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APPLICATION OF THE AVOIDABLE CONSEQUENCE RULE TO THE RESIDENTIAL LEASEHOLD AGREEMENT

INTRODUCTION

When a residential tenant abandons leased premises¹ he breaches a duty owed to his landlord to fulfill the terms of the leasehold agreement.² According to accepted principles of contract law, the avoidable consequence rule³ requires a party who suffers a breach of contract to make reasonable efforts to minimize his damages.⁴ This Note examines the controversy over whether the avoidable consequence rule requires a landlord to minimize his damages occasioned by the tenant's breach of the leasehold agreement.⁵ Jurisdictions have approached this problem

1. An abandonment occurs when a tenant physically vacates the premises with no intent to return and ceases to make rental payments due under the leasehold agreement. *See tenBraak v. Waffle Shops, Inc.*, 542 F.2d 919, 924 n.5 (4th Cir. 1976). *See generally* 1 Am. Law of Property, § 3.99, at 390 (A. Casner ed. 1952). The abandonment must manifest "an absolute relinquishment of [the] premises by a tenant." *Moore v. Northwest Fabricators, Inc.*, 51 Wash. 2d 26, 27, 314 P.2d 941, 942 (1957). This is a factual question determined by the tenant's intent to relinquish all rights in the leasehold estate. *See Butler Prods. Co. v. Roush*, 153 Ariz. 500, 502, 738 P.2d 775, 777 (Ct. App. 1987).

2. *See tenBraak*, 542 F.2d at 924 n.5; Humbach, *The Common Law Conception of Leasing: Mitigation, Habitability, and Dependence of Covenants*, 60 Wash. U.L.Q. 1213, 1237 n.111 (1983).

3. Under the avoidable consequence rule, a party who has suffered a breach of contract may not sit idly by and allow damages to accumulate. *See Chesapeake & Ohio Ry. v. Kelly*, 241 U.S. 485, 489 (1916); *United States v. United States Fidelity & Guar. Co.*, 236 U.S. 512, 526 (1915); *McDonald v. Miannecki*, 79 N.J. 275, 299, 398 A.2d 1283, 1295 (1979). *See generally* Restatement of Contracts § 336(1) comment d (1932). The avoidable consequence rule denies recovery of any damages flowing from consequences that the aggrieved plaintiff reasonably could have avoided. *See Chesapeake & Ohio Ry.*, 241 U.S. at 489; *United States Fidelity Guar. Co.*, 236 U.S. at 526; *Stipp v. Karasawa*, 318 S.W.2d 172, 175 (Mo. 1958); *McDonald*, 79 N.J. at 299, 398 A.2d at 1295; *Theiler v. Tillamook County*, 81 Or. 277, 158 P. 804, 805 (1916). *See generally* J. Calamari & J. Perillo, *Contracts*, § 14-15, at 610 (3d ed. 1987); D. Dobbs, *Remedies* § 12.6 (1973).

Often, the avoidable consequence rule is expressed as a duty on the part of the aggrieved plaintiff to mitigate his damages or as an obligation to take reasonable action to avoid increasing damages caused by the breaching defendant. *See Lynch v. Call*, 261 F.2d 130, 132 (10th Cir. 1958); *American Casualty Co. v. Glorfield*, 216 F.2d 250, 253 (9th Cir. 1954); *John S. Doane Co. v. Martin*, 164 F.2d 537 (1st Cir. 1947). This formulation, however, inaccurately expresses the avoidable consequence rule. *See generally* J. Calamari & J. Perillo, *Contracts* § 14-15, at 610-611 (3d ed. 1987). Similar to other principles limiting recoverable damages, the avoidable consequence rule places no affirmative duty whatsoever upon the aggrieved plaintiff. *See Griffin v. Oklahoma Natural Gas Corp.*, 132 Kan. 843, 847-52, 297 P. 662, 664-67 (1931); *McClelland v. Climax Hosiery Mills*, 252 N.Y. 347, 354, 169 N.E. 605, 608 (1930) (Cardozo, C.J., concurring). While the rule does not deny the plaintiff his claim against the breaching party, it reduces his recovery to the extent of any damages flowing from consequences he could have avoided. *See id.* The plaintiff suffers this ensuing loss, however, through his own choice not to avoid these damages. *See id.* at 358-59, 169 N.E. at 609-10. The rule does not violate the sanctity of contract because it is applied after the breach and requires only reasonable efforts by the plaintiff. *See id.*

4. *See supra* note 3.

5. *Compare* *Ruston v. Centennial Real Estate & Inv. Co.*, 166 Colo. 377, 380-81, 445 P.2d 64, 66 (1968) (avoidable consequence rule inapplicable pursuant to lease provision)

through judicial decisions as well as legislative enactments.⁶

Some jurisdictions refuse to apply the avoidable consequence rule to the residential leasehold agreement⁷ because, in accordance with common law principles, they classify a leasehold agreement as a conveyance of land.⁸ These jurisdictions equate the lease with the transfer of a property interest in the owner's estate,⁹ in effect making the tenant the owner of the leasehold estate for the term of the lease.¹⁰ The tenant's right to possession of the premises is enforced as though the tenant has a prop-

and *Simons v. Federal Bar Bldg. Corp.*, 275 A.2d 545 (D.C. 1971) (avoidable consequence rule inapplicable) *and* *Carpenter v. Riddle*, 527 P.2d 592 (Okla. 1974) (same) *with* *Vawter v. McKissick*, 159 N.W.2d 538 (Iowa 1968) (avoidable consequence rule applies) *and* *Sommer v. Kridel*, 74 N.J. 446, 378 A.2d 767 (1977) (same) *and* *Weinstein v. Griffin*, 241 N.C. 161, 84 S.E.2d 549 (1954) (same). *See generally* Restatement (Second) of Property § 12.1 reporters note 8 (1977).

6. *See* cases and statutes cited *infra* note 15.

7. This Note addresses only a residential tenant's abandonment of a leasehold agreement and does not address the issue in the commercial context. The Note focuses on the modern urban landlord-tenant relationship. Some of the arguments in Part II may not apply to less populated, rural communities.

8. *See infra* notes 19-52 and accompanying text (discussing the conveyance theory). For a comprehensive overview of this theory see Weissenberger, *The Landlord's Duty to Mitigate Damages on the Tenant's Abandonment: A Survey of Old Law and New Trends*, 53 Temp. L.Q. 1 (1980). As Weissenberger notes, twenty-five jurisdictions refuse to apply the avoidable consequence rule to the residential leasehold agreement. *See id.* at 7; *see, e.g.*, *Schuisler & Donnell v. Ames*, 16 Ala. 73 (1849); *Grayson v. Mixon*, 176 Ark. 1123, 5 S.W.2d 312 (1928); *Ruston v. Centennial Real Estate & Inv. Co.*, 166 Colo. 377, 445 P.2d 64 (1968); *Simons v. Federal Bar Bldg. Corp.*, 275 A.2d 545, 550 (D.C. 1971); *Kanter v. Safran*, 68 So. 2d 553 (Fla. 1953), *rev'd on other grounds*, 82 So. 2d 508 (Fla. 1955); *Love v. McDevitt*, 114 Ga. App. 734, 152 S.E.2d 705, 706 (1966); *De Winer v. Nelson*, 54 Idaho 560, 33 P.2d 356 (1934); *Jordon v. Nickell*, 253 S.W.2d 237, 238-39 (Ky. 1952); *D.H. Overmeyer Co. v. Blakeley Floor Covering, Inc.*, 266 So. 2d 925 (La. Ct. App.), *writ denied*, 263 La. 615, 268 So. 2d 676 (1972); *Enoch C. Richards Co. v. Libby*, 136 Me. 376, 378, 10 A.2d 609, 610 (1940); *Cassidy v. Welsh*, 319 Mass. 615, 67 N.E.2d 226 (1946); *Huntington v. Parkhurst*, 87 Mich. 38, 48, 49 N.W. 597, 600 (1891); *Gruman v. Investors Diversified Servs. Inc.*, 247 Minn. 502, 78 N.W.2d 377 (1956); *Alsup v. Banks*, 68 Miss. 664, 668, 9 So. 895, 895 (1891); *Rhoden Inv. Co. v. Sears, Roebuck & Co.*, 499 S.W.2d 375 (Mo. 1973); *Wein v. Arlen's, Inc.*, 98 N.H. 487, 103 A.2d 86 (1954); *Heighes v. Porterfield*, 28 N.M. 445, 214 P. 323 (1923); *Becar v. Flues*, 64 N.Y. 518, 520 (1876); *Carpenter v. Riddle*, 527 P.2d 592 (Okla. 1974); *Ralph v. Deiley*, 293 Pa. 90, 141 A. 640 (1928); *Durfee v. United Stores*, 24 R.I. 254, 52 A. 1087 (1902); *Maida v. Main Bldg.*, 473 S.W.2d 648 (Tex. Civ. App. 1971); *Mariani Air Prods. Co. v. Gill's Tire Mkt.*, 29 Utah 2d 291, 508 P.2d 808 (1973); *Barlow v. Wainwright*, 22 Vt. 88, 91-92 (1849); *Crowder v. Virginian Bank of Commerce*, 127 Va. 299, 103 S.E. 578 (1920); *Arbenz v. Exley, Watkins & Co.*, 52 W. Va. 476, 44 S.E. 149 (1903). *See generally*, Weissenberger, *supra* at 7, n.31.

These courts base their decisions on the common law conveyance theory. *See, e.g.*, *Simons v. Federal Bar Bldg. Corp.*, 275 A.2d 545, 550 (D.C. 1971); *Jordon v. Nickell*, 253 S.W.2d 237, 238-39 (Ky. 1952); *Huntington v. Parkhurst*, 87 Mich. 38, 48, 49 N.W. 597, 600 (1891); *Becar v. Flues*, 64 N.Y. 518, 520 (1876).

9. *See* cases cited *supra* note 8; *see also infra* notes 19-31 and accompanying text. *See generally* *Sommer*, 74 N.J. at 452-54, 378 A.2d at 770-71 (1977) (applying avoidable consequence rule but discussing the rationale of courts that do not); *W. Burby, Real Property* § 43, at 111 (1979).

10. *See* cases cited *supra* note 8; *see also infra* notes 19-31 and accompanying text. *See generally* *MAR-SON, Inc. v. Terwaho Enters., Inc.*, 259 N.W.2d 289, 291 (N.D.

erty right in the premises for the period of the leasehold agreement.¹¹ Under this view, the avoidable consequence rule does not apply because "the lessor need not concern himself with the lessee's abandonment of the lessee's own property."¹² The landlord's refusal to accept what is in effect the tenant's rescission of his lease places responsibility for all rents upon the tenant,¹³ who still holds the lease for the remainder of the term.¹⁴

Other jurisdictions reject this common law conveyance theory. They view the leasehold agreement as a contract for goods and services.¹⁵ Thus, the avoidable consequence rule, as a contract theory, applies to the

1977) (applying the avoidable consequence rule but giving the rationale of courts that do not); *W. Burby, supra* note 10, at 111 (1979).

11. *See, e.g., Camalier & Buckley-Madison, Inc. v. Madison Hotel, Inc.*, 513 F.2d 407, 414 (D.C. Cir. 1975); *Sagamore Corp. v. Willcutt*, 120 Conn. 315, 319, 180 A. 464, 465 (1935); *Commonwealth v. Monumental Props., Inc.*, 459 Pa. 450, 470-72, 329 A.2d 812, 822-23 (1974).

12. *MAR-SON, Inc.*, 259 N.W.2d at 291. Since the tenant has exclusive control over the premises, the landlord may be violating the landlord-tenant relationship if he reenters and relets the apartment. *See infra* notes 20-23 and accompanying text.

13. *See Sancourt Realty v. Dowling*, 220 A.D. 660, 660, 222 N.Y.S. 288, 289 (1st Dep't 1927) ("[T]he lessor is not required to lease to another if he have an opportunity. . . . Rent is a fixed compensation for a vested interest. . . . and the tenant's obligation to pay rent as compensation for the estate is absolute." (citations omitted)); *see also infra* notes 34-35 and accompanying text.

14. *See infra* note 34 and accompanying text.

15. *See infra* notes 53-66 and accompanying text (discussing the contractual theory). *See generally* Hicks, *The Contractual Nature of Real Property Leases*, 24 *Baylor L. Rev.* 443 (1972). According to Weissenberger, by 1980 twenty states imposed a duty on residential landlords to minimize damages. *See Weissenberger, supra* note 8, at 8. Currently twenty-three jurisdictions apply the avoidable consequence rule to the leasehold agreement as justified by contractual principles. Six states have adopted the rule through judicial decisions. *See West Side Auction House Co. v. Connecticut Mutual Life Ins. Co.*, 186 Ill. 156, 160-01, 57 N.E. 839, 841 (1900); *Vawter v. McKissick*, 159 N.W.2d 538 (Iowa 1968); *Sommer v. Kridel*, 74 N.J. 446, 449, 454-56, 378 A.2d 767, 769, 772-73 (1977); *Weinstein v. Griffin*, 241 N.C. 161, 84 S.E.2d 549 (1954); *Burkhalter v. Townsend*, 139 S.C. 324, 138 S.E. 34 (1927); *Goodwin v. The Upper Crust of Wyoming, Inc.*, 624 P.2d 1192 (Wyo. 1981).

Seventeen states have adopted the rule through statute. *See* Alaska Stat. § 34.03.230 (1985); Ariz. Rev. Stat. Ann. § 33-1370(c) (1988 Supp.); Cal. Civ. Code § 1951.2 (West 1985); Conn. Gen. Stat. § 47a-11(a) (1988 Supp.); Del. Code Ann. tit. 25, § 5508 (1975); Haw. Rev. Stat. § 521-70 (1985); Kan. Stat. Ann. § 58-2565 (1983); Ky. Rev. Stat. Ann. § 383.670 (Supp. 1988) (limited to specific counties); Md. Real Prop. Code Ann. § 8-207 (1988); Mont. Code Ann. § 70-24-426 (1987); Neb. Rev. Stat. § 76-1432 (1976); Nev. Rev. Stat. Ann. § 118.175 (Michie 1986); N.D. Cent. Code §§ 47-16-13.4 to .5 (1978); Or. Rev. Stat. § 91-825(3) (1983); Tenn. Code Ann. § 66-28-507 (1982) (limited to specific counties); Wash. Rev. Code Ann. § 59.18.310 (1989); Wis. Stat. Ann. § 704.29 (1981). It should be noted, however, that the Tennessee statute, Tenn. Code Ann. § 66-28-102(a) (1982) applies only in counties with populations over 200,000.

The law in Indiana and Ohio is unsettled on the issue. *Compare Hirsch v. Merchants Nat'l Bank & Trust Co.*, 336 N.E.2d 833, 836 (Ind. Ct. App. 1975) (applying the avoidable consequence rule) *and Stern v. Taft*, 49 Ohio App. 2d 405, 361 N.E.2d 279, 281 (1976) (same) *with Patterson v. Emerick*, 21 Ind. App. 614, 52 N.E. 1012 (1899) (not applying the avoidable consequence rule) *and White v. Smith*, 8 Ohio App. 368 (1917) (same). *See generally, Weissenberger, supra* note 8, at 8 n.32.

abandonment of the leased premises by a residential tenant. This requires the landlord to avoid any unnecessary accumulation of damages¹⁶ by using reasonable efforts¹⁷ to secure an alternative tenant upon the original tenant's abandonment.¹⁸

16. See, e.g., *West Side Auction House Co. v. Connecticut Mutual Life Ins. Co.*, 186 Ill. 156, 161, 57 N.E. 839, 841 (1900); *Vawter v. McKissick*, 159 N.W.2d 538, 541 (Iowa 1968); *Sommer v. Kridel*, 74 N.J. 446, 453, 378 A.2d 767, 770-71 (1977); *Weinstein v. Griffin*, 241 N.C. 161, 84 S.E.2d 549, 552 (1954); *Burkhalter v. Townsend*, 139 S.C. 324, 138 S.E. 34, 37 (1927); *Goodwin v. The Upper Crust of Wyoming, Inc.*, 624 P.2d 1192 (Wyo. 1981); see also *infra* notes 56-63 and accompanying text.

17. See *infra* notes 120-21 and accompanying text.

18. See, e.g., *Vawter v. McKissick*, 159 N.W.2d 538, 542 (Iowa 1968); *Sommer*, 74 N.J. at 457, 378 A.2d at 773 (1977). In doing so, the rent received from the new tenant is applied against the rent due from the defaulting tenant under the breached agreement, thereby minimizing the damages suffered by the landlord. See *Vawter*, 159 N.W.2d at 542; *Sommer*, 74 N.J. at 457, 378 A.2d at 773.

The controversy over the classification of the leasehold agreement is highlighted by the present confusion among New York courts regarding the application of the avoidable consequence rule to residential leasehold agreements. Compare *Centurian Dev. Ltd. v. Kenford Co.*, 60 A.D.2d 96, 98, 400 N.Y.S.2d 263, 264 (4th Dep't 1977) (refusing to apply the avoidable consequence rule) with *Howard Stores Corp. v. Robison Rayon Co.*, 36 A.D.2d 911, 912, 320 N.Y.S.2d 861, 862 (1st Dep't 1971) (mem.), *aff'g* 64 Misc. 2d 913 (Sup. Ct. 1970) (applying the avoidable consequence rule in reliance on landlord's failure to act in good faith) and *57 E. 54 Realty Corp. v. Gay Nineties Realty Corp.*, 71 Misc. 2d 353, 355, 335 N.Y.S.2d 872, 873-74 (Sup. Ct. 1972), *leave to app. denied*, N.Y.L.J., Oct. 18, 1972, at 2, col. 4 (1st Dep't) (lease is a contract and all contractual principles should apply); see also *Parkwood Realty Co. v. Marciano*, 77 Misc. 2d 690, 692, 353 N.Y.S.2d 623 (N.Y.C. Civ. Ct. 1974); *Gracie Town House v. Weinstein*, N.Y.L.J., March 14, 1973, at 17, col. 4 (App. Term); *New York Univ. v. Nieto*, N.Y.L.J., April 13, 1973, at 18, col. 4 (N.Y.C. Civ. Ct.); *Sherman Taylor Corp. v. Cohen*, N.Y.L.J., July 10, 1973, at 10, col. 8 (N.Y.C. Civ. Ct.).

In an 1876 decision that is still controlling today, the New York Court of Appeals held that an oral agreement to lease a house in the future is valid and obligatory and vests a present interest in the term of the lease. See *Becar v. Flues*, 64 N.Y. 518 (1876). Accordingly, the leasehold agreement is not a contract subject to the avoidable consequence rule and the landlord need not minimize the damages resulting from the tenant's breach of the agreement. See *Sancourt Realty Corp. v. Dowling*, 220 A.D. 660, 661, 222 N.Y.S. 288, 289 (1st Dep't 1927). The Appellate Division, Fourth Department, relying on the conveyance theory set out in *Becar*, refuses to apply the avoidable consequence rule to the landlord-tenant relationship. See *Centurian Dev. Ltd. v. Kenford Co.*, 60 A.D.2d 96, 400 N.Y.S.2d 263 (4th Dep't 1977); *accord Spohn v. Fine*, 124 Misc. 2d 1075, 1076, 479 N.Y.S.2d 139, 140 (Yates County Ct. 1984); *Building Supervision Corp. v. Skolinsky*, 50 Misc. 2d 375, 378, 270 N.Y.S.2d 454, 457 (N.Y.C. Civ. Ct. 1966); *Bedford Myrtle Corp. v. Martin*, 28 Misc. 2d 33, 33-34, 209 N.Y.S.2d 201, 203 (Sup. Ct. 1960); *Marshak v. Loewe*, 20 Misc. 2d 889, 890, 195 N.Y.S.2d 697, 698 (Sup. Ct. 1959); *59 Madison Ave. Corp. v. Bauer*, 15 Misc. 2d 780, 781-82, 180 N.Y.S.2d 1013, 1015-16 (Bronx Mun. Ct. 1958). The First Department, however, accepts the modern view of the lease as a contract and applies the avoidable consequence rule to a breach of a residential leasehold agreement. See *Howard Stores Corp. v. Robison Rayon Co.*, 36 A.D.2d 911, 912, 320 N.Y.S.2d 861, 862 (1st Dep't 1971) (mem.), *aff'g* 64 Misc. 2d 913 (Sup. Ct. 1970); *57 E. 54 Realty Corp. v. Gay Nineties Realty Corp.*, 71 Misc. 2d 353, 355, 335 N.Y.S.2d 872, 873-74 (Sup. Ct. 1972), *leave to app. denied*, N.Y.L.J., Oct. 18, 1972, at 2, col. 4 (1st Dep't); see also *Parkwood Realty Co. v. Marciano*, 77 Misc. 2d 690, 692, 353 N.Y.S.2d 623, 626-27 (N.Y.C. Civ. Ct. 1974); *Gracie Town House v. Weinstein*, N.Y.L.J., Mar. 14, 1973, at 17, col. 4 (App. Term); *New York Univ. v. Nieto*, N.Y.L.J., Apr. 13, 1973, at 18, col. 4 (N.Y.C. Civ. Ct.); *Sherman Taylor Corp. v. Cohen*, N.Y.L.J., July 10, 1973, at 10,

This Note argues that the avoidable consequence rule should apply to residential leasehold agreements. Part I examines the controversy concerning the classification of leases of residential real property as either a conveyance of land or a contract, and concludes that contractual principles mandate application of the avoidable consequence rule to residential leasehold agreements. Part II analyzes policy reasons supporting application of the avoidable consequence rule to residential leasehold agreements. This Note concludes that the avoidable consequence rule should be applied to residential leasehold agreements. It also recommends that the issue is best resolved by statute, which affords more precision and uniformity.

I. THE RESIDENTIAL LEASE: CONVEYANCE OR CONTRACT?

A. *Conveyance View*

According to the common law conception of residential leases, the leasehold agreement constitutes a conveyance of real property from the landlord to the tenant.¹⁹ Under this conveyance theory, the landlord conveys his possessory interest in the land to the tenant for the entire duration of the leasehold agreement.²⁰ In effect, the tenant's rights to the land under the leasehold agreement are just as complete as those of the owner of the estate.²¹ Consequently, upon execution of the leasehold

col. 8 (N.Y.C. Civ. Ct.). Although according to *Becar* New York remains a non-mitigation state, a significant number of New York lower courts follow the contractual approach, applying the avoidable consequence rule to the residential leasehold agreement. *See, e.g., Paragon Indus., Inc. v. Williams*, 122 Misc. 2d 628, 629-30, 473 N.Y.S.2d 92, 93 (App. Term 1983); *New York Univ. v. Nieto*, N.Y.L.J., Apr. 13, 1973, at 18, col. 4 (N.Y.C. Civ. Ct.); *Gracie Towne House v. Weinstein*, N.Y.L.J., Mar. 14, 1973, at 17, col. 4 (App. Term).

Some courts avoid the issue. In *Lefrak v. Lambert*, 89 Misc. 2d 197, 390 N.Y.S.2d 959 (N.Y.C. Civ. Ct. 1976), the trial court held that the tenant would not be liable for rent due because the landlord did not make a reasonable effort to relet the premises. On appeal, however, the court avoided the issue by holding that the landlord did make a reasonable effort to find an alternative tenant, obviating the need to decide whether the landlord must assume this duty. *See Lefrak v. Lambert*, 93 Misc. 2d 632, 633, 403 N.Y.S.2d 397, 398 (App. Term 1978) (mem.); *see, e.g., Goldman v. Orange County Chapter, New York State Assoc. for Retarded Children*, 121 A.D. 2d 683, 685, 503 N.Y.S.2d 884, 886 (2d Dep't 1986); *Gabin v. Goldstein*, 131 Misc. 2d 153, 155, 497 N.Y.S.2d 984, 986 (N.Y.C. Civ. Ct. 1986); *Birchwood Assocs. v. Stern*, 88 Misc. 2d 937, 938, 390 N.Y.S.2d 505, 506 (App. Term 1976).

19. *See, e.g., Sagamore Corp. v. Willcutt*, 120 Conn. 315, 319, 180 A. 464, 465 (1935); *Becar v. Flues*, 64 N.Y. 518, 520 (1876).

20. The tenant becomes a limited owner of the landlord's estate for the duration of the leasehold agreement. *See, e.g., Sagamore Corp.*, 120 Conn. at 319, 180 A. at 465; *Gruman v. Investors Diversified Serv.*, 247 Minn. 502, 78 N.W.2d 377, 380 (1956); *Becar v. Flues*, 64 N.Y. 518, 520 (1876); *MAR-SON, Inc. v. Terwaho Enters., Inc.*, 259 N.W.2d 289, 291 (N.D. 1977) (citing *Gruman*); *Commonwealth v. Monumental Properties, Inc.*, 459 Pa. 450, 470-74, 329 A.2d 812, 822-24 (1974). *See generally* R. Cunningham, W. Stoebuck & D. Whitman, *The Law of Property*, § 6.1 at 256 (1984 ed.) (tenant holds a possessory estate in the land).

21. *See Baker v. Clifford-Matthew Inv. Co.*, 99 Fla. 1229, 1232, 128 So. 827, 829 (1930); *Gruman*, 247 Minn. at 502, 78 N.W.2d at 380; *MAR-SON, Inc. v. Terwaho*

agreement, the landlord relinquishes his possessory interest in the land for the term of the lease²² and must avoid any act of dominion over the premises until the lease expires.²³

Because the landlord grants the tenant the equivalent of an estate for years, he owes the tenant few obligations during the term of the lease.²⁴ However, limited duties do exist between the landlord and the tenant. For example, the landlord must deliver possession of the premises²⁵ and protect the tenant in his quiet enjoyment²⁶ of the premises.²⁷ The tenant's duties to the landlord consist of refraining from disturbing other tenants,²⁸ making ordinary repairs in the absence of a covenant to the contrary,²⁹ and not committing waste.³⁰ Other than these limited duties, the landlord and tenant maintain a relationship essentially divorced from each other.³¹

Enters., Inc., 259 N.W.2d 289, 291 (N.D. 1977); Humbach, *supra* note 2, at 1213-90; see also *In Re Dant & Dant*, 39 F. Supp. 753, 758 (W.D. Ky. 1941), (it is as if the "lessee has purchased an interest in the real estate."), *aff'd sub nom.* *Kessler v. Jefferson Storage Corp.*, 125 F.2d 108 (6th Cir. 1941).

22. See *MAR-SON, Inc.*, 259 N.W.2d at 291 (N.D. 1977); *Sommer v. Kridel*, 74 N.J. 446, 454, 378 A.2d 767, 771 (1977).

23. See *Sommer*, 74 N.J. at 454, 378 A.2d at 771.

24. See generally, R. Cunningham, W. Stoebeck & D. Whitman, *supra* note 20, § 6.1, at 256 (tenant has a possessory interest while landlord retains a greater interest in reversion).

25. The tenant has a legal right to the land and the landlord is responsible for damages resulting when the tenant is prevented from taking possession of the land. See *Boltz v. Crawford & North Aves. Theatre Co.*, 294 Ill. App. 258, 261-62, 13 N.E.2d 844, 846 (1938).

26. The tenant's right to quiet enjoyment of the premises affords him protection against wrongful acts by the landlord. See *Milheim v. Baxter*, 46 Colo. 155, 103 P. 376, 377-78 (1909); *Winchester v. O'Brien*, 266 Mass. 33, 37-38, 164 N.E. 807, 809 (1929); *Hannan v. Harper*, 189 Wis. 588, 208 N.W. 255, 258-59 (1926).

27. However, at common law there was no implied duty on the part of a landlord to put the premises in repair. See *Welson v. Neujan Bldg. Corp.*, 264 N.Y. 303, 305, 190 N.E. 648, 649 (1934); *Widmor v. Healey*, 247 N.Y. 94, 96, 159 N.E. 874, 874 (1928); *Edwards v. N.Y. & Harlem R.R. Co.*, 98 N.Y. 245, 247 (1885); *Fermaglich v. Warshawiak*, 42 Misc. 2d 1077, 1079, 249 N.Y.S.2d 963, 966 (Rockland Co. Ct. 1964). The tenant, therefore, must bear the risk of the condition of the premises at the commencement of the lease and must repair defects in the premises existing at the time he takes possession barring any expressed covenants to the contrary. See *Franklin v. Brown*, 118 N.Y. 110, 115, 23 N.E. 126, 127 (1889); *Kosior v. Pomrinse*, 249 A.D. 196, 197, 291 N.Y.S. 830, 831 (1st Dep't 1936).

28. See *Louisiana Leasing Co. v. Sokolow*, 48 Misc. 2d 1014, 266 N.Y.S.2d 447 (N.Y.C. Civ. Ct. 1966).

29. See *King v. Cooney-Eckstein Co.*, 66 Fla. 246, 63 So. 659, 660 (1913); *Suydam v. Jackson*, 54 N.Y. 450, 453-54 (1873). Landlords and tenants often make covenants that place the obligation to make specific repairs on the landlord. See, e.g., *Miller v. Miller*, 217 Miss. 650, 64 So. 2d 739, 742 (1953) (covenant to keep roof in repair).

30. The tenant is not entitled to use the land in a manner that will diminish the value of the interests owned by others in the same land. See *Melms v. Pabst Brewing Co.*, 104 Wis. 7, 10, 79 N.W. 738, 739 (1899). For a discussion of what constitutes waste, see generally W. Burby, *Real Property* §§ 12-13, at 33-39 (1979).

31. See generally *Gruman v. Investors Diversified Servs.*, 247 Minn. 502, 78 N.W.2d 377 (1956).

According to the common law conveyance theory, the landlord's interest in the collection of rent arises from the tenant's ownership of the leasehold estate³² and runs from the land itself, rather than from the tenant.³³ Conversely, the tenant's obligation to pay rent stems from the landlord's conveyance of the land to him. The tenant, therefore, is bound to the rental obligation for as long as he owns the leasehold estate—for the entire term of the leasehold agreement regardless of what actually happens to the premises.³⁴ When the tenant vacates the premises, the common law treats this as an abandonment of his own estate and an offer to rescind the leasehold agreement prior to termination of the tenant's interest.³⁵ The landlord may respond to this offer in one of three ways.

First, the landlord may simply accept the abandonment and release the tenant from his leasehold obligations by renting to someone else.³⁶ Second, the landlord may take no action at all, thereby continuing to hold the tenant liable for the rent as it becomes due under the terms of the leasehold agreement.³⁷ This action comports with the tenant's ownership interest in the leased premises³⁸ because the tenant effectively owns the land during the stipulated term of the lease.³⁹ The landlord may only collect rent.⁴⁰

Finally, the landlord may exercise the "tenant's account remedy."⁴¹ This entitles the landlord to resume possession of the property for the limited purpose of reletting it to a new tenant.⁴² The rent received under the new lease is applied to the defaulting tenant's account.⁴³ The land-

32. See *Javins v. First Nat'l Realty Corp.*, 428 F.2d 1071, 1077 n.31 (D.C. Cir.), cert. denied, 400 U.S. 925 (1970); *Love, Landlord's Remedies when the Tenant Abandons: Property, Contract, and Leases*, 30 U. Kan. L. Rev. 533, 535 (1982).

33. See *Love, supra* note 32, at 535 ("[T]he rent issued from the land, and . . . the land was bound to pay the rent.")

34. See *Javins*, 428 F.2d at 1074; *Love, supra* note 32, at 535.

35. See *Love, supra* note 32, at 535.

36. See *Weinsklar Realty Co. v. Dooley*, 200 Wis. 412, 228 N.W. 515, 517 (1930).

37. See *D.H. Overmeyer Co. v. Blakeley Floor Covering, Inc.*, 266 So. 2d 925, 926 (La. Ct. App.), writ denied, 263 La. 615, 268 So. 2d 676 (1972); *Eidelman v. Walker & Dunlop, Inc.*, 265 Md. 538, 542-43, 290 A.2d 780, 783 (1972); *Gruman v. Investors Diversified Serv.*, 247 Minn. 502, 78 N.W.2d 377, 379 (1956); *Heighes v. Porterfield*, 28 N.M. 445, 214 P. 323, 324 (1923).

38. See *Love, supra* note 32, at 535.

39. See *supra* notes 19-23 and accompanying text.

40. See e.g., *Becar v. Flues*, 64 N.Y. 518, 520 (1876); *Commonwealth v. Monumental Properties*, 459 Pa. 450, 470-72, 329 A.2d 812, 822-23 (1974); *Love, supra* note 36, at 535. However, the landlord and tenant continue to owe some limited duties to each other. See *supra* notes 24-31 and accompanying text.

41. See *Love, supra* note 32, at 535; *Hayes v. Goldman*, 71 Ark. 251, 255, 72 S.W. 563, 564 (1903); *Roberts v. Wish*, 265 Mass. 179, 181-82, 163 N.E. 892, 893 (1928); *Centurian Dev. Ltd. v. Kenford Co.*, 60 A.D.2d 96, 98, 400 N.Y.S.2d 263, 264 (4th Dep't 1977); *Meagher v. Eilers Music House*, 84 Or. 33, 164 P. 373, 375 (1917); *Auer v. Penn*, 99 Pa. 370, 375-76 (1882).

42. See *Hoke v. Williamson*, 98 Kan. 580, 582, 158 P. 1115, 1116 (1916); *Love, supra* note 32, at 539-40.

43. See *Williamson*, 98 Kan. at 582, 158 P. at 1116; *Love, supra* note 32, at 539-40.

lord's damages from the defaulting tenant then amount to the difference between the breaching tenant's rent and the new tenant's rent.⁴⁴ The original tenant is not released from liability. Although this option remains available to the landlord it is inconsistent with the conveyance theory because, in essence, the landlord finds a new tenant to place on someone else's land.⁴⁵

Upon his abandonment, the tenant has no control over the landlord's choice of remedies.⁴⁶ Although the landlord, through a fiction, has conveyed to the tenant, the tenant is only a limited owner of the premises during the term of the leasehold agreement;⁴⁷ therefore, the tenant cannot divest himself of his estate to the landlord's disadvantage through an act of abandonment.⁴⁸ The tenant cannot evade liability for the rent by abandoning the premises before the expiration of the leasehold agreement.⁴⁹ Consequently, although the landlord owes some limited obligations to the tenant,⁵⁰ he otherwise may ignore the granted estate during the term of the leasehold agreement;⁵¹ the landlord need not seek a new tenant upon abandonment by the original tenant.⁵²

B. *Contract View*

Recently, a large body of case law has emerged, forsaking the common law conveyance theory and treating a lease as a contract between a merchant and a consumer for goods and services.⁵³ Under this contractual theory, the tenant does not receive an ownership interest in the land

44. See, e.g., *Williamson*, 98 Kan. at 582, 158 P. at 1116; *Wilson v. Ruhl*, 277 Md. 607, 613, 356 A.2d 544, 548 (1976); *Love*, *supra* note 32, at 536-44.

45. See *Sommer v. Kridel*, 74 N.J. 446, 453, 378 A.2d 767, 771 (1977); *Wright v. Baumann*, 239 Or. 410, 412-15, 398 P.2d 119, 120-21 (1965); *Love*, *supra* note 32, at 535.

46. See *Hickman v. Breadford*, 179 Iowa 827, 162 N.W. 53, 56-57 (1917).

47. See *supra* notes 19, 21 and accompanying text.

48. See *Bonetti v. Treat*, 91 Cal. 223, 27 P. 612, 613-14 (1891); *Anheuser-Busch Brewing Ass'n v. American Prod. Co.*, 211 P. 817, 818 (Cal. App. 1922) (*per curiam*).

49. See *Browne v. Dugan*, 189 Ark. 551, 561, 74 S.W.2d 640, 645 (1934); *De Hart v. Allen*, 26 Cal. 2d 829, 832-33, 161 P.2d 453, 455-56 (1945); *Haynes v. Aldrich*, 133 N.Y. 287, 291-92, 31 N.E. 94, 95-96 (1892).

50. See *supra* notes 25-31 and accompanying text.

51. See *Gruman v. Investors Diversified Serv.*, 247 Minn. 502, 78 N.W.2d 377, 379-80 (1956).

52. See *Gruman*, 247 Minn. at 504, 78 N.W.2d at 379; see also *supra* notes 13-15.

53. See, e.g., *Javins v. First Nat'l Realty Corp.*, 428 F.2d 1071, 1074-75 (D.C. Cir.), *cert denied*, 400 U.S. 925 (1970); *Green v. Superior Court*, 10 Cal. 3d 616, 619, 517 P.2d 1168, 1172-73, 111 Cal. Rptr. 704, 708-09 (1974); *Brown v. Southhall Realty Co.*, 237 A.2d 834, 836-37 (D.C. 1968); *Lemle v. Breeden*, 51 Haw. 426, 433, 462 P.2d 470, 474 (1969); *Kline v. Burns*, 111 N.H. 87, 92-93, 276 A.2d 248, 251-52 (1971); *Marini v. Ireland*, 56 N.J. 130, 141-43, 265 A.2d 526, 532-33 (1970).

Many landlord-tenant statutes also apply contractual principles to leases. See, e.g., Alaska Stat. §§ 34.03.160 to .230, .270 (1985); Ariz. Rev. Stat. Ann. §§ 33-1361-1370, -1373 (1974); Cal. Civ. Code §§ 1941.1.-2, 1951.2, 1951.5 (West 1985); Conn. Gen. Stat. §§ 47a-12-15, -12-19, (1988 Supp.); Del. Code Ann. tit. 25, §§ 5112, 5302, 5502, 5505, 5508, 5510 (1988 Supp.); Fla. Stat. §§ 83.05, .54-.57 (1988 Supp.); Or. Rev. Stat. §§ 91.800-.825, .845 (1984); Wash. Rev. Code Ann. §§ 59.18.080-.120, .160, .180, .310

through the leasehold agreement. Instead he only contracts with the landlord for a "well known package of goods and services"⁵⁴ in consideration for his payment of rent.⁵⁵

Courts viewing the lease as a contract reason that the modern tenant is no longer interested in the land when he enters into a residential leasehold agreement, but rather seeks a dwelling place upon the land.⁵⁶ Furthermore, the duties between the landlord and tenant consist of those contracted for in the leasehold agreement.⁵⁷ Accordingly, the tenant's obligation to pay rent stems from the leasehold agreement, not from his limited ownership of the land.⁵⁸

Under the contractual approach, a tenant's abandonment⁵⁹ is treated as a breach,⁶⁰ and the avoidable consequence rule obligates the landlord to minimize his damages⁶¹ by making reasonable attempts to secure a substitute tenant.⁶² Failure to undertake reasonable efforts to secure an alternative tenant results in a reduced damage recovery for the landlord.⁶³

The rationale for this contractual approach is grounded in the nature of today's urban housing market.⁶⁴ The conveyance theory is based on certain assumptions which are no longer valid. The common law conveyance theory comports with the nature of an agrarian economy where

(1988 Supp.); Wis. Stat. Ann. §§ 704.07, .17, .29 (West 1988 Supp.); see also Weisenberger, *supra* note 8, at 2 n.4.

The rationale for this view results from the proliferation of modern urban communities. The common law conveyance theory of leasing is not practical in urban cities where tenants rent for a place to live rather than for the land itself. The productivity of the land is irrelevant and the structure upon the land becomes the focus of the transfer between the landlord and tenant. Consequently, in urban communities the services and responsibilities that attach to the structure are of profound importance to the transaction. The landlord can no longer divorce himself from the effects of the transaction. See *infra* notes 54-77 and accompanying text.

54. *Javins v. First Nat'l Realty Corp.*, 428 F.2d 1071, 1074 (D.C. Cir.), *cert. denied*, 400 U.S. 925 (1970).

55. See cases cited *infra* note 53.

56. As one court reasoned:

The assumption of landlord-tenant law, derived from feudal property law, that a lease primarily conveyed to the tenant an interest in land may have been reasonable in a rural, agrarian society . . . [because] the value of the lease to the tenant [was in] the land itself. But in the case of the modern apartment dweller, the value of the lease is that it gives him a place to live.

Javins, 428 F.2d at 1074; see cases cited *supra* note 53.

57. The parties to the leasehold agreement contract through specific leasehold covenants for the goods and services they require from each other. See *Sommer v. Kridel*, 74 N.J. 446, 454-56, 378 A.2d 767, 771-72 (1977) (citing 2 Powell on Real Property, § 221[1], at 80-81, (1977 ed.)).

58. See *MAR-SON, Inc. v. Terwaho Enters., Inc.*, 259 N.W.2d 289, 291 (N.D. 1977); cases cited *supra* note 53.

59. See *supra* note 1 and accompanying text.

60. See *supra* note 2 and accompanying text.

61. See *supra* notes 3, 16-18 and accompanying text.

62. See *supra* notes 17-18 and accompanying text.

63. See *supra* notes 3-4, 16-18 and accompanying text.

64. See cases cited *supra* note 53.

the land is more important to a tenant than any structures upon it.⁶⁵ Today's modern tenant merely seeks a dwelling place and, therefore, rents for the purpose of obtaining shelter and services from the landlord.⁶⁶ To ensure that landlords provide the essential shelter and services that the modern tenant seeks,⁶⁷ landlord-tenant law must abandon the conveyance theory and instead apply contractual principles to the leasehold agreement.⁶⁸

Complexities associated with modern city life⁶⁹ support the application of contractual principles to the leasehold agreement. Problems arising from these complexities are commonly solved with specific leasehold covenants.⁷⁰ Inclusion of these covenants enables courts to "cast aside technicalities in the interpretation of leases and to concentrate their attention, as in the case of other contracts, on the intentions of the parties."⁷¹

Courts also infer contractual duties from the leasehold agreement⁷² because tenants generally maintain an inferior bargaining position with respect to landlords.⁷³ The application of warranties of habitability to the residential landlord-tenant relationship exemplifies the application of

65. See cases cited *supra* note 53. Evolving "social factors, [however], have exerted increasing influence on the law of estate for years," justifying rejection of the application of the conveyance theory to modern residential leasehold agreements. *Sommer v. Kridel*, 74 N.J. 446, 454, 378 A.2d 767, 771 (1977) (quoting 2 Powell on Real Property § 221[1], at 180-81 (1977 ed.)).

66. See *Javins v. First Nat'l Realty Corp.*, 428 F.2d 1071, 1079 (D.C. Cir.), *cert. denied*, 400 U.S. 925 (1970); cases cited *supra* note 53.

67. See *infra* notes 69, 77 and accompanying text. Applying contract principles to residential leases will help ensure availability of habitable apartments in markets where demand for housing exceeds supply. See *infra* note 91 and accompanying text.

68. The common law conveyance theory relieves the landlord of all but a few obligations to the tenant and cannot achieve the modern purpose of the leasehold agreement. See *Javins*, 428 F.2d at 1077-80; *Bauer v. 141-149 Cedar Lane Holding Co.*, 24 N.J. 139, 145, 130 A.2d 833, 836-37 (1957).

69. Such complexities include the common everyday needs associated with modern urban dwelling. The extensive standards set out in housing regulations provide a good guide for these services. See *Javins*, 428 F.2d at 1074 n.9. Examples of such services associated with general housing regulations are hot water, garbage disposal, *see, e.g.*, *Academy Spires, Inc. v. Brown*, 111 N.J. Super. 477, 482, 268 A.2d 556, 559 (1970), and air conditioning, *see, e.g.*, *Park Hill Terrace Assocs. v. Glennon*, 146 N.J. Super. 271, 276-77, 369 A.2d 938, 941-42 (1977).

70. See *Sommer v. Kridel*, 74 N.J. 446, 454, 378 A.2d 767, 771 (1977) (quoting 2 Powell on Real Property § 221[1], at 181 (1977 ed.)).

71. *Sommer*, 74 N.J. at 455, 378 A.2d at 772 (quoting 6 Williston on Contracts § 809A, at 592 (3d ed. 1962)). The use of these "specific lease covenants has reintroduced into the law of estates for years a predominantly contractual ingredient." *Id.* at 454, 378 A.2d at 771 (quoting 2 Powell on Real Property § 221(1) at 181 (1977 ed.)).

72. See *Sommer v. Kridel*, 74 N.J. 446, 455-56, 378 A.2d 767, 772 (1977); *Marini v. Ireland*, 56 N.J. 130, 143-144, 265 A.2d 526, 533 (1970).

73. The landlord's superior bargaining position arises from the fact that he owns the premises and sets the terms of the leasehold agreement. See, *e.g.*, *Javins v. First Nat'l Realty Corp.*, 428 F.2d 1071, 1079 (D.C. Cir.), *cert. denied*, 400 U.S. 925 (1970). See generally *Lefrak v. Lambert*, 89 Misc. 2d 197, 202, 390 N.Y.S.2d 959 (N.Y.C. Civ. Ct. 1976). Inequality in bargaining power also results when the demand for habitable residences exceeds supply. See *infra* note 91 and accompanying text.

modern contract principles to landlord-tenant law.⁷⁴ The landlord's obligation to provide the tenant with habitable premises is now an accepted principle of landlord-tenant law.⁷⁵ Courts have also adopted legislative health regulations in determining the landlord's obligation to the tenant under the implied warranty of habitability.⁷⁶ Courts have thus recognized that treating the lease as a contract, rather than as a conveyance, makes more sense in the modern urban housing market.⁷⁷

Because the residential leasehold agreement is viewed as a contract between the landlord and tenant, contractual principles, including the avoidable consequence rule, should be applicable.⁷⁸ Courts employ the avoidable consequence rule in every area of contract law,⁷⁹ including

74. See Johnson, *Correctly Interpreting Long-Term Leases Pursuant to Modern Contract Law: Toward a Theory of Relational Leases*, 74 Va. L. Rev. 751, 793 n.131 (1988).

75. Both courts and legislatures now recognize a contractually implied warranty of habitability in all residential leases, resulting in the landlord's continued duty to maintain the condition of the premises. See *Javins v. First Nat'l Realty Corp.*, 428 F.2d 1071, 1079 (D.C. Cir.), cert. denied, 400 U.S. 925 (1970); *Green v. Superior Court*, 10 Cal. 3d 616, 629, 517 P.2d 1168, 1176, 111 Cal. Rptr. 704, 712 (1974); *Lemle v. Breeden*, 51 Haw. 426, 433, 462 P.2d 470, 474 (1969); *Jack Spring, Inc. v. Little*, 50 Ill. 2d 351, 366, 280 N.E.2d 208, 217 (1972); *Mease v. Fox*, 200 N.W.2d 791, 796 (Iowa 1972); *Steele v. Lattimer*, 214 Kan. 329, 335-36, 521 P.2d 304, 309-10 (1974); *Boston Housing Auth. v. Hemingway*, 363 Mass. 184, 199, 293 N.E.2d 831, 843 (1973); *Marini v. Ireland*, 56 N.J. 130, 144, 265 A.2d 526, 533-34 (1970); *Teller v. McCoy*, 162 W. Va. 367, 380, 253 S.E.2d 114, 123 (1978); N.Y. Real Prop. Law § 235-b (McKinney Supp. 1988); Wash. Rev. Code Ann. § 59.18.060 (West Supp. 1989); Uniform Residential Landlord and Tenant Act § 2.104(a)(2).

76. In general, the cases indicate that any proof of housing code violations having a substantial adverse impact on health and safety will be sufficient to establish a breach of the implied warranty of habitability. See *Javins v. First Nat'l Realty Corp.*, 428 F.2d 1071, 1081-82 (D.C. Cir.), cert. denied, 400 U.S. 925 (1970); *Green v. Superior Court*, 10 Cal. 3d 616, 627, 517 P.2d 1168, 1175, 111 Cal. Rptr. 704, 711 (1974); *Jack Spring, Inc. v. Little*, 50 Ill. 2d 351, 366, 280 N.E.2d 208, 217 (1972); *Boston Housing Auth. v. Hemingway*, 363 Mass. 184, 200-01, 293 N.E.2d 831, 843-44 (1973); *King v. Moorehead*, 495 S.W.2d 65, 77-78 (Mo. App. 1973); *Kline v. Burns*, 111 N.H. 87, 92-93, 276 A.2d 248, 251-52 (1971); *Berzito v. Gambino*, 63 N.J. 460, 469-70, 308 A.2d 17, 22 (1973); *Pugh v. Holmes*, 486 Pa. 272, 289-90, 405 A.2d 897, 905-06 (1979); *Foisy v. Wyman*, 83 Wash. 2d 22, 30-31, 515 P.2d 160, 166 (1973). Examples of such housing code violations include failure to provide hot running water, see, e.g., *Winchester Mgmt. Corp. v. Staten*, 361 A.2d 187, 189-90 (D.C. 1976); *Pugh v. Holmes*, 486 Pa. 272, 291, 405 A.2d 897, 906-07 (1979); *Foisy v. Wyman*, 83 Wash. 2d 22, 29, 515 P.2d 160, 165 (1973), garbage disposal and elevator service, see, e.g., *Academy Spires, Inc. v. Brown*, 111 N.J. Super. 477, 482, 268 A.2d 556, 559 (1970), and, in general, "facilities vital to the use of the premises for residential purposes," *Berzito v. Gambino*, 63 N.J. 460, 466, 308 A.2d 17, 20 (1973) (quoting *Marini v. Ireland*, 56 N.J. 130, 144, 265 A.2d 526, 534 (1970)).

77. The common law conveyance theory imposes few obligations on the landlord. See *supra* notes 24-27 and accompanying text.

78. See, e.g., *Javins v. First Nat'l Realty Corp.*, 428 F.2d 1071 (D.C. Cir.), cert. denied, 400 U.S. 925 (1970); 57 E. 54 Realty Corp. v. Gay Nineties Realty Corp., 71 Misc. 2d 353, 355, 335 N.Y.S.2d 872, 873-74 (Sup. Ct. 1972), leave to app. denied, N.Y.L.J., Oct. 18, 1972 at 2, col. 4 (1st Dep't).

79. See *Brown v. Cairns*, 63 Kan. 584, 588, 66 P. 639, 640 (1901); *Peninsular Sav. & Loan Ass'n v. C.J. Breier Co.*, 137 Wash. 641, 243 P. 830, 832 (1926); see, e.g., *Oakland Metal Stamping Co. v. Forest Indus., Inc.*, 352 Mich. 119, 125-26, 89 N.W.2d 503, 506 (1958) (buyer of manufactured goods should have rejected the first lot as defective, thus

contracts of employment,⁸⁰ sales contracts,⁸¹ and even in cases of breach by anticipatory repudiation.⁸² Therefore, it is both logical and consistent with modern contract principles to apply the avoidable consequence rule to residential leasehold agreements.⁸³

II. POLICY REASONS FOR ADOPTING THE AVOIDABLE CONSEQUENCE RULE

Although the modern view regards a lease as contractual in nature, courts are not bound to apply all contractual principles to the leasehold agreement. Nevertheless, strong policy reasons favor application of the avoidable consequence rule to the residential leasehold agreement.

A. *Economic Efficiency*

Public policy and theories of economic efficiency encourage putting property to its most productive use. This goal is furthered by applying the avoidable consequence rule to the residential leasehold agreement.⁸⁴ Under the conveyance fiction, when a residential tenant abandons an apartment the landlord may stand idle and collect the full rent as, or after, it accrues,⁸⁵ leaving the abandoned apartment vacant for the duration of the breached leasehold agreement. Failure to impose the avoidable consequence rule fosters this inefficient use of residential property. The landlord will be assured of a full recovery in the event of litigation. He therefore has little or no incentive to relet the abandoned apartment.⁸⁶ Expenditure of time, effort, and money, such as the cost of ad-

avoiding any damages incurred later); *Johnson v. General Mutual Ins. Co.*, 24 N.Y.2d 42, 49, 246 N.E.2d 713, 717, 298 N.Y.S.2d 937, 943 (1969) (insured must try to obtain substitute insurance when original insurer wrongfully cancels his policy).

80. *See, e.g.*, *Ford Motor Co. v. EEOC*, 458 U.S. 219, 231-32 (1982); *Soules v. Independent School Dist. No. 518*, 258 N.W.2d 103, 106 (Minn. 1977).

81. *See, e.g.*, *Karlen v. Butler Mfg. Co.*, 526 F.2d 1373, 1379 (8th Cir. 1975); *Lewis v. Mobil Oil Corp.*, 438 F.2d 500, 508 (8th Cir. 1971); *Fraser-Smith Co. v. Chicago, Rock Island & Pac. R.R. Co.*, 435 F.2d 1396, 1399 (8th Cir. 1971); *Cargill, Inc. v. S/S Nasugbu*, 404 F. Supp. 342, 348 (M.D. La. 1975). *See generally* U.C.C. § 2-715(2).

82. *See, e.g.*, *Bu-Vi-Bar Petroleum Corp. v. Krow*, 40 F.2d 488, 492-93 (10th Cir. 1930); *Cameron v. White*, 74 Wis. 425, 431-32, 43 N.W. 155, 157 (1889).

83. *See Riverview Realty Co. v. Perosio*, 138 N.J. Super. 270, 273-74, 350 A.2d 517, 519 (App. Div. 1976) ("there is no sound reason for a continuation of a special real property rule to the issue of mitigation"), *rev'd*, 74 N.J. 446, 378 A.2d 767 (1977) (applying avoidable consequence rule). *See generally* S. Corbin, *Contracts* § 1039(a) (1984 Supp. Part II).

84. *See Sommer v. Kridel*, 74 N.J. 446, 456-57, 378 A.2d 767, 772 (1977); *Riverview Realty Co. v. Perosio*, 138 N.J. Super. 270, 273-74, 350 A.2d 517, 519 (App. Div. 1976), *rev'd*, 74 N.J. 446, 378 A.2d 767 (1977) (applying avoidable consequence rule); *MARSON, Inc. v. Terwaho Enters., Inc.*, 259 N.W.2d 289, 291 (N.D. 1977); *Martin v. Siegley*, 123 Wash. 683, 684-85, 212 P. 1057, 1058-59 (1923).

85. *See supra* notes 37-40 and accompanying text.

86. *See generally* cases cited *supra* note 84. However, some incentive to act may be provided if the landlord fears that he will be unable to collect a judgment rendered in his favor. Additional incentive may be provided if the housing market will tolerate a higher rent to a new tenant.

vertising, in securing an alternative tenant becomes an unnecessary burden.⁸⁷ Because the landlord may withhold a valuable commodity from the economy,⁸⁸ an important community resource goes underutilized.⁸⁹ Ultimately, the public pays for this inefficiency because it forces a dissipation of private resources to replace the loss.⁹⁰ Withholding habitable apartments from the housing market may increase the existing housing shortages in urban areas,⁹¹ resulting in the need to develop additional low-income housing.

Application of the avoidable consequence rule eliminates underutilization of residential space. Upon the tenant's abandonment, the landlord must avoid any unnecessary accumulation of damages and must make reasonable attempts to secure an alternative tenant.⁹² This assures the availability of the abandoned premises. The measure of minimized damages available to the landlord⁹³ avoids economic waste,⁹⁴ while allowing the landlord to maintain the economic position guaranteed by the original tenant's lease. A rule "designed not only to prevent and repair individual loss and injustice, but also to protect and conserve the economic welfare and prosperity of the whole community,"⁹⁵ is an efficient rule that should be applied.

Applying the avoidable consequence rule to the leasehold agreement also comports with the efficient breach theory of contract law.⁹⁶ Under the theory of efficient breach, the breach should result in an overall, efficient "pareto optimum" state whereby the aggrieved landlord is no worse off than he was under the existing leasehold agreement, and the breaching tenant is in the same or better position than he was under the original

87. See generally cases cited *supra* note 84.

88. See *Riverview*, at 138 N.J. Super. 273-74, 350 A.2d at 519.

89. See *id.*; see also McCormick, *The Rights of the Landlord Upon Abandonment of the Premises by the Tenant*, 23 Mich. L. Rev. 211, 221-22 (1925).

90. See McCormick, *supra* note 89, at 221-22.

91. See N.Y. Times, Apr. 14, 1987, at B1, col. 5.

92. See *supra* notes 3-4, 16-18 and accompanying text.

93. The avoidable consequence rule limits the landlord's recovery for the breach of the leasehold agreement to the difference between the rent received from the new tenant and the rent received under the breached agreement. See *supra* note 18.

94. There is no single rule eliciting the efficiency of this policy, but public policy favors a rule that limits recovery to a measurement based upon minimized damages. Cf. *Jacob & Youngs, Inc. v. Kent*, 230 N.Y. 239, 242-44, 129 N.E. 889, 890-91 (1921). In *Jacobs & Youngs* it was held that, if a contractor uses a brand of materials in building a house other than the brand specified in the contract, the measure of damages is the amount by which the contract breach has diminished the value of the house, not the cost of tearing down the house and rebuilding it correctly. See *id.* at 244-45, 129 N.E. at 891-92. Such decisions by courts incorporate the basic idea that economic waste should be avoided and that damages should be minimized by applying the avoidable consequence rule.

95. C. McCormick, *Damages*, § 125 (1935).

96. See generally Yorio, *In Defense of Money Damages for Breach of Contract*, 82 Colum. L. Rev. 1365, 1394-97 (1982). An efficient breach of contract is one which results in a net societal gain without economically harming the aggrieved party to the contract. See *id.*

agreement.⁹⁷ Application of the avoidable consequence rule to the abandonment of residential premises fosters this pareto optimum state because the landlord reoccupies his vacant apartment without suffering any detriment,⁹⁸ while the tenant obtains a better living situation, the presumable reason for his breach.

The avoidable consequence rule further promotes an efficient result by allowing the landlord, in effect, to cover for the tenant's breach of the leasehold agreement.⁹⁹ The landlord occupies a better position than the tenant to cover for the tenant's breach because, in general, he will incur much lower costs.¹⁰⁰ The landlord is in the business of renting property and usually has business relationships which make his cover costs, such as advertising, much cheaper.¹⁰¹ Furthermore, if the breaching tenant relocates somewhere far from the landlord's apartment, it will be virtually impossible for him to find a new tenant.¹⁰² Moreover, the landlord obviously knows more than the tenant about his own special needs in securing a replacement tenant.¹⁰³

Last, angry landlords may seek vengeance¹⁰⁴ by refusing to accept a suitable alternative tenant merely because of their personal dislike of the original breaching tenant.¹⁰⁵ Applying the avoidable consequence rule prevents such spiteful actions because the rational landlord will more likely examine his motives for vengeance if his ultimate monetary recovery will be reduced by such unproductive conduct.¹⁰⁶

97. *Cf.* *Lake River Corp. v. Carborundum Co.*, 769 F.2d 1284, 1289 (7th Cir. 1985) (a pareto optimum breach results in a "net societal gain"); Yorio, *supra* note 96 at 1394, n.150 ("if one person's situation can be improved without causing a loss to anyone else, a clear societal gain will occur, resulting in a 'pareto improvement' over the old."). *See generally* J. Hirshliefer, *Price Theory and Application* (3d ed. 1980); R. Posner, *Economic Analysis of the Law* (2d ed. 1977).

98. *See supra* note 18.

99. *See id.*

100. *Cf.* Yorio, *supra* note 96, at 1384-85 (drawing an analogy to the buyer and seller in a sales contract). This position is further justified by the fact that tenants usually occupy a bargaining position greatly inferior to that of landlords. *See* *Javins v. First Nat'l Realty Corp.*, 428 F.2d 1071, 1079 (D.C. Cir.), *cert. denied*, 400 U.S. 925 (1970); *Lefrak v. Lambert*, 89 Misc. 2d 197, 202, 390 N.Y.S.2d 959, 963 (N.Y.C. Civ. Ct. 1976); *supra* note 72 and accompanying text. Landlords typically have more resources available to secure an alternative tenant than does the breaching tenant. *Cf.* *Sommer v. Kridel*, 74 N.J. 446, 456, 378 A.2d 767, 772 (1977) (landlord is in better position to demonstrate whether he exercised reasonable diligence in attempting to relet the premises).

101. *Cf.* Yorio, *supra* note 96, at 1384 (drawing an analogy to the buyer and seller in a sales contract).

102. *Cf. id.* (drawing an analogy to the buyer and seller in a sales contract).

103. *Cf. id.* (drawing an analogy to the buyer and seller in a sales contract).

104. *Cf. id.* at 1384-85 (drawing an analogy to the buyer and seller in a sales contract).

105. *Cf. id.* at 1385-86 (drawing an analogy to the buyer and seller in a sales contract).

106. *Cf. In Re Estate of Pace*, 93 Misc. 2d 969, 974, 400 N.Y.S.2d 488, 492 (Sur. Ct. 1977) ("[A]lthough a person may wish to deal capriciously with his property, . . . his self-interest will usually prevent him from doing so.").

B. *Rejection of Traditional No-Mitigation Approach*

In addition to promoting efficient results, applying the avoidable consequence rule also produces the more equitable result for the tenant.¹⁰⁷ Because the landlord maintains a better bargaining position than the tenant,¹⁰⁸ as a "matter of basic fairness"¹⁰⁹ the landlord should make a reasonable attempt to cover the tenant's breach. Requiring the tenant to pay for his breach when an acceptable, alternate tenant is available is unduly punitive.¹¹⁰ Unfortunately, the no mitigation rule is often rationalized with traditional legal principles. The remainder of this Note examines these principles and concludes that they do not logically support a no mitigation rule.

A traditional argument raised against the application of the avoidable consequence rule to the residential leasehold agreement asserts that requiring the landlord to minimize his damages by attempting to secure a replacement tenant upon the original tenant's abandonment requires the landlord to alter or increase his obligation under the original leasehold agreement.¹¹¹ This argument is unpersuasive for two reasons. First, it is incorrect to interpret the avoidable consequence rule as placing an af-

107. *See Sommer v. Kridel*, 74 N.J. 446, 456-57, 378 A.2d 767, 773 (1977). *But see Browne v. Dugan*, 189 Ark. 551, 561, 74 S.W.2d 640, 645 (1934) (breaching tenant, as wrongdoer, should not profit from his malfeasance).

108. *See supra* note 72 and accompanying text.

109. *Sommer*, 74 N.J. at 456, 378 A.2d at 772. Although a reasonable tenant might attempt to mitigate his own damages by bringing in an alternative tenant, the inequity in the ability to do this indicates that the duty to mitigate should fall upon the landlord.

110. In *Sommer v. Kridel*, 74 N.J. 446, 378 A.2d 767 (1977), the landlord waited fifteen months and allowed \$4,658.50 in damages to accrue before attempting to relet the apartment. *See id.* at 457, 378 A.2d at 773. Despite the availability of a tenant who was ready, willing, and able to rent the apartment, the landlord needlessly increased his damages by turning her away. *See id.* There was no showing by the landlord that the alternative tenant was not a suitable one. *See id.* at 458, 378 A.2d at 773.

"[T]he logic . . . which permits the landlord to stand idly by the vacant, abandoned premises and treat them as property of the tenant and recover full rent, [must] yield to more realistic notions of social advantage which in other fields of law have forbidden a recovery for damages which the plaintiff by reasonable efforts could have avoided." *Id.* at 456, 378 A.2d at 772 (quoting McCormick, *supra* note 89, at 221-22). *See generally* Kaufman, *The Scientific Method in Legal Thought: Legal Realism and the Fourteen Principles of Justice*, 12 St. Mary's L.J. 77, 96-97 (1980).

111. *See Wohl v. Yelen*, 22 Ill. App. 2d 455, 464, 161 N.E.2d 339, 343 (1959). It has also been argued, in some jurisdictions, that an attempt to mitigate damages may be construed as an automatic termination of the leasehold agreement when the tenant is not in possession of the premises. Such agreements are called survival of liability clauses. *See Rosenfeld v. Aaron*, 248 N.Y. 437, 442, 162 N.E. 478, 479 (1928) ("Survivorship Clause"); *Michaels v. Fishel*, 169 N.Y. 381, 390, 62 N.E. 425, 427 (1902) ("covenant to pay, with no right to enjoy"). *See generally* J. Rosch, *New York Landlord & Tenant Summary Proceedings* § 785, at 236 (2d ed. 1971). As such, the landlord will lose all rights to damages from the tenant. However, this does not justify a no mitigation rule because in these jurisdictions the landlord and tenant may agree that the tenant will be liable for the duration of the leasehold agreement even though the tenant is out of possession. *See International Publication, Inc. v. Matchabelli*, 260 N.Y. 451, 454, 184 N.E. 51, 52 (1933).

firmative duty upon the landlord.¹¹² The landlord need not act, and may still hold the breaching tenant liable.¹¹³ By doing so, however, he may receive a reduced recovery.¹¹⁴ The reduction in the landlord's recovery does not result from the tenant's malfeasance, but rather from the landlord's own failure to minimize damages.¹¹⁵ Second, this argument fails to explain why a landlord should be treated differently from any other party against whom a contractual breach has been committed.¹¹⁶ It is a general principle of law that an injured party is prohibited from recovering damages for harm suffered if he could have taken reasonable steps to prevent such harm.¹¹⁷

Another argument against applying the avoidable consequence rule to the leasehold agreement is that the landlord-tenant relationship is personal.¹¹⁸ To require the landlord to seek a substitute tenant may compel him to accept, in a personal relationship, a party with whom he does not wish to conduct business.¹¹⁹ This argument is flawed, however, because the avoidable consequence rule does not require a landlord to relet to any replacement tenant. The rule merely requires objectively reasonable efforts on the part of the plaintiff to minimize his damages.¹²⁰ Such objective reasonable efforts need not be successful.¹²¹

Moreover, courts apply the avoidable consequence rule in employment contracts, which are more personal in nature than leases.¹²² A wrongfully discharged employee under an employment contract must attempt to minimize his damages by seeking employment elsewhere. In applying the avoidable consequence rule in the employment context, courts have adopted an objective test in determining the extent of the employee's ob-

112. See *supra* note 3.

113. See *id.*

114. See *id.*

115. See *id.*

116. See *Riverview Realty Co. v. Perosio*, 138 N.J. Super. 270, 273-74, 350 A.2d 517, 519 (App. Div. 1976), *rev'd*, 74 N.J. 446, 378 A.2d 767 (1977) (applying avoidable consequence rule).

117. See *supra* notes 78-83 and accompanying text.

118. Cf. *Wohl v. Yelen*, 22 Ill. App. 2d 455, 464, 161 N.E.2d 339, 343 (1959) (mitigation required even in employment contracts, where personal element is even more important).

119. See *id.*

120. The avoidable consequence rule is based on the unreasonableness of the non-breaching party's actions. See 5 A. Corbin, *Contracts*, § 1039 (1964). It does not force the landlord to accept an alternative tenant who is not a suitable substitute. See *infra* notes 122-31 and accompanying text.

121. See *Ninth Ave. & Forty-Second St. Corp. v. Zimmerman*, 217 A.D. 498, 500, 217 N.Y.S. 123, 125 (1st Dep't 1926). These efforts need not involve unreasonable expenses, cf. *Taylor v. Steadman*, 143 Ark. 486, 220 S.W. 821, 823 (1920) (party whose property was flooded by neighbor's diversion of water from a creek need only expend reasonable effort and expense to mitigate his damages); *Chambers v. Belmore Land & Water Co.*, 33 Cal. App. 78, 80, 164 P. 404, 406 (1917), nor jeopardize the landlord's credit rating, see *Audiger, Inc. v. Town of Hamilton*, 381 F.2d 24, 25 (5th Cir. 1967) (*per curiam*).

122. See, e.g., *Ford Motor Co. v. EEOC*, 458 U.S. 219, 231-32 (1982); *Soules v. Independent School Dist. No. 518*, 258 N.W.2d 103, 105-06 (Minn. 1977).

ligation to seek alternative employment.¹²³ The discharged employee need not minimize his damages by accepting employment in a different position or on different terms,¹²⁴ employment at a lesser rank,¹²⁵ at a reduced salary,¹²⁶ or at a location unreasonably distant from his former place of employment.¹²⁷

Courts may easily adapt a similar test to the landlord-tenant relationship. The landlord need not relet to a tenant who will use the premises for a substantially different purpose than that contemplated in the original lease.¹²⁸ Nor must the landlord alter or increase his obligations in order to secure a replacement tenant.¹²⁹ Objective factors such as whether the tenant is financially ready, willing and able to comply with the terms of the breaching tenant's agreement help determine the alternative tenant's suitability.¹³⁰ Moreover, the landlord need only expend rea-

123. See cases cited *supra* note 122; see also *infra* notes 124-31 and accompanying text.

124. See, e.g., *American Trading Co. v. Steele*, 274 F. 774, 783 (9th Cir. 1921) (chief accountant need not accept position as bookkeeper); *Billetter v. Posell*, 94 Cal. App. 2d 858, 211 P.2d 621, 623 (1949) (employee not required to accept re-employment in mitigation of damages if new employment would bring lower salary or would sacrifice employee's rights to damages under original contract); *San Antonio & A.P. Ry. v. Collins*, 61 S.W.2d 84, 89 (Tex. App. 1933) (wrongfully discharged railroad employee not required to accept work which is not of substantially same status, capacity or grade as previous position).

125. See, e.g., *Parker v. Twentieth Century-Fox Film Corp.*, 3 Cal. 3d 176, 182-83, 474 P.2d 689, 692-93, 89 Cal. Rptr. 737, 740-41 (1970) (actress engaged as lead in a musical film need not accept a substitute role as lead in a western film); *Cooper v. Stronge & Warner Co.*, 111 Minn. 177, 126 N.W. 541 (1910) (department manager need not accept a position as a sales clerk for the same salary).

126. See, e.g., *State ex rel. Freeman v. Sierra County Bd. of Educ.*, 49 N.M. 54, 157 P.2d 234 (1945) (principal need not accept a job as a teacher for a reduced salary).

127. See, e.g., *American Trading Co. v. Steele*, 274 F. 774, 783 (9th Cir. 1921) (resident of China hired in the Orient need not seek employment in the United States); *San Antonio & A.P. Ry. v. Collins*, 61 S.W.2d 84, 89 (Tex. App. 1933) (resident of Houston need not accept employment in San Antonio).

128. See, e.g., *Foggia v. Dix*, 265 Or. 315, 321, 309 P.2d 412, 414-15 (1972) (holding that landlord could restrict reletting to all dentists when he attempted to minimize damages).

129. See *id.*

130. See, e.g., *Marmont v. Axe*, 135 Kan. 368, 369, 10 P.2d 826, 827 (1932) (factors applied to commercial leasehold agreement). For example, the Alaska residential landlord and tenant statute specifies the grounds on which the landlord may reject an alternative tenant:

1. insufficient credit standing or financial responsibility;
2. number of persons in the household;
3. number of persons under 18 years of age in the household;
4. unwillingness of the prospective occupant to assume the same terms as are included in the existing rental agreement;
5. proposed maintenance of pets;
6. proposed commercial activity; or
7. written information signed by a previous landlord, which shall accompany the rejection, setting out abuses of other premises occupied by the prospective occupant.

Alaska Stat. § 34.03.060(d) (1975); see also Cal. Civ. Code § 1951.4 (West 1985). See generally Weissenberger, *supra* note 8, at 12 n.52. The issue is essentially one of fact to be

sonably diligent efforts in searching for a substitute tenant.¹³¹

A third argument traditionally used to support the common law no mitigation rule relies upon the contractual theory sometimes referred to as the "lost volume" seller's rule.¹³² The rule, as applied to the landlord-tenant relationship, provides that the landlord of a multi-unit building with empty apartments will not be able to minimize his damages by simply reletting a breaching tenant's apartment, because, by doing so, he may lose the opportunity to lease one of his other vacant apartments.¹³³

This argument proves no more compelling than the other two, however, because the avoidable consequence rule is based upon the reasonableness of the aggrieved party's efforts to minimize his damages.¹³⁴ The avoidable consequence rule can be applied on a case-by-case basis when

determined by the jury. *See* *Friedman v. Colonial Oil Co.*, 236 Iowa 140, 18 N.W.2d 196, 198 (1945).

131. *See* *Roberts v. Watson*, 196 Iowa 816, 820, 195 N.W. 211, 213 (1923); *Sommer v. Kridel*, 74 N.J. 446, 456-57, 378 A.2d 767, 773 (1977); *Weinstein v. Griffin*, 241 N.C. 161, 165, 84 S.E.2d 549, 552 (1954); *MAR-SON Inc. v. Terwaho Enter.*, 259 N.W.2d 289, 292 (N.D. 1977); *supra* note 121 and accompanying text; *see also* *Foggia v. Dix*, 265 Or. 315, 318 509 P.2d 412, 414-15 (1973) (landlord not required to lease premises for different purpose or below fair market value); *Exeter Co. v. Samuel Martin Ltd.*, 5 Wash. 2d 244, 249, 105 P.2d 83, 85 (1940) (honest and reasonable effort).

Proof of a reasonably diligent effort by a landlord includes, among other things, personal efforts to find new tenants, newspaper advertising, listings with real estate brokers and posting signs. *See* *Parkwood Realty Co. v. Marcano*, 77 Misc. 2d 690, 693, 353 N.Y.S.2d 623, 626-27 (N.Y.C. Civ. Ct. 1974).

132. *See generally* *Harris, A Radical Restatement of the Law of Seller's Damages: Sales Act and Commercial Code Results Compared*, 18 Stan. L. Rev. 66, 80-83 (1965).

133. *See* *Storage Technology Corp. v. Trust Co.*, 842 F.2d 54, 56 n.2 (3d Cir. 1988); *Teradyne, Inc. v. Teledyne, Indus.*, 676 F.2d 865, 868 (1st Cir. 1982); *Famous Knitwear Corp. v. Drug Fair, Inc.*, 493 F.2d 251, 254 n.5 (4th Cir. 1974); *Dushoff v. Phoenix Co.*, 22 Ariz. App. 445, 459, 528 P.2d 637, 641 (1974); *Sommer v. Kridel*, 74 N.J. 446, 456, 378 A.2d 767, 772 (1977); *Humbach, supra* note 2, at 1259.

The lost-seller's volume rule traditionally is applied to the breach of a sales contract. According to the theory, the aggrieved promisee in a breach of contract should not suffer for ensuing losses that he cannot truly prevent by making a substitute contract with another party. *See* *Neri v. Retail Marine Corp.*, 30 N.Y.2d 393, 285 N.E.2d 311, 334 N.Y.S.2d 165 (1972). This will occur when the substitute contract would have been available to the promisee even if the original contract had not been breached. In other words, but for the breach, the promisee could have had the advantage of both the original and the second substitute contract. Accordingly, the second substitute contract does not truly mitigate the loss from the breach of the first contract. *See* *Restatement (Second) of Contracts* § 347 comment f, § 350 comment d (1981).

For example, in *Neri*, the buyer agreed to purchase a boat from the seller. After a down payment was rendered, the buyer defaulted on the contract. *See Neri*, 30 N.Y.2d at 395, 285 N.E.2d at 312, 334 N.Y.S.2d at 166-67. The seller quickly secured an alternative buyer for the boat. *See id.* at 396, 285 N.E.2d at 312, 334 N.Y.S.2d at 167. The original buyer claimed that by doing this the seller mitigated his damages and, therefore, he was liable only for any offset between the two contract prices. *See id.* at 396, 285 N.E.2d at 312, 334 N.Y.S.2d at 167. The court, however, held that the loss of the original contract was unmitigatable because the second, alternate buyer could have purchased an entirely different boat from the seller, resulting in the advantage of two boat sales to the seller. *See id.* Consequently, the seller was awarded the value of the lost sale. *See id.* at 401, 285 N.E.2d at 315, 334 N.Y.S.2d at 171.

134. *See supra* notes 120-31 and accompanying text.

dealing with multiple vacant units. In certain cases, when equity favors the landlord, courts should not strictly enforce the mitigation doctrine. The rule does not require the landlord to actually secure an alternative tenant, but merely to make reasonable efforts to secure a new tenant. For example, courts should take into account the number of vacant units the landlord has for rent in determining the reasonableness of this effort.¹³⁵ However, in most populated urban areas where significant housing shortages exist,¹³⁶ the availability of numerous, acceptable, alternative tenants should place a greater burden upon the landlord in making a reasonable effort to locate a replacement tenant.¹³⁷

A final argument against applying the avoidable consequence rule to residential leasehold agreements holds that the rule will make tenants less prone to complete the term of the lease.¹³⁸ The tenant will not fear the consequences of abandonment if he knows that the landlord must attempt to relet his vacant apartment.¹³⁹ Moreover, such widespread abandonment of property is an invitation to vandalism.¹⁴⁰

This ignores reality. Requiring the landlord to minimize his damages does not completely relieve the tenant of his leasehold obligation.¹⁴¹ The tenant remains liable to the landlord for that amount over and above the rent that is secured from a replacement tenant.¹⁴² Because the landlord will receive this offset from the abandoning tenant, he will not hesitate to relet to a substitute tenant at a cheaper rent, imposing this additional financial burden on the abandoning tenant. Furthermore, the abandoning tenant also must pay rent in order to live somewhere else.¹⁴³ The

135. *See, e.g., Dushoff v. Phoenix Co.*, 22 Ariz. App. 445, 528 P.2d 637, 641 (1974) ("Reasonableness is to be determined by an examination of the totality of circumstances giving due regard to the efforts of the landlord in renting the abandoned premises, and the number of units he has for rent."); *Sommer v. Kridel*, 74 N.J. 446, 457, 378 A.2d 767, 773 (1977) ("If the landlord has other vacant apartments besides the one which the tenant has abandoned, the landlord's duty to mitigate consists of making reasonable efforts to re-let the apartment.") For example, a landlord of a multiple-unit dwelling with several vacant apartments would not be required to make special efforts to re-let a breaking tenant's apartment rather than the other available units.

136. *See generally* N.Y. Times, Mar. 16, 1988, at B1, col. 4; N.Y. Times, Apr. 14, 1987, at B1, col. 4.

137. Officials around the nation are concerned that over the next decade more than one half million low- and moderate-income families may be ousted from federally subsidized apartments built in the 1960's and 1970's. Estimates from a current New York City survey indicate that there were approximately 72,050 vacant residential apartments for the year 1987. *See* N.Y. Times, Mar. 16, 1988, at B1, col. 4. Many tenant advocates believe a significant number of these apartments were deliberately kept off the rental market by landlords attempting to "warehouse" them prior to conversion into cooperatives or condominiums. *See id.* Preventing warehousing would alleviate the current housing shortage by freeing up a significant number of low-income rental apartments. *See id.*

138. *See* Restatement (Second) of Property § 12.1 comment i, at 392 (1977).

139. *See id.*

140. *See id.*

141. *See supra* notes 3-4, 16-18 and accompanying text.

142. *See id.*

143. *See Berzito v. Gambino*, 63 N.J. 460, 466, 308 A.2d 17, 20 (1973) ("[The tenant]

possibility of such harsh financial burdens will discourage involuntary and unnecessary abandonments by residential tenants. In addition, because application of the avoidable consequence rule requires the landlord to attempt to relet the premises,¹⁴⁴ vacancies will not persist. This is especially true in most urban areas where significant housing shortages exist.¹⁴⁵

CONCLUSION

The controversy over whether to apply the avoidable consequence rule to the residential leasehold agreement arises from a disagreement about whether the basic nature of a lease is a conveyance of land or a contract. To comport with modern needs, courts have applied contractual principles to the leasehold agreement. This Note concludes that this is the better view, and therefore the avoidable consequence rule, a principle of contract law, should be applied to the residential leasehold agreement. Moreover, policy reasons support application of the avoidable consequence to the residential leasehold agreement. The rule fosters efficiency and maintains equity between the landlord and tenant.

In most jurisdictions, the trend toward the adoption of the avoidable consequence rule to the residential leasehold agreement has been primarily statutory.¹⁴⁶ This produces a more efficient and equitable system by giving each jurisdiction the capacity to tailor the rule to its own particular housing market. For example, the Tennessee statute requires landlords to mitigate damages only in densely populated areas.¹⁴⁷ This policy recognizes the difficulties that a landlord in a rural area may encounter in securing an alternative tenant. Thus, an apparent resolution of the confusion among the courts is for state legislatures to adopt statutes applying the rule to residential leasehold agreements. Until this is done, however, courts should clarify the existing confusion by judicially imposing the avoidable consequence rule to residential leasehold agreements.

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may be unable to find other quarters that he can afford and that he wishes to rent and in any event he will be saddled with the not inconsiderable expenses of moving.”).

144. See *supra* notes 3-4, 16-18 and accompanying text.

145. See *supra* notes 136-37 and accompanying text.

146. See *supra* note 15.

147. See *id.*