

Recent Developments: A Panel by Law Professors

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Panelists

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The Cases

1. *Elsinore Christian Center v. City of Lake Elsinore*, 291 F. Supp. 2d 1083 (C.D. Cal. 2003). Can a religious institution demand, under the Religious Land Use and Institutionalized Persons Act (RLUIPA), that a city issue it a conditional use permit (CUP) to operate a new church on downtown property for which such a permit is not available as of right? Central District of California says, “No” and finds the land use provisions of RLUIPA unconstitutional; courts are divided on this issue.

The Elsinore Christian Center hoped to move its congregation three blocks to a site that offered more on-site parking and asked the city of Lake Elsinore for a necessary CUP. The city denied the CUP, citing concerns about the loss of a needed grocery store currently operating at the site, the reduction in tax revenue, and a lack of sufficient parking at the new location. The church sued the city in federal court, claiming, among other things, that the city’s denial of the CUP violated RLUIPA.

The court began by applying RLUIPA to the facts and concluded that the city had, in fact, violated the Act. The church carried its initial burden under the statute by demonstrating that the city’s denial “impose[d] a substantial burden on the religious exercise” of the church. In fact, the court found, the burden on the church’s use of the land was “not only substantial, but entire.” The burden then shifted to the city to show that its denial of the CUP was in furtherance of a compelling government interest and was the least restrictive means of furthering that interest. Even assuming that the city had demonstrated a compelling interest, its decision to deny the CUP was not in furtherance of that interest. Moreover, the city followed the course that was the most burdensome on the church’s religious exercise.

But the court continued by finding RLUIPA’s land use provisions to be unconstitutional under both the Fourteenth Amendment and the Commerce Clause. The court rejected the argument that RLUIPA simply codifies the “individualized assessment” doctrine previously set forth by the Supreme Court. In addition, the statute does not merely deter constitutional violations, as permitted by Section 5 of the Fourteenth Amendment, but also defines the substance of constitutional guarantees, which is the province of the courts. The court buttressed this argument by reviewing the legislative record and finding little evidence of a “widespread and persisting deprivation of constitutional rights” and no proportionality between the problem Congress sought to prevent and the method it adopted to address this problem. “[T]he landscape is not so pervaded by religious bigotry that this blunderbuss of a remedy can be described as ‘congruent and proportional’ to the perceived injury.” Finally, because RLUIPA regulates land use law rather than economic conduct, the court concluded that Congress lacked legislative authority under the Commerce Clause.

This decision is at odds with other opinions addressing the constitutionality of RLUIPA in the land use context. Like the Religious Freedom Restoration Act before it, RLUIPA appears to be headed for the Supreme Court.

2. Myers v. LaCasse, 838 A.2d 50 (Vt. 2003). If a lender holds mortgages on two adjacent parcels and forecloses a *junior* mortgage on one of them, thereby rendering the other one landlocked and creating an easement by necessity, does the landlocked parcel continue to enjoy the benefits of that easement after a *senior* mortgage is foreclosed on the parcel with road access? Vermont Supreme Court says, “Yes.”

James and Marie LaCasse owned two adjacent parcels of land: Parcel I, which fronted on a public road, and Parcel II, which had no street frontage and no deeded right of access to any public road. The LaCasses mortgaged Parcel I three times in three years and subsequently defaulted on the third mortgage. The lender foreclosed, and Parcel I soon came to be owned by Nancy Myers. Myers also succeeded to ownership of the two senior mortgages, which expressly did not merge into her title. As a result of the foreclosure, Parcel II became landlocked, and an easement by necessity across Parcel I arose automatically, by operation of law.

Myers subsequently commenced foreclosure proceedings under the second mortgage encumbering Parcel I, in an effort to foreclose the easement by necessity the LaCasses claimed over Parcel I for the benefit of Parcel II. Myers’s argument was that the easement arose at the time the third mortgage was foreclosed, and thus the easement was junior to the second mortgage she was now seeking to foreclose. In an apparent case of first impression anywhere in the nation, the trial judge rejected this argument and the Vermont Supreme Court affirmed.

The senior mortgagee should have known at the time it took its mortgage that if the mortgagor defaulted, foreclosure of that mortgage would lead to the creation of an easement by necessity burdening Parcel I. The fact that it was a junior mortgagee that ultimately foreclosed first should not increase the senior mortgagee’s rights. Moreover, the primary policy rationale for recognizing easements by necessity is to ensure that land not lay idle because of a lack of access, a rationale that would be defeated by allowing mortgagees to sequence their foreclosures strategically.

3. Certain Interested Underwriters at Lloyd’s London v. City of St. Petersburg, ___ So.2d ___, 2003 WL 23094732 (Fla. Dist. Ct. App.). Can the insurer for a property owner recover from a city when police officers destroy the owner’s private property in the course of executing a valid search warrant? Florida District Court of Appeal says, “No.”

Myria Major owned a home in St. Petersburg that was insured by Lloyd’s of London. City police officers executed a valid search warrant on Major’s tenants. In an attempt to startle the tenants, the officers used “flash-bang” grenades, designed to make a loud noise and cause a brilliant flash of light. Unfortunately for all interested parties, especially Lloyd’s, the tenants had installed a recording studio in the lower level and had decided to muffle sounds by using an insulating foam that proved to be quite flammable. Major’s house was destroyed, Lloyd’s paid Major her insurance policy limits, and Lloyd’s, as subrogee, filed a two-count claim against the city alleging an unconstitutional taking and negligence.

The court held that, in the absence of negligence or misconduct, the federal and state takings clauses do not apply to the destruction of property resulting from legal actions: “Damage or destruction that occurs as an unintended, incidental consequence of lawful activity by government actors does not constitute a compensable taking.” The court distinguished cases from Texas and Minnesota in which the court had awarded compensation on similar facts, noting that the constitutions of both of those states—unlike that of Florida—require a remedy if property is “damaged” or “destroyed.” Instead, the court was more persuaded by a similar 1995 case decided by the California Supreme Court, as well as a 1947 Florida Supreme Court case limiting the availability of damages for non-negligent acts “done by persons in the execution of a public trust and for the public benefit.”

4. Edwards v. Hallsdale-Powell Utility District, 115 S.W.3d 461 (Tenn. 2003). Can homeowners recover from a local utility when the utility's pipes become clogged, causing raw sewage to flood the interior of the owners' homes? Tennessee Supreme Court says, "No."

On two occasions, the public sewer line serving the homes of two neighbors became clogged, causing a sewage backup into their homes. On both occasions, the utility cleaned the homes, and on the first occasion, the utility repaired damage. The owners also reported two other incidents in which their homes were subjected to sewage odors after the utility had cleaned the line. The neighbors filed suit against the utility alleging nuisance and inverse condemnation.

Tennessee courts recognize two different kinds of takings: Physical occupations and nuisance-type takings. Physical occupation takings require a direct and continuing physical invasion of property or a destruction of the owner's rights, while nuisance-type takings result from interference with the owner's use and enjoyment of their property. "To constitute a taking under either line of cases, however, some action on the part of the governmental defendant is required." The plaintiff must show that the defendant undertook a purposeful or intentional act. These plaintiffs did not make this showing.

The plaintiffs did identify one Tennessee Court of Appeals case which had acknowledged the possibility that a government defendant could negligently take property. But that case relied on two California cases which had, in turn, relied on that state's constitutional language requiring compensation for the "damaging" of property. Tennessee has no similar constitutional language, and the Tennessee Supreme Court overruled the earlier Tennessee case.

5. Four Times Square Associates, L.L.C. v. Cigna Investments, Inc. (New York, 2003) 764 N.Y.S. 2d 1. Mortgagor entitled to preliminary injunction preventing mortgage servicer from holding it in default for its failure to obtain terrorism insurance on the Conde Nast building.

The plaintiff, as holder of a ground lease on the Conde Nast building, executed a \$430 million nonrecourse mortgage before September 11th that required the mortgagor to maintain insurance coverage generally available from domestic insurers at commercially reasonable premiums. At the time of the loan's origination, the building's all risk coverage encompassed terrorist acts. Following September 11th, the proposed renewal policy explicitly excluded terrorism. The mortgage loan servicer, Cigna, declared an event of default and targeted property lockbox funds for purchase of terrorism coverage. The plaintiff sought a preliminary injunction preventing the servicer and others from holding it in default and from invading the lockbox funds. The trial court denied the injunction.

The Supreme Court, Appellate Division, unanimously reversed the trial court and granted the preliminary injunction on condition that the plaintiff post the security of letters of credit in the aggregate amount of \$5 million to address the defendants' threatened expenditure of between \$4.5 and \$5 million to purchase \$400 million in terrorism coverage pending the litigation. Despite the existence of factual questions such as whether terrorism insurance is generally available and its premiums commercially reasonable, the plaintiff had set forth a prima facie case on the likelihood of its success on the merits. Further, the equities demanded that the plaintiff not be compelled to purchase terrorism coverage until a final determination on the contractual rights and obligations of the parties to this mortgage loan.

6. Westmark Commercial Mortgage Fund IV v. Teenform Associates, L.P. (New Jersey, 2003) 362 N.J. Super. 336, 827 A.2d 1154. Foreclosing lender entitled to 6% late fee, default interest at 2% above contract rate, and prepayment premium, all as provided in the contract.

The borrowers defaulted under a note secured by mortgages on commercial properties. In the mortgagee's action for judicial foreclosure, the Chancery Division court entered a final judgment of foreclosure awarding the above amounts under the contract and the borrowers appealed the reasonableness of the amounts awarded.

The Superior Court, Appellate Division, affirmed the foreclosure judgment in a decision that addressed the standards for recovery of late fees, default interest, and prepayment premiums in commercial mortgage loans. The court determined that all these charges were enforceable liquidated damage provisions under the standard of reasonableness. Under the well-known New Jersey MetLife decision that evaluates these provisions using a reasonableness standard, the burden of establishing unreasonableness in a commercial context between sophisticated parties falls on the party challenging the provision. Given the mortgagors' failure to present evidence of unreasonableness, the presumptive reasonableness of the contractual default interest and late fee charges was not overcome. More significantly, the court addressed the reasonableness of the prepayment premium charged in connection with the accelerated debt in foreclosure. Rejecting a 1990 New Jersey appellate decision disallowing a prepayment premium in these circumstances, the New Jersey court aligned itself with the Restatement (Third) view that permits collection of contractually authorized prepayment premiums in the event of acceleration. Although applying the standard of reasonableness to prepayment charges (rather than the more lax standard of exorbitance applied by courts in California and elsewhere), the court affirmed the chancery determination of reasonableness given the borrowers' failure to present evidence of unreasonableness or sharp practices.

7. Northwest Bank Minnesota v. Blair Road Associates, L.P. (D. New Jersey, 2003) 252 F. Supp. 2d 86. Enforcing default interest provision conferring interest based on greater of two formulas, and also enforcing prepayment premium on default of mortgage loan as not duplicating default interest rate.

The borrowers defaulted under a nonrecourse commercial mortgage note, leading to a judicial foreclosure action in this diversity case. The court applied the New Jersey standard of reasonableness in upholding the default interest and prepayment charges. The promissory note provided for default interest at the greater of the contract rate plus 3% or the prime rate (as defined in the note) plus 4%. In enforcing this provision, the district court rejected the borrowers' argument that a default formula tied to the greater of two formulas was per se a penalty and not intended as a reasonable forecast of compensation for harm caused by the breach. The court suggested this alternative formula was simply an effort to address the vagaries of market conditions.

Further, the borrowers argued the default interest and prepayment provisions both sought to compensate the lender for the same loss—lost opportunity and market conditions requiring the lender to lend at lower rates after the prepayment. Under their reasoning, the borrowers demanded the two recoveries be combined in evaluating reasonableness. The district court regarded the charges under New Jersey case law as having separate purposes—default interest encompasses potential costs of administering a defaulted loan, as well as lost opportunity costs, and a prepayment charge is consideration not for the use of money but for the right to prepay. Regarded in isolation, the prepayment charge was reasonable.

8. MONY Life Insurance Company v. Paramus Parkway Building, Ltd. (New Jersey, 2003) 364 N.J. Super. 92, 834 A.2d 475. Foreclosing lender entitled to recover contractual sliding-scale prepayment fee and default interest of 6% above the contract rate.

Following the borrower's default on a commercial mortgage loan, the Chancery Division entered a final judgment of foreclosure awarding default interest and a prepayment charge in accordance with the parties' contract, as modified ten years previously in connection with earlier defaults.

On appeal, the borrower contended the 6% default interest and the prepayment charge provisions were illegal penalties. Applying New Jersey case law, the Appellate Division concluded the prepayment charge was reasonable. Interestingly, the charge was a throwback to earlier mortgage practice in using a so-called sliding scale formula that declined one-half of one percent each year. At the time of foreclosure, the formula allowed for only a one-half of one percent charge. The appellate court reached the same conclusion of reasonableness for the default interest charge. Significantly, the court noted that the defendant's prior default history and higher risk, prompting the enhanced 6% default rate in the loan modification agreement, justified this rate. The defendant presented no evidence to overcome the presumptive reasonableness of these contractual fees.

9. DiMase v. Aquamar 176, Inc., (Florida, 2003) 835 So.2d 1158. Prospective purchasers of two condominium units could recover their deposits.

The purchasers signed a condominium unit sale agreement, together with certain addenda intended to modify certain sales terms contained in the agreement. The addenda were not incorporated by reference into the sale agreement. The seller refused to sign the addenda and the buyers sought return of their deposits. The trial court granted summary judgment for the sellers, holding that the agreement was enforceable and that the buyers were not entitled to the return of their deposits.

Originally, the appeals court affirmed the judgment of the trial court on the basis that the purchase agreement was unambiguous and had been freely entered into by the buyers. Upon a motion for a rehearing en banc, however, the appeals court judgment was reversed, the court adopted Judge Ramirez's opinion as the opinion of the court. Judge Ramirez reasoned that the sale contract, together with the addenda, represented the whole contract, and when the seller submitted new addenda, they were making a counteroffer which was never accepted by the seller. According to Judge Ramirez, "Accordingly, there was no meeting of the minds and no contract."

10. Estate of Bontkowski v. Bontkowski (Illinois, 2003) , 785 N.E.2d 126. A mother's conveyance of a tract of land to her son for no consideration could be set aside upon a finding that her signature was forged.

A mother, 85 years old with limited education and limited ability to speak English conveyed a tract of land to her son for no consideration. He, in turn, mortgaged the property in order to secure loans. Upon the mother's death her estate brought a cause of action to recover the property. The trial court entered judgment for the estate.

The appellate court affirmed, primarily on the basis of deed forgery and inadequacy of consideration. In addition, the court held that because a forged deed is void, the mortgagee was not entitled to protection as a bona fide purchaser.

11. Funk v. Durant, (Ohio, 2003) 155 Ohio App. 3d 221. Home purchasers could not recover against sellers for fraud despite sellers' failure to disclose water problems in their statutorily mandated disclosure form.

Prior to closing home sellers completed a "Residential Property Disclosure" form mandated by Ohio law. The form did not accurately list all occasions of water leakage. The purchase contract called for the property to be purchased "as is." A thunderstorm caused water damage to the property shortly after the purchasers moved in. After negotiations between the parties to solve the problem broke down, the purchasers sued the sellers for damages based on various theories including fraud and misrepresentation. The trial court granted the sellers' motion for summary judgment.

The court of appeal affirmed. The "as is" purchase agreement provision did not relieve the defendants of liability on a claim of fraudulent misrepresentation. Nonetheless, the "open and obvious" evidence of basement water problems put them on notice. They had the opportunity to have an inspection made, which is encouraged by the statute, which they did to an extent with the assistance of a home inspector. The purchasers were clearly aware of prior problems. Further, no false, affirmative statements were made by the sellers, although additional events were not disclosed.

12. Rehnberg v. Hirshberg (Wyoming, 2003) 64 P.2d 115. A purchaser of property could not prevail in a breach of real estate sales contract dispute arising from a dispute over fishing rights and a use agreement.

When the parties entered into a purchase agreement the seller and his neighbors were engaged in litigation for the purchase of establishing fishing rights over a nearby guest ranch. The agreement contained a provision that if the dispute established fishing rights in the seller they would be assigned to the buyer. The buyer attempted to resell the property after the closing and requested an assignment of the fishing rights even though litigation was still pending. When the seller refused to assign the rights unless he was paid additional monies, the buyer sued for breach of contract. The trial court dismissed the buyer's claim for failure to state a claim upon which relief could be granted.

The Supreme Court of Wyoming affirmed. It agreed with the trial court that the contract was unambiguous and that "...there are no oral agreements or representations between Buyer, Seller or Brokers to modify the terms and conditions of this contract." Further, since the contract provided that fishing rights were to be assigned *only* if the seller secured them through litigation, the buyer had no valid claim.

13. Glenmoor Properties Limited Partnership v. Joseph 2003 Ohio 6152, 2003 Ohio App LEXIS 5494, 2003 WL 22718929 (November 17, 2003). Does a subdivision restriction that requires the selection of certain contractors and the payment of a Promotion and Marketing Fee based on the cost of the house run with the land? Ohio Court of Appeals says “Yes/”

The deeds in Glenmoor’s subdivision included a provision that required that grantees choose a builder from a list of approved builders and the builders were then required to pay a 5% “Promotion Fee” to Glenmoor and a ¾ % “Marketing Fee” to Smythe-Cramer Co. (not otherwise identified, but whom an internet search shows to be real estate company). If the grantee chose a builder who was not on the list, the grantee was to insert into the construction contract a requirement to pay the fees, withhold the fees from the final payment and pay them directly. The deed stated that the obligation to require the builder to pay the fee was to be deemed a covenant running with the land and binding upon heirs and assigns of the grantee.

The property at issue was transferred twice before coming into the hands of Josephine Joseph. Ms. Joseph constructed a home and did not pay the fee.. Glenmoor sued to collect the fee directly from her.

The court began by reciting the usual requirements for a covenant to run with the land. According to the court these are:

- Intent for the covenant to run with the land
- The covenant must touch and concern the land.
- There must be privity of contract.

As to the third the court meant privity of estate since that is what the case they cited required.

Touch and concern was the problem and the court said that the covenant did. The court said that the fees directly relate to the house or improvements built on the lot. The marketing and promotion fees “benefit the landowner, as such fees are related to the privilege of building a home in the ...development. The Marketing and Promotion fees help promote the development and are directly related to the right to build a home...”

Further the court added, even if the promise was a personal covenant it would be binding in equity on a purchaser taking the estate with notice.

The case is interesting because of the rather perfunctory recital of the fee as touching and concerning. Although payments of money are not unusual in subdivisions (indeed they are probably by now customary), they normally relate to the expenses of common improvements—roads, parks, other amenities. There does not seem to be any requirement that the developer use these fees to add anything to the subdivision. The name of the fee suggests that they are designed to help sell other property within the subdivision. That does not seem to meet the traditional test and concern test for the payment of money.

The fee rather seems to be a way of enforcing a provision that certain builders will be chosen. There are a few cases where sellers attempted to reserve the right to construct improvements on property that they were selling and recent cases have tended not to allow those covenants to run.

14. Johnson v. The Pointe Community Association Inc. 73 P. 3d 616 (Ariz. App., 2003). How much deference should a court give to a community association entitled to deference by a court when the association makes the decisions concerning the enforcement of restrictive servitudes? Arizona Appellate Court says “Not much.”

The restrictive servitudes in the Pointe subdivision required approval by a the Community Association Board before making exterior improvements. They also specified paint colors and required, among other things, that all exterior wiring be concealed. The Boyles, in the course of some landscape renovation, built a new trellis, painted and altered the stucco finish on their backyard patio columns. They also put an electrical conduit on an exterior wall; they claimed to be replacing one left by the contractor who built the house..

Their neighbors, the Johnsons, objected to the changes, particularly to the trellis, and informed the Boyles that Board approval was required before the exterior of the property could be altered. After some time the Boyles submitted the request for approval of their changes and the Johnsons responded with their objections. The Board, after viewing the property, proposed some alternatives that they would approve. The issue of the trellis was ultimately resolved, but the Board indicated that it would take no action concerning the other complaints. The Johnsons sued the Board and the Boyles seeking enforcement of the covenants.

The Board agreed that it was obligated to enforce the covenants but argued that it had met the its obligations and further that the public policy required the court to defer to the Board’s decisions concerning the enforcement.

The court declined to give deference to the Board’s decision concerning the propriety of enforcing the covenants. The court noted that while an association may be given deference in certain areas (such as how to maintain the complex), here it is not to be given the deference that it might be given if it had sought resolution by a skilled neutral or perhaps had used a formal dispute resolution process.

This case represents a fairly common problem in the resolution of disputes in covenanted communities. Particularly in communities where approval of building plans or paint colors or the like, there is the problem of how those decisions are made. Enforcement issues can arise even with relatively low level use decisions such as whether to get after the person who doesn’t mow their lawn as regularly as his neighbors.

The usual standard for making these decisions is a good faith requirement. This is sometimes said to be the equivalent of the business judgment rule. Problems arise in these cases when the decision maker’s own interests are directly impacted by the decision they make, and when, as perhaps occurred here, the enforcers decide to let something go by that seems small to them, but is very important to one person in the subdivision.

A final thought, like Jerry Springer, increasingly planned communities are taking the place of governments in terms of the services that they provide for their residents. They also limit (in some cases) expressions of opinion in ways that the government could not. It’s a little odd to think of a high priced residential subdivision as a company town, but in many ways that is what it is.

See also Day v. Santorsola, 118 Wn. App. 746, 766 P. 3d 1190 (2003) (Association member making the decision was one whose view would be impacted by the building), Persimmon Hill First Homes Association v. Lonsdale 31 Kan. App. 889 (75 P. 3d 278) (2003) (injunction for violation of restrictive covenant can issue without proof of irreparable harm), and Colorado Homes Ltd. v. Loersch-Wilson 43 P. 3d 718 (Colo. App. 2002) (Business judgment rule suggested for board decisions.)

15. Hasvold v. Park County School District No. 6, 45 P. 3d 635 (Wyo. 2002). A deed to a corporation, granting an easement for ingress, egress and utilities before the corporation acquires a parcel may be appurtenant to the parcel, but it may not; the parties' intention is what matters.

Donald Kramer owned a parcel of property next to the Ellises. On August 5, 1987 The Ellises conveyed an easement across their property to Tall Oak Trees Inc. Donald Kramer was an owner and officer of Tall Oak. On August 20, 1987 Kramer conveyed his property to Tall Oak. The property was mortgaged, apparently either foreclosed or conveyed by a deed in lieu to the mortgage, and ultimately came into the hands of Rosencrance by a deed that did not mention the easement. The Ellis property ultimately came into the hands of the Hasvolds. The Hasvolds objected to the Rosencrance's continued use of the easement, asserting that it was personal to Tall Oak and not appurtenant to the parcel. There was an express easement to the School District in another deed from the Ellises conveying property to them in 1982 which the Hasvolds claimed had been abandoned.

The lower gave summary judgment to the Rosencrances, determining that the easement to Tall Oak was an easement appurtenant. On appeal the case was remanded for a full hearing on what the intent of the original parties to the easement was. The court looked for "badges" that might help determine whether the easement was personal (in gross) or appurtenant. The easement was stated to be non-exclusive. It did not mention the land that it eventually was claimed to be appurtenant to, and it did not run to the heirs, successors and assigns of Tall Oak. It was not stated to be of perpetual duration. The court saw those factors as badges of an easement in gross. On the other hand the deed did not state that it was personal, and it provide for ingress, egress and utilities. Those factors were badges of an easement appurtenant. There was a suggestion that the easement was intended as a temporary easement for construction purposes.

This case is a cautionary tale. If the easement was intended to be appurtenant it would have been simple to wait until the land belonged to Tall Oak to make the conveyance. If the easement was intended to be a temporary easement for construction purposes the easement could have been drafted for definite period.

There has usually been a presumption in favor of easements appurtenant over easements in gross and the court did not mention that as a factor. Nor did the court indicate what use had been made of the easement after Tall Oak conveyed the property or after construction was finished which might have been of aid as a matter of the parties' practical construction of the document.

16. Circuit City Stores, Inc. v. Rockville Pike Joint Venture Limited Partnership, 376 Md. 331, 829 A. 2d 976 (2003). A lessor's attempt to obtain the right to terminate the lease and still collect rent until the end of the term is more or less successful. Avoidable consequences rule still means the lessor must mitigate.

Circuit City rented 40,000 square feet in Rockville Pike's shopping center. Circuit City was an anchor tenant for the shopping center. The lease required Circuit City to continuously operate its business during the term of the lease. The lease did not allow assignment or subletting without landlord's consent, which was not to be unreasonably withheld. If Circuit City failed to observe any material terms of the lease and failed to cure within 30 days of written notice, Rockville could terminate the lease and expel Circuit City. Finally, for our purposes, the lease provided that Circuit City remained liable for payment of rent, notwithstanding the termination and whether or not the premises remained vacant but with credit for any rent received less expenses of reletting (including remodeling costs).

Circuit City determined to move, closed its store and vacated the premises. Circuit City had offered a replacement tenant whom Rockville had refused and Rockville rejected a sublease to the same tenant. Rockville then gave formal notice of termination of the lease. Circuit City paid rent as obligated until Rockville leased the property to Food Lion, but in order to lease to Food Lion it had to demolish the Circuit City structure.

The case has an exceptionally complicated procedural profile, but its main point has to do with the way in which landlords are dealing with the changes the law with regard to tenant abandonment. Traditionally, the landlord whose tenant abandoned a commercial lease had three choices:

- Accept the surrender and terminate the lease
- Reenter and attempt to relet on the tenant's account
- Let the premises stand vacant and sue for the rent as it comes due.

Recent decisions have undercut the landlord's ability to let the premises stand vacant. A recent Daily Development from DIRT suggests that about half the states have put in a duty to mitigate in commercial lease cases.

The problem sometimes was that when a landlord chose the second option, a court might find that there was surrender and relieve the tenant of all rent obligations. Here, where there is a substantial change in the premises for a new tenant, this might well be the case. The Court found that the landlord here had clearly accepted the tenant's surrender, but to avoid that consequence, the landlord had included a provision in the lease allowing termination and recovery of rent. The court saw that it shifted the focus of the lease to contract view of the lease and made the landlord's claim one for damages, not for rent.

This solved one problem, but it still left the landlord with some duty to mitigate as the court invoked the "avoidable consequences" rule with respect to damages. Whether the landlord had acted consistently with that rule needed to be determined. Thus the case was remanded for a determination as to whether the efforts made to find a new tenant and the arrangement with Food Lion were reasonable.

As a final note the landlord sought and apparently obtained a judgment for all for the rent due to the end of the term of City's lease, although the term had not yet ended. This would be reduced by the amounts to be received under the Food Lion lease. The court noted that while the calculation of these figures may be difficult, that is not a reason to terminate Circuit City's obligations under the lease.

This case recognizes the possibility that landlords may have a duty to mitigate and that the old three way choice for landlords whose tenants abandon may be going fast. Whether leases are contracts or conveyances, and of course they are both, landlords increasingly seem to have a duty to mitigate.