

NOTE

WHY THERE SHOULD BE A DUTY TO MITIGATE LIQUIDATED DAMAGES CLAUSES

I. INTRODUCTION

On May 15, 2008, the Massachusetts Supreme Judicial Court held that there is no duty for non-breaching parties to mitigate damages in the face of a liquidated damages clause.¹ In 2002, Paul Minihane entered into a ten-year license agreement with NPS, LLC for two Club seats at Gillette Stadium, the home of the New England Patriots football team.² This agreement included a liquidated damages provision that allowed NPS, LLC to accelerate the balance of monies owed under the contract in the event of default.³ Despite attending all but one game in the 2002 season, Minihane paid only two payments under the agreement, and NPS, LLC subsequently brought suit to enforce the acceleration clause.⁴ On appeal, the issues were confined to determining whether the liquidated damages clause was valid and the amount of the damages award.⁵ Although both parties briefed the issue of mitigation on the assumption that non-breaching parties had such a duty,⁶ the Supreme

1. NPS, LLC v. Minihane, 886 N.E.2d 670, 675 (Mass. 2008).

2. *Id.* at 672. NPS, LLC is the developer of Gillette Stadium. *Id.*

3. *Id.* The acceleration clause read as follows:

“In the event that Licensee shall not have cured the default or breach . . . , Owner may terminate the right of Licensee to the use and possession of the Club Seats and all other rights and privileges of Licensee under the Agreement and declare the entire unpaid balance of the License Fee (which for the purposes hereof shall include the total aggregate unpaid balance of the annual License Fees for the remainder of the Term) immediately due and payable, whereupon Owner shall have no further obligation of any kind to Licensee. Owner shall have no duty to mitigate any damages incurred by it as a result of a default by Licensee hereunder. . . .”

Id. at 672 n.2.

4. *Id.* at 672-73.

5. See Brief of the Plaintiff-Appellant at 1, NPS, LLC v. Minihane, 886 N.E.2d 670 (Mass. 2008) (No. SJC-10134) (statement of the issues solely references the enforceability of the liquidated damages clause and the damages award); Brief for the Defendant-Appellee at 1, NPS, LLC v. Minihane, 886 N.E.2d 670 (Mass. 2008) (No. SJC-10134) (statement of the issues solely references the enforceability of the liquidated damages clause and the damages award).

6. Brief of the Plaintiff-Appellant, *supra* note 5, at 31, 33 (arguing that NPS, LLC had no duty to mitigate as a lost volume seller and, even if it had a duty to mitigate, it made all reasonable attempts to do so); Brief for the Defendant-Appellee, *supra* note 5, at 20-21 (arguing that NPS, LLC had a duty to mitigate damages by attempting to resell the licenses and that it did mitigate its damages by using the seats for good will).

Judicial Court “held” that there is no duty to mitigate damages in the face of a liquidated damages clause.⁷

At first glance, this holding seems inequitable given the circumstances of the case. First, the New England Patriots had just won their first Superbowl championship in team history,⁸ and over 1.5 million fans attended the championship rally in Boston.⁹ Thus, there seemed no lack of opportunity to mitigate by reselling the seats.¹⁰ Additionally, as the duty to mitigate in the face of a liquidated damages clause was not argued or briefed by the parties, the court was not attuned to the repercussions and complications of issuing such a broad holding, nor the great injustice the holding would cause to the traditional understanding of mitigation doctrine. Rather, the court simply “follow[ed] the rule in many other jurisdictions.”¹¹ As a result, the categorical rule dispensing with the duty to mitigate in the face of a liquidated damages clause is faulty and underdeveloped in light of the policies underlying the mitigation doctrine. These policies include promoting efficiency, avoiding double profits, and avoiding penalty to the defendant.¹² Contrary to decisions unconditionally dispensing with this duty, non-breaching parties generally should be required to mitigate damages despite the enforcement of a liquidated damages clause, especially when mitigation is simple and easy to calculate.¹³ After

7. *NPS, LLC*, 886 N.E.2d at 675. A “holding” is defined as “[a] court’s determination of a matter of law pivotal to its decision.” BLACK’S LAW DICTIONARY 749 (8th ed. 2004). Because the relevancy of mitigation in the face of a liquidated damages clause was not raised on appeal, see *supra* note 6 and accompanying text, and was thus not pivotal to the decision, it is unclear why the Supreme Judicial Court would pronounce such a “holding.”

8. Official New England Patriots, *The History of the New England Patriots*, <http://www.patriots.com/history/index.cfm?ac=History> (last visited Mar. 29, 2010).

9. *Id.*

10. In fact, NPS, LLC noted that it was doing “everything [it] c[ould] to sell out the stadium.” Brief of the Plaintiff-Appellant, *supra* note 5, at 33 (alteration in original) (citation omitted). NPS, LLC sent brochures to prospective licensees, maintained an interactive website, gave facility tours to potential buyers, and hosted events with Patriots football players to attempt resale of the licensed seats. *Id.* at 33-34. Despite such efforts, seats in the Club section did not sell out every year. *Id.* at 34. NPS, LLC argued that, as a lost volume seller, damages could not be mitigated because these seats remained available for sale. *Id.* at 31. Even though NPS, LLC, as a commercially reasonable entity, was taking such actions anyway, the court’s holding eliminates the need to attempt any such efforts.

11. *NPS, LLC*, 886 N.E.2d at 675.

12. See *infra* Part III.B-D.

13. Numerous scholars and commentators have noted that there is no duty to mitigate damages in contract law. RESTATEMENT (SECOND) OF CONTRACTS § 350 cmt. b (1981); STEVEN J. BURTON & ERIC G. ANDERSEN, CONTRACTUAL GOOD FAITH: FORMATION, PERFORMANCE, BREACH, ENFORCEMENT § 5.3.2, at 175 (1995); CHARLES L. KNAPP ET AL., PROBLEMS IN CONTRACT LAW: CASES AND MATERIALS 851 (5th ed. 2003); 24 SAMUEL WILLISTON & RICHARD A. LORD, A TREATISE ON THE LAW OF CONTRACTS § 64:27 (4th ed. 2002); E. Allan Farnsworth,

detailing the purposes of liquidated damages and the mitigation doctrine in Part II, Part III of this Note will explore the reasoning of those courts opining that there is no duty to mitigate liquidated damages clauses. Part III will then refute the rationale of these holdings by exploring the role of mitigation in promoting economic efficiency and the avoidance of waste, preventing double profits, avoiding penalties in contracts damages, and the policy of good faith in contract enforcement and performance. After discussing these common law and policy reasons supporting the duty to mitigate in the case of some liquidated damages clauses, Part IV will explore the applicability and validity of such a holding in the context of the Uniform Commercial Code (“UCC” or the “Code”). After considering some possible complications to this theory in Part V, such as the complexity of modern commercial contracts, the questionable duty to accept mitigation offers from the breaching party, and the lost volume seller doctrine, this Note will ultimately conclude that the courts have erred in categorically dispensing with the duty to mitigate damages in the face of liquidated damages clauses. Alternatively, courts should hold that non-breaching parties are required to mitigate damages in the face of liquidated damages clauses, except when mitigation would be particularly difficult to calculate.

II. BACKGROUND ON LIQUIDATED DAMAGES AND MITIGATION THEORY

A. The Use and Purpose of Liquidated Damages Clauses

Liquidated damages clauses constitute agreements by the parties as to the appropriate compensation for breach of contract and are awarded in place of actual damages.¹⁴ Liquidated damages clauses are favored by

Legal Remedies for Breach of Contract, 70 COLUM. L. REV. 1145, 1184 (1970); Recent Case Note, *Damages—Mitigation by Injured Party on Breach of Contract*, 34 YALE L.J. 553, 554 (1925) [hereinafter Recent Case Note, *Damages*]. As non-breaching parties are not subject to legal action or required to pay damages as a result of any failure to mitigate, mitigation can hardly be deemed a duty. Rather, the mitigation doctrine simply precludes the non-breaching party from recovering damages that could have been avoided by reasonable effort. RESTATEMENT (SECOND) OF CONTRACTS § 350 cmt. b.; BURTON & ANDERSEN, *supra*, § 5.3.2, at 175; KNAPP ET AL., *supra*, at 851; 24 WILLISTON & LORD, *supra*, § 64:27; Farnsworth, *supra*, at 1184; Recent Case Note, *Damages*, *supra*, at 554. However, because mitigation is an affirmative defense to be pled and proved by the defendant, and requires set-off when damages have not been mitigated, it has been argued that labeling mitigation a “duty” is both correct and consistent with usage. See MONROE H. FREEDMAN, *CONTRACTS: AN INTRODUCTION TO LAW AND LAWYERING* 251 (2008). As the phrase “duty to mitigate” is commonly used, it will also be used throughout this Note.

14. See ISRAEL A. WASHBURN, *PRINCIPLES OF THE LAW OF CONTRACTS AS EXHIBITED IN SPECIAL CONTRACTUAL RELATIONS* 493 (2d ed. 1918) (“Liquidated damages are damages agreed upon by the parties as and for compensation for, and in lieu of, the actual damages arising from a breach of contract.”).

the courts when damages are “uncertain” in nature and there is no market standard or other objective value to measure actual harm in the event of breach.¹⁵ Valid liquidated damages clauses save both time and expense at trial by preventing the need to litigate the actual damages caused by the breach.¹⁶ The UCC, the model of commercial codes in virtually every jurisdiction, requires that liquidated damages be reasonable in light of anticipated or actual harm and that there be difficulty in proving actual loss for such clauses to be enforceable.¹⁷ The Restatement (Second) of Contracts (the “Restatement”) also follows this formulation.¹⁸

Thus, two elements must be evaluated in determining the validity of liquidated damages provisions: the difficulty of proof of loss and the reasonableness of the predetermined amount in relation to actual or anticipated damages. However, the language of section 2-718(1) of the UCC and the Restatement presents some difficulties in determining the time at which reasonableness and difficulty of proof of loss are to be evaluated. For example, if the liquidated damages amount is a reasonable forecast of expected damages at the time of contracting, yet no actual damages result from the breach, should the liquidated damages clause be enforced? The language of the UCC indicates that, should the amount set under the liquidated damages clause be reasonable from one vantage point, but not the other, then the clause is valid.¹⁹ The

15. *Consol. Flour Mills Co. v. File Bros. Wholesale Co.*, 110 F.2d 926, 929-30 (10th Cir. 1940) (noting that the court will “look with candor, if not with favor, upon such provisions . . . where the damages are uncertain in nature or amount, or are difficult of ascertainment”); *Art Country Squire, L.L.C. v. Inland Mortgage Corp.*, 745 N.E.2d 885, 891 (Ind. Ct. App. 2001) (“Generally, we look more favorably upon a liquidated damages provision where it appears from all the evidence . . . that the actual amount was uncertain or difficult to ascertain at the time of execution of the agreement.”); WASHBURN, *supra* note 14, at 495 (noting liquidated damages are favored when damages are “wholly uncertain”).

16. See Susan V. Ferris, Note, *Liquidated Damages Recovery Under the Restatement (Second) of Contracts*, 67 CORNELL L. REV. 862, 866 (1982).

17. Section 2-718(1) of the UCC reads:

Damages for breach by either party may be liquidated in the agreement but only at an amount which is reasonable in the light of the anticipated or actual harm caused by the breach, the difficulties of proof of loss, and the inconvenience or nonfeasibility of otherwise obtaining an adequate remedy.

U.C.C. § 2-718(1) (2003); see also MASS. GEN. LAWS ANN. ch. 106, § 2-718(1) (West 1999) (Massachusetts liquidated damages provision adopting the language of section 2-718(1) of the UCC).

18. See RESTATEMENT (SECOND) OF CONTRACTS § 356(1).

19. See U.C.C. § 2-718(1); Ferris, *supra* note 16, at 872 (noting this result under the second interpretation section 2-718(1) of the UCC). Thus, to be invalid, the liquidated damages clause must be unreasonable both in light of anticipated and actual damages. Cf. U.C.C. § 2-718(1); Ferris, *supra* note 16, at 872. The first interpretation of UCC section 2-718(1) requires that the amount set be reasonable in light of both anticipated damages and actual harm. See Ferris, *supra* note 16, at

Restatement also appears to endorse this “either-or” proposition, validating the liquidated damages provision if it is reasonable in light of anticipated or actual harm.²⁰ However, the Restatement states that a no-actual-harm defense can invalidate a liquidated damages clause because loss and damages are not difficult to prove if no harm results from the breach.²¹

Section 2-718(1) of the UCC and courts interpreting this provision shed little light on the correct resolution of this anticipated versus actual harm conundrum.²² Courts struggle to balance freedom of contract with the inequity that would result if a party were able to recover the liquidated damages amount in the event of no actual harm.²³ Thus, the precedential common law decisions of each state typically determine if reasonableness and difficulty of proof of loss are to be evaluated at the time of contracting or at the time of breach.²⁴ Under Massachusetts common law, a liquidated damages provision is enforceable if it is reasonable in light of anticipated damages only.²⁵ The refusal to take a “second look” at actual damages “most accurately matches the expectations of the parties, who negotiated a liquidated damage[s] amount that was fair to each side based on their unique concerns and circumstances surrounding the agreement, and their individual estimate of damages in event of a breach.”²⁶ Additionally, by limiting the inquiry to reasonably anticipated damages, the litigation process is unencumbered by the time and expense incurred in proving actual

871. However, this interpretation would require the expensive and time-consuming litigation that such clauses were meant to avoid. *Id.* at 872.

20. Ferris, *supra* note 16, at 874 (noting this result under the Restatement).

21. See RESTATEMENT (SECOND) OF CONTRACTS § 356 cmt. b (“If, to take an extreme case, it is clear that no loss at all has occurred, a provision fixing a substantial sum as damages is unenforceable.”); see also Ferris, *supra* note 16, at 876.

22. See Ferris, *supra* note 16, at 873-74.

23. See *TAL Fin. Corp. v. CSC Consulting, Inc.*, 844 N.E.2d 1085, 1093 (Mass. 2006); see also Ferris, *supra* note 16, at 862 (noting the tension between freedom of contract and equity in liquidated damage recovery).

24. Compare *Kelly v. Marx*, 705 N.E.2d 1114, 1115 (Mass. 1999) (holding the reasonableness of damages and difficulty of proof of loss are evaluated at the time of contracting), with *Mattingly Bridge Co. v. Holloway & Son Constr. Co.*, 694 S.W.2d 702, 704-05 (Ky. 1985) (holding that a liquidated damages clause that is unreasonable at the time of contracting *or* at the time of breach is invalid).

25. *TAL Fin. Corp.*, 844 N.E.2d at 1093; *Kelly*, 705 N.E.2d at 1115-16 & n.4 (expressly rejecting the “second look” test and the no-actual-harm defense of the Restatement).

26. *Kelly*, 705 N.E.2d at 1117; see also *TAL Fin. Corp.*, 844 N.E.2d at 1093. In addition, the Court of Appeals of Maryland advanced an interesting argument akin to a “slippery slope” in rejecting the no-actual-harm defense, asking: “[I]f we were to accept the no-actual-harm defense, why would courts not then give greater damages than contemplated when the damages actually exceeded the stipulated amount?” *Barrie Sch. v. Patch*, 933 A.2d 382, 393 (Md. 2007).

damages.²⁷ Contrary to their stated rejection of the “second-look” test, Massachusetts courts continue to state that the non-breaching party cannot be awarded more than actual damages when damages are easily ascertainable and the liquidated damages amount is “grossly disproportionate to actual damages,” or is “unconscionably excessive.”²⁸ Consequently, the UCC, Restatement, and common law all present discordant positions on the proper interpretation and analysis of liquidated damages provisions, including the right of breaching parties to assert a no-actual-harm defense.

B. Understanding the Mitigation Doctrine

While the law concerning liquidated damages is inconsistent, no such inconsistency exists in the general rule requiring non-breaching parties to mitigate damages. Also known as the doctrine of avoidable consequences, the mitigation doctrine simply states that “damages are not recoverable for loss that the injured party could have avoided without undue risk, burden or humiliation.”²⁹ The mitigation doctrine is interpreted as imposing both negative and positive obligations on the non-breaching party.³⁰ First, the non-breaching party must refrain from any activities that increase the loss.³¹ Second, a non-breaching party

27. *Kelly*, 705 N.E.2d at 1117.

28. *NPS, LLC v. Minihane*, 886 N.E.2d 670, 673 (Mass. 2008) (citing *A-Z Servicer, Inc. v. Segall*, 138 N.E.2d 266, 268 (Mass. 1956)).

29. RESTATEMENT (SECOND) OF CONTRACTS § 350(1) (1981); *see also* BURTON & ANDERSEN, *supra* note 13, § 5.3.2, at 175; KNAPP ET AL., *supra* note 13, at 851; WASHBURNE, *supra* note 14, at 489; 24 WILLISTON & LORD, *supra* note 13, § 64:27; Recent Case Note, *Damages*, *supra* note 13, at 554. Additionally, the Restatement incorporates the mitigation doctrine into its “Measure of Damages in General” section. RESTATEMENT (SECOND) OF CONTRACTS § 347. The injured party’s “right to damages” is “less . . . any cost or other loss that he has avoided by not having to perform.” *Id.* Theoretically, these damages are disallowed because they are viewed either as being caused by the defendant or by the non-breaching party’s intervening will rather than by the plaintiff. *See* WASHBURNE, *supra* note 14, at 489; 24 WILLISTON & LORD, *supra* note 13, § 64:27.

30. *See* Robert A. Hillman, *Keeping the Deal Together After Material Breach—Common Law Mitigation Rules, the UCC, and the Restatement (Second) of Contracts*, 47 U. COLO. L. REV. 553, 568 (1976).

31. *Id. Rockingham County v. Luten Bridge Co.*, 35 F.2d 301 (4th Cir. 1929), is perhaps the most famous case forbidding acts that increase a non-breaching party’s losses. Rockingham County, after awarding a contract for the construction of a bridge to the plaintiff, decided not to construct the road in which this bridge was to “be a mere connecting link.” *Id.* at 303. As this bridge was effectively a “bridge to nowhere,” the county cancelled the contract at the start of construction, little work having been done at the time of cancellation. *Id.* The plaintiff, however, continued to construct the bridge and sued for damages nine months after the contract was cancelled. *Id.* The court held that the non-breaching party has a “duty to do nothing to increase the damages flowing” from a breach of contract and, thus, the plaintiff “had no right . . . to pile up damages by proceeding with the erection of a useless bridge.” *Id.* at 307.

must take affirmative actions to minimize loss.³² The doctrine does not, however, require the non-breaching party to be successful in this effort to mitigate.³³ The policy espoused by the doctrine is simply to encourage a party to make “reasonable efforts” to minimize loss.³⁴ Corbin notes:

His recovery against the defendant will be exactly the same whether he makes the effort and mitigates his loss, or not; but if he fails to make the reasonable effort, with the result that his injury is greater than it would otherwise have been, he cannot recover judgment for the amount of this avoidable and unnecessary increase. The law does not penalize his inaction; it merely does nothing to compensate him for the loss that he helped to cause by not avoiding it.³⁵

Not only does the doctrine emphasize merely effort and not success, but a non-breaching party is solely required to make an effort that is “reasonable”³⁶ and “appropriate in the circumstances.”³⁷ The non-breaching party is not required to take steps that would be inconvenient, burdensome, or expensive.³⁸ Thus, mitigation places no greater burden on a non-breaching party than to make a reasonable effort to minimize loss, and a party who tries to do so, but fails, will recover the total damages owed in each case.

III. JUDICIAL RECOGNITION OF THE LIQUIDATED DAMAGES/MITIGATION CONUNDRUM—AND WHY THESE COURTS ARE WRONG

A. The Rationale of the Courts

Despite this relatively simple standard for complying with the mitigation doctrine, many courts, including those relied on by the

32. Hillman, *supra* note 30, at 568.

33. RESTATEMENT (SECOND) OF CONTRACTS § 350(2) (“The injured party is not precluded from recovery by the rule stated in Subsection (1) to the extent that he has made reasonable but unsuccessful efforts to avoid loss.”).

34. *Id.* § 350 cmt. h; 24 WILLISTON & LORD, *supra* note 13, § 64:27. What constitutes reasonable effort and undue risk or expense under section 350(2) of the Restatement “is a question of fact.” *Id.* Additionally, the non-breaching party is compensated for expenses garnered in the attempt to mitigate. RESTATEMENT (SECOND) OF CONTRACTS § 350 cmt. h.

35. 5 ARTHUR LINTON CORBIN, CORBIN ON CONTRACTS § 1039 (1964); *see also* Farnsworth, *supra* note 13, at 1192 (“The principle of substitution . . . applies only where an adequate substitute contract could have been arranged by the injured party. Where no such transaction was possible, the general measure of recovery applies.”).

36. 5 CORBIN, *supra* note 35, § 1039.

37. RESTATEMENT (SECOND) OF CONTRACTS § 350 cmt. b.

38. *Id.* § 350 cmt. g. For example, a person terminated from employment is not required under the mitigation doctrine to take an inferior position, either in pay or stature, or a position different from her previous position. *See* WASHBURN, *supra* note 14, at 490.

Massachusetts Supreme Judicial Court in deciding *NPS, LLC v. Minihane*, have held that there is no duty to mitigate damages when the contract contains a liquidated damages clause.³⁹ However, the reasoning of these cases is often scant and, in some cases, nonexistent.⁴⁰ The Massachusetts Supreme Judicial Court, explaining its reasoning more fully than other courts, relied on freedom of contract principles and noted that parties “exchange the opportunity to determine actual damages after a breach, including possible mitigation, for the ‘peace of mind and certainty of result’ afforded by a liquidated damages clause.”⁴¹ Courts also justify their holdings by noting that mitigation is assessed by the court, while liquidated damages are determined by the parties.⁴² Thus, courts find that the purpose of liquidated damages clauses is defeated if mitigation is required and the parties’ determination of actual damages is not upheld.⁴³

Again, the negligible reasoning behind such broad holdings is alarming, especially considering that the logic used is often faulty. For example, the Supreme Court of Ohio noted that “[a] valid liquidated damages clause contemplates the nonbreaching party’s inability to identify and mitigate its damages.”⁴⁴ A liquidated damages clause does contemplate the inability to identify and calculate actual loss.⁴⁵ However, it does not follow that the parties contemplated the possibility of successful mitigation in determining the liquidated damages amount, as the doctrine simply requires a party to make a reasonable effort to mitigate.⁴⁶ In fact, the parties just as likely may have focused only on actual loss, rather than loss avoided, in determining the amount due under the liquidated damages clause. Additionally, good business sense

39. See *NPS, LLC v. Minihane*, 886 N.E.2d 670, 675 & n.9 (Mass. 2008). The Massachusetts court cited to the following cases to support its holding: *Barrie Sch. v. Patch*, 933 A.2d 382 (Md. 2007); *Fed. Realty Ltd. P’ship v. Choices Women’s Med. Ctr., Inc.*, 735 N.Y.S.2d 159 (N.Y. App. Div. 2001); *Lake Ridge Acad. v. Carney*, 613 N.E.2d 183 (Ohio 1993); *Cady v. IMC Mortgage Co.*, 862 A.2d 202 (R.I. 2004). *Id.* at 675 n.9, 676.

40. For example, a New York court simply found that damages are not reduced as a result of a failure to mitigate because the liquidated damages clause is valid, without explaining the reasoning for this result. *Fed. Realty Ltd. P’ship*, 735 N.Y.S.2d at 162. The Florida court shed slightly more light on its decision, finding that there is no duty because damages were unknown at the time the contract was formed and thus the liquidated damages clause was valid. *Cady*, 862 A.2d at 219. However, the court did not explain why the uncertainty of damages necessitates the holding that there is no duty to mitigate. See *id.*

41. *NPS, LLC*, 886 N.E.2d at 675 (quoting *Kelly v. Marx*, 705 N.E.2d 1114, 1117 (1999)).

42. *Lake River Corp. v. Carborundum Co.*, 769 F.2d 1284, 1291 (7th Cir. 1985); *Barrie Sch.*, 933 A.2d at 392.

43. *Lake River Corp.*, 769 F.2d at 1291; *Barrie Sch.*, 933 A.2d at 392.

44. *Lake Ridge Acad.*, 613 N.E.2d at 190.

45. See *supra* note 15 and accompanying text.

46. See *supra* notes 34-35 and accompanying text.

often dictates that the non-breaching party work to make up its loss, even if it is entitled to damages.⁴⁷

The Ohio court went on to state, “[i]f damages are ‘uncertain as to amount and difficult of proof,’ as they must be, the nonbreacher cannot be expected to reduce them after a breach.”⁴⁸ This is perhaps the most illogical statement of all. Even though the opportunity to mitigate is uncertain at the time of contracting, opportunities may arise prior to and after breach that could make mitigation simple, effortless, and profitable for the non-breaching party. While some courts have held that there is a duty to mitigate,⁴⁹ the trend towards the opposite holding is alarming.⁵⁰

Rather than relying solely on liquidated damages theory, the decision to eliminate the general duty to mitigate damages should take into consideration the purposes of both liquidated damages and mitigation doctrine. Taking into account all dimensions of these contract principles, courts should not promulgate categorical rules dispensing with the duty to mitigate in the face of liquidated damages clauses. Rather, the better rule is to enforce the traditional duty to mitigate damages on all non-breaching parties, even if the parties have stipulated to a liquidated damages provision in the contract, with exceptions to this rule occurring on a case-by-case basis. This rule would best effectuate the policies underlying the mitigation doctrine. First, mitigation of liquidated damages can promote efficiency and the avoidance of economic waste. Second, mitigating liquidated damages prevents the non-breaching party from earning double profits. Third, mitigation prevents penalizing the defendant for her breach and thus effects the purposes of the law of damages by limiting the damages award to compensation only. Fourth, the mitigation effort is consistent with contractual good faith, an overarching principle of American contract law.⁵¹ Finally, a categorical rule upholding the duty to mitigate will protect non-breaching parties’ interests in the event the liquidated

47. As noted above, NPS, LLC was making every effort to resell the seats purchased by Minihane. Brief of the Plaintiff-Appellant, *supra* note 5, at 33.

48. *Lake Ridge Acad.*, 613 N.E.2d at 190.

49. See *Watts Bldg. Corp. v. Schoel, Ogle, Benton, Gentle, & Centeno*, 598 So. 2d 832, 834-35 (Ala. 1992) (upholding rent acceleration clauses only when the duty to mitigate damages is enforced); *Aurora Bus. Park Assocs. v. Michael Albert, Inc.*, 548 N.W.2d 153, 157 (Iowa 1996) (rent acceleration clause was valid as it properly provided for landlord’s duty to mitigate damages); *Arrowhead Sch. Dist. No. 75, Park County v. Klyap*, 79 P.3d 250, 264 (Mont. 2003) (noting that attempts to waive the general duty to mitigate damages can render a liquidated damages clause unconscionable).

50. The holding that there is no duty to mitigate in the face of a liquidated damages clause is beginning to be recognized as law in treatises and summaries of American law. See 22 AM. JUR. 2D *Damages* § 538 (2003); 24 WILLISTON & LORD, *supra* note 13, § 65:31.

51. See *infra* note 96 and accompanying text.

damages clause is held to be invalid or constitute a penalty. In this case, traditional damage calculations would apply and the damages award could be reduced by any failures to mitigate.

B. The Avoidance of Waste and Promotion of Efficiency

One of the main purposes underlying the mitigation doctrine is the avoidance of economic waste.⁵² “‘Economic waste’” occurs when a party “use[s] . . . assets in a way considered ‘wasteful’ according to standards shared by society in general.”⁵³ Mitigation prevents waste by disallowing the non-breaching party from taking actions that increase its damages.⁵⁴ In *Rockingham County v. Luten Bridge Co.*, the court notes that continuing to complete work on a bridge, despite the county’s cancellation of the contract due to its decision not to construct the road that the bridge was built to connect, “inflict[s] damage on the defendant without benefit to the plaintiff The work may be useless to the defendant, and yet he would be forced to pay the full contract price.”⁵⁵ Pursuing such work, despite knowledge that the contracting party no longer desires such service, wastes not only the physical materials used in construction or manufacture, but also the many hours of labor that could have been put to better use pursuing other projects.⁵⁶ Holding that there is no duty to mitigate forces a defendant to accept goods or services that it does not want, thereby denying the market of such goods or services where they may be in greater demand.⁵⁷ In sale of goods cases, there is likely to be another person in the free market who wants

52. See Hillman, *supra* note 30, at 558; see also *Rockingham County v. Luten Bridge Co.*, 35 F.2d 301, 307 (4th Cir. 1929).

53. Farnsworth, *supra* note 13, at 1173.

54. See *Clark v. Marsiglia*, 1 Denio 317, 318 (N.Y. 1845) (“[T]he plaintiff had no right, by obstinately persisting in the work, to make the penalty upon the defendant greater than it would otherwise have been.”); Hillman, *supra* note 30, at 568. Such waste, in turn, penalizes the defendant by forcing her to compensate a greater loss than if the plaintiff had stopped in her work. See *infra* Part III.D.

55. 35 F.2d at 307 (citation omitted).

56. See *id.* at 303 (noting that plaintiff claimed damages totaling \$18,301.07 in labor and materials, despite that such costs totaled only \$1,900 at the time of contract breach).

57. See *Clark*, 1 Denio at 318-19; Hillman, *supra* note 30, at 558-59. This rationale for mitigation is not applicable to the facts of the *NPS, LLC v. Minihane* case, as NPS, LLC was not performing services for Minihane. See generally 886 N.E.2d 670 (Mass. 2008) (NPS, LLC had sold a license for Club Seats to Minihane, and not personal services.). However, it is important to mention this rationale, as this Note espouses a general directive to uphold a duty to mitigate in the face of liquidated damages clauses across contract types.

and is willing to pay for such goods, encouraging sellers to mitigate their damages by entering into substitute transactions.⁵⁸

Closely tied to the theory of waste-avoidance is the idea that the law abhors idleness.⁵⁹ This idea is expounded most clearly in *Howard v. Daly*:

[A] person discharged from service must not remain idle, but must accept employment elsewhere if offered The doctrine of “constructive service” is not only at war with principle, but with the rules of political economy, as it encourages idleness and gives compensation to men who fold their arms and decline service, equal to those who perform with willing hands their stipulated amount of labor. . . . [N]o rule can be sound which gives him full wages while living in voluntary idleness.⁶⁰

Mitigation thus prevents the “moral hazard” of idleness and inefficiency by requiring that a plaintiff make a reasonable effort to minimize her loss to receive her expectation interest on the contract.⁶¹ Without mitigation, “some plaintiffs . . . [would] allow avoidable losses to mount,” knowing that full damages would be recoverable in court.⁶²

Such hazards do not disappear just because damages are specified in a liquidated damages clause. For example, in *NPS, LLC*, the “substantial benefit” of Club seats would remain unused throughout the remainder of the ten-year license should NPS, LLC elect not to mitigate.⁶³ More likely, NPS, LLC would choose to resell the seats so as to not waste this benefit, and in fact tried to do so. But, since mitigation is “irrelevant” when there is a liquidated damages clause, NPS, LLC would retain a “double profit.”⁶⁴ As many New England Patriots fans

58. See Farnsworth, *supra* note 13, at 1188; Hillman, *supra* note 30, at 558-59. Indeed, the seller is likely to have every incentive to do this anyway. Cf. Michael B. Kelly, *Living Without the Avoidable Consequences Doctrine in Contract Remedies*, 33 SAN DIEGO L. REV. 175, 182 (1996) (noting as one example that a buyer, after a seller's breach, will still need to purchase substitute goods to avoid consequential damages).

59. See *Howard v. Daly*, 61 N.Y. 362, 373 (1875); Farnsworth, *supra* note 13, at 1188 (citation omitted); Kelly, *supra* note 58, at 186.

60. 61 N.Y. at 373-74. “Constructive service” is the idea that the employee was ready and willing to perform the contract at any time, and would have done so except for the breach and thus the aggrieved party can recover wages as if service was actually provided. See *id.* at 368-70.

61. Kelly, *supra* note 58, at 186.

62. *Id.* Further, the damages award would also compensate the plaintiff for any incidental costs of the mitigation effort. *Id.* at 186-87.

63. *NPS, LLC v. Minihane*, 886 N.E.2d 670, 675 (Mass. 2008).

64. See *infra* notes 73-75 and accompanying text. As previously noted, NPS, LLC was trying without success to enter into substitute license agreements. See *supra* note 10. However, it is unknown if NPS, LLC was insisting that substitute agreements be for ten-year durations. Under

would attest, allowing these seats to remain empty for nine straight years would be using “assets in a way considered ‘wasteful’ according to standards shared by society in general.”⁶⁵ As previously noted, it is likely that a member of the free market would recognize such a benefit and be willing to purchase the licenses.⁶⁶ However, if no such substitute purchaser exists, the plaintiff still receives her full recovery if the mitigation attempts fail.⁶⁷ The broad holding that mitigation efforts are irrelevant in the face of liquidated damages clauses denies the opportunity for other consumers to benefit from the breach.

C. Preventing Double Profits

It is common understanding that, in breach of contract cases, general damages are “based on . . . expectation interest[s].”⁶⁸ Not only does mitigation prevent the non-breaching party from receiving “double profits” as a result of breach,⁶⁹ but it also prevents the non-breaching party from retaining any non-monetary benefits that result from the breach.⁷⁰

General contract damages dictate that a party is entitled to those damages that represent its expectation interest: “Compensation is the fundamental and all-pervasive principle governing the award of damages. . . . ‘In civil actions, the law awards to the party injured a just indemnity for the wrong which has been done him, *and no more*’”⁷¹ Thus, damages in breach of contract cases aim to put the non-breaching party “in as good a position [financially] as he would have been in had the contract been performed.”⁷² If a party successfully mitigates its damages, but is allowed to recover the same amount as if it did not mitigate its damages (for example, by being awarded the full liquidated

mitigation theory, it may or may not have been reasonable to insist on such lengthy contracts. NPS, LLC may have been able to reasonably mitigate by entering into shorter contractual relationships.

65. Farnsworth, *supra* note 13, at 1173; *see also supra* notes 8-9, 53 and accompanying text.

66. *See supra* notes 57-58 and accompanying text.

67. 5 CORBIN, *supra* note 35, § 1039.

68. RESTATEMENT (SECOND) OF CONTRACTS § 347 (1981).

69. *See* FREEDMAN, *supra* note 13, at 250; Recent Case Note, *Damages*, *supra* note 13, at 554.

70. *See* Kelly, *supra* note 58, at 190. The non-breaching party can retain non-monetary benefits after breach that are not deducted when determining defendant’s liability. *See id.* at 190-91. For example, NPS, LLC gained the non-monetary benefit of using the Club seats to entertain VIPs, charities, and employees to promote goodwill in the community and workplace, and yet this was not taken into account in the damages award. Brief for the Defendant-Appellee, *supra* note 5, at 21.

71. WASHBURN, *supra* note 14, at 456-57 (citing *Baker v. Drake*, 53 N.Y. 211, 220 (1873) (emphasis added)).

72. RESTATEMENT (SECOND) OF CONTRACTS § 347 cmt. a; *see also* Kelly, *supra* note 58, at 176-77.

damages amount), it is obtaining a greater benefit than it deserves under strict compensation and may in fact be receiving “double profits.”⁷³ In fact, if a plaintiff avoids any loss, “allowing recovery for the avoided loss would leave her in a position better than the one she would have occupied if the contract had been performed.”⁷⁴ The general expectation interest accounts for the avoidable consequences doctrine, as awarded damages do not encompass the windfall or double profits that result from successful mitigation.⁷⁵

The mitigation doctrine is in accord with the general expectation interest even if mitigation efforts are not successful.⁷⁶ Superficially, the mitigation doctrine appears to be at odds with the expectation interest by denying the plaintiff full recovery if no reasonable mitigation attempts are taken.⁷⁷ However, Professor Michael B. Kelly argues that the mitigation doctrine is in line with the expectation interest when one considers the benefits that are retained by the breaching party after the breach.⁷⁸ For example, sellers of goods retain their goods, which not only can be resold, but have a monetary value in and of themselves.⁷⁹ NPS, LLC retained the “substantial benefit” of having the seats available when Minihane breached his contract.⁸⁰ Not only was NPS, LLC trying to resell the seats,⁸¹ but, while this effort was ongoing, the seats were used by “VIP’s, charities, families of players and employees and this provide[d] value to the New England Patriots.”⁸² Professor Kelly notes:

The law attributes the market price to the seller not because she *could* have realized that value by reasonable efforts to sell the goods, but because she *did* realize that value by retaining the goods. The goods are valuable; retaining them is a benefit. The plaintiff, thus, has received an actual benefit from the breach, not merely an opportunity to reduce the loss. The expectation interest requires an offset for the

73. See Kelly, *supra* note 58, at 184. Chief Justice Bell, dissenting in *Barrie School v. Patch*, noted that awarding the full liquidated damages amount without regard to mitigation “would result in a windfall . . . , i.e., the School would be doubly compensated.” 933 A.2d 382, 401 (Md. 2007); see also *Priebe & Sons, Inc. v. United States*, 332 U.S. 407, 418 (1947) (“[O]ne man’s default should not lead to another man’s unjust enrichment.”).

74. See Kelly, *supra* note 58, at 184.

75. *Id.* at 187; see also FREEDMAN, *supra* note 13, at 249.

76. Kelly, *supra* note 58, at 185.

77. *Id.* at 185, 187.

78. *Id.* at 187.

79. See *id.* at 188. Additionally, one retains her time in the event of breach of a service contract. *Id.*

80. See *NPS, LLC v. Minihane*, 886 N.E.2d 670, 675 (Mass. 2008).

81. Brief of the Plaintiff-Appellant, *supra* note 5, at 33.

82. Brief for the Defendant-Appellee, *supra* note 5, at 21.

value of that benefit.⁸³

Thus, mitigation is required to fulfill the expectation interest of contract damages law and to prevent double profits, whether the effort is successful or not.

D. Preventing Penalty

Allowing the non-breaching party to retain double profits, or benefits above and beyond its expectancy interest, correspondingly penalizes the breaching party by requiring payment greater than that required for compensation.⁸⁴ In *Clark v. Marsiglia*, the court noted that the plaintiff would “make the penalty upon the defendant greater than it would otherwise have been” by not mitigating damages.⁸⁵ Chief Justice Bell, in his dissent in *Barrie School v. Patch*, noted that contracts law does not aim to penalize the breaching party: “It is a long-held, and well-settled, general principle of contract law that contract remedies are to be compensatory, not punitive. . . . Liquidated damages provisions are not immune to this general rule.”⁸⁶ Thus, mitigation enforces the expectation interest by disallowing the non-breaching party from gaining more than he has lost as a result of the breach and by forbidding the breaching party to lose more in the payment of damages than he has gained after breach.⁸⁷

The very purposes of contract damages law are defeated by courts that hold that mitigation does not apply if there is a liquidated damages clause.⁸⁸ That the parties have specified in advance the amount of

83. Kelly, *supra* note 58, at 190. Professor Kelly ultimately concludes that “we can live without the avoidable consequences doctrine” if courts correctly conceptualize expectancy damages by accounting for the benefits retained by a breach. *Id.* at 289.

84. See FREEDMAN, *supra* note 13, at 249; see also *supra* note 54, *infra* notes 85-86 and accompanying text.

85. 1 Denio 317, 318 (N.Y. 1845).

86. 933 A.2d 382, 395 (Md. 2007).

87. The Florida District Court of Appeal recognized that double profit/penalty issues would arise should the court not require mitigation in the face of liquidated damages clauses in situations similar to *Barrie School*: “[W]here the school actually fills the place of the absent student, the school’s damages will be mitigated to the extent of the new student’s payments. To conclude otherwise would create a dual recovery for the school and a penalty to the parent” *Perez v. Aerospace Acad., Inc.*, 546 So. 2d 1139, 1141 (Fla. Dist. Ct. App. 1989). Similar to the reasoning of Chief Justice Bell in his dissent in *Barrie School*, discussed *infra* note 88, the court reasoned that, insofar as mitigation was not taken into account, the liquidated damages clause was a penalty, and the case was remanded for a determination of this issue. *Id.*

88. *Barrie Sch.*, 933 A.2d at 395 (Bell, C.J., dissenting) (“I am troubled by the result reached by the Majority, as it undermines basic principles of contract law pertaining to the equity and reasonableness of contract remedies.”). Chief Justice Bell, in arguing that mitigation should factor into the court’s award of damages in the face of liquidated damages clauses, took a slightly different

damages appropriate in the event of a breach does not mean that the non-breaching party does not retain benefits. While the freedom of contract principle is one reason to uphold the validity of liquidated damages clauses,⁸⁹ freedom of contract also encompasses “[t]he legal right of either party to violate, abandon, or renounce his contract, on the usual terms of compensation to the other for the damages which the law recognizes and allows”⁹⁰ While parties have the freedom to stipulate liquidated damages, there is a corresponding freedom to break such a contract, and the measure of damages must be consistent with the expectation interest.⁹¹ The damages award, then, must be adjusted accordingly to ensure that the aggrieved party is receiving compensation only, and not more than the expectation: “Liquidated damages provisions are based on the principle of just compensation and may not be used to reap a windfall or to secure performance by the compulsion of disproportion.”⁹² It is good business sense (and common sense) to think that an aggrieved party will attempt to resell goods that have been repudiated in the contract or otherwise seek to capitalize on any benefits that were retained.⁹³ Where a party will take such actions in pursuance of greater profits, the law should take these actions into account when determining damages, even if the liquidated damages clause is valid.

Admittedly, holding that there is no duty to mitigate is more efficient in the sense that the court will have little to no work to do in calculating damages. However, courts must do equity and justice, and such ends are not achieved by dispensing with the need to mitigate damages in the face of *every* liquidated damages clause. It has long been established that “[e]quity abhors forfeitures.”⁹⁴ In high value contracts, disregarding the duty to mitigate when it would be easy to calculate damages would subsequently require the defendant to incur the penalty

view than that espoused in this Note. Rather than determining the validity of a liquidated damages clause and then applying mitigation principles, Chief Justice Bell proposes that mitigation is a factor to be considered in determining the validity of the liquidated damages clause itself:

Thus, viewing a liquidated damages provision in retrospect, the non-breaching party’s failure to mitigate renders the clause a penalty and, thus, invalid. The clause is likewise invalid where the non-breaching party’s damages, in effect, have been—because not excessive, or exorbitant—mitigated. . . .

. . . [W]here the non-breaching party . . . has taken steps that mitigated the damages, that fact must be taken into account.

Id. at 404.

89. See Ferris, *supra* note 16, at 863.

90. Rockingham County v. Luten Bridge Co., 35 F.2d 301, 308 (4th Cir. 1929).

91. See WASHBURNE, *supra* note 14, at 456-57.

92. JKC Holding Co. v. Wash. Sports Ventures, Inc., 264 F.3d 459, 468 (4th Cir. 2001).

93. Kelly, *supra* note 58, at 226-27 & n.148.

94. FREEDMAN, *supra* note 13, at 74.

and may amount to a forfeiture of a substantial amount of money. Surely, requiring reasonable attempts to prevent such a loss to the defendant is not a heavy burden for the non-breaching party to bear. For example, the result would certainly be unjust if NPS, LLC was able to resell the license in its entirety and Minihane remained obliged to forfeit \$65,500, the remaining value of the license.⁹⁵

E. The Good Faith Requirement in Contract Enforcement

Good faith and fair dealing in the performance and enforcement of contracts is a fundamental concept of American contract law.⁹⁶ The doctrine of avoidable consequences “is at [the] heart” of “good faith enforcement.”⁹⁷ Courts for many centuries refused to find against the express contract because of the nebulous and vague definition of good faith.⁹⁸ However, courts have long recognized that “to persist in accumulating a larger demand is not consistent with good faith”⁹⁹

Efforts to minimize losses evince good faith even if the parties have laid out a reasonable estimate of the damages that may result from breach. As Professors Steven J. Burton and Eric G. Andersen note, “[r]egardless of the source, . . . the principles of good faith govern enforcement rights.”¹⁰⁰ These professors explicitly state that:

The same principle applies when enforcement is by means of an agreed term, rather than common law damages. The enforcing party is held accountable for taking reasonable steps that would reduce the costs of the remedy. Accordingly, one may not invoke an enforcement term if he could have taken reasonable measures, not prejudicial to his own position, to eliminate or reduce the risk to the performance interest the

95. NPS, LLC v. Minihane, 886 N.E.2d 670, 676 (Mass. 2008).

96. See BURTON & ANDERSEN, *supra* note 13, § 1.1, at 2 (noting that “almost all U.S. jurisdictions” require good faith in the performance and enforcement of contracts). The idea of good faith is overwhelmingly recognized, and has found statutory recognition in the adoption of the UCC in 1954. *Id.* at 164.

97. *Id.* at 164 n.2.

98. See KEVIN M. TEEVEN, A HISTORY OF THE ANGLO-AMERICAN COMMON LAW OF CONTRACT 307 (Paul L. Murphy ed., 1990). Courts in the distant past only recognized defenses such as fraud and duress because “[v]ague abstractions like good faith were adverse to predictability and the security of the transaction.” *Id.* Good faith, while still rather imprecise, can be conceptualized as follows: “Once the contract is formed or reasonable expectations are raised, the parties trust that their defenses may be lowered on the faith of an implied agreement to act honestly and faithfully in carrying out their common purpose.” *Id.* at 306.

99. Clark v. Marsiglia, 1 Denio 317, 319 (N.Y. 1845); see also TEEVEN, *supra* note 98, at 309 (“[A] knowing failure to mitigate damages was found to violate good faith.”).

100. BURTON & ANDERSEN, *supra* note 13, § 5.2.2, at 169.

term was designed to protect.¹⁰¹

It is thus clear that, whether or not the amount of actual damages was predetermined in a liquidated damages clause, it promotes good faith and fair dealing to take reasonable attempts to minimize the amount owed by the defendant.¹⁰²

Additionally, requiring a duty to mitigate liquidated damages protects the integrity of contracts in the marketplace. Scholars note that if society had a great interest in *compelling* contract performance, penalties such as criminal or civil sanctions, or the award of punitive damages, would constitute the remedy for breach of contract.¹⁰³ Professor E. Allan Farnsworth notes that “a society that depends so heavily on private bargains has itself a stake in how bargains fare.”¹⁰⁴ Thus, contract law aims to “salvage the transaction” and “avoid unnecessary waste” by imposing the duty to mitigate damages.¹⁰⁵ However, such “salvaging” cannot occur if no duty to mitigate is required in the face of a liquidated damages clause. While it can hardly be said that holding that there is no duty to mitigate will deter people from entering contracts, it is in accord with the policies underlying damages law and contractual good faith to require parties to “salvage” a transaction.

F. Consistency in Damages Calculations—The Difference Between Expected Loss and Actual Damages

Requiring non-breaching parties to mitigate damages in the face of liquidated damages clauses does not contradict the purpose of such provisions. The rule eradicating the duty to mitigate liquidated damages does not recognize that, at common law, mitigation is factored into the damages awarded to the non-breaching party.¹⁰⁶ Actual damages constitute “[a]n amount awarded to a complainant to compensate for a proven injury or loss; damages that repay actual losses.”¹⁰⁷ Actual damages represent the loss on the bargain caused by the breach and are calculated by determining the loss in value minus the cost avoided, plus

101. *Id.* at 286.

102. *See id.* at 175.

103. *See* Farnsworth, *supra* note 13, at 1145-46; Hillman, *supra* note 30, at 556.

104. Farnsworth, *supra* note 13, at 1183; *see also* Hillman, *supra* note 30, at 556 (“By encouraging contract formation, society is benefited by the specialization and efficiencies which result from the contract arrangement.”).

105. Farnsworth, *supra* note 13, at 1183.

106. *See infra* notes 107-08 and accompanying text.

107. BLACK’S LAW DICTIONARY 416 (8th ed. 2004).

other loss.¹⁰⁸ The Restatement dictates that the amount mitigated by the non-breaching party is “simply subtracted from the amount that would otherwise have been recoverable as damages” to determine awarded damages.¹⁰⁹ Thus, absent a liquidated damages clause, damages are calculated in three steps: First, the court must determine the losses *caused by the breach* (including both loss in value and other loss); second, the amount that was, or could have been, mitigated must be determined by the court; third, the amount mitigated is subtracted from the amount of loss to determine actual damages.¹¹⁰ This method of calculating damages accords with the aims of damages law.¹¹¹

The method of calculating loss delineated above is equally applicable in the face of a liquidated damages clause. Courts and scholars consistently conceptualize liquidated damages as a substitute for actual damages.¹¹² However, if a liquidated damages clause is a reasonable estimate of anticipated or actual damages and thus seeks to “repay actual losses,”¹¹³ this formulation does not include any “harm avoided” after the breach and, as such, may overcompensate the non-breaching party.¹¹⁴ As a substitute for actual damages, the liquidated damages amount represents only step one in the formula above.¹¹⁵ If

108. Farnsworth, *supra* note 13, at 1162 (“*Damages = loss in value – cost avoided + other loss*”).

109. RESTATEMENT (SECOND) OF CONTRACTS § 350 cmt. b (1981); *see* KNAPP ET AL., *supra* note 13, at 848 (“These savings are to be deducted from the aggregate loss suffered in order to compute the plaintiff’s net recovery.”).

110. *See* Hollwedel v. Duffy-Mott Co., 188 N.E. 266, 268 (N.Y. 1933) (asserting that the wages payable for the remainder of the contract constitutes only the “prima facie” measure of damages, but awarded damages must account for income that the terminated employee “has earned, will earn, or could with reasonable diligence earn during the unexpired term”); RESTATEMENT (SECOND) OF CONTRACTS § 350 cmt. b; KNAPP ET AL., *supra* note 13, at 848.

111. *See supra* notes 71-75 and accompanying text.

112. NPS, LLC v. Minihane, 886 N.E.2d 670, 674 n.6, 675 n.9 (Mass. 2008); Barrie Sch. v. Patch, 933 A.2d 382, 392 (Md. 2007); WASHBURNE, *supra* note 14, at 493. *But see* RESTATEMENT (SECOND) OF CONTRACTS § 356 cmt. a (noting that liquidated damages determine the amount “payable” in case of breach). However, this formulation of liquidated damages as amount payable is conditional—such clauses only represent the amount payable “as long as the provision does not disregard the principle of compensation.” *Id.*

113. BLACK’S LAW DICTIONARY 416 (8th ed. 2004).

114. *See supra* notes 71-75 and accompanying text.

115. Some courts state that liquidated damages function to replace step three in the above formulation. *See Barrie Sch.*, 933 A.2d at 392. However, this court repeatedly confused actual and awarded damages. The court noted that liquidated damages are a substitute for actual loss, but did not differentiate actual and awarded damages. *Id.* The court simply stated that inquiry need not occur as to actual damages, and that this “includes a determination of whether the parties attempted to mitigate damages . . .” *Id.*; *see also* Lake Ridge Acad. v. Carney, 613 N.E.2d 183, 190 (Ohio 1993) (noting that “[a] . . . liquidated damages clause contemplates the nonbreaching party’s inability to identify and mitigate its damages”). The Ohio court posited that a liquidated damages

there was mitigation, or a reasonable opportunity to mitigate, the court should go on to determine the mitigation amount and subtract this amount from that due under the liquidated damages provision, especially where such calculations are simple.¹¹⁶ Upholding liquidated damages clauses allows the courts to save time and expense by forgoing litigation regarding loss in value and other loss.¹¹⁷ Because the liquidated damages clause does not require proof regarding step one, the time and expense of litigating this first issue is avoided despite having a duty to mitigate.¹¹⁸ Additionally, as parties are under no duty to wait for the non-breaching party to attempt mitigation prior to bringing suit,¹¹⁹ the amount of time assessed in mitigation litigation may not necessarily be burdensome. If the attempt to mitigate is unsuccessful, the aggrieved party will receive the full liquidated damages amount.¹²⁰ Therefore, requiring a duty to mitigate does not add complicated calculations when mitigation is unsuccessful.

Furthermore, where liquidated damages clauses represent accelerated payment, substitute transactions may allow the court to drastically reduce all calculations: “Where the principle of substitution applies, it has the major consequence of relieving the court of much of the burden of calculating loss.”¹²¹ For example, in *NPS, LLC*, if a buyer offered to purchase the remaining nine years of the license for the same contract price, then clearly the damages calculation would equal only Minihane’s missed payments, plus any fees expended by NPS in entering the substitute transaction.¹²² Similarly, if the company was able to re-sell a license for only one year, it is clear that it would not require tremendous litigation to subtract one year from the total loss. In fact, the simplicity of calculating damages in such cases should invalidate a

clause substituted for payable damages, making “proof of . . . actual loss (including what he earned or might have earned on another job) . . . no longer relevant.” *Id.* at 190.

116. As stated in the Introduction, this Note argues only that courts should not adopt a general rule dispensing with the duty to mitigate in the face of a valid liquidated damages clause. If damages are extremely complex, requiring mitigation in all circumstances would defeat the purposes of entering into a liquidated damages clause by increasing the time and money spent on litigating damages. See *infra* Part V.A.

117. See *Kelly v. Marx*, 705 N.E.2d 1114, 1117 (Mass. 1999); RESTATEMENT (SECOND) OF CONTRACTS § 356 cmt. a; Ferris, *supra* note 16, at 866.

118. See BURTON & ANDERSEN, *supra* note 13, § 7.3.3.2, at 315; WASHBURNE, *supra* note 14, at 493 n.29.

119. See 17B C.J.S. *Contracts* § 608 (1999) (“[W]here one party to a contract breaches it, the other party may immediately bring suit . . .”).

120. See RESTATEMENT (SECOND) OF CONTRACTS § 350(2); *Id.* § 350 cmts. a, h.

121. Farnsworth, *supra* note 13, at 1198.

122. See *supra* note 108 and accompanying text; see also *supra* text accompanying notes 115-16.

liquidated damages clause because liquidated damages clauses are only appropriate where damages are difficult to calculate.¹²³

G. A Safeguard in the Event of Penalty or Invalidity

Lastly, a categorical rule dispensing with the duty to mitigate damages in the face of a liquidated damages clause can jeopardize the damages award for those non-breaching parties relying on the rule if the clause is deemed invalid and is severed from the contract. Alternatively, holding that there is a duty to mitigate damages safeguards the non-breaching party in the event that the party does not mitigate damages and traditional contract damages principles are applied.¹²⁴ Although courts tend to favor the aggrieved party's desires in construing liquidated damages clauses,¹²⁵ the party wishing to set aside the provision has many arguments at its disposal to prove the clause invalid.¹²⁶ First, the liquidated damages clause may stipulate an amount that is unreasonable in light of anticipated damages.¹²⁷ Second, the liquidated damages clause

123. See *supra* notes 15, 17 and accompanying text.

124. See *Lake River Corp. v. Carborundum Co.*, 769 F.2d 1284, 1292 (7th Cir. 1985) ("The parties did not contract explicitly with reference to the measure of damages if the agreed-on damage formula was invalidated, but all this means is that the victim of the breach is entitled to his *common law* damages." (emphasis added)). The court expressly intended such calculations to include mitigation: "In this case [common law damages] would be the unpaid contract price . . . minus the costs . . . saved by not having to complete the contract . . ." See *id.*; *Barrie Sch. v. Patch*, 933 A.2d 382, 402 (Md. 2007) (Bell, C.J., dissenting) (noting that when a liquidated damages clause is invalid, "[t]hat simply means that the School will have to prove its actual damages as it would in any breach of contract action and will be required, moreover, to mitigate its damages . . ."); see also U.C.C. § 2-719 cmt. 1 (2003) ("[A]ny clause purporting to modify or limit the remedial provisions of this Article in an unconscionable manner is subject to deletion and in that event the remedies made available by this Article are applicable as if the stricken clause had never existed."); RESTATEMENT (SECOND) OF CONTRACTS § 356 cmt. a (noting that remedies for breach of contract are determined by the "rules stated in this Chapter" when a liquidated damages clause is deemed invalid, including the doctrine of avoidability).

125. *TAL Fin. Corp. v. CSC Consulting, Inc.*, 844 N.E.2d 1085, 1092 (Mass. 2006) (following the majority of courts in deciding that doubts as to the validity of the liquidated damages clause are resolved in favor of the non-breaching party). But see *Lake River Corp.*, 769 F.2d at 1290 ("Illinois courts resolve doubtful cases in favor of classification as a penalty . . .").

126. *TAL Fin. Corp.*, 844 N.E.2d at 1087, 1092 (holding that the burden of proof rests with the party seeking to set the provision aside). It is also important to note here that common law rules for invalidating liquidated damages clauses may vary by jurisdiction. Compare *Kelly v. Marx*, 705 N.E.2d 1114, 1116-17 (Mass. 1999) (holding that a "second look" at the actual damages arising from breach is not appropriate in evaluating the validity of a liquidated damages clause), with *X.L.O. Concrete Corp. v. John T. Brady & Co.*, 482 N.Y.S.2d 476, 478 (N.Y. App. Div. 1984) (holding that a liquidated damages clause is not valid if grossly disproportionate to actual injury), *aff'd*, 489 N.E.2d 768 (N.Y. 1985). This Note intends only to provide an overview of conflicting holdings, rather than a comprehensive analysis by jurisdiction.

127. See *TAL Fin. Corp.*, 844 N.E.2d at 1093-94 (noting that although Massachusetts does not espouse taking a "second look" at actual damages, a great disparity between actual harm and the

may be unreasonable in light of actual damages.¹²⁸ Third, damages may not have been difficult to calculate at the time of contracting or at the time of the breach.¹²⁹ Finally, a liquidated damages clause may be deemed unconscionable and struck from the contract.¹³⁰ While courts traditionally prefer to promote freedom of contract principles by enforcing the parties' express contract, "[t]here is no bright line separating an agreement to pay a reasonable measure of damages from an unenforceable penalty clause."¹³¹

In the event that such arguments prove successful and a liquidated damages clause is severed from the contract, the court will use traditional contract principles, including mitigation, to determine the damages award.¹³² If the non-breaching party makes no attempt to mitigate damages in reliance on the rule that mitigation is irrelevant in the face of a liquidated damages clause, it may find its damages reduced by any loss that could have been avoided through reasonable mitigation attempts.¹³³ On the other hand, upholding a general duty to mitigate will encourage a party to make active attempts to mitigate damages in all cases. To the extent that the mitigation effort is successful and the amount is easily calculable, the liquidated damages award, or the expectancy damages if the liquidated damages clause is severed, will be reduced accordingly. If mitigation attempts are not successful, the non-breaching party will be awarded the full liquidated damages or, alternatively, its full expectancy damages if the liquidated damages clause is deemed invalid. Courts should therefore not promulgate broad rules dispensing with the obligation to mitigate, as the non-breaching

liquidated damages clause *known at the time of contracting* is construed as an unenforceable penalty). The court noted that "[f]ailing to provide any recognition for the type, or timing, of the default, while by no means determinative, tends to indicate that the provision's intended purpose was not to estimate the different types of damages that might arise from a future default, but to penalize for any failure, however immaterial." *Id.* at 1093.

128. See *RKR Motors, Inc. v. Associated Unif. Rental & Linen Supply, Inc.*, 995 So. 2d 588, 595 (Fla. Dist. Ct. App. 2008) (holding that a liquidated damages clause must bear some reasonable relationship to the actual injury caused by the breach to be enforceable).

129. See *Lake River Corp.*, 769 F.2d at 1289-90 ("If damages would be easy to determine then . . . it is a penalty.").

130. See *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445, 449 (D.C. Cir. 1965) (holding that contracts are unconscionable where one party lacks a meaningful choice, and the contract unreasonably favors the other party); *Campbell Soup Co. v. Wentz*, 172 F.2d 80, 83-84 (3d Cir. 1948) (finding that the contract as a whole is unconscionable because it "drives too hard a bargain"); see also U.C.C. § 2-718(1) (2003) ("A term fixing unreasonably large liquidated damages is void as a penalty."); *id.* § 2-302 cmt. 1 (noting that the provision allows the court to sever unconscionable clauses to prevent "oppression and unfair surprise").

131. *TAL Fin. Corp.*, 844 N.E.2d at 1093.

132. See *supra* note 124 and accompanying text.

133. See *supra* notes 29, 33-34 and accompanying text.

party may be penalized for any inactivity resulting from reliance on the rule if the liquidated damages clause is deemed invalid.

In light of the aims of mitigation theory, courts should not dispense with the duty to mitigate in the face of liquidated damages clauses. However, as will be seen in Part V, complex contracts and difficult factual situations may unduly complicate the calculation of actual damages, thereby thwarting the efforts of the parties to avoid such complex and expensive litigation. In such situations, courts should determine that, given the circumstances of the case, mitigation is not required in order to uphold the intent of the parties.

IV. MITIGATION AND LIQUIDATED DAMAGES UNDER THE UCC

Although this Note has primarily explored the common law concepts of mitigation and liquidated damages, almost all states have enacted the UCC.¹³⁴ These enactments create statutory duties for those entering commercial contracts.¹³⁵ Although the UCC does not expressly codify a duty to mitigate in the face of a liquidated damages clause, such a result is suggested given the numerous provisions encompassing general mitigation principles and good faith in the UCC.

A. The Emphasis on Minimization of Damages in the UCC

Several sections of the UCC deny recovery to those non-breaching parties that do not attempt to minimize their losses.¹³⁶ First, section 2-712(1) of the UCC provides that a buyer of goods may purchase substitute goods as a result of the seller's breach.¹³⁷ However, damages are limited to "the difference between the cost of cover and the contract price together with any incidental or consequential damages . . . but less

134. The UCC was first available to the public in 1952. Charles W. Mooney, Jr., *Introduction to the Uniform Commercial Code Annual Survey: Some Observations on the Past, Present, and Future of the U.C.C.*, 41 BUS. LAW. 1343, 1345 (1986). Currently, the UCC has been enacted with some variation in all states except Louisiana and the District of Columbia. *Id.* at 1344 n.3. Although the major purposes of the UCC were to update the commercial law and provide national uniformity, such uniformity has been seriously undermined by the large number of legislative amendments made by each state in enacting the Code. *Id.* at 1346; U.C.C. § 1-103(a). This Note will explore the UCC as written by the National Conference of Commissioners on Uniform State Laws and the American Law Institute, rather than any particular state's adaptation of the Code. See Mooney, *supra*, at 1344.

135. It appears that the UCC may only apply in those cases where the parties argue that such statutes apply. See *TAL Fin. Corp.*, 844 N.E.2d at 1092 (deciding that case law governed when the parties did not alert the trial judge to applicable UCC provisions).

136. See *infra* notes 137-45 and accompanying text.

137. U.C.C. § 2-712(1).

expenses saved in consequence of the seller's breach."¹³⁸ This provision expressly denies both expenses saved (in essence, mitigated) and losses avoided by limiting recovery to the difference of cover and contract price.¹³⁹ Additionally, consequential damages only encompass losses that could not *reasonably* be mitigated.¹⁴⁰ When a buyer breaches the contract, the UCC requires an aggrieved seller to exercise reasonable commercial judgment in deciding whether to complete purchased goods:

Where the goods are unfinished an aggrieved seller may in the exercise of reasonable commercial judgment for the purposes of *avoiding loss* and of effective realization either complete the manufacture and wholly identify the goods to the contract or cease manufacture and resell for scrap or salvage value or proceed in any other reasonable manner.¹⁴¹

Section 2-709 of the UCC provides:

(1) When the buyer fails to pay the price as it becomes due the seller may recover . . . the price . . . of goods identified to the contract *if the seller is unable after reasonable effort to resell them at a reasonable price* or the circumstances reasonably indicate that such effort will be unavailing. (2) Where the seller sues for the price . . . [t]he net proceeds of any such resale must be credited to the buyer and payment of the judgment entitles him to any goods not resold.¹⁴²

Thus, section 2-709 mandates that the seller attempt mitigation to recover damages.¹⁴³ Section 2-718(2) of the UCC notes that a buyer is entitled to restitution when a seller does not deliver goods because of a buyer's breach, but this right is "subject to offset to the extent that the seller establishes . . . the amount or value of any benefits received by the buyer directly or indirectly by reason of the contract."¹⁴⁴ Additionally, "if the seller has notice of the buyer's breach before reselling goods received in part performance, his resale is subject to the conditions laid down in this Article on resale by an aggrieved seller (Section 2-706)"

138. *Id.* § 2-712(2); *see also* Hillman, *supra* note 30, at 580.

139. U.C.C. § 2-712(2). However, it should be noted that the UCC appears to contradict itself as to whether such damages that could have been avoided are recoverable. Despite the language in section 2-712(2), section 2-712(3) explicitly states any additional remedies are not barred to those buyers that do not cover. *Id.* § 2-712(3).

140. *Id.* § 2-715(2)(a) ("Consequential damages resulting from the seller's breach include . . . any loss . . . which could not reasonably be prevented by cover . . .").

141. *Id.* § 2-704(2) (emphasis added); *see also* Hillman, *supra* note 30, at 580.

142. U.C.C. § 2-709(1)-(2) (emphasis added); *see also* Hillman, *supra* note 30, at 580.

143. *See* U.C.C. § 2-709(1)(b).

144. *Id.* § 2-718(2)-(3).

and requires resale in a commercially reasonable manner.¹⁴⁵ The UCC thus provides ample incentives to mitigate damages, as numerous provisions deny the non-breaching party recovery of losses that could have been avoided with reasonable effort.

Lastly, the duty to mitigate damages in the face of a liquidated damages clause may be inferred from the UCC provision outlining the Code's general remedies theory. Section 1-305(a) of the UCC provides:

The remedies provided by [the Uniform Commercial Code] must be liberally administered to the end that the aggrieved party may be put in as good a position as if the other party had fully performed but neither consequential or special damages nor penal damages may be had except as specifically provided in [the Uniform Commercial Code] or by other rule of law.¹⁴⁶

This provision captures the traditional theory of contract damages and provides only for the non-breaching party's expectancy interests.¹⁴⁷ As noted above, such expectancy interests encompass mitigation, as any losses that the non-breaching party does not avoid become an added benefit that would not have accrued had the contract been fulfilled.¹⁴⁸ The Official Comment also states that this section of the UCC "makes it clear that damages must be minimized."¹⁴⁹ The recognition of the mitigation doctrine, implied by the above language stressing compensation in damages awards, would thus be properly applied to liquidated damages provisions under the UCC.

B. The Importance of Good Faith and the Common Law in the UCC

The UCC's emphasis on good faith further supports a rule obligating mitigation of damages despite a liquidated damages clause. Section 1-304 of the UCC expressly requires that merchants employ good faith in both contract performance and enforcement.¹⁵⁰

145. *Id.* § 2-718(4). The language of section 2-706(1) is analogous to that of section 2-712 and reads:

Where the resale is made in good faith and in a commercially reasonable manner the seller may recover the difference between the resale price and the contract price together with any incidental damages allowed under the provisions of this Article . . . but less expenses saved in consequence of the buyer's breach.

Id. § 2-706(1).

146. *Id.* § 1-305(a) (alteration in original).

147. *See supra* notes 68-72 and accompanying text.

148. *See supra* Part III.C.

149. U.C.C. § 1-305 cmt. 1.

150. *Id.* § 1-304 ("Every contract or duty within [the Uniform Commercial Code] imposes an obligation of good faith in its performance and enforcement." (alteration in original)).

Additionally, while the UCC provides that parties can vary their rights and duties by agreement, the “obligations of good faith, diligence, reasonableness, and care . . . may not be disclaimed by agreement.”¹⁵¹ As noted previously, good faith is violated when the non-breaching party makes no effort to mitigate damages.¹⁵² To emphasize the inseparability of mitigation and good faith, the Code reiterates in numerous sections that the non-breaching party should attempt the mitigation of losses in good faith.¹⁵³ For example, section 2-706 requires that a seller must resell goods “in good faith and in a commercially reasonable manner” after a buyer’s breach.¹⁵⁴ Section 2-712(1) provides that a buyer may “cover,” but only if such cover is made “in good faith and without unreasonable delay”¹⁵⁵ In accordance with the discussion in Part III.E, the UCC’s good faith requirement indicates that mitigation should be required in the face of a liquidated damages clause.

Furthermore, the UCC states that the “principles of law and equity” supplement the Code provisions.¹⁵⁶ The Official Comment recognizes that the UCC “was drafted against the backdrop of existing bodies of law, including the common law and equity, and relies on those bodies of law to supplement its provisions”¹⁵⁷ It also clarifies that the common law will be preempted when there is a UCC provision on point, or where there is a conflicting UCC policy.¹⁵⁸ As the UCC promotes a policy of mitigation,¹⁵⁹ and its provisions do not explicitly provide otherwise, mitigation in the face of a liquidated damages clause is not preempted by the UCC. Consequently, mitigation, an established common law principle and a recognized embodiment of good faith,

151. *Id.* § 1-302(a)-(b). Although section 1-302 disallows such obligations from being written out of any contract, it notes that contracts can specify the “standards by which the performance of those obligations [are] to be measured if those standards are not manifestly unreasonable.” *Id.* § 1-302(b). Admittedly, a liquidated damages clause that specifies *awarded* damages and explicitly excludes a duty to mitigate may be viewed as the “standard” for which good faith in enforcement may be measured, assuming *arguendo* that such a clause would not be construed as unconscionable. However, as commercial reasonableness often indicates that mitigation is desirable and parties may have an expectation that the non-breaching party will attempt to mitigate losses, good faith is best effected by requiring mitigation, rather than assuming that the parties intended to vary the traditional conceptions of good faith in contract enforcement.

152. *See supra* notes 96-102 and accompanying text.

153. *See infra* notes 154-55 and accompanying text.

154. U.C.C. § 2-706(1); *see also* Hillman, *supra* note 30, at 580.

155. U.C.C. § 2-712(1).

156. *Id.* § 1-103(b).

157. *Id.* § 1-103 cmt. 2.

158. *Id.*

159. *See supra* Part IV.A.

should be considered when determining damages under commercial contracts that include liquidated damages clauses.¹⁶⁰

To summarize, the UCC expressly anticipates the mitigation of damages in a number of provisions governing the damages awarded in case of breach. The UCC also emphasizes good faith in both contract performance and enforcement. Moreover, the UCC's comment requires that the common law act as a gap-filler in UCC interpretation, implying that such commonly understood doctrines as mitigation govern when not explicitly displaced by the UCC itself. Thus, holding that there is a duty to mitigate damages in every circumstance, including in the face of a liquidated damages clause, does not conflict with the statutory duties created by the UCC.

V. THE (MINIMAL) PROBLEMS AND COMPLEXITIES OF REQUIRING A DUTY TO MITIGATE LIQUIDATED DAMAGES CLAUSES

While holding that there is a duty to mitigate damages despite a liquidated damages clause resonates with the appropriate understanding of both common law and the UCC, and constitutes sound policy, this holding is not without its difficulties. However, these difficulties are germane to mitigation and liquidated damages generally and do not reflect any increased problems due to requiring the mitigation of liquidated damages. Such complications include the complexities of modern commercial contracts, an offer to mitigate from the breaching party, and the problem of lost volume sellers.

A. The Complexity of Modern Commercial Contracts and International Law

Enforcement difficulties often arise due to the complexity and specialization of modern commercial contracts, which may in turn cause difficulties in mitigating damages.¹⁶¹ Many commercial contracts can extend over long periods of time, involve multiple parties, and include benefits that may not be "objectively quantifiable."¹⁶² As noted previously, such complexities are exactly why parties formulate liquidated damages provisions in the first place.¹⁶³ Some contend that

160. See Hillman, *supra* note 30, at 580-81 (discussing holdings applying common law mitigation principles to cases decided under the UCC).

161. See Charles J. Goetz & Robert E. Scott, *The Mitigation Principle: Toward a General Theory of Contractual Obligation*, 69 VA. L. REV. 967, 970, 1001-02 (1983).

162. See *id.* at 1000. Indeed, these are reasons as to why mitigation can involve litigation.

163. See *id.* ("Even in markets with close substitutes, particularized clauses are important for any atypical bargainer."); see also *supra* notes 15-16 and accompanying text.

such clauses may need to be viewed flexibly by the courts to protect the “idiosyncratic bargainer[’s] . . . nonpecuniary values.”¹⁶⁴ Because the contract is uniquely tailored to each party’s individual needs, the ability to mitigate by entering substitute transactions may be severely decreased, and the parties may become “mutually dependen[t]” on each other to receive the benefits from the contract.¹⁶⁵

*California and Hawaiian Sugar Co. v. Sun Ship, Inc.*¹⁶⁶ is one example of a complicated contract in which a court would be well advised to dispense with a duty to mitigate the liquidated damages clause. California and Hawaiian Sugar Company, a transporter of raw sugar from Hawaii to California, contracted with Sun Ship, Inc. and Halter Marine, Inc. to build an “integrated tug barge”; Sun Ship was to build the barge, and Halter Marine was to build the tug.¹⁶⁷ Because any sugar stored on the ground or remaining unharvested spoils, ready and available transportation to the California refineries was pivotal to the business of the Sugar Company.¹⁶⁸ The contract with Sun Ship included a liquidated damages clause of \$17,000 per day in the event Sun Ship failed to deliver.¹⁶⁹ Although Halter Marine did not deliver the tug to Sun Ship on time, thereby preventing Sun Ship from connecting the tug to the barge to complete the ship, the court found that the liquidated damages clause specifically required the *barge* to be delivered on time, and thus Sun Ship’s failure to deliver the barge triggered the liquidated damages clause.¹⁷⁰ Additionally, because the damages were extremely difficult to calculate, and the liquidated damages amount was reasonable given the anticipated harm, the clause did not constitute a penalty.¹⁷¹

In this case, the Sugar Company was able to mitigate its damages by finding other available shipping.¹⁷² Costs avoided also included transportation savings and lay-up costs.¹⁷³ However, “the exact damages caused [to] its manifold operations by lack of the integrated tug boat [were] . . . difficult of ascertainment.”¹⁷⁴ Because it was impossible to

164. Goetz & Scott, *supra* note 161, at 1001.

165. *Id.* at 1002.

166. 794 F.2d 1433 (9th Cir. 1986).

167. *Id.* at 1434-35.

168. *Id.* at 1435.

169. *Id.*

170. *See id.* at 1435-36, 1439.

171. *Id.* at 1436. It should be noted that the court decided this case under Pennsylvania’s adoption of the UCC, which has identical language to the UCC itself. *See id.* The court uses common law to interpret these provisions. *Id.* at 1437.

172. *Id.* at 1436.

173. *Id.* at 1438.

174. *Id.* at 1439.

determine how much was saved by the delivery of the sugar to the refineries and industrial customers, it was impossible to calculate actual damages. As this contract contained numerous factors that made loss in value, other loss, and loss avoided extremely difficult to calculate, it was appropriate for the court to disregard mitigation in the face of a valid liquidated damages clause. However, to reiterate, this difficulty is not inherent in all contracts that contain liquidated damages clauses, and such decisions to disregard mitigation should be reserved for those cases where such calculations are nearly impossible.

In today's increasingly globalized society, many commercial contracts have the potential to involve parties from multiple countries and nations. As such, in the spring of 1980, the General Assembly of the United Nations convened the Convention on Contracts for the International Sale of Goods ("CISG").¹⁷⁵ The CISG, unlike the UCC, explicitly requires mitigation:

A party who relies on a breach of contract must take such measures as are reasonable in the circumstances to mitigate the loss, including loss of profit, resulting from the breach. If he fails to take such measures, the party in breach may claim a reduction in the damages in the amount by which the loss should have been mitigated.¹⁷⁶

In line with the common law and the UCC, the CISG also requires "the observance of good faith in international trade," the corollary of which includes mitigation in contract enforcement.¹⁷⁷ As of July 1, 2008, seventy countries, including the United States, had become parties to the CISG.¹⁷⁸

Similar to the UCC analysis above,¹⁷⁹ the CISG's emphasis on mitigation and good faith supports a duty to mitigate damages despite a liquidated damages clause. In fact, the case for recognizing a duty to mitigate in the face of a liquidated damages clause is even stronger in international law because the CISG expressly requires reasonable attempts to mitigate loss.¹⁸⁰ Furthermore, the U.N. General Assembly,

175. See United Nations Convention on Contracts for the International Sale of Goods, Apr. 11, 1980, 1489 U.N.T.S. 3 [hereinafter CISG]. The CISG "governs the sale of goods between private parties whose places of business are in different nations and whose nations are Contracting Parties to the CISG." Andrew Babiak, Comment, *Defining "Fundamental Breach" Under the United Nations Convention on Contracts for the International Sale of Goods*, 6 TEMP. INT'L & COMP. L.J. 113, 113 (1992).

176. CISG, *supra* note 175, art. 77, at 73.

177. *Id.* at art. 7(1).

178. Christine E. Nicholas, *Teach an Old UCC Dog New Tricks: An Overview of the U.N. Convention on the International Sale of Goods*, BUS. L. TODAY, Sept./Oct. 2008, at 39, 39.

179. See *supra* Part IV.

180. See *supra* note 176 and accompanying text.

“[r]ecognizing that a wide range of international trade contracts contain clauses obligating a party that fails to perform an obligation under the contract to pay an agreed sum to the other party,” urged States to adopt the Uniform Rules on Contract Clauses for an Agreed Sum Due upon Failure of Performance (the “Uniform Rules”).¹⁸¹ However, the United Nations Commission on International Trade Law (the “U.N. Commission”) did not amend the duty to mitigate damages under Article 77 of the CISG when adopting the rules regarding agreed sums.¹⁸² As the Uniform Rules were written and adopted only three years after the CISG, the U.N. Commission would presumably have adopted such a modification if it had intended to dispense with the duty to mitigate in the face of a liquidated damages clause.¹⁸³ Thus, parties engaging in international commercial contracts should be aware that the general duty to mitigate is not definitively excluded by the inclusion of a liquidated damages clause in the contract.¹⁸⁴

B. Are You Required to Mitigate if the Mitigation Offer Comes from the Breaching Party?

Although the mitigation doctrine requires the non-breaching party to avoid all reasonable losses upon contract breach, it is not clear if a non-breaching party must accept reasonable offers of mitigation from the breaching party.¹⁸⁵ For example, would NPS have been required to accept if Minihane had offered to pay for the remainder of the license? A number of courts have decided that there is no duty to accept mitigation offers from the breaching party:¹⁸⁶ “We doubt if any man should be required to contract a second time with one who has without cause breached a prior contract with him. A man’s nature is such that he almost instinctively rebels against it.”¹⁸⁷ A non-breaching party should also not have to accept a substitute contract with the breaching party

181. G.A. Res. 38/135, at 270, U.N. Doc. A/RES/38/135 (Dec. 19, 1983).

182. See U.N. Comm’n on Int’l Trade, *Uniform Rules on Contract Clauses for an Agreed Sum Due Upon Failure of Performance*, annex I, U.N. Doc. A/38/17 (June 29, 1983).

183. See *id.*

184. However, parties do always have the option of excluding the CISG and agreeing to a different governing law. Babiak, *supra* note 175, at 141.

185. See Hillman, *supra* note 30, at 554-55.

186. See, e.g., *Cain v. Grosshans & Petersen, Inc.*, 413 P.2d 98, 102 (Kan. 1966); *Canadian Indus. Alcohol Co. v. Dunbar Molasses Co.*, 179 N.E. 383, 385 (N.Y. 1932); *Stanley Manly Boys’ Clothes, Inc. v. Hickey*, 259 S.W. 160, 162 (Tex. Comm’n App. 1924). But see *Lawrence v. Porter*, 63 F. 62, 66 (6th Cir. 1894) (“The obligation on the buyer to mitigate his loss, by reason of the seller’s refusal to carry out such a sale, is not relaxed because the delinquent seller affords the only opportunity for such reduction of the buyer’s damage.”).

187. *Stanley Manly Boys’ Clothes, Inc.*, 259 S.W. at 162.

when the initial contract was of a personal nature (for example, an employment contract), when the new contract contains new or changed terms, when the offer is conditioned on waiver of damages from the breach of the original contract, and when the breaching party has already committed a material breach.¹⁸⁸ Thus, although it may make economic sense to accept such a new offer, courts do not typically allow the breaching party to benefit by mandating a second contract between the parties.¹⁸⁹

Despite the reluctance of courts to require the non-breaching party to deal with the breaching party for mitigation purposes, the UCC contains a number of provisions that indicate such mitigation efforts *would* be required.¹⁹⁰ Many provisions of the Code require mitigation to the extent that it is “reasonable.”¹⁹¹ As the reasonableness of an offer does not depend on the identity of the offeror, it follows that the non-breaching party should accept the breaching party’s mitigation offer.¹⁹² For example, section 2-706(4) allows a seller to resell goods as a result of the breach, but the buyer must be given reasonable notification of the time and place of the resale.¹⁹³ As section 2-706(2) only requires that the sale be “commercially reasonable,” the buyer may reasonably repurchase the goods at the public sale.¹⁹⁴ Section 2-508(1) also allows the seller to cure any defects in delivery if the time for performance has not yet expired, thereby requiring the buyer to accept the seller’s mitigative efforts to cure.¹⁹⁵ Under section 2-712, a buyer may, but is not required to, make “any reasonable purchase” to mitigate damages “in good faith.”¹⁹⁶ Consequently, “[i]f the breaching seller offers the goods at contract price or at the best price available and the buyer has assurances that the seller will perform, it may only be reasonable for the buyer to purchase from the seller.”¹⁹⁷ In fact, a court in Alabama held

188. See Hillman, *supra* note 30, at 569-70.

189. See *id.* at 568.

190. See *supra* Part IV.

191. See *supra* notes 140-42, 145 and accompanying text.

192. However, as previously noted, common law provisions supplement the UCC provisions. See *supra* notes 156-57 and accompanying text. Thus, where a jurisdiction has ruled that an injured party has no duty to accept offers to mitigate from the breaching party, it may be that the deciding court will follow such precedent in determining what is reasonable, even when the case is governed by the UCC.

193. See U.C.C. § 2-706(4)(b) (2003); see also Hillman, *supra* note 30, at 581.

194. U.C.C. § 2-706(2); see Hillman, *supra* note 30, at 581 (“Since under Section 2-706 the resale must be ‘reasonable,’ presumably seller could not arbitrarily refuse to resell to the buyer.”).

195. See U.C.C. § 2-508(1). Further, the seller is allowed additional time to perform if she had “reasonable grounds to believe” such goods would be satisfactory. *Id.* § 2-508(2).

196. *Id.* § 2-712(1).

197. Hillman, *supra* note 30, at 583-84.

that the jury must decide if a buyer did not properly mitigate damages when he purchased pipe from a third party, rather than opting to purchase pipe at a lower cost from the breaching seller.¹⁹⁸

This issue is germane to the doctrine of mitigation as a whole and has yet to be resolved. Requiring mitigation in the face of a liquidated damages clause does not solve this issue, but also does not add to the complexity of determining if the non-breaching party need accept such offers. In light of the principles discussed above, parties' expectations are sustained by requiring mitigation in all circumstances, and parties should expect to deal with the breaching party where the governing jurisdiction has ruled on the issue, or where the UCC dictates that such actions are necessary.

C. The Lost Volume Seller Problem

Another problem relating to the doctrine of mitigation is that of the lost volume seller. A lost volume seller "is one whose willingness and ability to supply is, as a practical matter, unlimited in comparison to the demand for the product."¹⁹⁹ Common law holds that lost volume sellers are not required to mitigate damages because such sellers would have been able to enter the second contract regardless of breach, and thus cannot receive their expectation interest by simply entering a subsequent transaction.²⁰⁰ Thus, the second transaction is not truly a substitute of the first, as the second transaction would have occurred regardless of breach.²⁰¹

Holding that there is a duty to mitigate liquidated damages clauses leaves this doctrine intact when a party is truly a lost volume seller, and rightfully so. Because the seller's profit cannot be recouped by entering into a second transaction, disallowing mitigation does not discourage

198. See *Owens v. Clow Corp.*, 491 F.2d 101, 104 (5th Cir. 1974); see also *Hillman*, *supra* note 30, at 585.

199. *Collins Entm't Corp. v. Coats & Coats Rental Amusement*, 629 S.E.2d 635, 637 (S.C. 2006).

200. See *R.E. Davis Chem. Corp. v. Disonics, Inc.*, 826 F.2d 678, 682 n.7 (7th Cir. 1987) ("[B]y definition, a lost volume seller cannot mitigate damages through resale. Resale does not reduce a lost volume seller's damages because the breach has still resulted in its losing one sale and a corresponding profit."); *Gianetti v. Norwalk Hosp.*, 833 A.2d 891, 904 (Conn. 2003); *Collins Entm't Corp.*, 629 S.E.2d at 637. But see *Ne. Vending Co. v. P.D.O., Inc.*, 606 A.2d 936, 938 (Pa. Super. Ct. 1992) (rejecting lost volume seller theory and requiring such sellers to mitigate damages).

201. See RESTATEMENT (SECOND) OF CONTRACTS § 347 cmt. f (1981) ("If the injured party could and would have entered into the subsequent contract, even if the contract had not been broken, and could have had the benefit of both, he can be said to have 'lost volume' and the subsequent transaction is not a substitute for the broken contract."); Farnsworth, *supra* note 13, at 1195-96.

economic waste and inefficiency, and does not entitle the seller to double profits. Additionally, failure to mitigate damages does not evidence bad faith because the seller is simply aiming to place himself in as good a position as if the contract had been performed in accordance with traditional contract principles.²⁰² However, courts must take care in determining who qualifies as a lost volume seller. As noted, a lost volume seller must be “unlimited” in supply.²⁰³ NPS, which possesses approximately 6000 Club seats, is not unlimited in its supply of this level of seating.²⁰⁴ For those who are truly lost volume sellers, mitigation need not apply even in the presence of a liquidated damages clause because the policies and reasons for encouraging mitigation are not applicable in such cases.

VI. CONCLUSION

In conclusion, the common law duty to mitigate damages should be retained, even if a contract contains a liquidated damages clause. Courts holding that there is no such duty provide little rationale for their holdings, effectively taking the easy way out by simply dispensing with the obligation. At the very least, there are a number of reasons why a categorical rule holding that there is no duty to mitigate damages despite a liquidated damages clause is undesirable. Such a broad holding allows for less exertion by all parties: courts will not have to bother calculating mitigation and the non-breaching party will not have to expend any effort to avoid loss. When calculations and mitigation are simple and unproblematic, courts promote inequity by awarding the total liquidated damages amount without requiring even the slightest effort to mitigate. Not only does this distort traditional damages law, but it allows the breaching party to recover unearned profits over and above the expectation interest while simultaneously penalizing the defendant. Additionally, such a holding encourages waste and idleness and is inconsistent with the doctrine of good faith. Under the rule suggested above, the recovery by NPS would be exactly the same. As NPS was

202. See *supra* Part III.E.

203. *Collins Entm't Corp.*, 629 S.E.2d at 637.

204. Stadiums of Pro Football, Gillette Stadium, <http://www.stadiumsofprofootball.com/afc/GilletteStadium.htm> (last visited Mar. 9, 2010). In fact, since the entire stadium has a maximum capacity, NPS cannot, by definition, be a lost volume seller no matter what seat is sold. Although the court did not rule on the issue, NPS argued in its brief that it had no duty to mitigate damages because it was a lost volume seller. Brief of the Plaintiff-Appellant, *supra* note 5, at 31. Ironically, although the parties did argue the lost volume seller issue, the court ruled instead that NPS had no duty to mitigate because of the presence of a liquidated damages clause, an issue argued by neither party. See *supra* notes 5-7 and accompanying text.

actively but unsuccessfully attempting to resell the licensed seats, NPS did not have losses avoided. Actual damages were appropriately the amount of liquidated damages specified in the contract. Thus, the “right” result was reached via a different ruling by the court.

The analysis in this Note does not interfere with the ability of parties to stipulate to liquidated damages clauses and in fact encourages them to do so when the damages calculation is complex. Freedom of contract and the preservation of the parties’ interests are of utmost importance in contract law and necessary for the efficient functioning of society. Courts must look to protect parties’ interests in avoiding cumbersome and expensive litigation over damages and should, on a case-by-case basis, dispense with the rule requiring mitigation where it is warranted by complex calculations. However, it is problematic that courts expound overarching categorical rules so as to exclude traditional mitigation doctrine, especially where the issue is not broached or argued by the parties. Requiring a duty to mitigate in all circumstances is a simple, easy to follow rule. Where mitigation is successful, contractual relations remain positive and assets are not wasted. If mitigation is not successful, no harm is done, and the non-breaching party continues to receive the benefit of its bargain in the full liquidated damages amount. Additionally, if the mitigation calculation is burdensome to calculate, then courts have the discretion to dispense with this duty on a case-by-case basis. It is no skin off the system’s back to require only a reasonable effort to mitigate—but the benefits gained, as seen above, are enormous.

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