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INTRODUCTION

Section 9-213.1 of the Illinois Code of Civil Procedure, which became effective on January 1, 1984, imposes an affirmative duty upon landlords in Illinois to take reasonable measures to minimize losses caused by a tenant’s breach of a lease. This legal duty is designed to encourage the most efficient and productive use of land. Landlords can no longer collect damages from an abandoning tenant without making a reasonable effort to find a new tenant for the property.

Prior to the enactment of Section 9-213.1, no Illinois statute addressed a landlord’s duty to mitigate damages. Instead, Illinois courts inconsistently applied the mitigation of damages doctrine when a tenant abandoned leased

2. See infra note 6 and accompanying text.
3. Under a duty to mitigate damages, landlords must diligently seek replacements for defaulting tenants. The Washington Supreme Court remarked on the advantageous effect of the landlord’s duty:
   "It is not in accordance with public policy to lay down a rule whereby the landlord would be required to permit the premises to remain idle over a long term and thereafter recover damages for the full amount of the rentals stipulated for the term, because it is better for the parties to the agreement as well as to the public, to have property put to some beneficial use."
   Martin v. Siegly, 123 Wash. 683, 687-88, 212 P. 1057, 1059 (1923). See also Mar-Son, Inc. v. Terwaho Enters., Inc., 259 N.W.2d 289, 291 (N.D. 1977) (landlord’s duty to mitigate damages based on policy that property be put to productive use); C. MCCORMICK, HANDBOOK ON THE LAW OF DAMAGES § 33, at 127 (1935) (duty to mitigate damages is designed to “protect and conserve the economic welfare and prosperity of the whole community”); McCormick, The Rights of a Landlord Upon Abandonment of the Premises by the Tenant, 23 MICH. L. REV. 211, 211-12 (1925) (if landlords must replace defaulting tenants to recover damages, landlords will keep property in constant use); Note, Landlord and Tenant—Mitigation of Damages—Landlord Must Plead and Prove Actual Efforts to Relet in Order to Recover Rent for the Balance of the Term of a Wrongfully Abandoning Tenant—Vawter v. McKissick, 159 N.W.2d 538 (Iowa 1968), 45 WASH. L. REV. 218, 224 (1970) (“welfare and prosperity” of community is enhanced by the landlord’s duty to replace defaulting tenants).

The only statute that dealt with tenant abandonment in Illinois was one that permitted the landlord to seize upon grain or other crops growing on rented land after an abandonment. See ILL. REV. STAT. ch. 110, § 9-318 (1983).
The Illinois legislature promulgated Section 9-213.1 to clarify the landlord's duty to mitigate damages. In its entirety, the statute provides:

After the effective date of this amendatory Act of 1983, a landlord or his agent shall take reasonable measures to mitigate the damages recoverable against a defaulting lessee.

With passage of Section 9-213.1, Illinois joined the national trend in property law of requiring landlords to mitigate damages arising from a tenant's abandonment. Despite the legislature's efforts to push Illinois law in this direction, however, the statute fails to adequately address many aspects of the mitigation issue.

This Note analyzes the following questions left unaddressed by the statute:

1. What actions constitute an exercise of "reasonable measures" to mitigate damages under the new statute?
2. Which party must bear the burden of proving whether "reasonable measures" to mitigate have been taken?
3. Can the landlord's duty to mitigate be waived by the parties in the lease?
4. What factors will be considered in calculating the damage award?
5. Does the new statute apply to both commercial and residential leases?

In order to suggest answers to these questions, this Note examines the Illinois House of Representative's debate on Section 9-213.1, prior Illinois court decisions, and the statutes and decisions of other jurisdictions that have

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6. ILL. REV. STAT. ch. 110, § 9-213.1 (1983). Generally, in the absence of a clear intent to apply an amendatory act retroactively, it will be applied only prospectively. See Fireside Chrysler-Plymouth Mazda v. Chrysler Corp., 129 Ill. App. 3d 575, 581, 472 N.E.2d 861, 865 (1st Dist. 1984). Accordingly, due to the absence of any provision to the contrary contained in § 9-213.1, it is likely that Illinois courts will apply the statute only to leases entered into after § 9-213.1's effective date. But see Sclar, Landlord's Remedies When Tenant Abandons the Premises—Illinois Requires Landlords to Mitigate Damages, 13 REAL EST. L.J. 270, 276 (1985) (suggesting that § 9-213.1 will be applied retroactively to cover "leases in existence as of its effective date"). The Illinois legislature could have resolved this problem by including a provision in § 9-213.1 similar to that which appears in the Uniform Residential Landlord-Tenant Act: "This act shall become effective on January 1, 1984. It applies to rental agreements entered into or extended or renewed on or after that date." UNIFORM RESIDENTIAL LANDLORD-TENANT ACT § 6-101 (1972).

imposed a duty on the landlord to mitigate damages upon an abandonment. The Note concludes by proposing an amendment to the current statute.

I. GENERAL BACKGROUND

The doctrine of "avoidable consequences" requires that plaintiffs make reasonable efforts to minimize losses caused by the breach of a contract. Aggrieved parties are denied recovery under this doctrine for damages that arise from their failure to mitigate. The rule derives from a principal doctrine of contract remedies: that aggrieved parties should be placed in the same position that they would have enjoyed had the contract been performed.

Rules of contract law have generally not been applied to leases under the theory that a leasehold represents a conveyance to the tenant of real property. Formerly, landlords satisfied their obligations to tenants merely by transferring the leasehold to the tenant. The transfer also bound the tenant for the term of the lease through the concept of privity of estate. The tenant was considered the exclusive possessor of a non-freehold interest in land. Under this common law fiction, the tenant's choice to abandon the rental premises did not concern the landlord.


9. Hicks, supra note 8, at 515 (contract law denies recovery for avoidable damages).


11. See, e.g., In re Dant & Dant, 39 F. Supp. 753, 758 (W.D. Ky. 1941) (rule in contract law that requires mitigation of damages not applicable to leases, since a lease involved the purchase of real estate); Sommer v. Kridel, 74 N.J. 446, 453, 378 A.2d 767, 771 (1977) (absence of duty to mitigate in landlord-tenant law is rooted in common law principle of property law that equates a lease with a transfer of an interest in property out of owner's estate); 1 American Law of Property § 3.17, at 212 (A. Casner ed. 1952); 2 M. Friedman, Friedman on Leases § 16.3, at 845-46 (2d ed. 1983); 2 R. Powell & P. Rohan, Powell on Real Property § 221(1), at 179 (1983) (hereinafter cited as R. Powell); Bradbrook, supra note 8, at 15; Weissenberger, supra note 7, at 5; Recent Case, Landlord and Tenant—Right of Lessor to Refuse any Subtenant When Lease Prohibits Transfer Without Consent, 41 Minn. L. Rev. 355, 356 (1957).

12. Recent Case, supra note 11, at 356; cf. 1 American Law of Property, supra note 11, § 3.103, at 397 (tenant is not relieved of duty to pay rent even if leased premises are destroyed, because a lease is a conveyance of land and the tenant received estate upon execution of the lease).


14. Professor Cribbet described the effect of this common law rule:
As a result of the distinction between leases and other types of contracts, courts treated the duties of a breaching party to a lease differently from a breaching party to an ordinary contract. Several modern courts, however, reject the common law distinction between a lease and a contract. The current trend is toward recognizing tenants' reasonable expectations, and requiring landlords to mitigate damages in both residential and commercial leases.

According to the so-called majority rule for mitigation of damages in landlord-tenant law, a landlord has no obligation to mitigate damages when a tenant defaults on a lease. The landlord can remain idle and continue to

It is a basic principle of contract law that ... the non-breaching party ... must mitigate or lessen damages .... But the lease was also a conveyance of real property and, since the tenant owned a non-freehold estate, it was no concern of the lessor if he chose not to occupy it, i.e., the landlord did not need to mitigate damages but could fold his hands and hold tenant for rent for the full term.

J. CRIBBET, supra note 7, at 190.

15. For an analysis of the distinction between a lease and an agreement for a lease or an ordinary contract, see 1 AMERICAN LAW OF PROPERTY, supra note 11, § 3.17, at 212-13, and 2 M. FRIEDMAN, supra note 11, § 16.3, at 845.


17. One court discussed tenants' rights in these terms:

[T]he relationship of landlord and tenant suggests further compelling reasons for the law's protection of the tenant's legitimate expectations of quality. The inequality in bargaining power between landlord and tenant has been well documented. Tenants have very little leverage to enforce demands for better housing.


18. See Sommer v. Kridel, 74 N.J. 446, 453, 378 A.2d 767, 770-71 (1977); see also Weissenberger, supra note 7, at 10 (recognizing growing support for landlord duty of mitigation).

19. Gruman v. Investors Diversified Serv., 247 Minn. 502, 505, 78 N.W.2d 377, 379 (1956); 1 AMERICAN LAW OF PROPERTY, supra note 11, § 3.99, at 392; 3 H. TIFFANY, LAW OF REAL PROPERTY § 902, at 560 (3d ed. 1939); Groll, supra note 8, at 312; Hicks, supra note 8, at 516; Weissenberger, supra note 7, at 3.

The Restatement (Second) of Property espouses the common law majority rule on landlord mitigation:

[If] the tenant abandons the leased property, the landlord is under no duty to attempt to relet the leased property for the balance of the term of the lease to mitigate the tenant's liability under the lease, including his liability for rent ....

RESTATEMENT (SECOND) OF PROPERTY § 12.1(3) (1977). The comments that interpret § 12.1 advise that tenants would exploit a landlord's duty to mitigate by abandoning property and
collect full rent from the abandoning tenant.\textsuperscript{20} Approximately nineteen jurisdictions presently follow the majority rule.\textsuperscript{21} The Supreme Judicial Court of Maine recently reaffirmed its acceptance of the majority rule in \textit{Dahl} v. \textit{Comber}.\textsuperscript{22} In \textit{Dahl}, the court held that, absent an agreement to the contrary, landlords have no duty to mitigate their damages when tenants either default in their payment of rent or abandon the premises.\textsuperscript{23}

Commentators and courts have advanced several arguments in support of the majority rule. The first argument is that in an abandonment the tenant is the wrongdoer and should therefore not be permitted to create an affirmative obligation on the landlord to mitigate damages. This argument, however, is inconsistent with the doctrine of contract law that requires an injured party to mitigate after the wrongful party has breached.\textsuperscript{24} For leaving landlords to fill their vacancies. \textit{Id.} \textsection 12.1, comment i (1977). Even when landlords have the duty to mitigate, however, tenants remain liable for the difference between the rent due under their leases and the rent paid by the tenants who replace them. Although tenants have a theoretical incentive to abandon in view of the landlord's duty to mitigate, this incentive is offset by the tenant's prospective liabilities. See \textit{Note}, \textit{supra} note 3, at 225.

The so-called majority rule is, in all probability, no longer actually followed by a majority of jurisdictions. See \textit{infra} note 43 and accompanying text.

20. \textit{American Law of Property}, \textit{supra} note 11, \textsection 3.99, at 392 (landlords may leave abandoned property vacant, while they retain the right to collect full rent from defaulting tenants); 2 M. \textit{Friedman}, \textit{supra} note 11, \textsection 16.3, at 842 (to the same effect).


22. 444 A.2d 392, 394-95 (Me. 1982). The tenants leased an industrial building for a term scheduled to run from August 1, 1978 to July 31, 1983. The tenants did not pay their rent during April, May, and June of 1979. On August 16, 1979, the landlord obtained a writ of possession for the leased premises. The landlord then found a substitute tenant who occupied the premises until February 1, 1980. The landlord brought an action against the original tenant for rent and damages due under the original lease. As a defense, the tenants asserted that the landlord had accepted their surrender of the lease by reletting the premises; the landlord replied that his efforts to relet the premises were merely an effort to mitigate damages. The Supreme Judicial Court of Maine affirmed the trial court's opinion in favor of the landlord.

23. \textit{Id.} at 394 n.3.


25. See generally A. \textit{Corbin, Corbin on Contracts} § 1039, at 243 n.4 (1964) (an employee who is wrongfully discharged has duty to mitigate damages by seeking new employment).
instance, an employee who is wrongfully discharged has a duty to mitigate damages from the breach of an employment contract by accepting similar and available employment. A breach of a lease should be treated the same as the breach of a contract.

Another argument used in support of the majority rule is that tenants, who have a legal estate in their leased property for the lease term, should bear the legal responsibility for their decision to abandon. In other words, the landlord is not responsible for the tenant’s decision to abandon the leased property. This argument relies upon the common law doctrine that a lease represents the conveyance of an interest in real estate rather than an ordinary contract. The current trend in the law, however, is to disregard this fiction and treat leases like any other contracts.

A third argument that is advanced to support the majority rule is that landlords may be forced to lease their premises to unwanted tenants if they have a duty to mitigate. This argument presupposes that a lease is a personal arrangement, and that a landlord should not be compelled to enter into a personal relationship solely for the purpose of mitigation. A lease in modern times, however, is rarely a personal relationship. More commonly, the lease is a business contract between the landlord and tenant in which use of space or land is sold in exchange for the payment of rent.

A fourth reason propounded for the no-mitigation rule is based on equity. Many existing leases were prepared on the assumption that the landlord did

26. Wohl v. Yelen, 22 Ill. App. 2d 455, 464, 161 N.E.2d 339, 343 (1st Dist. 1959) (landlord’s duty to mitigate damages is analogous to discharged employee’s duty to find new work); A. CORBIN, supra note 25, § 1039, at 243 n.4; Groll, supra note 8, at 319.

27. The common law doctrines of property influence the majority rule; since a tenant owns an estate in the leased premises, it is not the landlord’s concern if the tenant decides to abandon. See Bernstein v. Seglin, 184 Neb. 673, 676, 171 N.W.2d 247, 250 (1969); Wright v. Bauman, 239 Or. 410, 413, 398 P.2d 119, 120 (1965); 2 M. FRIEDMAN, supra note 11, § 16.3 at 846; Hicks, supra note 8, at 516.

28. Sommer v. Kridel, 74 N.J. 446, 456-57, 378 A.2d 767, 772 (1977) (“antiquated real property concepts” that support majority rule are pure fiction in modern landlord-tenant law); Weissenberger, supra note 7, at 6-7 (to the same effect).

29. See supra note 16 and accompanying text.

30. See Wohl v. Yelen, 22 Ill. App. 2d 455, 464, 161 N.E.2d 339, 343 (1st Dist. 1959) (lessor, under duty to accept suitable subtenant, may be forced into unwanted “personal relationship”); Groll, supra note 8, at 319 (landlord should not be required to join undesired privity of estate). Contra Note, supra note 3, at 225 (lessor is not required to accept subtenants who are “financial risks” or who conduct a business forbidden by the terms of the lease).


32. See, e.g., Lefrak v. Lambert, 89 Misc. 2d 197, 201-02, 390 N.Y.S.2d 959, 963 (N.Y. Civ. Ct. 1976) (lease is, for landlord, no different than contract for a package of goods); Groll, supra note 8, at 320 (landlord-tenant relations are both personal and business-related); Bradbrook, supra note 8, at 19 (to the same effect).
not have a duty to mitigate damages.\textsuperscript{33} To impose a legal duty, it is argued, would effectively rewrite all of these leases. This argument is unpersuasive in light of the obvious remedy: the legal duty may be imposed only prospectively.\textsuperscript{34}

The final and perhaps strongest argument for the majority rule is that it helps landlords avoid the appearance of accepting the tenant’s surrender of leased premises. By reentering and reletting the abandoned premises, landlords may be deemed to have terminated the lease by accepting the tenant’s abandonment.\textsuperscript{35} Such reentering and reletting is a violation of the tenant’s leasehold estate.\textsuperscript{36} Landlords’ acts of accepting their tenants’ surrender, however, should be distinguished from landlords’ acts to mitigate damages on behalf of their defaulting tenants. This differentiation is a question of fact that can be made after an evaluation of circumstances surrounding a particular case.\textsuperscript{37} Most courts find that landlords accept a surrender by some “decisive, unequivocal act” that evinces their intent to terminate a lease.\textsuperscript{38} For instance, a landlord’s reletting of premises for a period beyond the term of the defaulting tenant’s lease may constitute an acceptance of a tenant’s surrender.\textsuperscript{39} In contrast, when the landlord accepts the keys to the premises,\textsuperscript{40}

\begin{footnotesize}
\textsuperscript{33} See Gruman v. Investors Diversified Serv., 247 Minn. 502, 509, 78 N.W.2d 377, 381 (1956); see also Hicks, supra note 8, at 517 (change in law would be inequitable to the landlords who relied on old rule); Weissenberger, supra note 7, at 6 (to impose a duty to mitigate might penalize landlords who relied on the majority rule while drafting the lease).

\textsuperscript{34} See supra note 6.

\textsuperscript{35} See Surety Realty Corp. v. Asmer, 249 S.C. 114, 119, 153 S.E.2d 125, 128 (1967); Bulkeley, supra note 5, at 591; Hicks, supra note 8, at 517; Note, supra note 3, at 226.

\textsuperscript{36} Groll, supra note 8, at 315; see also Grueninger Travel Serv., Inc. v. Lake County Trust Co., 413 N.E.2d 1034, 1038 (Ind. App. 1980) (acts by the landlord inconsistent with the continuation of the lease may constitute an acceptance of the tenant’s surrender).


\textsuperscript{39} Compare Wilson v. Ruhl, 277 Md. 607, 613, 356 A.2d 544, 547 (1976) (lessor may not recover brokerage expenses incurred during negotiation of new lease that extended beyond term of original lease; offer of extended terms constituted an acceptance of surrender) with Millison v. Clarke, 287 Md. 420, 426, 413 A.2d 198, 206 (1980) (reletting beyond original term not conclusive of acceptance of surrender; must look to landlord’s intent).

\textsuperscript{40} See Coffin v. Fowler, 483 P.2d 693, 695 (Alaska 1971) (landlord’s acceptance of keys, standing alone, is not an acceptance of a tenant’s obligations); Grueninger Travel Serv., Inc. v. Lake County Trust Co., 413 N.E.2d 1034, 1038 (Ind. App. 1980) (acceptance of keys alone is not an acceptance of surrender). For Illinois cases on this point, see West Side Auction House Co. v. Connecticut Mut. Life Ins., 186 Ill. 156, 161, 57 N.E. 389, 841 (1900), and Auto Supply Co. v. Scene-In-Action Corp., 340 Ill. 196, 204, 172 N.E.2d 35, 38-39 (1930).
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DEPAUL LAW REVIEW

places a "For Rent" sign on the property,\(^4\) or permits a tenant to occupy part of the leased premises,\(^4\) courts have not found an acceptance of surrender to have occurred.

The persuasiveness of the arguments against the no-mitigation rule has lead an increasing number of jurisdictions to treat leases like contracts and impose a duty on landlords to mitigate damages. One commentator has even concluded that the no-mitigation doctrine is no longer the true "majority rule" in the United States.\(^4\) Two policies in particular support the creation of a landlord's duty to mitigate. First, mitigation ensures the most efficient and productive use of land.\(^4\) Under the majority rule, a landlord may accumulate damages by not reletting abandoned premises.\(^4\) Under the mitigation doctrine, however, the public benefits because property is put to productive use.\(^4\) Second, landlords would be discouraged from aggravating their injuries when reasonable efforts to relet abandoned premises could have minimized their losses.\(^4\)

II. ILLINOIS LAW ON MITIGATION

A. Prior to Section 9-213.1

Before the recent enactment of section 9-213.1,\(^4\) no Illinois statute imposed a duty on landlords to mitigate damages caused by a tenant's default.\(^4\) Instead, inconsistent and confusing case law governed this area.\(^5\) The need

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42. See Harry Hines Medical Center, Ltd. v. Wilson, 656 S.W.2d 598, 601 (Tex. Ct. App. 1983) (landlord's acceptance of a partial occupation of abandoned premises was an effort to mitigate and not an acceptance of surrender).
43. Weissenberger, supra note 7, at 7.
44. See supra note 3 and accompanying text.
45. Hicks, supra note 8, at 518 (without duty to mitigate, landlord has incentive to leave his property "idle and unproductive").
47. See Wright v. Bauman, 398 P.2d 119, 121 (Or. 1965); see also C. McCORMICK, supra note 3, § 33, at 127 (rules for awarding damages should discourage self-induced economic loss); Hicks, supra note 8, at 518 (parties to contracts should be discouraged from "passively suffering economic loss").
48. See supra note 6.
49. See supra note 4 and accompanying text.
for legislation that would clearly set forth the Illinois position on mitigation was manifest.

The Illinois Supreme Court has not addressed the landlord's duty to mitigate damages since the controversial case of *West Side Auction House Co. v. Connecticut Mutual Life Insurance Co.*, which was decided in 1900. In *West Side*, the tenant abandoned the leased premises seven months prior to the expiration of the lease term. The landlord brought an action to recover the rent remaining under the lease plus accrued interest. The tenant argued that the landlord, who accepted the keys and placed a "For Rent" sign on the premises, accepted the tenant's surrender. The court rejected the tenant's arguments and stated that, "[u]pon the abandonment of the leased premises by the tenant it was the right and the duty of the landlord to take charge of the premises, preserve them from injury, and, if it could, re-rent them, thus reducing the damages for which the lessee was liable."

Subsequent to the *West Side* decision, Illinois appellate courts disagreed about whether the Supreme Court's language was binding authority or merely dicta. Three distinct lines of Illinois appellate court decisions resulted from the split of opinion, although two approaches have recently fallen into disuse. The first line of cases reflects the American majority rule; these cases impose no duty on the landlord to minimize damages caused by an abandonment. In *Hirsch v. Home Appliances, Inc.*, the First District Appellate Court held that a landlord did not have an obligation to relet premises that had been abandoned by a tenant. The *Hirsch* court avoided the problem of

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51. 186 Ill. 156, 57 N.E. 839 (1900).
52. *Id.* at 157, 57 N.E. at 839.
53. *Id.* at 157, 57 N.E. at 840.
54. *Id.* at 161, 57 N.E. at 841.
56. Other cases construed the supreme court's language as authority for an affirmative duty on a landlord to mitigate damages. See *Levy v. Burks*, 191 Ill. App. 478, 479 (1st Dist. 1915); *Contratto v. Star Brewery Co.*, 165 Ill. App. 507, 511 (4th Dist. 1911).
57. See, e.g., *Hirsch v. Home Appliances, Inc.*, 242 Ill. App. 418, 424 (1st Dist. 1926) (landlord has no obligation to exercise any diligence to relet abandoned premises); *Harmon v. Callahan*, 214 Ill. App. 104, 109 (1st Dist. 1919) (adhering to majority position unless lease specifically requires a landlord to relet); *Scanlan v. Hoerth*, 151 Ill. App. 582, 585-86 (1st Dist. 1909) (lessor under no legal obligation to relet); *Rau v. Baker*, 118 Ill. App. 150, 153 (1st Dist. 1905) (a wrongfully abandoning tenant may not impose a duty on a landlord to seek another tenant).
58. *Id.* at 424.
interpreting the *West Side* language by holding that the supreme court did not actually require a landlord to relet, but only allowed him to do so if he could. The *Hirsch* court based its decision on the premise that a tenant who unlawfully abandons rental property should not be able to impose an affirmative obligation on the landlord to relet.

A second line of Illinois Appellate Court decisions imposes a duty on landlords to minimize the injuries that result from a tenant's breach by reletting abandoned property. *Marling v. Allison,* which characterizes this line of cases, involved facts similar to the *Hirsch* case. The court nevertheless held that a landlord owed the tenant a duty to use reasonable diligence in minimizing the damages caused by the breach of the lease.

The most current and dominant line of Illinois Appellate Court cases imposes no general obligation on the landlord to mitigate damages, but requires the landlord to accept a suitable subtenant when one is

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59. See supra notes 51-54 and accompanying text.

60. The court, quoting from an earlier opinion, held:

While in the case of abandonment by the tenant the authorities are that the landlord may re-enter and re-rent, if he can, we know of no case in which it has been held that the landlord must, if he can, re-rent or lose his remedy against the lessee on the lease . . . .

242 Ill. App. at 425 (quoting Rau v. Baker, 118 Ill. App. 150, 153 (1st Dist. 1905)).

61. Id.

62. See, e.g., *Marling v. Allison,* 213 Ill. App. 224, 227 (1st Dist. 1919) (landlord owes tenant duty to use reasonable diligence to minimize loss); *Contratto v. Star Brewery Co.*, 165 Ill. App. 507, 511 (4th Dist. 1911) (landlord must try to reduce damages caused by defaulting tenant); *McCormick v. Loomis*, 165 Ill. App. 214, 216-17 (1st Dist. 1911) (landlord could recover agreed rent less amount realized from rerenting); *Hinde v. Madansky*, 161 Ill. App. 216, 220 (4th Dist. 1911) (landlord under obligation to rerent abandoned property); *Resser v. Corwin*, 72 Ill. App. 625, 629 (2d Dist. 1897) (landlords' damages in actions for breach of a lease are the rent owing under the former lease minus the rent that landlords could have received if they had relet their property in a reasonable amount of time).

63. 213 Ill. App. 224 (1st Dist. 1919).

64. In *Marling*, the landlord leased property to a tenant for a term of one year, beginning May 1, 1916, at $95 per month. According to the lease, the tenant was to give the landlord at least 60 days notice before vacating. On March 12, 1917, the tenant notified the landlord in writing that he would vacate the apartment on April 30, 1917. Because the notice was given fewer than 60 days before the expiration of the term, the landlord told the tenant that he would hold him liable for another year's rent. The tenant vacated on April 30, 1917 and the landlord brought an action for rent for May, June, and July of 1917.

65. Id. at 227 (citing *Woodbury v. Sparrell Print*, 198 Mass I, 84 N.E. 441 (1908)). For other First District cases that limit the duty imposed on the lessor in *Marling*, see West v. McNaughton, 211 Ill. App. 261 (1st Dist. 1918) (tenant's tender of a desirable subtenant not a defense in an action for rent) and *Consumers Market House v. Powers*, 192 Ill. App. 89, 90 (1st Dist. 1915) (sublessee not obligated to relet abandoned property to a new tenant for a different purpose than the original tenant).

66. One Illinois court held that a standard of reasonable commercial judgment should be used to evaluate the reasonableness of a lessor's actions in accepting or rejecting a replacement tenant. See *Reget v. Dempsey-Tegeler*, 70 Ill. App. 2d 32, 38, 216 N.E.2d 500, 503 (5th Dist.
offered. This position was set forth by the Third Division of the First Appellate District in *Scheinfeld v. Muntz T.V., Inc.* In *Scheinfeld*, the court held that a landlord’s duty to mitigate became effective when a defaulting tenant tendered a suitable replacement tenant. The presentation of a suitable subtenant was a “condition precedent” to the imposition of a duty to mitigate damages being placed upon a landlord. A landlord could not arbitrarily reject a suitable replacement tenant and continue to hold the original tenant liable for the entire rent in default. This approach has been adopted by the First District, the Fifth District, and, most recently, the Second and Fourth Districts.

**B. The Enactment of Section 9-213.1**

Until recently, Illinois law in the area of a landlord’s duty to mitigate damages was notably inconsistent. The Illinois General Assembly, appar-
ently dissatisfied with the drift toward the First District's quasi-mitigation rule, added Section 9-213.1 to the Illinois Code of Civil Procedure. Illinois thereby followed other states that have imposed a statutory duty of mitigation upon an aggrieved party in a lease situation. Section 9-213.1 establishes a uniform rule that landlords and their agents must take reasonable measures to mitigate the damages recoverable against a defaulting tenant. The statute commands Illinois courts to apply one rule of law in all suits for rent against abandoning tenants.

According to the Illinois House of Representatives debate, the General Assembly recognized that there was no valid distinction between a lease and a contract for the purpose of encouraging mitigation of damages. The distinction is rooted in the feudal view of a lease as an inviolable estate in land; landlords were not permitted to enter the leased property or to relet it during the term of the lease. The legislature also found, as a practical matter, that landlords almost always seek to reduce their losses when tenants default. Two further arguments support the General Assembly's position. First, even though a cause of action may exist against the tenant for the entire amount due under the lease, it benefits the landlord to have the

According to his analysis, the lessor has no general duty to mitigate damages when a tenant defaults on a lease. This rule is subject to three exceptions: (1) when the abandoning tenant tenders a suitable subtenant; (2) when a provision in the lease expressly places a duty on the landlord to mitigate; (3) when the landlord accepts the tenant's surrender. See Bulkeley, supra note 5, at 588-91.


78. See supra note 6 and accompanying text.


In all areas of contract law in this state, . . . except for the one that I'm going to mention, . . . the nonbreaching party has a duty . . . to take reasonable steps to try to reduce the damages against the party who is in default. That is true in every contract in Illinois . . . except . . . for [the] landlord-tenant contract, which we normally call leases. Through a throwback to old English common law, a landlord does not have to do anything to try to reduce the damages against a tenant in default. As a matter of fact, landlords do it anyway, even though they don't have to, because it's . . . crazy not to try to do something to reduce your damages . . . .

80. Id.

81. Id.
premises occupied in order to prevent vandalism and destruction. Second, a new tenant will pay for the cost of occupancy and save the landlord the expense of litigation. The legislature was primarily concerned with the potential for abuse under the prior Illinois law, since a landlord was not required to mitigate damages caused by a breach. The debates emphasized that vacant property was susceptible to damage because a landlord was not required to lease the premises after an abandonment.

Since landlords customarily mitigated their damages prior to the enactment of Section 9-213.1, the legislature did not consider the creation of a landlord's duty to mitigate damages to be a major change in Illinois law. Perhaps this attitude resulted in the brief and uninformative statutory language of Section 9-213.1. The legislature failed to address several issues that are latent in the mitigation rule.

III. Analysis of Section 9-213.1

Section 9-213.1 does not resolve the confusion in Illinois law about the landlord's duty to mitigate damages. There are five problems with the current language of Section 9-213.1: (1) the statute does not define the scope of "reasonable measures" to relet abandoned property; (2) the statute does

82. Dahl v. Comber, 444 A.2d 392, 394 n.3 (Me. 1982). See also Hicks, supra note 8, at 518-19 (if landlord is not required to mitigate damages, abandoned property will be left vacant and susceptible to "vandalism, accidental fire and undetected waste").

83. Dahl v. Comber, 444 A.2d 392, 394 n.3 (Me. 1982).

84. Representative Preston detailed the landlord mischief that could result from a no-mitigation rule:

[I]f . . . [a] tenant who moves out . . . leaves the door wide open, and the landlord, when the tenant abandoned, sees that there is water overflowing in the bathtub, and it's overflowing on the floor, the . . . landlord has no obligation, under current law, to merely go in and turn the faucet off. He can stand by and watch the water overflow, bring down the ceiling. In fact, perhaps even destroy the entire building, and then go and sue that tenant who had left the premises for the entire cost of that building. Now, obviously, you and I know that makes no sense, and landlords won't do that and they don't do that, but in a rare occasion, they can do that

House Debate, supra note 79, at 64.

85. Id.

86. After saying that the bill required landlords simply to take reasonable measures to mitigate damages, Representative Preston stated: "Now, this sounds like this is really changing the law a great deal, but, in fact, it's not changing the law almost at all . . . ." Id. at 65.

87. One commentator has criticized the inadequacies of Section 9-213.1:

The straightforward language of this statute appears, at first reading, to be a welcome departure from the unfortunate tendency of lawmakers to express themselves in more complicated fashion. Upon closer examination, however, the simplicity of the statute means the legislature has failed to resolve some important questions about the statute's effect on the landlord's remedies.

See Sclar, supra note 6, at 270.

88. Id.
not allocate the burden of proving whether "reasonable measures" have been taken; (3) the statute does not forestall the possibility of lease clauses that waive the mitigation duty; (4) the statute does not address how courts should measure damages caused by a default; and (5) the statute does not explicitly cover commercial leases. To resolve these problems without an amendment to the statute, Illinois courts must look to their own confusing precedent. The case law and statutes of other states which have imposed an affirmative duty on landlords to mitigate damages can also provide some guidance to Illinois courts.

A. Determining Reasonable Measures

The Illinois General Assembly incorporated the phrase "reasonable measures" into the language of Section 9-213.1 to describe the extent of a landlord's duty to minimize the loss caused by a defaulting tenant. Unfortunately, the General Assembly did not define the term reasonable measures. Illinois courts face the task of fashioning a definition based on the brief legislative history contained in the House transcription debates.89

The legislators recognized in their debates the difficulty of determining what is reasonable in different situations.90 One legislator suggested that a determination of reasonable measures depends on whether a lease is for urban or rural property.91 For urban property, the legislator indicated, reasonable measures may consist of placing a "For Rent" sign on the abandoned premises since it is often in high demand.92 A reasonable effort to lease rural property, however, would undeniably require more than placing a "For Rent" sign on the property.93 The distinction between an urban and rural lease in assessing the reasonable efforts of a landlord is therefore valid. The General Assembly must provide some framework for the courts to use when they evaluate the reasonable measures of landlords to relet. Such a framework should incorporate the rural-urban distinction, and other reason-

89. See House Debate, supra note 79, at 63.
90. Representative Cullerton noted this difficulty: "[I]f I am a landlord and my tenant ups and moves out two months before the end of a lease, do I have an obligation to take out an ad and pay the 25 bucks for an ad in the Tribune to try to rent it for that last month?" Id. at 66.
91. Representative Preston responded: "No, ... representative, you don't ... It's impossible for me to tell you in every situation what is reasonable." Id.
92. Id.
93. Id.
able distinctions in the efforts required to rent different kinds of property.

Illinois case law also does not assist courts that must evaluate the reasonableness of a landlord's conduct after a tenant's breach of a lease. The courts have not yet applied Section 9-213.1 in a mitigation case, and prior determinations that placed a duty on the landlord to mitigate damages provide no basis for measuring the reasonable efforts of landlords.94 These decisions held that the determination of reasonableness was one for the trier of fact.95 For example, in Marling v. Allison,96 the trial court excluded testimony that indicated that the landlord had refused to accept a suitable subtenant at a rate of ten dollars less per month than the original lease.97 The First District Appellate Court reversed and remanded the case for a determination by the jury as to whether the landlord acted reasonably.98

While reasonableness must be determined on a case-by-case basis,99 the General Assembly should have indicated more precisely how to evaluate reasonable measures. For example, the Wisconsin legislature defined reasonable efforts as "those steps which . . . are in accordance with local rental practice for similar properties."100 The Wisconsin legislature used this language to reflect an appreciation that in some commercial office settings it is considered bad practice to advertise vacancies in newspapers.101 Accordingly,

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94. See cases cited supra note 62.
95. See, e.g., Marling, 213 Ill. App. at 227 (remanded case to trial court to determine if lessor's actions of rejecting $85 per month from a replacement tenant was reasonable); McCormick v. Loomis, 165 Ill. App. 214, 218 (1st Dist. 1911) (remanded trial court judgment, with directions to factor into calculation of damages whether landlord exercised due diligence to relet). See also Reget v. Dempsey-Tegeler & Co., 70 Ill. App. 2d 32, 38, 216 N.E.2d 500, 503 (5th Dist. 1966) (standard of reasonable commercial judgment should be used to evaluate lessor's decision to accept or reject a replacement tenant).
96. 213 Ill. App. 224 (1st Dist. 1919). For the facts of this case, see supra note 64.
97. Id. at 226 (citing Woodbury v. Sparrell Print, 198 Mass. 1, 84 N.E. 441 (1908)).
98. Id. at 227.
99. See, e.g., Grueninger Travel Serv., Inc. v. Lake County Trust Co., 413 N.E.2d 1034, 1039 (Ind. App. 1980) (whether landlord exercised requisite diligence was question of fact); Wilson v. Ruhl, 277 Md. 607, 611, 356 A.2d 544, 547 (1976) (trier of fact must determine whether landlord met duty to mitigate). For other cases, see supra note 95 and accompanying text.
100. Wis. Stat. Ann. § 704.29(2) (West 1981). The Maryland statute limits the landlord's duty to relet by not requiring them to treat their abandoned property in preference to other property they may have available. See Md. Real Prop. Code Ann. § 8-207(b) (1981), which states:
    (b) No obligation to lease vacated unit in preference to others—The provisions of subsection (a) do not impose an obligation to show or lease, the vacated dwelling unit in preference to other available units.
101. The committee comments to the Wisconsin statute illustrate the meaning of the language "local rental practice for similar properties," with the following example:
    Thus, in some commercial office buildings it is not considered good practice to advertise in newspapers; accordingly the landlord would not have to advertise as a reasonable effort to rerent.
the landlord in such circumstances should not be required to advertise as a reasonable effort to mitigate. Unlike Section 9-213.1, the Wisconsin statute makes a clear statement of a landlord's duty to mitigate damages. Although the statute does not explicitly list factors of reasonableness, it limits the court's consideration in each case to the local rental practices for similar types of property.

The lack of a clear definition of reasonable measures by the Illinois legislature will force Illinois courts to look to the decisions in other states for guidance. Most jurisdictions generally agree on the standard that should be used to measure a landlord's efforts to mitigate. This standard has been variously described as "due diligence," "reasonable efforts," "reasonable diligence," and "ordinary diligence." Regardless of the phraseology used, the courts have consistently reviewed certain factors in determining whether landlords acted reasonably in their efforts to reduce damages. These factors include: (1) whether the landlord advertised the vacancy; (2) whether a "For Rent" sign was placed on the

102. Id.
103. One commentator supporting this approach said the following of § 9-213.1: "[I]t seems unfair to the landlord to require him to do more to relet the abandoned premises than other property owners would do to seek tenants for similar property. The statute should therefore, define 'reasonableness' in terms of local rental practices for similar properties." Sclar, supra note 6, at 274.
104. Hicks, supra note 8, at 519.
109. See, e.g., Carpenter v. Wisniewski, 139 Ind. App. 325, 329, 215 N.E.2d 882, 884 (1966) (lessor satisfied duty of reasonable efforts by advertising in newspaper, placing sign on window, and employing a realtor); Sommer v. Kridel, 74 N.J. 446, 458-59, 378 A.2d 767, 773-74 (1977) (court's assessment of reasonable efforts to mitigate should include whether the landlord showed premises to prospective tenants or advertised in a local newspaper); First Wis. Trust Co. v. L. Wiemann Co., 93 Wisc. 2d 258, 274, 286 N.W.2d 360, 364 (1980) (landlord exercised reasonable diligence advertising rental, placing signs in window, and contacting people interested in renting);
property;\textsuperscript{110} and (3) whether the premises were offered to potential new tenants during the vacancy period.\textsuperscript{111} Though one of these acts might not constitute reasonable measures by itself,\textsuperscript{112} the landlord's performance of such acts raises a presumption that a landlord has exercised reasonable diligence in reletting the abandoned premises.

Other factors used in measuring reasonable efforts occasionally arise. A few jurisdictions consider whether the landlord let too much time pass between the abandonment and the efforts to relet; too long a delay may be considered unreasonable.\textsuperscript{113} It is also considered unreasonable by some courts for a landlord to seek a higher rent for premises after they are abandoned.\textsuperscript{114}

Wiesenberger, supra note 7, at 23 (when landlord advertises vacancy, it is a factor to consider when evaluating reasonable efforts to mitigate).

\textsuperscript{110} See, e.g., Carpenter v. Wisniewski, 139 Ind. App. 325, 329, 215 N.E.2d 882, 884 (1966) (duty satisfied when landlord advertised in newspaper, placed sign on window, and employed a realtor); Kamada v. RX Group L.T.D., 639 S.W.2d 146, 149 (Mo. App. 1982) (duty satisfied when landlord placed "For Rent" sign on building and in magazine); Parkwood Realty Co. v. Marciano, 77 Misc. 2d 690, 693, 353 N.Y.S.2d 623, 626 (N.Y. Civ. Ct. 1974) (due diligence found when lessor posted a sign on the premises after it was vacated). See also Hicks, supra note 8, at 519; Annot., 21 A.L.R. 2d 354, 585-87 (1968) (placement of "For Rent" sign on the premises is a factor to consider while evaluating the landlord's reasonable effort to relet).

\textsuperscript{111} See, e.g., Stewart Title and Trust v. Pribbeno, 129 Ariz. 15, 16, 628 P.2d 52, 53 (1981) (landlord made reasonable efforts by sending prospective tenants letters and by hiring realty firm); Hershorn v. La Vista, Inc., 110 Ga. App. 435, 436, 138 S.E.2d 703, 704 (1964) (landlord's showing of apartment to all prospective tenants constitutes reasonable efforts); see also Hicks, supra note 8, at 519 (landlord's actions to find new tenants, such as showing property to prospective tenants or hiring real estate agency, pertinent to assessing reasonable efforts).

\textsuperscript{112} Thorne v. Broccoli, 478 A.2d 271, 273 (N.J. Super. Ct. 1984) (not reasonable efforts to speak with two or three realtors but to offer no exclusives); Wavter v. McKissick, 159 N.W.2d 538, 542-43 (Iowa 1968) (placing a "For Rent" sign in a window is by itself insufficient to establish reasonable diligence); Lefrak v. Lambert, 89 Misc. 2d 197, 205, 390 N.Y.S.2d 959, 965 (N.Y. Civ. Ct. 1976) (duty breached even though landlord advertised in major newspaper); Parkwood Realty Co. v. Marciano, 77 Misc. 2d 690, 693, 353 N.Y.S.2d 623, 627 (N.Y. Civ. Ct. 1974); Anderson v. Andy Darling Pontiac, Inc., 257 Wisc. 371, 376, 43 N.W.2d 362, 364 (1950) (reasonable diligence not established where newspaper advertisement was placed in only one issue of local paper).

\textsuperscript{113} Compare Lefrak v. Lambert, 89 Misc. 2d 197, 200-01, 390 N.Y.S. 2d 959, 961 (N.Y. Civ. Ct. 1976) (seventeen month vacancy after an abandonment held to be unreasonable, absent proof of a good faith effort by lessor to relet) with Birchwood Ass'n v. Stern, 86 Misc. 2d 607, 608-09, 383 N.Y.S.2d 175, 176 (1976) (lessor who rented apartment three months after it was vacated made diligent effort to relet).

Raising the rent may delay rerental of the premises and is inconsistent with mitigation efforts. These factors, while applied less frequently than the three listed above, also help courts determine whether a landlord made a reasonable effort to mitigate damages.

There are certain burdensome efforts that courts have not required of landlords who attempt to relet abandoned property. Courts have not required landlords to relet abandoned premises to new tenants who intend to use them for purposes different from the original tenant’s. Courts have also not demanded that landlords relet at a rate less than the fair rental value. While an increase in rent may limit the marketability of the premises, if the rate charged is competitive with similar rental property, it will generally be held reasonable. Finally, courts have not required landlords to give preferential treatment to abandoned premises over other similar property that they own and are also seeking to lease. In the course of reletting abandoned property, landlords are permitted to treat that property as part of their "vacant stock."

Section 9-213.1 needs an amendment that interprets the phrase reasonable measures. As a model approach, the Illinois General Assembly should look to the more concise language of section 704.29(2) of the Wisconsin statute. By narrowing the court’s consideration in each case to the specific locale and similar types of property, the General Assembly would clarify the interpretation of reasonable measures under section 9-213.1. All relevant

115. See Mar-Son, Inc. v. Terwaho Enters., Inc., 259 N.W.2d 289, 292 (N.D. 1977); Weissenberger, supra note 7, at 23.

116. See, e.g., Carpenter v. Wisniewski, 139 Ind. App. 325, 328, 215 N.E.2d 882, 884 (1966) (lessor obliged only to relet abandoned premises for use as a drug store); Foggia v. Dix, 265 Or. 315, 321, 500 P.2d 412, 414-15 (1973) (lessor not required to relet premises to persons not working in dentistry or related field since offices were part of dental clinic).


118. See, e.g., Del E. Webb Realty & Management v. Wessbecker, 628 P.2d 114, 116 (Colo. App. 1980) (increase in rent from $8 per square foot to $11 or $12 per square foot not a breach of lessor’s duty to mitigate because lease permitted rerental at current commercial rate); United States Nat’l. Bank v. Homeland, Inc., 291 Or. 374, 384, 631 P.2d 761, 767 (1981) (increase from $1415 to $1500 per month was consistent with the lessor’s obligation to mitigate).

119. See, e.g., Sommer v. Kridel, 74 N.J. 446, 457, 378 A.2d 767, 773 (1977) (abandoned apartment should be treated as part of lessor’s ordinary “vacant stock”); Lefrak v. Lambert, 89 Misc. 2d 197, 200, 390 N.Y.S.2d 959, 961 (N.Y. Civ. Ct. 1976) (lessor under no obligation to rent abandoned property before renting similar property which was previously vacant).


121. One commentator agrees that the Wisconsin statutory treatment of the mitigation issue should be a model for state legislatures. See Wiessenberger, supra note 7, at 41.

122. A recent article discussing § 9-213.1 supported the argument that the Illinois legislature should change the statute to define “reasonableness” in terms of local rental practices for similar properties. See Sclar, supra note 6, at 274. The author says that it would be unfair to require the lessor “to do more to relet the abandoned premises than other property owners would do to seek tenants for similar property.” Id. at 274.
factors that prove the reasonableness of the landlord's efforts may be considered by the court under such an amendment.

B. Burden of Proof

An additional problem with Section 9-213.1 is that it does not allocate the burden of proving reasonable measures. Under traditional contract law, the defaulting party must establish that the injured party could have reduced damages. In the leasehold situation, however, the courts are split. Some courts place the burden on the landlord to prove the presence of reasonable diligence in reletting abandoned property. Other courts require that the breaching tenant prove the landlord's lack of reasonable diligence.

In Illinois, the courts have held that the burden of proof should rest upon the defaulting tenant. For example, in the early Fourth District Appellate Court case of *Hinde v. Madansky*, the court placed the burden of proof on the tenant. The court held that in order for the tenant to be relieved

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124. C. McCormick, supra note 3, § 33, at 130 (breaching tenant must produce evidence that landlord "could reasonably have reduced his loss or avoided injurious consequences").


128. 161 Ill. App. 216 (4th Dist. 1911). The *Hinde* case involved a five year lease between defendant tenant and plaintiff landlord. The lease commenced on February 1, 1908. On March 3, 1908, after a dispute between the landlord and the tenant, the tenant abandoned the premises. The landlord brought an action for 10 months rent at $120 per month. The trial court awarded the landlord a total of $240. Dissatisfied with the award, the landlord appealed. The appellate court acknowledged that the landlord had a duty to mitigate after an abandonment, but placed the burden of proving the landlord's lack of due diligence to relet on the defaulting tenant. Since there was no evidence in the record that proved that the landlord could have reentered the premises during the 10 months it was vacant, the appellate court reversed and remanded the case for a redetermination of damages.

129. Id. at 220.
from liability for any portion of the rent due after an abandonment, the
lessee had the burden of proving that the landlord did not exercise due
diligence to rerent the premises. The court placed an additional duty on
the tenant to show how much rent could have been obtained for the premises,
so that actual loss could be determined. Consistent with the holding in
Hinde, recent Illinois cases also place the burden of proof upon the breaching
tenant to show that a substitute tenant is reasonable.

Section 9-213.1 does not allocate the burden of proof to either the landlord
or the tenant. Consequently, Illinois case law will probably be adopted
and the tenant will have the burden of proof. The arguments in support
of this position are nevertheless unpersuasive. First, it is argued that to place
the burden of proof on the tenant discourages abandonment. Presumably,
the public policy encouraging productive and efficient use of the land would
be fostered by a rule that penalizes abandonment. This extra deterrence,
however, is probably unnecessary; a breaching lessee is already liable for
rent while the premises are vacant, plus rerental costs and any balance caused
by rerental at a lower rate. This potential liability already deters tenants
from abandonment.

Second, some commentators argue that the duty to
mitigate imposes a needless penalty on the landlord
by requiring proof of due diligence. This argument assumes that the only purpose of allocating

130. Id. at 220-21.
131. Id. at 220-21. 132. See, e.g., In re Estate of Conklin, 116 Ill. App. 3d 426, 429, 451 N.E.2d 1382, 1384
(4th Dist. 1983); Chicago Title and Trust Co. v. Hedges Mfg. Co., 91 Ill. App. 3d 173, 177,
281, 238 N.E.2d 418, 419-20 (5th Dist. 1968) (tenant’s affidavits opposing summary judgment
must show that tenant offered a suitable subtenant to lessor).

Cases that require defaulting tenants to prove the suitability of replacement tenants are
distinguishable from cases that place the burden of proof on the tenants to show a lack of due
diligence by the lessors in reletting. Evidence about the suitability of a subtenant is available
to both landlord and tenants. By contrast, efforts taken by landlords under an affirmative duty
to relet may be unknown to defaulting tenants. See infra note 142 and accompanying text. The
more equitable approach to the burden of proof problem is to place the burden of proof on
the landlords, who have superior access to information about their own efforts to mitigate
damages. See infra note 141 and accompanying text.

133. See supra note 6 and accompanying text.
134. See supra notes 123-32 and accompanying text.
135. One commentator supports the theory that the tenant should bear the burden of proving
reasonable efforts by the following argument:

The policy to keep property in productive use is ill-served by a rule that might
encourage abandonment. To deprive the landlord of all the benefits of his bargain,
if he does not minimize his damages, is to run the risk that renters might take
leases less seriously, eroding the commercial utility of such agreements.

Note, supra note 3, at 228.
136. Id.; see supra note 3 and accompanying text.
137. Conversely, to give landlords the duty to mitigate would not add significantly to the
tenants’ incentive to abandon. See Bradbrook, supra note 8, at 19; Groll, supra note 8, at 314.
138. See Note, supra note 3, at 227; Bradbrook, supra note 8, at 29.
the burden of proof to landlords is to irritate them. \(^{139}\) A more plausible reason, however, is that landlords should shoulder the burden of proof because they have access to the best evidence of their efforts to relet. \(^{140}\) Landlords and tenants are not in an equal position to prove the requirement of reasonable efforts; landlords actually know what they have done and they can usually document their efforts. It is unnecessarily burdensome to require former tenants to discover the efforts taken by their landlords to relet. \(^{141}\)

Legislatures in other states have resolved this controversy by addressing the burden of proof issue in their statutes. For example, in California the legislature allocates the burden of proof to the tenant to show that certain losses could reasonably have been avoided. \(^{142}\) In a unique approach to the issue, the Wisconsin statute allocates the burden of proof between the landlord and tenant. \(^{143}\) The landlord has the initial burden of alleging and proving efforts to relet the abandoned premises. The tenant then has the burden to show that the efforts taken by the landlord were not reasonable and to establish how much reasonable efforts would have reduced damages. \(^{144}\)

140. See *Sommer v. Kridel*, 74 N.J. 446, 457, 378 A.2d 767, 773 (1977) (landlord can prove reasonable diligence to relet more easily than the tenant); *Lefrak v. Lambert*, 89 Misc. 2d 197, 200, 390 N.Y.S.2d 959, 961 (N.Y. Civ. Ct. 1976) (to the same effect); *Sclar, supra* note 6, at 275-76 (evidence of reasonable efforts is "almost entirely within the landlord's knowledge"); *Weissenberger, supra* note 7, at 24 (some courts place burden on landlords, who are presumably better able to prove their own efforts).
141. *Vawter v. McKissick*, 159 N.W.2d 538, 542 (Iowa 1968) (efforts to relet are in landlords' own peculiar knowledge; thus, it is proper to require them to prove reasonable efforts).
142. Section 1951.2(a) of the California Civil Code states in pertinent part:
   (a)(1) The lessor may recover from the lessee:
      (1) The worth at the time of award of 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 the unpaid rent which would have been earned after termination until the time of award exceeds the amount of such rental loss that the lessee proves could have been reasonably avoided;
      (3) Subject to subdivision (c), the worth at the time of award of the amount by which the unpaid rent for the balance of the term after the time of the award exceeds the amount of such rental loss that the lessee proves could be reasonably avoided . . .

   *CAL. CIV. CODE* § 195.2(a)(1)-(3) (West 1985) (emphasis added).
143. See *WIS. STAT. ANN.* § 704.29(3) (West 1981), which states:
   (3) *Burden of Proof:* The landlord must allege and prove that he has made efforts to comply with this section. The tenant has the burden of proving that the efforts of the landlord were not reasonable, that the landlord's refusal of any offer to rent the premises or a part thereof was not reasonable, that any terms and conditions upon which the landlord has in fact rerented were not reasonable, and that any temporary use by the landlord was not part of reasonable efforts to mitigate in accordance with sub. (4)(c); the tenant also has the burden of proving the amount that could have been obtained by reasonable efforts to mitigate by rerenting.
144. *Id.*
The Illinois legislature should adopt neither the California nor Wisconsin approach. Both statutes place the ultimate burden of proving the landlord's reasonable efforts on the defaulting tenant. It is more equitable to assign the burden of proof to landlords since they are in a better position to prove the reasonableness of their own actions. Placing the burden of proof on tenants would undercut the landlord's duty to mitigate damages by making it difficult for a tenant to seek a remedy under Section 9-213.1.

C. Waiver of Section 9-213.1

Section 9-213.1 leaves open the possibility that landlords may circumvent their duty to mitigate damages by including clauses in leases that waive their duty. The language and legislative history of the statute do not reveal whether the duty to mitigate may be abrogated by agreement between the parties. The legal possibility of waiver clauses would have an important impact on the practical significance of Section 9-213.1. If waiver is permitted, landlords will always include waiver clauses in their leases and the statute would be ineffective. Illinois case law reveals that when a lease contains specific provisions concerning a landlord's duty to mitigate damages, the courts have respected those provisions. In Hirsch v. Home Appliances, Inc., the First District Appellate Court interpreted a lease clause that expressly relieved the landlord of all responsibility to relet after a tenant's default. After adopting the

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145. See supra note 140 and accompanying text.
146. A waiver clause, as the term is used in this Note, is a provision contained in a written lease that relieves a landlord of the duty to mitigate damages.
147. House Debate, supra note 79, at 63.
148. See Sclar, supra note 6, at 273; see also R. Kratovil & R. Werner, Real Estate Law 474 (7th ed. 1979) (waiver clauses are common in modern leases); Berkman, Duty of a Commercial Landlord to Mitigate: Some Thoughts on Danpar Associates, 55 Conn. B.J. 339, 342 (1981) (attorneys for landlords place waiver clauses in most leases). For an extensive discussion about form leases and their tendency to focus on the landlord's interests, see Kirby, Contract Law and the Form Lease: Can Contract Law Provide the Answer? 71 Nw. U.L. Rev. 204 (1976).
149. See Johnstowne Centre Partnership v. Chin, 110 Ill. App. 3d 595, 598, 442 N.E.2d 680, 682-83 (4th Dist. 1982), rev'd on other grounds, 99 Ill. 2d 284, 458 N.E.2d 480 (1984); Hirsch, 242 Ill. App. at 420; see also Bulkeley, supra note 5, at 590 (one way to impose duty to mitigate on landlords is to provide for the duty in the lease, since Illinois enforces such provisions).
150. 242 Ill. App. 418 (1st Dist. 1926). See supra notes 57-58 and accompanying text.
151. The lease clause provided:

[L]essor shall not be required to accept or receive any tenant offered by lessee nor to do any act whatsoever or exercise any diligence whatsoever in or about the procuring of another occupant or tenant to mitigate the damages of lessee, or otherwise, the lessee hereby waiving the use of any care or diligence by lessor in the re-letting thereof.

Id. at 420.
general rule that a landlord is under no obligation to rerent abandoned premises, the court referred to the waiver clause and stated:

No case holds, so far as we are aware, that the parties to a lease may not enter into a valid agreement with respect to this question by which the parties would be bound (and when we examine the lease it is . . . apparent that the parties have specifically agreed the landlord shall in no case be bound). . . .

This passage reflects the court's willingness to bind landlords and tenants to waiver clauses. In the more recent case of Scheinfeld v. Muntz T.V. Inc., decided in 1966, the First District Appellate Court again recognized the potential significance of lease provisions that waive the landlord's duty to mitigate damages. In Scheinfeld, the court refused to follow the majority rule and stated that a landlord had a duty to accept a suitable subtenant when one had been tendered. The court observed that it was not imposing a rule contrary to the terms of the lease since the lease did not state that the landlord had no duty to mitigate. The opinion suggests that the court might have ruled differently had a waiver clause been present in the lease. Both the Hirsch and Scheinfeld cases are consistent with the doctrine that the parties to a lease should have the privilege of freedom of contract.

Since contract law assumes that agreements are the product of equal bargaining, the policy of freedom of contract is inappropriate in the lease situation. There is generally a great disparity of bargaining power in lease negotiations that favors landlords over tenants. At the root of this problem

152. Id. at 424.
153. Id. at 426.
155. See supra note 19 and accompanying text.
156. 67 Ill. App. 2d at 16, 214 N.E.2d at 511.
157. The court found the lease terms and the rule consistent in this case: "Since neither the prime lease nor the sublease in the instant case provides that the respective landlords shall have no duty to mitigate damages, this court would not be eliminating any of the express provisions of either lease in applying the mitigation rule." Id. at 16, 214 N.E.2d at 510.
158. Note, supra note 17, at 995; Bradbrook, supra note 8, at 20.

A New Jersey District Court enforced a waiver clause in a lease on the theory that a commercial letting is the product of arms-length negotiations. See Carisi v. Wax, 192 N.J. Super. 536, 543, 471 A.2d 439, 443 (1983). This distinction between the commercial and residential lease on the issue of waiver has also gained the support of one commentator. See Sclar, supra note 6, at 274.

The policy of allowing waiver of the duty to mitigate damages in the commercial lease is inappropriate. Not every commercial tenant has the ability to negotiate at arms length with a landlord over specific terms in the lease. See Comment, Landlord-Tenant: The Medieval Concepts of Feudal Property Law Are Alive and Well in Leases of Commercial Property in Illinois, 10 J. MAR. J. PRAC. & PROC. 338, 355 (1975). Also, the policy of encouraging efficient
is the form lease, which imposes rental terms favorable only to landlords.160 When searching for an apartment, a tenant ordinarily has no opportunity to negotiate over specific lease terms.161 The tenant typically signs a form lease, which is invariably drafted to protect the landlord's interests.162 If Section 9-213.1 can be waived, tenants will become the victims of boilerplate provisions in these form leases that waive the landlord's duty to mitigate damages.163

Mitigation statutes in other states include language that makes waiver clauses unenforceable. Maryland, for example, clearly forbids the waiver of the landlord's duty to mitigate damages.164 States that have adopted the Model Residential Landlord-Tenant Code hold unenforceable any agreements that conflict with the Code's specific provisions; waiver clauses may be among the unenforceable agreements.165 Finally, the Uniform Residential
Landlord and Tenant Act apparently precludes lease clauses that waive the tenant's rights and remedies under the Act. 166

The California legislature approached the waiver issue differently. The California Civil Code provides a landlord with the option of shifting the duty to mitigate to the defaulting tenant, but only if the lease also provides for assignments and subleasing. 167 Unless the assignment clause is present, the statutory duty to mitigate remains with the landlord. Therefore, California does allow for waiver, but the landlord must permit occupation of the premises to be transferred by the lessee before waiver becomes effective. 168

"Any agreement, whether written or oral, shall be unenforceable insofar as the agreement or any provision thereof conflicts with any provision of this act and is not expressly authorized herein." Several states have adopted statutes similar to the Model Code. See, e.g., DEL. CODE ANN. tit. 25, §§ 5501-6104 (1975); HAWAII REV. STAT. §§ 521-1 to -76 (1976); WASH. REV. CODE ANN. §§ 59.18.010 to .900 (Supp. 1985).

The Model Code is a vehicle for promoting reform in American landlord-tenant law. The drafters were concerned that existing law contributed to the perpetuation of slums. To remedy this situation, the drafters sought to effect the following reforms: (1) to encourage landlords to repair and maintain leased property; (2) to identify the specific rights and duties of both landlords and tenants; (3) to provide for procedural remedies, such as summary proceedings for possession, a prohibition against the allocation of attorneys fees through lease provisions, and a ban on the use of confession of judgment clauses; (4) to criminalize certain landlord conduct (e.g., unlawful retention of security deposits, insertion of confession of judgment clause).

166. See UNIFORM RESIDENTIAL LANDLORD AND TENANT ACT § 1.403(a)(1) (1972), which provides that, "A rental agreement may not provide that the tenant . . . agrees to waive or forego rights or remedies under this act."

One commentator suggests that UNIFORM RESIDENTIAL LANDLORD AND TENANT ACT § 4.203, which does not expressly preclude waiver clauses, can be read to permit waiver clauses. See Weissenberger, supra note 7, at 32. If one assumes, however, that the tenant has a "right" to have damages mitigated by the lessor, then § 1.403(a)(1) would clearly prohibit the waiver of that right.


The purpose of the Uniform Act, as expressed in the Commissioner's Comment, is to protect the vital interests of both parties to the lease, as well as the public at large. English common law doctrine, which treats a lease like a conveyance of a non-freehold estate with independent covenants, is not applicable to modern urban conditions. The Act also reflects the modern treatment of contract and lease obligations of the parties as interdependent. See UNIFORM RESIDENTIAL LANDLORD AND TENANT ACT § 1.102, Commissioner's Comments (1972).


(b) [T]he lessor may enforce all his rights and remedies under the lease, including the right to recover the rent as it becomes due under the lease, if the lease permits the lessee to do any of the following:

(1) sublet the property, assign his interest in the lease, or both.

168. The Law Revision Comments to § 1951.4 suggest that to allocate the duty to mitigate
The most equitable approach to the waiver problem is the Maryland statute, which absolutely prohibits waiver of the duty to mitigate damages. The average tenant is not typically in a position to bargain against the insertion of overreaching clauses within form leases. Furthermore, protective devices such as unconscionability provide only marginal assistance to the tenant. The high cost of litigation often prevents the tenant from seeking this type of redress.

D. Measurement of Damages under Section 9-213.1

Section 9-213.1 imposes a duty on landlords to mitigate the damages recoverable against a defaulting tenant, but does not indicate how damages should be measured. It is not clear, for instance, whether defaulting tenants should have their liability offset by excess rents that landlords receive by reletting the abandoned premises. It is also not clear which party is responsible for reletting costs such as advertising, brokerage fees, and listing expenses incurred by landlords while seeking new tenants. An analysis of Illinois case precedent provides assistance in answering these questions.

In Illinois, the formula for measuring damages from the breach of a lease is the total unpaid rent for the remaining term of the lease, less the amount that the landlord obtains from reletting. In the case of Wanderer v. Plainfield Carton Corp., the Third District Appellate Court concluded that excess rent realized by the landlord should be credited against the unpaid

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"most useful where the lessor does not have the desire, facilities, or ability to manage the property" and to acquire a suitable replacement. See Cal. Civ. Code § 1951.4 (Law Revision Commission Comment 1970) (West 1985). The fallacy of this argument is that the typical residential tenant lacks the resources to mitigate damages as effectively as the landlord. See Weissenberger, supra note 7, at 35.

169. See Bradbrook, supra note 8, at 20; Rabin, supra note 159, at 583.

170. For a discussion on the use of the doctrine of unconscionability to protect the tenant from overreaching clauses, see Note, supra note 17.

171. See Kirby, supra note 148, at 233 (the various protective devices created by the courts rarely "filter down" to the tenants who need the assistance).

172. Id.

173. One example: A tenant rents a space for $300 per month. Five months before the end of the lease term, the tenant abandons the premises. If within two months the landlord finds a replacement tenant at a monthly rate of $400, then the issue is whether the defaulting lessee should be credited with the additional $100 per month to offset damages.


In an early Illinois Supreme Court case, the rule was stated as follows: "The rent due from the original lessee is to be credited with such rent as is realized from the reletting. The lessor is entitled to such sum, as shall be equal to the rents required by the terms of the lease to be paid during the full term . . . ." Grommes v. St. Paul Trust Co., 147 Ill. 634, 644-45, 35 N.E. 820, 822 (1893).

rent owed by the breaching tenant. The court held that landlords should only be entitled to recover losses actually caused by the breach. Any excess amounts received by landlords were to be credited to defaulting tenants. The court also held that reletting costs, such as broker’s commissions and attorney’s fees, should be borne by defaulting tenants. The court stated that the breaching tenant should not be permitted to avoid liability for the reasonable expenses incurred by the landlord in an effort to reduce damages. The court held that the reletting costs would be deducted from the rent received from new tenants, and defaulting tenants would remain liable to landlords for their remaining damages.

By applying the Wanderer rationale to the duty imposed under Section 9-213.1, defaulting tenants will be entitled under the statute to offset excess rent from their liability. This result is consistent with the doctrine that contract damages should put the injured parties in the same position they would have been had the contract been fully performed. Landlords would receive windfall profits if they were allowed to keep excess rents from reletting while collecting damages from the original tenant for rent that accrued during the term of the vacancy. It has also been argued that when a

176. Id. at 556, 351 N.E.2d at 634. Wanderer involved a commercial lease in which the tenant agreed to lease premises for a period of five years beginning on June 1, 1971. In September of 1972, the tenant vacated the premises and stopped paying rent and taxes. Six months later, the landlord relet the premises to a third party and received an excess of $5140 per year over the old lease arrangement. The total excess received by the landlord over the term of the new lease amounted to $16,705. In an action brought by the landlord against the original tenant, the trial court awarded $25,214.50 to the landlord, which included $10,500 for six months of defaulted rent, $2914 for taxes, $6768 for broker’s commissions, and $4032.50 for attorney’s fees. The tenant appealed, claiming that the trial court should have credited him with the excess rent earned under the new lease.

177. Id. at 558, 351 N.E.2d at 636.


179. 40 Ill. App. 3d at 559-60, 351 N.E.2d at 637.

180. Id. at 560, 351 N.E.2d at 637. The court also held that the tenant should bear the reasonable expenses incurred by the landlord while the landlord sought new tenants for the abandoned property. The court relied in part on a waiver clause in the lease, which relieved the lessor from liability for reletting and collection costs.


182. See Dalamagas v. Fazzina, 36 Conn. Sup. 523, 527, 414 A.2d 494, 495 (1979) (court credits defaulting tenant with excess rent earned by landlord after landlord relet abandoned premises).

183. Id. at 527, 414 A.2d at 495 (landlord overcompensated for injuries if permitted to retain excess rent earned from reletting property).
landlord is under a duty to relet abandoned property, the reletting is done on behalf of the defaulting lessee with the original leasehold remaining intact. The landlord's actions in rerenting are performed as the agent of the tenant, and are treated as the equivalent of a sublease or assignment. The excess rent received under the sublease would therefore be credited to the tenant and be used to set off damages caused by the abandonment.

The Wanderer case also places liability on tenants for costs incurred by landlords while they take measures to relet. Placing the responsibility for these reletting costs on breaching tenants is equitable since they are the wrongdoers. Tenants may also be discouraged from abandoning leased premises if they are held responsible for costs incurred by landlords who are forced to relet. Reducing the frequency of abandonments would also promote judicial concern for keeping property at its most productive use.

The Restatement (Second) of Property also supports the view that the cost to a landlord to mitigate damages should be charged to the defaulting tenant.

While the Wanderer decision is helpful in resolving these issues, it was decided at a time when landlords had no affirmative duty to mitigate damages. The Illinois General Assembly should therefore have provided a definite statement of the factors to be used to calculate and offset damages. The mitigation statutes in Wisconsin and California both deal directly with the measurement of damages issue. In Section 704.29(2) of the Wisconsin statute, the breaching tenant receives a credit for "rent actually received under a rerental agreement." This provision would entitle tenants to excess amounts received by the landlord in reletting. Section 704.29(2) also allows

184. Professor Schoshinski, an authority in the area of landlord-tenant law, argues that even when the landlord relets abandoned property, the defaulting tenant retains a leasehold and is still responsible for the difference between what was owed under the original lease and what is received through reletting. See R. SCHOSHINSKI, AMERICAN LAW OF LANDLORD AND TENANT § 10:14, at 684 (1980). The standard reply to this argument is that the landlord's efforts to relet property are contrary to the continued existence of the landlord-tenant relationship, and those efforts cause the termination of the tenant's leasehold estate. Id. at 685. Since the tenant no longer has a right to possession, the landlord should be entitled to keep any excess money received in rerenting the premises.
185. Id. at 684-85.
186. See supra notes 179-80 and accompanying text.
187. See Wanderer, 40 Ill. App. 3d at 559-60, 351 N.E.2d at 637 (defaulting tenants should not be allowed to "escape liability" for expenses incurred by the lessor in mitigation); see also Wilson v. Ruhl, 277 Md. 607, 613, 356 A.2d 544, 548 (1976) (tenant held liable for landlord's rerental expenses).
188. See supra note 137 and accompanying text.
189. See supra note 3 and accompanying text.
190. The position of the Restatement (Second) of Property on mitigation is that landlords have no obligation to mitigate the losses. See supra note 19. A lease may be written to impose a duty on landlords to mitigate, and in such cases the defaulting tenant is liable for the landlord's rerental expenses. See Restatement (Second) of Property § 12.1, comment i (1977).
landlords to recover "all reasonable expenses of listing and advertising incurred in rerenting and attempting to rerent.""192 A similar provision in the California Civil Code states that, "[u]pon such termination, the landlord may recover from the lessee . . . [a]ny . . . amount necessary to compensate the lessor for all the detriment proximately caused by the lessee's failure to perform his obligations under the lease or which in the ordinary course of things would be likely to result therefrom."193 The California statute allows landlords to recover all reasonable expenses incurred by reletting the abandoned property.194

Illinois case law, which follows an inconsistent and confusing course,195 should be supplanted by a clear legislative standard. Statutory language following the Wisconsin law should be incorporated into section 9-213.1. The clause would assign to tenants liability for reletting costs incurred by landlords, while it would credit tenants with excess rent received by landlords who secure a higher rent on the subsequent lease.

E. Application of Section 9-213.1 to Commercial Leases

Section 9-213.1 does not state whether the duty to mitigate damages applies to commercial leases as well as residential leases. Landlord-tenant law generally gives less deference to commercial tenants since they possess a greater degree of bargaining power.196 The language of Section 9-213.1 places only a general duty on landlords to mitigate damages, and the chapter to which this section is attached makes no distinction between commercial and residential leases.197 Section 9-214 of the Illinois Code of Civil Procedure defines a lease as "every letting, whether by verbal or written agreement."198 While

192. Id.
193. See CAL. CIV. CODE § 1951.2(a)(4) (West 1985); see also DEL. CODE ANN. tit. 25, § 5508(d)(1) & (2) (1975), which provides:
(d) If the tenant wrongfully quits the rental unit and unequivocally indicates by words or deeds his intention not to resume tenancy, he shall be liable for the lesser of the following for such abandonment:
(1) The entire rent due for the remainder of the term and reasonable renovation expenses other than for normal wear and tear incurred in preparing the apartment for a new tenant.
(2) All rent accrued during the period reasonably necessary to rerent the premises at a fair rental, plus the difference between such fair rental and the rent agreed to in the prior rental agreement, plus a reasonable commission for the rerenting of the premises. This subsection shall apply if less than (1) notwithstanding that the landlord did not rerent the premises.
194. The Legislative Committee Comments about Section 1951.2(a)(4) suggest that the landlord should be entitled to recover expenses incurred while mitigating damages after an abandonment. See CAL. CIV. CODE § 1951.2 (Legislature Committee Comment 1970 addition) (West 1985).
195. See supra note 5 and accompanying text.
196. See infra note 211 and accompanying text.
197. See supra note 6 and accompanying text.
198. See ILL. REV. STAT. ch. 110, § 9-214 (1983), which states; "Lease defined. The term 'lease' as used in part 2 of Article IX of this Act, includes every letting, whether by verbal or written agreement."
the broad phrase "every letting" used in Section 9-214 could conceivably encompass commercial leases, Illinois courts occasionally treat commercial and residential leases differently. Because equitable enforcement of Section 9-213.1 may be hampered by such a distinction, the section should be amended to specifically include commercial leases.

In cases involving the landlord's duty to mitigate damages, Illinois courts have commonly applied the rule to both residential and commercial leases. The most recent Illinois decisions have required the landlords of both residential and commercial leases to accept suitable replacements when they have been tendered. This is in accord with the majority of jurisdictions. For example, in the Second District Appellate Court case of Chicago Title and Trust Co. v. Hedges Manufacturing Co., a commercial tenant who began to experience financial difficulties abandoned the leased premises prior to the end of the lease term. The court held that the landlord had no general duty to mitigate, but did have a duty to accept a suitable subtenant.


Until recently, New Jersey distinguished between residential and commercial leases in the area of mitigation. The New Jersey Supreme Court decision, Sommer v. Kridel, 74 N.J. 446, 378 A.2d 767 (1977), approved of this distinction in a footnote:

We see no distinction between the leases involved in the instant appeals and those which might arise in other types of residential housing. However, we reserve for another day the question of whether a landlord must mitigate damages in a commercial setting.

Id. at 456 n.4, 378 A.2d at 772 n.4. But see Carisi v. Wax, 192 N.J. Super. 536, 471 A.2d 439 (1983) (decided subsequent to Sommer, and holding that a landlord who rents commercial property has duty to mitigate damages).


203. Id. at 174, 414 N.E.2d at 233.
that the original tenant had offered. The opinion did not address the fact that the case involved a commercial lease.

In other areas of landlord-tenant law in Illinois, such as implied warranty of habitability, the courts draw a distinction between commercial and residential leases. In *Jack Spring, Inc. v. Little*, the Illinois Supreme Court held that an implied warranty of habitability would be included in all oral and written contracts governing the tenancies of occupants of multiple dwellings. Illinois appellate court decisions in this area, however, have not extended the doctrine of habitability to commercial leases. This distinction has typically been justified by limiting the holding in *Jack Spring* to cover only leases involving the occupancy of "multiple dwelling units." At least one Illinois appellate court, though, has observed that residential tenants need more protection under the law because commercial tenants are in an equal bargaining position with the landlords, and are better able to negotiate lease terms regarding the repair and maintenance of the premises.

Arguments in support of limiting the landlord’s duty to mitigate to residential property assume that commercial renters are equal to landlords in

204. Id. at 177, 414 N.E.2d at 235.
205. 50 Ill. 2d 351, 280 N.E.2d 208 (1972). *Jack Spring* involved an action for rent by the landlord against the tenant for two months back rent. The tenant raised two principal affirmative defenses: that the landlord did not comply with his promise to make certain repairs to the premises, and that the building was structurally defective and in violation of the Chicago Housing Code. The circuit court entered a judgment for possession. The Illinois Supreme Court reversed and remanded the case, and held that a warranty of habitability is implied in all leases of multiple dwellings.

206. Id. at 366, 280 N.E.2d at 217.

209. For instance, in *Ing v. Levy*, 26 Ill. App. 3d 889, 326 N.E.2d 51 (1st Dist. 1975), the First District Appellate Court refused to extend the implied warranty of habitability to a commercial lease; the court maintained that this rule was consistent with *Jack Spring*:

[T]he court [in *Jack Spring*] alluded to the unequal bargaining positions of the modern urban apartment dweller and the landlord who 'sells housing as a commercial businessman and has a much greater opportunity, incentive and capacity to inspect and maintain the condition of his building' .... No Illinois court has extended the [*Jack Spring*] rule to commercial leases, and since in the case at bar we are reviewing a dispute over a commercial lease, we must apply traditional common law principles .... It has traditionally been held a landlord is not ... bound to repair or maintain leased premises unless he has expressly agreed to do so by written covenants.

*Id.* at 891-92, 326 N.E.2d at 54.

210. *Id.*
bargaining power. While this may be true in some instances, not every commercial lease is negotiated at arm's length. Small and inexperienced commercial tenants are potential victims of the one-sided form leases. Furthermore, no matter how bargaining power is allocated, the ability of commercial tenants to bargain has little relevance to the utility of a landlord's duty to mitigate damages. The main reason for imposing a duty to mitigate damages is to keep land at its most efficient and productive use by not allowing it to remain vacant after an abandonment. This policy is equally applicable to commercial and residential leases. The best approach is to require landlords in both the commercial and residential setting to mitigate their damages after an abandonment by a tenant.

Some statutes clearly distinguish between residential and commercial leases and require mitigation only in residential leases. For instance, the Kentucky statute, Section 383.670(3), states that "If the tenant abandons the dwelling unit, the landlord shall make reasonable efforts to rent it at a fair rental." A "dwelling unit" is defined in Section 383.545(3) as "a structure or the part of a structure that is used as a home, residence, or sleeping place by one person who maintains a household or by two or more persons who maintain a common household." Sections 5103 and 5102(9) of the Delaware Code, Title 25, expressly provide that the Code shall apply to all leases involving dwelling, commercial, and farm units within the state.

Both the Kentucky and Delaware legislatures have given their respective courts a clear rule about the application of their statutes to the commercial leases. Section 9-213.1 provides no such assistance to Illinois courts. Despite the ambiguity in Section 9-213.1, it is likely that the Illinois courts will apply the statute to both residential and commercial leases. Illinois cases uni-

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211. See Restatement (Second) of Property § 5.1, comment b (1977) ("Leases relating to commercial and industrial properties are usually made under circumstances of greater equality of bargaining power than in the case of a residential properties"); see also E.P. Hinkel & Co., Inc., v. Manhattan Co., 506 F.2d 201, 206 (D.C. Cir. 1974) (implied warranty of fitness not extended to commercial lease since parties are in positions of equal bargaining power); Kruvant v. Sunrise Mkt., Inc., 58 N.J. 452, 456, 279 A.2d 104, 106 (1971) (repair and deduct remedy not available in commercial leases, because such leases are negotiated at arms length).

212. Comment, supra note 159, at 355.

213. See supra notes 45-47 and accompanying text.

214. See Berkman, supra note 148, at 356.

215. The following statutes limit their scope to "[residential] dwelling units": ALASKA STAT. § 34.03.360(3) (1975); ARIZ. REV. STAT. ANN. § 33-1310(3) (Supp. 1984); CONN. GEN. STAT. § 47(g)-1(c) (Supp. 1984); KAN. STAT. ANN. § 58-2543(c) (1983); KY. REV. STAT. § 383.545(3) (1984 Supp.); NEB. REV. STAT. § 76-1410(3) (1981); NEV. REV. STAT. § 118.060(1) (1983); OR. REV. STAT. § 91.705(3) (1977); TENN. CODE ANN. § 66-28-104(3) (1982).


217. Id. § 383.545(3).

218. The Delaware Code states that it shall apply to any rental agreement of a rental unit within the state. See DEL. CODE ANN. tit. 25, § 5103 (1975). A rental unit is defined in the statute as all dwelling, commercial and farm units. Id. § 5102(9).
formly make no distinction between the types of tenants on the mitigation issue. The failure of the General Assembly to distinguish between the two types of leases reflects its intent to treat them the same. In other areas of landlord-tenant law, such as retaliatory eviction, the General Assembly has stated that the relevant statute applied only to residential property. To make Section 9-213.1 clearer on this issue, the General Assembly should add a clause similar to the one that appears in the Delaware statute. By amending the Section, the General Assembly can signal to the courts that the duty to mitigate damages applies to commercial leases.

IV. PROPOSED AMENDMENT TO SECTION 9-213.1

The present language of Section 9-213.1 does not satisfactorily address various issues connected with the landlord's duty to mitigate damages. To make Section 9-213.1 clearer, the following amendment is proposed:

A. Duty to Mitigate: After the effective date of this Amendatory Act, a landlord or his agent shall take reasonable measures to mitigate the damages recoverable against a defaulting tenant arising from the breach or abandonment of any lease, including any residential, commercial, industrial, farm or other letting.

1) Reasonable measures shall be assessed in accordance with commercially reasonable standards based on the local rental practice for similar property.

2) Reasonable measures shall not require a landlord to give preferential treatment to the abandoned premises relative to other available units.

219. See supra notes 199-203 and accompanying text.

220. See supra note 198 and accompanying text.

221. See, e.g., ILL. REV. STAT. ch. 80, § 71 (1983), which states:

It is declared to be against public policy of the state for a landlord to terminate or refuse to renew a lease or tenancy of property used as a residence on the ground that the tenant had complained to any governmental authority of a bona fide violation of any applicable building code, health ordinance or similar regulation.


The Kimmel holding and the policy underlying ILL. REV. STAT. ch. 80, § 71 (1983) support the argument that § 9-213.1 was intended to apply to both commercial and residential leases. If the Illinois legislature meant to make a distinction, they would have stated it in the language of the statute.

222. See supra note 218 and accompanying text.

223. The language for this definition of a lease appears at DEL. CODE ANN. tit. 25, § 5102(9) (1975). See supra note 217.

224. Commercially reasonable standards is not a concept which is entirely new in Illinois. This standard was used by the Illinois courts to evaluate the reasonableness of a landlord's action to accept or reject a replacement tenant. See supra note 66.
B. **Burden of Proof:** The landlord shall have the burden of proving that reasonable measures have been taken.

C. **Measure of Damages:** Upon default or abandonment by a tenant, the measure of damages shall be the total unpaid rent for the remaining term of the lease, less what the landlord can obtain from reletting the premises for all or part of that term. The landlord is entitled to recover all reasonable expenses incurred in the reletting and attempting to relet the premises.

D. **Waiver Prohibited:** No provision of this section may be waived in any lease or other agreement.

This proposed amendment provides assistance to the trier of fact by limiting the consideration of reasonable measures to the local rental practice for similar property. It further clarifies the meaning of reasonable measures by indicating that the landlord will not be required to give preferential treatment to the abandoned property. The amendment also resolves any doubt as to who will have the burden of proving the exercise of reasonable measures by clearly placing that responsibility on the landlord. This result is desirable because the landlord, unlike the typical tenant, possesses a greater degree of knowledge regarding the efforts taken in mitigation as well as their reasonableness. The amendment prohibits waiver of the landlord's duty to mitigate which protects the tenant from overreaching clauses. For the measurement of damages, the language allows the lessee a credit for excess rent received, but also holds the lessee responsible for the reletting costs incurred by the lessor. Finally, the proposed amendment indicates a clear intention to apply the duty to mitigate damages to the commercial lease.

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225. Section (A)(1) of the proposed amendment is borrowed from the Wisconsin Landlord Tenant Act, Wis. Stat. Ann. § 704.29 (2) (1981). Professor Weissenberger considers the Wisconsin statute to be one of the most "well balanced" and "well conceived" statutory treatments of the mitigation issue:

While several approaches to the modification of the orthodox doctrine were surveyed, one state's resolution emerges as particularly well conceived. Wisconsin's statutory treatment of the landlord's mitigation duties represents a well balanced accommodation of the respective interests of the landlord and tenant which attend the abatement situation.

Weissenberger, supra note 7, at 41.

226. This language is taken from § 8-207(b) of the Maryland Real Property Code. See supra note 100. It is incorporated into § 9-213.1 to recognize the common law theory that landlords need only treat the abandoned property as part of their ordinary vacant stock. See supra notes 119-20 and accompanying text.

227. See supra notes 140-42 and accompanying text.

228. Provision (D), which prohibits waiver, is included in the amendment to offset the increased reliance by landlords on the standard form lease which has placed the tenant in a position of unequal bargaining power with the lessor. See supra notes 159-61 and accompanying text. Similar language is found in § 8-207(d) of the Maryland Real Property Code. See supra note 164 and accompanying text.

229. This rule appears in Wanderer v. Plainfield Carton Corp., 40 Ill. App. 3d 552, 351 N.E.2d 630 (3d Dist. 1976). See supra notes 175-80 and accompanying text. The language of Provision (C) is similar to that adopted by the Wisconsin legislature in § 704.29(2) of the Wisconsin Landlord Tenant Act.

230. Illinois case law presently makes no distinction between a residential and commercial
V. Conclusion

Illinois courts have long been in need of a consistent rule of law to be applied in all cases involving tenant abandonment. Section 9-213.1 responds to this need by bringing Illinois landlord-tenant law into accord with the national trend, requiring the landlord to mitigate the damages caused by the defaulting lessee. By imposing a duty on the landlord to take reasonable measures to relet, abandoned property will less often remain vacant and idle. This will enhance the productive use of all rental land in Illinois.

The terms of the statute are nevertheless inadequate to solve numerous issues related to the landlord's duty to mitigate. This Note has analyzed the case law from both Illinois and other jurisdictions in an effort to determine how the statute may be interpreted. In view of the statute's shortcomings, the General Assembly must reexamine the current language of Section 9-213.1. Since Illinois case law on the landlord's duty to mitigate damages is dated and inconsistent, the General Assembly must work all the harder to replace the judicially developed rules with comprehendible standards. The proposed amendment would transform section 9-213.1 into an effective statutory rule of landlord mitigation.

Anthony J. Aiello

lease with regard to mitigation. See supra notes 199-203 and accompanying text. The inclusion of the phrase "arising from breach or abandonment of any lease, including any residential, commercial, industrial, farm or other letting" in Section (A) of the amendment, merely codifies the current position of the Illinois courts. Furthermore, the soundness of the distinction between a commercial and residential lease with regard to landlord mitigation is questionable, since the policy of encouraging the most productive and efficient use of the land is equally applicable to both. See supra note 213 and accompanying text.