

Mitigation of damages

How to take reasonable actions to limit damages in a lawsuit **Interviewed by Chelan David**

If your business has been injured by another party, your first reaction may be to sue for damages. But by first taking reasonable actions to limit your losses, you can increase your odds of recovering those damages. In most situations in which a business has been injured — whether by theft of trade secrets, a contract breach, etc. — it can take steps to prevent damages from worsening.

For example, say that a supplier is unable to deliver a crucial part to produce your products.

“Rather than halt production and lose all profits that your business likely would receive from selling its products, you could try to find another supplier,” says Courtney D. Tedrowe, a partner with Novack and Macey LLP. “You might pay a higher price, thus reducing your overall profit margin, but you would not be out all of your profits.”

That mitigation of damages, sometimes referred to as the doctrine of avoidable consequences, can be crucial in the event of a lawsuit.

Smart Business spoke with Tedrowe about a plaintiff's obligations and what courts deem reasonable mitigation efforts.

What obligations does a business have in the event it has been injured?

Frequently, courts and attorneys say that a plaintiff has a duty to mitigate damages, but that characterization is inaccurate. Strictly speaking, a plaintiff does not have an obligation to take steps to limit losses after it has been injured, and will generally not incur liability for failing to do so.

However, if some or all of a plaintiff's damages could have been avoided had it taken reasonable steps to mitigate them, it might not be able to recover that portion of damages from the defendant. Thus, it is in the plaintiff's best interest to determine what steps it can reasonably take to avoid unnecessarily increasing damages after injury, and then take those steps. In many cases, the plaintiff can recover from the defendant the cost of making reasonable attempts to mitigate damages.

How does a court decide which actions are reasonable?

First, the defendant must prove that the plaintiff could have taken certain reasonable steps to avoid unnecessarily increasing its damages. What constitutes a reasonable step is determined on a case-by-case basis. However, a plaintiff is not required to take extraor-



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inary measures, and a defense of failure to mitigate is not a basis for a hypercritical examination of the plaintiff's conduct.

The plaintiff need not assume any undue risks or burdens in an attempt to mitigate its damages. Further, the law does not require the mitigation efforts to be successful; all that matters is that the plaintiff made the attempt.

Second, the defendant generally must prove the amount by which the damages increased because of the plaintiff's failure to take reasonable steps. The defendant should have evidence not only showing that the plaintiff failed to take reasonable steps to avoid increasing damages but also evidence showing by how much that failure inflated damages.

Under what circumstances is this legal concept most commonly seen?

Mitigation is a defense in almost every case in which the award of monetary damages is claimed. It is usually raised as an affirmative defense in litigation, in which the defendant claims the plaintiff's damages should be reduced because either the plaintiff actually did mitigate its damages, or, had the plaintiff taken certain actions, its damages would have been less.

In most states, there is an exception to mitigation, sometimes referred to as the lost volume doctrine. In cases in which the plaintiff does a volume business — handles or could

handle multiple contracts of the same kind simultaneously — and has lost sales as a result of another's wrongdoing, the plaintiff might not be able to mitigate its damages by finding a replacement contract. Because the seller is capable of handling multiple contracts simultaneously for little additional marginal cost, it could have had the benefit of both the repudiated contract and the subsequent contract at the same time. Therefore, even if the plaintiff could have obtained another contract after the first was breached, it would not replace the lost contract.

For example, say a fencing company contracts to build a fence for \$10,000. The buyer breaches that contract. Shortly thereafter, the company contracts with someone else to build a fence for \$10,000. If the company can prove it could have taken both jobs, its damages are based on the net profit it would have made on the breached contract, without regard to its ability to get a subsequent contract. However, although this has been adopted in most states, it hasn't been in all, and the burden is on the plaintiff, not the defendant, to prove the doctrine applies.

How can a business be affected by the responsibility to mitigate damages?

If a business has been injured and is contemplating litigation, it should be aware of the possibility that the defendant might assert a mitigation defense which, if proven, would reduce the awarded. Thus, as soon as the business learns of an injury, it should take all reasonable steps to prevent damages from unnecessarily increasing. Employees should be asked to analyze all of the possible harms to the business including losses due to business interruption, lost business opportunities and harm to reputation. Once specific potential damages are identified, consider whether there are reasonable means of minimizing or stopping these harms from occurring.

It does not usually matter whether your efforts are successful, only that you took reasonable steps to try to mitigate. Moreover, the law generally does not require you to take undue risks or burdens to try to mitigate damages. If you follow these basic principles, you likely will stand an excellent chance of defeating a mitigation defense.

Of course, you should consult an attorney as to whether mitigation applies, as it will depend on the particular facts in your case and the law of your particular jurisdiction. <<

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