Welcome to this podcast on Mitigation brought to you by CALI. I am Professor Scott J. Burnham.

The topic of this podcast is the basic concept of mitigation, or, as it is sometimes called, avoidable consequences, which is used in computing damages.

Mitigation is a principle that can limit a plaintiff’s recovery in a claim for breach of contract. The principle is stated in Restatement (Second) of Contracts § 350(1) as follows: “[D]amages are not recoverable for loss that the injured party could have avoided without undue risk, burden, or humiliation.” Therefore, we deduct from the award to the plaintiff any losses that the defendant can show that the plaintiff could have reasonably prevented.

For example, in an employment situation, if you wrongfully fire me, I am going to claim as my expectancy the salary that I would have earned for the remaining term of my employment contract. But the savings that resulted – my time – is now freed up when I would have otherwise had to work for you. Contract law doesn't want me to sit around and watch re-runs of Buffy during that time. Contract law wants me to use that time productively, so it is going to deduct in mitigation the amount that I earned or could have earned during that time. But contract law is not going to make me demean myself for your benefit, so I have to take only reasonably comparable work in order to mitigate. You may recall the case of *Parker v. Twentieth Century Fox*, where the court found that the actress Shirley MacLaine did not have to mitigate by taking a role as the female lead in a western movie filmed in Australia when the movie studio breached by not giving her the lead role in a song and dance movie to be filmed in Hollywood. You may disagree, but the court found that these were not comparable.

Back to the employment example, let’s assume I was going to earn $50,000 for the period of time when I'm unemployed because you fired me. If I was able to find comparable work for $30,000, that is going to be deducted from the damages. So instead of paying me $50,000, you are only going to have to pay me $20,000. Similarly, if I don't take a job, the burden is on you to prove that I could have mitigated. So if you prove that I could have taken a comparable job for $30,000 for that time, but didn't, then I'm also going to have the $30,000 deducted and I'm only going to get $20,000. So always look to see whether the mitigation is comparable and always look to see if it was time that was freed up by the breach. For example, if I am fired by you from a day job, but I am able to get work at night, I might have been able to take that night job anyway and therefore that time was not freed by the breach and money from that job would probably not be deducted in mitigation.

We sometimes refer to a “duty” to mitigate, but that is not entirely accurate. There is no affirmative duty on the part of the plaintiff to mitigate, such as by taking a job when fired. However, if the defendant can prove that the plaintiff could have mitigated, then that amount will be deducted from the damages whether the plaintiff had taken actually took the job or not.

A classic example of mitigation is the case of *Rockingham County v. Luten Bridge Co*. The county hired Luten to build a bridge, and after Luten had begun construction, the county decided it did not want the bridge and breached by telling Luten to stop work. Luten nevertheless completed the bridge and sued for the contract price. The court held that completing the work was a failure to mitigate on the part of Luten. Let’s say the contract price was $100,000 and Luten would have made a profit of $10,000 on the job. If the county had breached the contract right after it was signed, Luten would have recovered $10,000 as expectancy damages. If the county had breached halfway through construction, after Luten had expended $45,000 in labor and materials, Luten would have recovered $55,000. In other words, the breach is always going to result in a $10,000 gain for Luten; continuing the work does nothing for Luten but costs the county more. Luten had a duty to avoid those consequences.

There is an interesting twist on this rule in U.C.C. § 2-704. Assume a buyer hires a seller to build a machine for $100,000 and the seller anticipates making a profit of $10,000. When the seller has completed half of the construction at a cost of $45,000, the buyer breaches and says it does not want the machine. Can the seller complete construction of the machine? The answer is yes, because completion may mitigate the damages. For example, if the half-built machine is worth only $5,000 as scrap, then the seller is entitled to $50,000 as damages – the $45,000 in costs plus the $10,000 anticipated profit, minus the $5,000 gained from selling the scrap. But if the seller can complete the machine and sell it for $90,000, then the damages are only $10,000 – the $100,000 the seller would have had under the contract less the $90,000 resale. So unlike completion of a bridge – which would have no value – completion of the machine can mitigate the damages.

There are other situations in which mitigation comes into play in U.C.C. Article 2. By the way, mitigation is not expressly mentioned in Article 2, but recall that § 1-103(2) provides that unless displaced by particular provisions of the Code, the principles of law and equity supplement it. So since mitigation is not displaced, we would read it in as a supplementary principle of law. For example, assume you were obligated to sell me a widget for $2,000 and you breached. One remedy available to the buyer when the seller breaches is covered under § 2-712. I buy a comparable widget for $2,500 and claim as damages $500, the difference between the cover price of $2,500 and the contract price of $2,000. If you can prove that when I made that purchase, similar widgets were available on the market for $2,200, then I will only recover $200 in damages instead of $500 because of my failure to mitigate.

Mitigation also applies to consequential damages, which are the subject of the podcast on Foreseeability. Let’s say you knew that if you did not supply me with the widget then my factory would not be able to operate and I will lose profits. Under the rule of foreseeability, a reasonable person in your shoes would have known at the time we made the contract that if you breached, that loss was likely to occur, so you will be responsible for the loss. But if you can prove that I could have purchased a comparable widget somewhere else, and thereby kept my factory operating, then I failed to mitigate. I could have prevented that loss, so you will not be responsible for the consequential damages that I could have reasonably prevented.

Let’s briefly review this podcast. At this point, you should be able to explain that mitigation puts a limit on the non-breaching party’s recovery by denying recovery for losses that party could have avoided and you should be able to provide examples from both the common law and the sale of goods under the U.C.C.

I hope you’ve enjoyed this podcast on Mitigation.

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