



Common Law Remedies for Tenant Abandonment

- #1: Do nothing, allow rent to continue to accrue, sue to collect as it accrues
- #2: Accept T's abandonment, terminate lease, re-let to new tenant
- #3: Re-enter, re-let without terminating T's lease (implied sublease/assignment)



"Mitigation Rule"

- *Schneiker*: L must attempt to mitigate
 - Lease is also a K; K law doesn't award damages that nonbreaching party could have avoided
 - If L fails to make reasonable effort to mitigate, L's recovery is **reduced by the amount L could have obtained if L made such an effort** (i.e., fair rental value of premises)
- Not all states have embraced the duty to mitigate in this context, however



Abandonment and Mitigation

- Note: **some** states continue to hold L has **no duty to mitigate** (including Missouri)
 - Missouri: if L actually tries to mitigate, it must act reasonably to do so, but L has no affirmative duty to mitigate
- Also, in some states that have adopted the mitigation principle, parties **in commercial leases** are free to contract out of this duty
 - i.e., if lease states L will have no duty to mitigate if T abandons, that provision is enforceable by L



Discussion Problem

- L and T have a 3-year lease (\$1000/mo.)
- After six months, T abandons premises
- L has potential replacement tenant (willing to pay \$1,200/month in rent)
- Should L:
 - Take option 2 (lease on its own account), or
 - Take option 3 (implied assignment/sublease)?



Options 2 and 3: Re-Letting

- Option 2 terminates the lease (T is not liable for future **rent** payments, but is liable for damages caused by breaching the lease)
- Option 3 does not terminate the lease
 - "New tenant" is an implied assignee (or perhaps a sublessee) of abandoning T; T is still liable for future rent payments as they come due
 - Payments made by "new tenant" are credited toward abandoning T's rental liability



Option #2 (Accept T's Surrender)

- Con: Because T's right to possession has been terminated, T isn't liable for future **rent (as it would have accrued)**
 - Thus, if T1 later defaults in making rent payments, L can't go back to T and collect rent unpaid by T1!
- Pro: L is re-leasing property on its own account
 - Thus, T will no longer have any right to possession, no claim against \$200/mo. "bonus rent" paid by T1

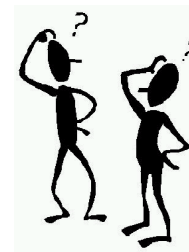


Option #3 (Re-Let on T's Behalf)

- Pro: T remains liable for future rent as it accrues (implied assignment; T is not relieved of liability)
 - If T1 later defaults, L could still hold T liable for rent as it comes due!
- Con: unless lease contained recapture clause, bonus value of \$200/month would belong to T!
 - L would thus have to pay the “extra” \$200/month it collects from T1 to T, unless lease contains a “recapture” clause

The Abandoning Tenant

- Same facts, but now prospective new tenant (T1) is only willing to lease for \$800/month (assume that is current fair rental value)
- Now what advice would you give to L re: how to proceed?



Anticipatory Repudiation

- If L accepts surrender, T is not liable for future rent, but is liable for damages due to anticipatory repudiation (as in *Schneiker*)
 - Damages = \$200/mo. lost bargain x number of remaining months, discounted to present value
 - Note: L can recover this amount from T **immediately**; if L re-lets via option 3, L could only recover extra \$200 rent from T as it comes due each month



Option 3?

- Why might L re-let on T's behalf (option 3), rather than sue T for anticipatory repudiation?
 - T would remain a surety if T1 defaults
 - Option 2: L's suit for **damages** is an election of remedies; L could not thereafter get any further recovery from T
 - If L is worried about T1's creditworthiness, L may prefer to re-let on T's behalf (thereby keeping T “on the hook” for full \$1,000/mo. if T1 defaults)



Option 2?

- If there's no bonus value in the lease, why not always just re-let on T's behalf, to keep T “on the hook”? Why would L ever pursue anticipatory repudiation damages?
 - Keeping T “on the hook” may not make sense in some cases, such as
 - T's death (have limited time to file claim vs. T's estate)
 - T's bankruptcy (T's liability discharged)



L's Options

- Also note: in any event, L should not sue for anticipatory repudiation **until after L has found replacement tenant**
 - If L sues for anticipatory repudiation immediately, L's damages are reduced by “fair rental value” of premises for **all future months**
 - Thus, if possible, L should keep T bound to lease (and liable for **rent**) until L has agreement with replacement tenant



Survival Clause (p. 493)

- (1) More authoritative survival clause needed
 - L's actions to secure premises/re-let will not be deemed to constitute acceptance of T's surrender
 - T's lease not to be deemed terminated **except by express written agreement of L**
- (2) L's subsequent behavior should be consistent w/clause, confirmed in writing
- (3) "Recapture" provision needed (if L has to re-let, L does not have to pay any bonus value to T)



Condition of the Premises

- Traditional rule: *caveat lessee*
 - Rationale: lease is conveyance; during lease, T is owner, has responsibility to maintain land (and can inspect before signing lease)
- 1950/60s: public interest lawyers attack *caveat lessee* as applied to urban residential tenancies
 - "Illegal lease" doctrine (violation of housing code at beginning of term = illegal lease); of limited use (placed no continuing duty on L during the term)



Implied Warranty of Habitability

- Since 1950s, courts in most states have implied warranty of habitability into **residential leases** (premises are safe, clean, fit for habitation)
 - L must (a) place premises in habitable condition at beginning of term, and (b) maintain them in such a condition throughout the term
- IWH is treated as "dependent" covenant
 - If breached, T may sue for damages, **but may also terminate lease/withhold rent payments**

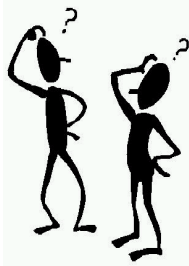
- Lambert leases luxury apartment (\$1000/mo.)
- Lambert wants to leave because:
 - Maid service is incompetent
 - Concierge is incompetent
 - Doorman was fired and not replaced
 - Landlord takes several days to respond to service calls
- Can Lambert terminate the lease on account of Landlord's breaches of the lease?

Problem 1



Implied Warranty of Habitability?

- T leases 2-bedroom apartment
- T discovers central AC isn't working, notifies L, but L fails to fix it
- T vacates the premises, declares lease terminated for breach of IWH
- L sues T for anticipatory repudiation of the lease
- Proper analysis?



Parameters of the IWH

- In some states, parameters established judicially (*Pugh*: "safe and sanitary")
- In other states, parameters are established by reference to housing codes (e.g., code violation creates a **presumptive** IWH violation)
 - L could show a housing code violation didn't render premises uninhabitable
 - T (theoretically) could show premises were not habitable even though in housing code compliance



IWH Analysis

- Is lack of air conditioning a “defect of a nature and kind [that] will prevent the use of the dwelling for its intended purpose?”
[*Pugh*]
- Does it matter whether the apartment had AC in the first place?