v. H.T.G., Inc., 866 S.W.2d 903 (Mo. Ct. App. 1993) (determining that the landlord has no duty to subdivide abandoned premises into smaller units to mitigate damages)).

137. Flynn, *supra* note 51, at 762; *Shank-Jewella*, 535 So. 2d at 1207.

138. *Shank-Jewella*, 535 So. 2d at 1210.

139. *Id.* at 1210-11.

140. *Id.* at 1212-13.

141. Flynn, *supra* note 51, at 762 (referring to *Marco Kona Warehouse*, 768 P.2d at 247).

142. *Marco Kona*, 768 P.2d at 249; *see also* Flynn, *supra* note 51, at 763.

143. *Marco Kona*, 768 P.2d at 249; *see also* Flynn, *supra* note 51, at 763.

144. *Marco Kona*, 768 P.2d at 249; *see also* Flynn, *supra* note 51, at 763.

145. *Marco Kona*, 768 P.2d at 249; *see also* Flynn, *supra* note 51, at 763.

146. *Marco Kona*, 768 P.2d at 249; *see also* Flynn, *supra* note 51, at 763.

147. *Marco Kona*, 768 P.2d at 249; *see also* Flynn, *supra* note 51, at 763.

148. *Marco Kona*, 768 P.2d at 248; *see also* Flynn, *supra* note 51, at 763.

149. Flynn, *supra* note 51, at 763.

150. *Marco Kona*, 768 P.2d at 255.

151. Flynn, *supra* note 51, at 763.

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

153. *Id*.

154. *Id.* The two cases are Sommer v. Kridel and Riverview Realty Co. v. Perosio, 350 A.2d at 517.

155. *Sommer,* 378 A.2d. at 769.

156. *Id*.

157. *Id*.

158. *Id*.

159. *Id.*

160. *Id.* at 770.

161. *Id.*

162. *Id*.

163. *Id*. at 772.

164. *Id.* at 773.

165. *Id.*

166. *Id.* at 774.

167. *Id*. at 772.

168. *See* Morris G. Shanker, *The Case for a Literal Reading of UCC Section 2-708(2) (One Profit for the Reseller)*, 24 Case W. Res. L. Rev. 697 (1973). Shanker argues that the lost-volume principle undermines the importance of the duty to mitigate damages. *Id*. at 701-03. He reasons that by reselling goods to a subsequent purchaser, the original buyer is merely exercising his right to mitigate damages. *Id*. But under the theory of the lost-volume seller, the original buyer still caused the seller to lose additional profit that would have been made from committing both sales. *Id*. Thus, the seller's efforts at mitigation are futile as the breaching buyer has to pay the seller's lost profit anyway. *Id*. Shanker's conclusion is based upon his premise that, because most sellers have a supply greater than demand, nearly every seller qualifies as a lost-volume seller. *See* Daniel W. Matthews, Comment, *Should The Doctrine of Lost Volume Seller Be Retained? A Response to Professor Breen*, 51 U. Miami L. Rev. 1195, 1213 (1997) (summarizing Shanker at 700-01). Therefore, nearly every breaching buyer is left with no hope of mitigation. *Id*. In Shanker's opinion then, the lost-volume principle destroys the duty to mitigate. *Id*. But Shanker also predicted that a court faced with this scenario would not reach this result. Breen, *supra* note 75, at 820.. He believed that a court "might well rule that [the original buyer,] having assigned its rights to [the subsequent purchaser,] . . . has no further damage responsibility to [the seller]." *Id*

But see id. at 821, contending that if the lost-volume-seller concept is accepted, the "impossibility of mitigation through resale necessarily follows," and thus Shanker's argument is irrelevant.

Compare *Matthews* at 1214, arguing that Shanker's analysis is misguided:

> "To claim that the lost volume concept is inconsistent with mitigation is to contenance a lack of understanding when mitigation is to be applicable . . . [A]s a general rule, the nonbreaching party has a duty to mitigate its damages by entering into a similar contract. However, the important qualification to this rule is that if the subsequent contract would have been made regardless of the breach, then that contract is not taken into consideration to minimize damages . . . . The philosophical heart of the lost volume theory is that the seller would have generated a second sale irrespective of the buyer's breach. It follows that the lost volume seller cannot possibly mitigate damages."

Id.

169. Smith, *supra* note 10, at 562-63.

170. *See supra* Part V.C.3.

171. *See supra* Part V.C.2.

172. *See supra* Part V.C.2-3.

173. *See supra* Part III.A.

174. Goldberg, *supra* note 102, at 295-96.

175. *Id*. at 291.

176. *See* Robert E. Scott, *The Case for Market Damages: Revisiting the Lost Profits Puzzle*, 57 U. Chi. L. Rev. 1155, 1175 (1990).

177. *Id*. at 1182.

178. *See id*. at 1182.

179. *See Theoretical Postscript, supra* note 8, at 728.

180. *Id*.

181. Goldberg, *supra* note 102, at 292-93.

182. *Id*. at 293.

183. Scott, *supra* note 176, at 1167.

184. Goldberg, *supra* note 102, at 294.

185. *See id*. at 294-97.

186. *Id*. at 294.

187. See *id.* at 294-97 for a detailed economic analysis of the potential affects of shifting liability.

188. *Id*. at 296.

189. *See* Scott, *supra* note 176, at 1179.

190. *See* i*d*. at 1179-80.

191. *See* i*d*. at 1180.

192. *Id*.

193. *Id*.

194. *Id*.

195. *Id*. at 1192.

196. *See* Breen, *supra* note 75, at 785, 827.

197. Many difficulties exist when trying to estimate the potential damages caused by a breaching tenant when multiple available units exist. For example, the Texas Apartment Association ("TAA") lease provides that a breaching tenant is liable for a re-letting charge not to exceed 85% of one month's rent as well as any lost rents incurred by the landlord and any other charges due under the lease. *See* Texas Apartment Association, Inc., Residential Lease Contract, at paragraph 11 (Oct. 2005). The lease also provides that the landlord has a duty to mitigate damages, but it does not address the multiple-vacancy scenario and the lost-volume principle. *Id.* at paragraph 32. *See also* Texas Association of Realtors, Inc., Residential Lease, at paragraph 28 (Oct. 2003). This Comment's proposed legislative solution would preempt the TAA and Texas Realtors Association lease provisions, thus eliminating the re-let fee charge, and limit the landlord's recovery to one rental period's rent. The trade-off is certainty and simplicity when the landlord has multiple vacancies.

198. *See generally* Goldberg, *supra* note 102, at 298.

199. *See id*. at 296.

200. *See generally* Mashian, *supra* note 7, at 14 (emphasizing the expensive and disruptive impact relocation has for retail and manufacturing businesses). This is also certainly true for residential tenants.

201. *Id*.

202. *See generally* Thomas W. Merrill, *Incomplete Compensation for Takings*, 11 N.Y.U. Envtl. L.J. 110, 119 (2002).

203. That is, assuming Texas courts hold that the landlord's right to profit supersedes their duty to mitigate.

204. The term "double rent" refers to the combination of rents for which a breaching tenant is liable under the current system after abandoning an apartment with multiple vacancies. The tenant will be liable not only for rent on the tenant's new dwelling unit but also for the rent accruing under the previous lease.

205. On the other hand, the Legislature should be wary about applying this analysis to commercial tenants. Commercial leases, unlike residential leases, are generally negotiated at arms length with attorneys often involved. *See* Victor P. Goldberg et al., *Bargaining in the Shadow of Eminent Domain: Valuing and Apportioning Condemnation Awards Between Landlord and Tenant*, 34 UCLA L. Rev. 1083, 1091 (1987). Residential leases are seldom the products of arms length bargaining; rather, it is often a "take it or leave it" situation. *See* Alex M. Johnson, Jr., *Correctly Interpreting Long-Term Leases Pursuant to Modern Contract Law: Toward a Theory of Relational Leases*, 74 Va. L. Rev. 751, 755 (1988). Thus, commercial tenants are not only better aware of the potential consequences at the time of signing a lease, but they generally have the opportunity to negotiate the terms of the lease. Applying the lost-volume principle to commercial tenancies therefore seems appropriate. Additionally, because of the significantly greater dollar amounts involved in commercial tenancies, eliminating actual damages might unfairly result in significant economic losses for commercial landlords.

206. The Texas legislature may enact both liquidated damages statutes and penal statutes. *See* Flores v. Millenium Interests, Ltd., 2005 Tex. LEXIS 733, *10-11 (Tex. 2005) (explaining that liquidated damages provisions have been used in several Texas statutes when referring to a penalty). Thus, regardless of whether this legislation is viewed as liquidated damages or a penalty, the Legislature can enact it.