Defendant’s Responsibility to Minimize Plaintiff’s Loss: A Curious Exception to the Avoidable Consequences Doctrine

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I. INTRODUCTION

The avoidable consequences doctrine requires courts or, more often, juries, to reduce the amount of damages a plaintiff recovers by the amount of any losses that the plaintiff could have avoided by reasonable conduct,

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Regardless of whether the plaintiff actually avoided those losses.\(^1\) For over a century, however, courts have recited an exception to the avoidable consequences doctrine: when defendants and plaintiffs have an equal opportunity to minimize the loss, plaintiffs may recover the full loss even if they did not take reasonable measures that would have reduced the loss.\(^2\) The exact content and extent of the exception varies from source to source.\(^3\) The formulations, however, produce the same effect. Each permits the plaintiff to recover damages that she could have avoided by reasonable conduct, despite the avoidable consequences doctrine.\(^4\) In effect, the equal opportunity exception

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1. See, e.g., RESTATMENT (SECOND) OF CONTRACTS § 350 (1981); RESTATMENT (SECOND) OF TORTS § 918 (1979). The doctrine often is referred to as the "duty to mitigate damages." Throughout this century, scholars and commentators have questioned the accuracy of that phrase. See, e.g., DAN B. DOBBS, HANDBOOK ON THE LAW OF REMEDIES § 3.7, at 188 (1973) (advising the avoidance of the word "duty" in this context and preferring the term "minimize" rather than "mitigate"); CHARLES T. MCCORMICK, HANDBOOK ON THE LAW OF DAMAGES 127 (1935) ("[T]he person wronged should not be spoken of as under a 'duty' to avoid damage, but rather under a 'disability' to recover for avoidable loss."); ARTHUR G. SEDGWICK, ELEMENTS OF THE LAW OF DAMAGES 73 (2d ed. 1909) ("[S]ince the result of neglecting the duty falls not on another, but on the person himself in fault, it seems to be one of those self-regarding duties which are outside the domain of the law."). Despite these protests, the phrase continues in the use of jury instructions and appellate decisions. Michael B. Kelly, Living Without the Avoidable Consequences Doctrine in Contract Remedies, 33 SAN DIEGO L. REV. (forthcoming 1996) (page numbers hereinafter refer to the unpublished manuscript, on file with the author). Perhaps out of frustration, Dobbs recently withdrew objections to the usage, suggesting it probably will not mislead anyone. DAN B. DOBBS, LAW OF REMEDIES § 3.9, at 271 n.5 (2d ed. 1993) [hereinafter DOBBS (2d)]. There are reasons to suspect some jurists have in fact been misled. See Jeffrey K. Riffer & Elizabeth Barrowman, Recent Misinterpretations of the Avoidable Consequences Rule: The "Duty To Mitigate Damages and Other Fictions, 16 HARV. J.L. & PUB. POL'Y 411 (1995); Kelly, supra, at 140. Nonetheless, old habits die hard. This article occasionally may lapse into the common usage.

2. See, e.g., Louisville, N.A. & C. Ry. Co. v. Summer, 5 N.E. 404, 406 (Ind. 1886); DOBBS, supra note 1, § 3.7, at 186; DOBBS (2d), supra note 1, § 3.9. Presumably the exception represents a tie-breaking rule; if the defendant had a better opportunity to minimize the loss, the exception would preclude limiting the award based on the plaintiff's failure to act reasonably.

3. Compare Summer, 5 N.E. at 406 (applying the exception "where he whose duty it is primarily to do work necessary to fulfill a contract, and to prevent damage which may result from a failure, has equal knowledge of the consequences of non-compliance and opportunity to fulfill the obligation") with DOBBS, supra note 1, § 3.7, at 186 (applying the exception when "both the plaintiff and the defendant have equal opportunity to reduce the damages by the same act or expenditure, and it is equally reasonable to expect the defendant to minimize damages").

4. The text reflects the working of the doctrine in the cases that actually apply it. Numerous cases recite the doctrine in conjunction with a statement that the plaintiff in fact had acted reasonably to avoid the loss or that the loss could not have been avoided without unreasonable effort by the plaintiff. See, e.g., S.J. Groves & Sons Co. v. Warner Co., 576 F.2d 524, 530 (3d Cir. 1978) (finding that the plaintiff acted reasonably); Unverzagt v. Young Builders, Inc., 215 So. 2d 823 (La. 1968) (finding mitigation unduly burdensome on the plaintiff). In these cases, the plaintiff would recover the full loss even if the court applied the avoidable consequences doctrine. Thus, the exception to the doctrine presents, at best, an alternative holding producing
trumps the avoidable consequences doctrine; the latter simply does not apply when the defendant has an equal opportunity to prevent the loss.5

S. J. Groves & Sons Co. v. Warner Co.6 illustrates the way courts apply the exception. Groves was a subcontractor on a bridge construction job. Warner agreed to provide Groves with ready-mixed concrete for the job. Although Warner consistently failed to provide enough concrete,7 Groves continued to deal with Warner instead of seeking a different concrete supplier or buying additional concrete from a supplemental supplier. The district court held that after a certain date, reliance on Warner was unreasonable and Groves should have obtained additional concrete from a supplemental supplier.8 Concluding that damages for delay accruing after that date could have been avoided if Groves had hired a supplemental supplier, the trial court denied a large portion of Groves' claim.9

The Third Circuit reversed, based in part on the equal opportunity exception:

Engaging Trap Rock as an additional source of supply was a course of action open to Warner as well as Groves. Indeed, on other commercial work Warner had used Trap Rock as a supplemental supplier. . . . Where both the plaintiff and the defendant have had equal opportunity to reduce the damages by the same act and it is equally reasonable to expect the defendant to minimize damages, the defendant is in no position to contend that the plaintiff failed to mitigate. Nor will the award be reduced on account of damages the defendant could have avoided as easily as the plaintiff. The duty to mitigate damages is not applicable where the party whose duty it is primarily to perform a contract has equal opportunity for performance and equal knowledge of the consequences of nonperformance.10

the same result.

5. In fact, it may be error to instruct the jury about the avoidable consequences doctrine when the defendant had an equal opportunity to prevent the loss. See Baldus v. Mattern, 93 N.W.2d 144, 155 (N.D. 1958) (dicta); Ivester v. Family Pools, Inc., 262 S.C. 67, 202 S.E.2d 362 (1974).

6. 576 F.2d 524 (3d Cir. 1978).

7. Problems with timing of deliveries and the quality of the concrete also arose. Id. at 526-27.

8. Id. at 526.

9. The trial court denied Warner the protection of the standard contract provision precluding damages for delay by finding Warner had acted in bad faith. Id.

10. Id. at 530 (citations omitted).
The court vacated the application of the avoidable consequences doctrine and remanded for a determination of the full damages for delays caused by Warner. The equal opportunity exception was an alternative holding. The quoted passage follows the court's holding that it was reasonable for Groves to rely on Warner instead of seeking supplemental supplies from Trap Rock. The court concluded either ground sufficiently supported reversal.

As the title of this article suggests, I find this exception quite curious. Part II of this article identifies and explores some of the very strange results that might follow if courts began to apply the exception seriously. For example, a buyer of goods, such as Groves, might no longer need to worry about covering to avoid consequential damages. As long as the seller had an equal opportunity to obtain substitute goods for the buyer, the exception could permit the buyer to recover preventable consequential losses. The exception, if applied literally, could work serious mischief in the application of relatively settled remedies. This potential for mischief offers the first hint that the equal opportunity exception does not deserve a place in the law.

If the equal opportunity exception serves some function, however, an effective argument for its retention might remain. Part III examines the origins of the equal opportunity exception in order to discover the rationale for its creation. The search reveals a rather questionable pedigree. The exception that courts recite today differs in some subtle but important ways from the earliest treatment of the equal opportunity exception. More importantly, the cases from which the equal opportunity exception arose address a problem that no longer troubles courts or litigants. The question involved the timing of mitigation: when should the plaintiff begin to minimize the loss in the face of uncertainty concerning whether the defendant will perform or will prevent the loss? Because the timing issues can be (and, to some extent, have been) handled by other legal mechanisms, the equal opportunity exception no longer seems to serve that function. Thus, no rationale for the continued existence of the exception emerges from its history.

The exception, however, could serve new purposes that make its retention useful. Part IV posits the most plausible purpose: efficiency. This goal might reconcile the exception with the rationale for the avoidable consequences doctrine, which also seeks to minimize waste. Superficially, the exception

11. Under that view of the case, the result would be the same even if the avoidable consequences doctrine applied; the doctrine does not reduce the award if the plaintiff acted reasonably in attempting to minimize the loss.
12. S.J. Groves & Sons Co., 576 F.2d at 530.
13. While S.J. Groves & Sons Co. involved a construction project, the court applied Article 2 of the Uniform Commercial Code to the case because the contract between Groves and Warner involved the sale of concrete. Id.
appears to allocate the burden of mitigation to the party who can prevent the harm at the least cost. In fact, however, uncertainty created between the parties, neither of whom may know how efficiently the other can prevent the harm, seems likely to impede the minimization of the loss or, occasionally, produce wasteful duplication of efforts to minimize the harm. In the final analysis, no policy explanation accounts satisfactorily for this exception.

Courts should renounce the equal opportunity exception. It serves no discernible purpose in the law, but its continued existence raises the potential for truly strange results. Because the exception is almost entirely a creature of dicta, courts may disapprove of the exception without overruling any prior holding. The danger the exception poses should overcome the temptation to let this sleeping dog lie. Because the exception lacks a valid justification, its continued existence offers merely a means for litigants to raise unjustified issues that increase litigation costs and may produce injustice.

II. THE MISCHIEF OF THE EQUAL OPPORTUNITY EXCEPTION: IS THERE A PROBLEM?

The equal opportunity exception threatens to swallow the avoidable consequences doctrine in a large number of cases. If courts began to apply the equal opportunity exception consistently, they could find many situations in which the defendant may have an opportunity to prevent the loss that is at least equal to the plaintiff’s opportunity. To date, courts have not applied the exception to produce absurd results. In fact, almost all of the opinions that recite the equal opportunity exception could reach the same result without ever mentioning the exception. A latent problem, nonetheless, the doctrine sits waiting for a court to use it to produce results inconsistent with ordinary remedial principles.

The equal opportunity exception could supplant the avoidable consequences doctrine in almost every contract case. The defendant could prevent all damages to the plaintiff simply by performing the contract. Even outside contract law, the party who commits the wrong always has a better opportunity to prevent the wrong from occurring. Anticipating this reasoning, one court has limited the exception to situations where the defendant could do precisely the same act the plaintiff allegedly should have done. Even so limited, the

15. E.g., S.J. Groves & Sons Co., 576 F.2d at 524. In this case, the plaintiff’s reasonableness would have justified reversal even without the exception. See supra text accompanying notes 6-12.


17. Courts could continue to reduce recoveries by the amount of avoidable losses by characterizing the avoidable loss as an estimate of the benefit the plaintiff received as a result of the breach. See Kelly, supra note 1.

18. See Rossi, 710 F.2d at 834. Dobbs included the “same act” limitation when reporting the
equal opportunity exception could eliminate the avoidable consequences doctrine in substantial classes of cases.

Whenever cover can prevent a buyer's consequential losses, a breaching seller of goods has ample opportunity to minimize the loss by finding a substitute supplier for the buyer. The seller actually has two opportunities to prevent the loss: initially by performing, or later by effectuating cover. The "same act" limitation will not prevent this application of the equal opportunity exception. Cover is the same act the seller argues the buyer should perform in order to prevent consequential damages. Should buyers recover all consequential losses, despite their own unreasonable failure to cover?

The above-cited sale of goods example may seem academic. The U.C.C., which governs sales of goods, codifies the avoidable consequences doctrine but does not include an exception when the breaching seller has an equal opportunity to minimize the loss. While the equal opportunity exception may still apply in cases governing services, real estate, intangibles, or other items of exchange where cover with substitute performance might minimize the loss, the exception may not apply to the sale of goods.

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exception in the first edition of his treatise. See Dobbs, supra note 1, § 3.7, at 186. The new edition neither contains the limitation nor explains its deletion. Dobbs (2D), supra note 1, § 3.9. While more courts might accept the "same act" limitation if confronted with a case where it mattered, the limitation is usually not an issue in cases involving the equal opportunity exception.


20. In some cases, if the seller covers for the buyer, the result would be defined as performance rather than breach followed by cover. However, where the contract specifies goods of a particular producer or where the seller delivers the cover goods late, cover by the seller might differ from performance. In these cases, the buyer's right to reject nonconforming goods and obtain cover might undermine the defendant seller's efforts to minimize the burden on the plaintiff buyer. See U.C.C. § 2-601.

21. Foreseeability will remain a limitation on the consequential damages, but that limit would apply even if we dropped all mention of avoidability from section 2-715 of the U.C.C. The equal opportunity exception also includes a foreseeability element if it applies only when the plaintiff and the defendant had equal awareness of the consequences of nonperformance. See Louisville, N. A. & C. Ry. v. Sumner, 5 N.E. 404, 406 (Ind. 1886) (applying the exception where the defendant "has equal knowledge of the consequences of non-compliance and opportunity to fulfill the obligation"). But "equal knowledge" appears to apply to foreseeability at the time of the breach, which is a less restrictive provision than foreseeability at the time of contract formation. Thus, whenever the plaintiff can satisfy the general requirement of foreseeability, the exception seems likely to apply.

22. See U.C.C. § 2-715(2)(a) (providing for loss "which could not reasonably be prevented by cover or otherwise").

23. While cover is easiest to conceptualize in the sale of goods, the same analysis applies to sellers of services, such as construction contractors or even employees. Except in cases where the identity of the provider was particularly important to the buyer, the seller may be able to locate a replacement service or employee just as easily as the buyer. The uniqueness of land may
The absence of statutory authority, however, has not prevented courts from applying the equal opportunity exception to cases governed by the U.C.C. At least two courts have invoked the exception when refusing to reduce the damages that a buyer may recover under the U.C.C.\(^24\) In each case, the defendant-seller argued that the plaintiff-buyer should have minimized the loss by buying the goods from someone else instead of continuing to look to the seller for performance.\(^25\) Both courts specifically referred to the equal opportunity exception despite the fact that it does not appear in the U.C.C.\(^26\)

The results in \textit{S.J. Groves \& Sons Co.} and \textit{Smith-Wolf Construction} can be defended on other grounds. The defendants' arguments sound silly: the seller argues that the buyer never should have believed the seller's assurances that it would cure the breach. In each case, the court stated that the plaintiff reasonably decided to accept the seller's efforts to cure (or at least improve) its performance. Thus, the court could have rested the decision on the avoidable consequences doctrine itself.\(^27\) Nevertheless, the alternative holding looms large in these opinions, suggesting that courts will not always consider the failure to codify the exception as an impediment to employing it in U.C.C. cases.

The equal opportunity exception may not apply to all cases involving cover. Some buyers are in a better position to cover for themselves.\(^28\) Sellers may have limited contact with their competitors, a situation encouraged by the

raise different issues regarding sellers of real property. The buyer's preferred blend of size, price, and location may vary in ways that the seller cannot anticipate when trying to locate substitute property. In some cases, however, the available substitutes may be equally accessible to either party. Concern for the unique attributes of the provider or the property often arise in the context of assignment and delegation; they require no additional comment here. \textit{See generally RESTATEMENT (SECOND) OF CONTRACTS § 318 (1981).}


25. In \textit{S.J. Groves \& Sons Co.}, the defendant consistently failed to deliver sufficient quantities of cement to a construction job in a timely manner. The defendant argued that the plaintiff should have purchased additional cement from defendant's competitor instead of relying on the defendant as the sole source of cement (despite the contract to purchase the cement from defendant). \textit{S.J. Groves \& Sons Co.}, 576 F.2d at 526. In \textit{Smith-Wolf Constr.}, the defendant was a supplier of sealant on a tunnel construction project. The product did not perform up to warranty, requiring more men, equipment, and time to apply it effectively. The plaintiff eventually did part of the job with a different brand of sealant. The defendant argued that the plaintiff should have minimized losses by ignoring the defendant's efforts to perform and using the competitor's goods earlier. \textit{Smith-Wolf Constr.}, 756 P.2d at 1030.

26. \textit{S.J. Groves \& Sons Co.}, 576 F.2d at 530; \textit{Smith-Wolf Constr.}, 756 P.2d at 1030.

27. As long as the plaintiff acted reasonably to minimize the loss, it does not matter that other mitigation efforts might have proven more effective. \textit{RESTATEMENT (SECOND) OF CONTRACTS § 350(2) (1981).}

28. \textit{But see} Goetz \& Scott, \textit{supra} note 19, at 1011-12; Schwartz, \textit{supra} note 19, at 287.
antitrust laws, whereas buyers may deal regularly with more than one supplier. In some cases, buyers may have special needs, the importance of which they have not communicated to their sellers. For example, a buyer may insist upon goods from companies that do not invest in a pariah nation like Serbia. If so, the seller might cover with similar goods that do not satisfy the buyer’s idiosyncratic tastes. If these differences can be demonstrated, the equal opportunity exception may not protect buyers from application of the avoidable consequences doctrine.29

Assuming some buyers have a better opportunity to cover, the equal opportunity exception may still impinge upon the avoidable consequences doctrine. Some plaintiffs will not have any particular advantage over defendants in obtaining cover. Especially in the case of fungible goods, buyers can argue that they did not need to effectuate cover because the seller had an equal opportunity to find another source of the goods. If courts accept these arguments, some plaintiffs will escape the strictures of the avoidable consequences doctrine even though they failed to act reasonably to minimize their losses.

Employment contracts offer additional fertile ground for the equal opportunity exception to work its mischief. Every employer that remains in business can rehire a discharged employee. Rehiring is much easier for the employer than seeking new work is for the employee. Should every discharged employee receive full wages because the employee is entitled to remain idle and insist that the employer rehire her?20

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29. Because plaintiffs have no incentive to reveal any of their potential advantages in effectuating cover, the exception may apply more often than not. Plaintiffs who cover do not need to raise the equal opportunity exception. Any losses avoidable by cover have been avoided, so the avoidable consequences doctrine will not limit the plaintiff’s recovery. In addition, the plaintiff may recover the reasonable cost of effectuating cover as an element of incidental damages, presumably even if the defendant also tried to effectuate cover. See U.C.C. § 2-715(1). Plaintiffs who do not cover, on the other hand, have no interest in establishing a superior capacity to cover. Plaintiffs may minimize any potential advantages in order to encourage the court to apply the exception. If the plaintiff’s superior position depends on subjective evaluations or facts known only to the plaintiff, such as uncommunicated special requirements, the defendant may have considerable difficulty discovering, let alone proving, that the plaintiff actually had a better opportunity to minimize the loss. Although liberal discovery rules may permit the defendant access to evidence, the defendant may not know to look for uncommunicated requirements and arguably should not be forced to form the habit of asking plaintiffs about such specifics as whether they would have rejected goods made by a company with investments in Serbia. Liberal discovery rules might compel a response to such an interrogatory or document request if plaintiff objected. Defendants, however, might prefer not to ask these questions; discovery efforts could reveal the equal opportunity exception to a plaintiff who had no idea it existed.

30. In theory, the expectation interest may limit the employee’s recovery to less than the full wages lost because some offset for the benefit of leisure may be necessary to put the plaintiff in the position she would have occupied if the contract had been performed. See Kelly, supra note 1, at 42. Courts have never explicitly taken the benefit of leisure into account when calculating
If the equal opportunity exception is limited to situations where the plaintiff and the defendant have an equal opportunity to perform the same act,\(^{31}\) rehire may not fit. The employee cannot rehire herself; therefore the employer need not rehire her. Perhaps, then, the exception would not support a decision to reject the avoidable consequences doctrine based on the employer’s opportunity to rehire the employee. If framed as an effort to encourage action by the party who can prevent or minimize the loss at the least cost, on the other hand, the employer’s ability to rehire might fall squarely within the exception.

Even if the exception did not apply when the defendant’s only mitigation method involved rehire, it could influence recovery in many employment cases. A job search involves looking through want ads and sending out resumes to prospective employers. In theory, the breaching employer has the same opportunity to perform these portions of a job search as the employee. Under the equal opportunity exception, the onus to find job possibilities, if not to find a new job, could fall on the employer.\(^{32}\) The employee’s only duty would be to follow up on leads the employer finds.\(^{33}\) While such a process may seem absurd, at least one court has come dangerously close to endorsing the conclusion, albeit in a different context: “If an employer sees fit to discharge his employee[s] without legal excuse, it is equally within his power to seek, and, if he find, to offer, other similar employment to such em-

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\(^{31}\) See DOBBS, supra note 1, § 3.7, at 186.

\(^{32}\) The employer may search too narrowly or too broadly if, unknown to the employer, the plaintiff has special limitations or qualifications. For example, the employer might not consider positions in other cities, even if the plaintiff is willing to relocate, because the avoidable consequences doctrine does not compel plaintiffs to relocate. Similarly, an employer may consider positions in companies that do not have a strict policy against smoking even though the plaintiff’s health requires a pristine work environment. The employee could eliminate unacceptable openings found by an employer’s overbroad search, though the wasted effort could be reduced if the plaintiff conducted his own search. An unduly narrow search would potentially hurt the employer more than the employee because the failure to find other work extends beyond the period for which the employer must pay damages. In addition, the employee, once aware of limitations in the employer’s search, can expand its scope without wasteful duplication of effort. These considerations may place some cases outside the equal opportunity exception. But these limitations on the employer’s ability to find suitable openings will not be universal and, thus, some cases may fall within the scope of the exception.

\(^{33}\) Employers frequently make out-placement services available to discharged employees, particularly when discharge results from a general reduction in force rather than a decision to fire a bad employee. To my knowledge, no one has suggested that an employer who failed to make out-placement services available to discharged employees must continue to pay the employees, despite the spectre of the avoidable consequences doctrine. Nor, to my knowledge, has anyone suggested that out-placement should include searching the classified ads for discharged employees. Nevertheless, application of the equal opportunity exception in the employment realm could substantially increase the cost of discharge to employers.
ploy[e] . . . "34 Whether that dicta will translate into application of the
equal opportunity exception in the employment area remains to be seen.

Potentially strange results extend into other areas as well. Laycock
proposed two hypotheticals from tort law that illustrate how silly the exception
could become:

Suppose [a wealthy] plaintiff . . . refused to pay for repairs [on a truck,
and allowed it to remain in the repair shop for months] because it was
defendant's responsibility. Could plaintiff recover for loss of use on the
ground that defendant could have avoided that damage as easily as plaintiff
could?

Suppose defendant negligently started a fire in plaintiff's house.
Suppose plaintiff and defendant both stood by, each urging the other to call
the fire department. Could plaintiff recover for damages that would have
been avoided if he had promptly reported the fire?35

As the foregoing hypotheticals illustrate, the exception, when taken to the
theoretical limit, raises the potential for very odd results, results completely
at odds with the purposes of the avoidable consequences doctrine.

The preceding discussion is, of course, a blatant attempt at reductio ad
absurdum. The results seem so ridiculous that no effort has been made to
explain why they are wrong.36 Perhaps my inability to point to any body of
case law in which the courts have reached absurd results suggests that the
problem is not severe.

The possibility that the problem is not severe deserves some attention. If
courts have found ways to avoid reaching absurd results despite the equal
opportunity exception, further action may be unnecessary. That conclusion,
however, should depend on why absurd results have not occurred. Laycock
posits that the situations that make the exception appear ridiculous may not
arise very often.37 Nevertheless, however infrequently such cases arise, the
law should be prepared for them. Arguably, the absence of any discernable

the burden of proving that the employee could have earned money by reasonable efforts). The
dicta has been repeated in subsequent cases. See Harper Woods Federation of Teachers v. Board


36. To some extent, the entire discussion in this section assumes that the avoidable
consequences doctrine produces appropriate results. Scholars differ in their justifications for the
discipline. Sedgwick contends it limits recoveries to the damages the defendant proximately caused.
See Sedgwick, supra note 1. McCormick contends it minimizes waste. See McCormick, supra
note 1. I have suggested that it takes account of the benefits of breach in calculating the plaintiff's
rightful position. See Kelly, supra note 1.

limits to the exception makes sensible results harder to achieve in difficult cases.

A review of cases invoking the equal opportunity exception suggests yet a third explanation for the absence of absurd results: the exception itself almost never drives the result. In cases where courts recite the equal opportunity exception in support of the outcome, they could reach the same outcome without ever mentioning the exception. Courts that recite the equal opportunity exception often have alternative justifications available, usually finding that the plaintiff in fact acted reasonably.38 Having found reasonableness, these courts could have ended their inquiry into the avoidable consequences doctrine. The doctrine does not authorize reduction of a damage award when the plaintiff acted reasonably, even if the plaintiff did not select the most effective or efficient method of minimizing the loss.39 In other cases, courts have not explicitly held that the plaintiff acted reasonably, but the facts clearly would have supported such a conclusion if the court had wanted to rest the result on this more traditional basis.40 In either situation, recitation of the equal opportunity exception adds nothing to the result except, perhaps, providing some insulation against reversal if the reasonableness decision proves untenable.41 Other cases recite the exception even though technical problems would have prevented the avoidable consequences doctrine from reducing the award even if the exception did not exist.42 At best, then, the equal opportunity exception is usually offered as an alternative holding or dicta that bolsters a decision fully justifiable on other grounds.

The exception is not, however, confined entirely to dicta. Cases exist where the equal opportunity exception is essential to the outcome—where the


40. See, e.g., Louisville, N.A. & C. Ry. v. Sumner, 5 N.E. 404 (Ind. 1886), discussed infra notes 70-77 and accompanying text.

41. Because reasonableness is an issue of fact, higher levels of review are unlikely to disturb rulings on that issue. However, in cases where an intermediate appellate court reverses the trial court's reasonableness judgment, further review could reinstate the trial court's judgment on the ground that the intermediate court showed too little deference to the trial court's determination of the facts.

42. See, e.g., Ivester v. Family Pools, Inc., 262 S.C. 67, 202 S.E.2d 362 (1974) (in which a lack of evidence regarding the cost of repair would have prevented the court from limiting recovery to that amount); Angelos v. First Interstate Bank, 671 P.2d 772, 777 (Utah 1983) (holding that the avoidable consequences doctrine does not require a plaintiff to anticipate and prevent subsequent wrongdoing by a defendant).
avoidable consequences doctrine seems to dictate one result, but the court decided the case differently in reliance on the exception. Continued reference to the equal opportunity exception threatens to keep it alive. If we let this sleeping dog lie, a court or litigant may awaken it. When that happens, the dog may bite people whom the law should protect.

Perhaps a single example will demonstrate that the equal opportunity exception does influence the outcome of cases. In *Shea-S&M Ball v. Massman-Kiewit-Early*, two contractors installing adjoining sections of a subway fought over responsibility for delays and damage caused by flooding. The contracts required the defendant to prevent water damage. After complaints by the plaintiff, the transit authority (WMATA) suggested that the plaintiff could prevent damage by building a dike between the adjoining sections. The plaintiff's failure to build the dike was held to be unreasonable. The avoidable consequences doctrine seems to require the court to reduce the plaintiff's recovery by the amount of loss that the plaintiff could have avoided by building the dike. The trial court reached that result. The appellate court, however, applied the equal opportunity exception, rejecting the avoidable consequences doctrine as a limit on the plaintiff's recovery. The court held that the avoidable consequences doctrine was not applicable when the defendant had the primary obligation to prevent water damage, the same opportunity to build a dike, and the same knowledge of the consequences of not building a dike.

*Shea-S&M Ball* demonstrates the continued vitality of the exception. The only explanation the court gave for allowing the plaintiff full recovery, and the only plausible explanation discernable from the opinion, is the equal opportunity exception. *Shea-S&M Ball* resembles Laycock's hypothetical of two people standing outside a burning building arguing about who should call the fire department. Water, not fire, poses the danger. But while two stubborn parties fight about who should prevent the flooding, neither acts and the flood damage mounts. Neither party generates much sympathy. The court could plausibly assign the responsibility for not building the dike to either party. Many equal opportunity cases seem likely to produce the same

44. Id.
45. Each contractor had a contract with the Washington Area Metropolitan Transit Authority (WMATA). The plaintiff was a third-party beneficiary of the defendant's contract with WMATA. *Id.* at 1248.
46. The defendant had volunteered to pump out water that built up behind the dike if the plaintiff would build it. *Id.* n.3.
47. The court affirmed the rejection of the plaintiff's tort claim on the basis that the plaintiff had been contributorily negligent. *Id.* n.4.
49. *Id.*
balance: almost by definition, both parties acted unreasonably. When the loss falls on one of them, the result does not scream injustice.

Because we can tolerate the result in Shea-S&M Ball, the case does not cast the equal opportunity exception in its worst light. Allocating the burden to build the dike to the defendant, the party to whom the contract allocated the burden of preventing water damage, seems plausible. Why should the defendant be able to shift that burden to another party, especially, as in this case, a party with whom it had no contractual arrangement at all? The question, however, mischaracterizes the effect of applying the avoidable consequences doctrine. The burden of building the dike would fall on the defendant in any event, since the cost to build the dike would be recoverable as damages.\(^5\) Thus, the issue concerns who initially should act to minimize the loss, not who ultimately should bear the burden.

To a large extent, it does not matter where the law places the task of minimizing the loss in the first instance, as long as both parties know upon whom the burden falls. Only one circumstance presents a problem: when neither party builds the dike. As long as the law clearly puts the burden to build the dike on one party or the other, the dike likely will be built and the wasteful (that is, avoidable) damage will be prevented. But if the law contains exceptions or issues that permit each party to hope to prevail at trial, the possibility that neither will build the dike increases. Thus, the possibility that society will suffer unnecessary losses increases, both in terms of water damage and substantial litigation costs.

Even without the equal opportunity exception, the law cannot provide complete certainty. If it had never heard of the equal opportunity exception, the plaintiff in Shea-S&M Ball might have refused to build the dike because it considered that course to be reasonable in light of the contract requiring the defendant to prevent water damage. The plaintiff might have discovered and relied on other limitations on the avoidable consequences doctrine. For example, the avoidable consequences doctrine arguably requires efforts to minimize the loss only after the breach occurs.\(^6\) Each new intrusion of water

\(^5\) See Goetz & Scott, supra note 19, at 977.

\(^6\) The Restatement (Second) of Torts explicitly limits the avoidable consequences doctrine to actions the plaintiff reasonably should have taken “after the commission of the tort.” RESTATEMENT (SECOND) OF TORTS § 918(1) (1979). Some authorities treat this as a general limitation on the avoidable consequences doctrine. See, e.g., 22 AM. JUR. 2D DAMAGES § 497 (1988) (distinguishing the avoidable consequences doctrine from contributory negligence). The language may aptly describe the normal cases in which the avoidable consequences doctrine arises without actually limiting the effect of the doctrine. For example, some courts have applied the avoidable consequences doctrine to limit damages when the plaintiff could have minimized the loss by acting before the wrong occurred, such as by fastening a seat belt. See, e.g., Spier v. Barker, 323 N.E.2d 164 (N.Y. 1974). The result might flow more naturally from an expanded view of comparative fault. See, e.g., Fernandez v. Vukosa, 436 N.Y.S.2d 919, 922 (Civ. Ct. 1980) (holding that the seat belt defense fell within New York’s statute on comparative fault).
may constitute a new breach. As long as the plaintiff reasonably reduced the water damage following each flood, it arguably had no obligation to anticipate future breaches by the defendant.\textsuperscript{52} This reasoning, too, might have prevented construction of the dike by a stubborn plaintiff. This reasoning also provides the court with alternative methods to deal with cases in which the plaintiff appropriately chose not to minimize the loss. The equal opportunity exception seems superfluous if it applies only where these other techniques exist.

The equal opportunity exception increases the uncertainty concerning which party should act to minimize a loss. By offering plaintiffs an additional excuse for not preventing a loss, the number of cases where neither party acts increases. Because the equal opportunity exception cannot increase certainty, it protects only unreasonable plaintiffs who fail to prevent loss.\textsuperscript{53} An exception that protects only unreasonable and stubborn plaintiffs should be discarded.

In summary, the equal opportunity exception does pose a problem. It has not died, but remains an active, if rare, part of the common law. Its language threatens upheaval in the application of the avoidable consequences doctrine. Simple cases governed by settled principles may turn out differently than expected if a litigant or court invokes the exception. The exception should not be dismissed as a mere anachronism.

III. THE ORIGIN OF THE EXCEPTION: IS THERE A REASON?

A. Tracing the Exception’s Roots

An explanation for the existence of the equal opportunity exception is more elusive than one might imagine. In tracing the roots of the exception, I found no modern opinion in which a court attempted to explain why the

\textsuperscript{52} “It is only damaging consequences of past wrongful conduct that must be avoided . . . .” McCORMICK, supra note 1, § 37, at 137. The plaintiff is not “required to anticipate that wrong will be committed.” 25 C.J.S. Damages § 33 (1966), at 702. The exception arises more commonly in tort cases involving trespass or nuisance. McCormick finds the rule appropriate when a defendant threatens to commit a future wrong, which the plaintiff can avoid by succumbing to the threat. When a defendant creates a continuing nuisance or trespass that the plaintiff knows will produce additional breaches in the future, McCormick advocates limiting recovery under the avoidable consequences doctrine in order to encourage the plaintiff to minimize waste. MCCORMICK, supra note 1, at 139-40. He cites with approval a case in which the plaintiff could have prevented flooding of a mine by erecting a small levee. McCORMICK, supra note 1, at 140 (citing Mobile & O. Ry. Co. v. Red Feather Coal Co., 119 So. 606, 609 (Ala. 1928)).

\textsuperscript{53} If plaintiffs reasonably await performance by the primary obligor, then the avoidable consequences doctrine will not reduce their recovery at all. Thus, courts could dispense with the exception.
exception exists. None of the courts that have discussed the exception have identified any circumstances in which the avoidable consequences doctrine produced objectionable results that the exception might abate. None have identified any policy the equal opportunity exception might advance. Rather, courts have relied upon bare citations of authority, without any effort to justify or explain the existence of the rule. In fact, the decisions announcing the exception show a surprising dearth of authority. Many courts relied heavily, or even exclusively, on legal encyclopedias. Others cited earlier cases in which the court mentioned the principle, but either did not apply it or did not need to apply it. This reliance on secondary authorities, dicta, and alternative holdings instead of binding precedent raises a red flag. If the equal opportunity exception arose from an authoritative legal source, why doesn't anyone cite that source? If it has a purpose, why doesn't anyone mention it?

The explanation for the exception is elusive even at its root. The first authority to mention equal opportunity to minimize the loss was J.G. Sutherland's 1883 treatise on Remedies. Sutherland's treatise treats equal opportunity less as an exception to the avoidable consequences doctrine and more as an element of the reasonableness inquiry required by the doctrine. The pertinent passage in Sutherland begins by stating that the avoidable consequences doctrine applies to contracts for construction or repair. The treatise continues:

The duty in such cases is not arbitrarily imposed on the injured party, and exacted of him in all cases, to do or amend the work of the other party, or to finish it; but only when in view of all the circumstances of the particular case, it is a reasonable duty, which he ought to perform, instead of passively allowing a greater damage. Where the party whose duty it is primarily to do the work necessary to fulfil the contract, and to prevent damage from past failure, or to stay injury resulting from his negligence, or other wrong, is in possession, or has equal knowledge and opportunity, he alone may be looked to to fulfil that duty, and it will not avail him to say the injured party might have lessened the damages by performing for him.

55. See, e.g., S.J. Groves & Sons Co. v. Warner Co., 576 F.2d 524 (3d Cir. 1978); Schmidt v. Abey Motors, 248 N.W.2d 792, 796 (N.D. 1976).
56. 1 J.G. SUTHERLAND, A TREATISE ON THE LAW OF DAMAGES 151 (1883).
57. Id. at 150-51 (footnote omitted). Careful readers will note that, in the quoted passage, the word "equal" arguably modifies knowledge, but not opportunity. Read in this way, any opportunity to minimize the loss would negate the avoidable consequences doctrine if the defendant had equal knowledge of the need to minimize the loss. That interpretation is consistent with Sutherland's own canons of statutory interpretation, where limitations generally modify only the nearest term. 2 J.G. SUTHERLAND, STATUTES AND STATUTORY CONSTRUCTION § 420 (John
Two interpretations are possible. First, Sutherland may mean that the duty to minimize the loss is imposed on the plaintiff only if circumstances make it reasonable to impose such a duty. Alternatively, Sutherland may mean that we always impose the duty to minimize the loss, but that reasonable conduct satisfies that duty. The plaintiff has a duty to minimize the loss by reasonable means. The duty applies in all conceivable circumstances, but inaction breaches the duty only when the circumstances make action by the plaintiff reasonable. This second interpretation sounds very much like a statement of the avoidable consequences doctrine itself. The plaintiff must always take reasonable measures to minimize the loss, but in some cases the measures that might avoid the loss may be unreasonable. Failure to take those unreasonable measures will not affect the plaintiff’s right to recover the full loss from the defendant.

Tension between Sutherland’s language and the structure of his argument makes it difficult to prefer either reading. The language seems to imply the first interpretation: It seems fair to rephrase “[t]he duty . . . is not . . . imposed . . . in all cases . . .” as “the duty to mitigate damages usually is imposed, but some exceptions exist.” The passage then defines the situations where the exception exists. Oddly, however, the argument contains no explanation for the exception. Lack of an explanation would be understandable if the passage were intended merely to identify the way courts have implemented the reasonableness requirement already inherent in the avoidable consequences doctrine. But where an exception exists, one would expect some explanation why the rule should vary under certain circumstances.

Sutherland might reasonably omit an explanation for the exception if it were so well established that no comment seemed necessary. The equal opportunity exception, however, was not well established. Sutherland was the first legal authority to use that language and may thus be regarded as the exception’s creator.

In fact, the authorities upon which Sutherland relied offer precious little support for the concept of an equal opportunity exception. None of the cases even mentioned the words “equal opportunity.” Of the thirteen cases cited, over half offer no support for the proposition, no matter how viewed.58 The

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58. Some of these cases simply did not address the avoidable consequences doctrine on appeal. Chicago & R.I. R.R. v. Ward, 16 Ill. 521 (1855); Priest v. Nichols, 116 Mass. 401 (1874); Flynn v. Trask, 93 Mass. (11 Allen) 550 (1866); Gardner v. Smith, 7 Mich. 410 (1859). In two other cases, the court reversed judgment for the plaintiff because the trial court had not properly applied the avoidable consequences doctrine. See Waters v. Brown, 44 Mo. 302 (1869); Fisher v. Brown, 4 Mo. 204 (1829).
others discuss issues that, while related to the avoidable consequences doctrine, have little direct bearing on the existence of an exception to the rule.

Three cases involved situations where the plaintiff could not easily tell when to begin efforts to minimize the loss. One of them explains the difficulty perfectly:

If when the plaintiff requested the defendants to repair the drain, they had refused to do so, it would have been the duty of the plaintiff himself to have done it, and all he could have recovered would have been the costs of the repair. He could not in such case lie by, and incur loss for want of the repairs, far beyond the cost of fixing it, and make the defendants liable. If the defendants wrongfully refused to repair, still it was the duty of the plaintiff to conduct [sic] like a reasonable and prudent man, and take the course that would be least detrimental to himself, and to the defendants. But if the defendants, on having notice to repair the drain, admitted their liability to repair it, and promised to do so, and thus kept the plaintiff from making the repairs himself, and thus prolonged the period of loss to the plaintiff, so that it exceeded the cost of the repairs, that loss justly should fall on the defendants. It was rather a question as to whether the

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v. Goebel, 40 Mo. 475 (1867). In another, the court expressed concern that the paucity of evidence in the record might conceal a case where the plaintiff was aware of the defendant’s breach and, thus, should have taken action to minimize the loss. See Haysler v. Owen, 61 Mo. 270, 273-74 (1875) (reversing and remanding judgment for the plaintiff on other grounds).

59. Smith v. Chicago, C. & D. R.R., 38 Iowa 518 (1874); Schwinger v. Raymond, 83 N.Y. 192 (1880); Keyes v. Western Vt. Slate Co., 34 Vt. 81 (1861); see also Hexter v. Knox, 63 N.Y. 561, 566-67 (1876) (holding that a defendant present on the premises making other repairs could not complain that the plaintiff failed to make repairs that would minimize the loss). Smith and Keyes involve assurances by the defendant that it would cure the default. The court in Schwinger is far from clear in its treatment of the avoidable consequences doctrine. The plaintiff agreed to carry the defendant’s beans by barge and to keep them dry during transit. The plaintiff failed to keep the beans dry; they sprouted, which reduced their value. When the plaintiff sued for unpaid cost of carriage, the defendant counterclaimed for damage to the beans. The plaintiff argued that since the defendant knew the beans were not covered when the barge left port and knew the barge had insufficient wood to cover the beans, the defendant was estopped from complaining that the beans were not covered. That is as close as the opinion comes to an avoidable consequences argument. The court rejects the argument because the plaintiff had promised “to protect the goods during the entire trip, not merely at the moment of departure.” Schwinger, 83 N.Y. at 200. The court apparently believed that the possibility that the plaintiff might cover the beans later during the voyage avoided the estoppel, perhaps because the defendant acquiesced, if at all, only to breach at the moment of departure and not to breach for the entire journey. The avoidable consequences doctrine seems more easily applied by pointing out that once the barge left the dock, the defendant had no opportunity to protect the beans by any means, reasonable or otherwise. On the other hand, until the beans left the dock, no breach had occurred and the defendant had no reason to take precautions that the plaintiff had promised to take. The rather tenuous connection between Schwinger and either the avoidable consequences doctrine or Sutherland’s approach to equal opportunities makes it difficult to view this case as authority for the exception.
plaintiff acted in good faith, and with fair and reasonable prudence, in the course he took in waiting for the defendants to repair, under their assurances, instead of proceeding to make them himself. The defendants when called on should have immediately proceeded to make the repairs themselves or else have refused, so that the plaintiff could have made them himself. If they omitted to make them, on being called on, and kept the plaintiff from doing it by false and delusive promises, they cannot complain of being made liable to loss occasioned by the delay.60

The above-quoted language does not suggest that the avoidable consequences doctrine does not apply in any case. Rather, the opinion focuses on whether the plaintiff acted reasonably under the circumstances, with particular attention to whether the time for plaintiff to act had arrived or whether the plaintiff reasonably could continue to allow the defendant an opportunity to cure the problem. The entire inquiry focuses on the plaintiff's reasonableness, an inquiry inherent in the avoidable consequences doctrine itself. Furthermore, the opinion never asks whether the defendant had an equal opportunity to make the repairs.

A second trio of cases addressed another issue: the choice between cost of repair and diminution of value.61 In a famous case familiar to most law students, a plaintiff sought the cost of tearing down a house to replace perfectly adequate pipe with pipe of another manufacturer, despite the fact that the house would not be worth any more after the repairs.62 The cases cited by Sutherland raise the opposite concern: the plaintiff seeks to recover consequential losses that exceed the cost of repair, even though she might have avoided the consequential losses by making the repairs. These cases involved defendants who had an equal or greater opportunity to prevent the loss. Each involved leased premises where the lessor promised to repair or improve the premises. When defects in the repairs or improvements made a portion of the premises unusable, either the landlord or the tenant could make (or hire someone to make) the needed repairs. In each case, the plaintiff did not make repairs, but attempted to recover damages for loss of use of the portion of the premises made unusable by the breach.

Interestingly, two of the cases seem quite sympathetic to the plaintiff. One holds that the plaintiff may choose between the two measures of recovery: if she makes the repairs, she may recover their cost; if she does not, she may recover the consequential losses.63 The court did not even note the existence of the avoidable consequences doctrine, implying that the doctrine was not a

60. Keyes, 34 Vt. at 86.
61. Green v. Mann, 11 Ill. 613 (1850); Hexter v. Knox, 63 N.Y. 561 (1876); Myers v. Burns, 35 N.Y. 269 (1866).
62. Jacob & Youngs, Inc. v. Kent, 129 N.E. 889 (N.Y. 1921); see also O'Brien Bros. v. The Helen B. Moran, 160 F.2d 302, 306 (2d Cir. 1947) (deciding that the plaintiff could not recover the cost of repairing the barge if the cost exceeded the value of the barge).
63. Myers, 35 N.Y. at 272-73.
constraint on recovery. The issue was a legal choice between two measures of damages, not the reasonableness of the plaintiff's choice. 64

To the extent that these cases purport to allow the plaintiff an unfettered choice between repairs and consequential losses, they are not valid today. The avoidable consequences doctrine requires a plaintiff to make a reasonable choice. 65 A plaintiff who neglects repairs and incurs larger consequential losses cannot recover the full consequential loss. 66 That result is not new, as revealed by the passage quoted above from Keyes v. Western Vermont State Co. 67 Yet in the latter half of the nineteenth century, some courts still seemed to struggle with the proper balance between the plaintiff's election of remedies and the avoidable consequences doctrine. Thus, Myers v. Burns 68 treats the issue as entirely within the plaintiff's discretion, without even mentioning the avoidable consequences doctrine. The other two cases recognize that the avoidable consequences doctrine can limit the plaintiff's range of choices, but still suggest that the plaintiff had the right to make repairs but was not bound to do so. 69

These cases, if they remained good law, would require an exception to the avoidable consequences doctrine because the doctrine limits the plaintiff's options by limiting her recovery if she makes an unreasonable choice. If Sutherland meant to endorse the plaintiff's unfettered election of remedies, he chose odd language to express this conclusion. Nothing in Sutherland's language indicates that a plaintiff has an unfettered right to choose not to repair a loss. Sutherland refers to the reasonableness of a plaintiff's decision not to repair in light of a defendant's duty and opportunity to perform the work. Nor does an equal opportunity exception seem likely to protect the plaintiff's choice very often. If choice of remedies were the goal, the limitation to equal opportunity cases would frustrate the goal as often as it furthered it.

64. Efforts to conflate the avoidable consequences doctrine into the measure of damages have not disappeared. Dobbs, for example, notes the similarity between the avoidable consequences doctrine and a market damage measure, which offsets the amount a plaintiff received (resale price) or could have received (market price) in a substitute transaction against the plaintiff's recovery. Dobbs (2d), supra note 1, § 3.9 n.4. Dobbs insists, however, that the avoidable consequences doctrine does not apply to general damages. Id. § 3.9. In practice, the difference between avoidable consequences and a general damages measure lies in the burden of proof, but probably nowhere else: the defendant generally must prove the amount of offset under the avoidable consequences doctrine, while the plaintiff must prove the offset under the general rule. See, e.g., O'Brien Bros., 160 F.2d at 505-06.

65. The same result applies when the court sees the issue as a choice of remedial measure. The general rule today is that the plaintiff may recover no more than the cost to repair injured property. The choice is made by the court: the cost of repair or the amount of the loss, whichever is less. See O'Brien Bros., 160 F.2d at 505-06.


67. 34 Vt. 81, 86 (1861). See supra note 60 and accompanying text.

68. 35 N.Y. 269, 272-73 (1866) (two dissenters).

69. Hexter v. Knox, 63 N.Y. 561, 567 (1876); see Green v. Mann, 11 Ill. 613, 615 (1850).
Sutherland probably did not intend this passage to endorse the plaintiff's election of remedies. Considering the range of cases cited in his treatise, it is likely that Sutherland gathered any case that remotely suggested a plaintiff did not need to minimize a loss caused by faulty construction or repair, including cases where the defendant had not raised the issue. The cases addressed diverse problems—such as election of remedies, assurances from the defendant, unclear timing of the breach—and stated diverse justifications for the result. Treating them as a whole, Sutherland inferred that sometimes the primary obligor should minimize the loss. Understood in that way, the avoidable consequences doctrine requires no exception. The reasonableness element of the doctrine can allocate the burden to the primary obligor in appropriate cases.

Sutherland's language, however, inspired courts to take a somewhat different direction. The first case to apply Sutherland's equal opportunity exception is instructive. In Louisville, N. A. & C. Ry. Co. v. Sumner\(^70\) a railroad purchased a right-of-way across agricultural land, promising to fence the right-of-way. The railroad breached by not building the fences. Damage to livestock and crops resulted. Apparently, the contract did not include a specific date by which the railroad needed to complete the fences. The railroad argued that it became the farmer's duty to build the fence "upon the failure of the railway company to erect the fences within a reasonable time."\(^71\)

Two timing problems combine here: uncertainty regarding when the breach occurred and uncertainty regarding whether the railroad would cure the breach. Uncertainty concerning when a breach occurs seems inherent in the absence of a specific time for performance. The gap filler—a "reasonable time"—posed difficulty for the farmer in determining when he needed to erect the fences himself. The court recognized this difficulty: "The plaintiff had the right to depend on the defendant to perform its contract until it repudiated it, or until it became apparent that the railway company did not intend to execute it within a reasonable time."\(^72\) By requiring that the breach be "apparent" to the plaintiff, courts allow the plaintiff to give the defendant the benefit of the doubt until breach becomes obvious.\(^73\) In Sumner, that might have required considerable time. Thus, even a lengthy delay by the farmer in fencing the track himself might have been reasonable. Lending even more credibility to the farmer's decision to rely on the railroad to complete the fences is the fact that the railroad gave assurances.\(^74\) The court stated: "[I]t cannot be said that

\(^{70}\) S. N. E. 404 (Ind. 1886).

\(^{71}\) Id. at 406.

\(^{72}\) Id.

\(^{73}\) Similar language appears in the legal encyclopedias. See, e.g., 22 AM. JUR. 2D DAMAGES § 504 (1988) (explaining that the plaintiff's ability to rely on assurances of the defendant lasts only "so long... as there is ground for expecting that he [defendant] will perform. But a plaintiff who has no reason to believe that the defendant will remedy the problem cannot just let damages accumulate").

\(^{74}\) Sumner, 5 N. E. at 406.
the plaintiff was not justified in relying upon the assurances so given, and, in
reliance thereon, postponing the erection of the fences himself.”75 Thus,
Sumner reflects the timing concerns that, in part, motivated Sutherland’s
reference to the defendant’s opportunity to minimize the loss.

At this point, Sumner seems like an easy case. The plaintiff’s decision not
to erect the fences was reasonable in light of the defendant’s assurances. Thus,
the avoidable consequences doctrine, if applied, would not have reduced the
plaintiff’s recovery by the amount of loss that could have been avoided by
building the fences himself. Alternatively, and with less confidence, we could
conclude that the plaintiff’s duty to build the fences himself had not arisen
because the plaintiff did not know unequivocally that the defendant had
breached. Thus, the avoidable consequences doctrine would not have been
triggered and would not reduce the plaintiff’s recovery.

The Sumner court, however, introduced the arguments discussed above
by referring to the equal opportunity exception:

While it is true the law imposes upon a party who is injured from
another’s breach of contract the duty of making reasonable exertions to
render the injury as light as possible, it is equally beyond question that,
where he whose duty it is primarily to do work necessary to fulfill a
contract, and to prevent damage which may result from a failure, has equal
knowledge of the consequences of non-compliance and opportunity to
fulfill the obligation, he alone may be depended upon to perform the duty,
and it will not avail him to say the injured party might have performed the
duty for him, and thus lessened the damages.76

The passage does not explicitly state an exception to the avoidable con-
sequences doctrine. Yet the juxtaposition of these two rules, each “equally
beyond question,” suggests the court sees them as mutually exclusive. Where
one governs, the other cannot.77 Thus, with very little reading between the

75. Id.
76. Id.
77. One colleague has suggested that the language here reflects a difference between the rules
applicable before and after the breach. The avoidable consequences doctrine applies after the
breach, while the defendant’s equal opportunity to prevent the harm refers to the time before the
breach. The two portions of the sentence are mutually exclusive under either interpretation. But
if the language regarding equal opportunities applies only to the time before breach, it does not
constitute an exception to the avoidable consequences doctrine because the avoidable consequen-
cies doctrine begins to apply only when the breach occurs.

Nothing in the language precludes an interpretation that equal opportunity refers to the time
before breach. But that interpretation renders the reference to “equal knowledge of the
consequences of noncompliance and opportunity to fulfill the obligation” completely superfluous.
Before a breach occurs, the promisor cannot complain that the other party “might have performed
the duty for him” even if the promisor was not equally aware of the consequences. Even a
plaintiff with a vastly superior opportunity to perform can safely sit back and expect the defendant
to perform until repudiation or breach indicates that the defendant will not perform. Only after
the breach occurs, when the avoidable consequences doctrine arguably imposes some duty on the
lines, this language seems to announce an exception to the avoidable consequences doctrine that provides a set of circumstances under which the duty to mitigate damages does not govern the outcome of the case.

These early references to equal opportunities to minimize the loss pose a puzzle. They arguably do not create an exception at all. Both Sutherland and Sumner could be read to apply a reasonableness test rather than an equal opportunity exception. More important, neither identifies a reason for creating an exception or for paying attention to equal opportunities at all. The best explanation for the concern motivating these authorities rests on timing issues: When the plaintiff reasonably believes that the defendant may yet perform, the plaintiff need not preempt the defendant’s efforts by taking action. Yet the language of each authority comes perilously close to announcing that the avoidable consequences doctrine does not apply to these situations.

In reconstructing the development of the equal opportunity exception, it seems that legal encyclopedias latched onto the language of Sutherland and Sumner and reported it as an exception. Their discussions imply that the duty to mitigate simply does not exist in these situations. “A plaintiff is not under a duty to mitigate damages if the other party . . . had equal opportunity to perform and equal knowledge of the consequences of nonperformance.” 78

The absence of duty sounds like an exception. These sources do not identify the issue as whether the plaintiff acted reasonably. They sometimes recognize the reasonableness of relying on a defendant’s assurances of performance in the same section where they report the equal opportunity exception. 79 Thus, separate references to the equal opportunity exception suggest that the encyclopedias view it as distinct from considerations of plaintiff’s reasonableness.

Modern courts have sometimes followed the encyclopedias in treating this limitation as an exception. The precise impact of the exception is not easily

plaintiff to minimize the loss, could any argument plausibly arise that the plaintiff should have performed for the defendant. Thus, only after the breach does it make any sense to compare the relative responsibilities and opportunities of the parties to prevent the loss. Indeed, only after the breach will there be an injured party or a lawsuit in which the defendant might want to say that the plaintiff “might have performed the duty for him.” Therefore, the court must have intended to juxtapose two rules that compete with one another after the breach occurs.

78. 22 AM. JUR. 2D DAMAGES § 508 (1988). In a similar vein, Corpus Juris Secundum announced that the defendant “cannot, while the contract is subsisting and in force, be heard to say that plaintiff might have performed for him.” 25 C.J.S. DAMAGES § 34, at 709 (1966).

79. 17 C.J. DAMAGES § 99 (1919) (“If, however, a contract has been practically broken, the fact that the other party has from time to time made promises leading to a belief that it would be fulfilled will authorize a full recovery, although plaintiff, relying on such promises, may have taken no action to prevent the injury.”); 25 C.J.S. DAMAGES § 34 (1966) (identical language). American Jurisprudence states the qualification regarding assurances in a section not limited to contract actions. 15 AM. JUR. DAMAGES § 28 (1938) (“the repeated assurances of the defendant after an injury has begun that he will remedy the condition is sufficient justification for the plaintiff’s failure to take steps to minimize loss, so long, at least, as there is ground for expecting that he will perform”); 22 AM. JUR. 2D DAMAGES § 504 (1988) (identical language).
demonstrated; the cases rarely turn on the distinction between an exception and an inquiry into the plaintiff's reasonableness. But there are indications that courts sometimes believe equal opportunity precludes application of the avoidable consequences doctrine.

First, a court may imply that the defendant's equal opportunity to minimize the loss makes the avoidable consequences doctrine inapplicable. In stating that the avoidable consequences doctrine "does not apply" or "is not applicable," a court is doing more than merely saying, "on these facts, it may not be appropriate to reduce the plaintiff's recovery." Rather, the court has taken a preemptive role, denying jurors an opportunity to decide whether the defendant should have prevented the waste in this situation. Second, some courts address the exception independently of the plaintiff's reasonableness rather than viewing the defendant's opportunity simply as one factor bearing on the plaintiff's reasonableness. Third, at least two cases imply that it would be reversible error to instruct the jury on the avoidable consequences doctrine when the defendant had an equal opportunity to minimize the loss. This

80. See, e.g., Wartzman v. Hightower Prod., Ltd., 456 A.2d 82, 88 (Md. Ct. Spec. App. 1983) ("The doctrine of avoidable consequences, moreover, does not apply where both parties have an equal opportunity to mitigate damages."); Hiss v. Friedberg, 112 S.E.2d 871, 875 (Va. 1960) ("since [defendants] . . . had the same opportunity to purchase the outstanding leasehold as the [plaintiffs], . . . it was the primary duty of [defendants] to do so and they cannot be heard to say that the [plaintiffs] should have performed for them"); Unverzagt v. Young Builders, 215 So. 2d 823, 828 (La. 1968) ("this duty to mitigate the damages is not applicable where the party whose duty it is primarily to perform a contract 'has equal opportunity for performance and equal knowledge of the consequences of nonperformance'") (quoting Parker v. Harris Pine Mills, 291 P.2d 709, 717 (Or. 1955)).

81. See, e.g., S.J. Groves & Sons Co. v. Warner Co., 576 F.2d 524 (3d Cir. 1978).

82. Baldus v. Mattern, 93 N.W.2d 144, 155 (N.D. 1958); Ivester v. Family Pools, Inc., 262 S.C. 67, 70, 202 S.E.2d 362, 363 (1974). Baldus involved breach of a warranty of title free from liens. The defendant argued that the plaintiff should have mitigated the loss by bidding at the sheriff's sale of the property. The defendant, however, had promised to buy the property at the sheriff's sale, thus making bids by the plaintiff superfluous. Given this promise, the court held that the plaintiff's decision not to enter a bid was eminently reasonable. Baldus, 93 N.W.2d at 155. But the court did not hold that the jury correctly applied the instruction on avoidable consequences by finding the plaintiff acted reasonably. The court held that the instruction should not have been given at all because the defendant had an equal opportunity to bid at the sale. Id. This implies that even if the plaintiff had acted unreasonably, the jury should not have been allowed to consider the avoidable consequences doctrine.

In Ivester the defendant argued that the plaintiff should have repaired a defectively constructed pool and then sued for the cost of repair. Instead, the trial court had awarded plaintiff a refund of the purchase price. The supreme court affirmed the trial judge's decision not to instruct the jury on the avoidable consequences doctrine. The brief decision does not clearly indicate whether the court based its holding on the equal opportunity exception or on the absence of any evidence that would meet the defendant's obligation to prove the cost of repair. Ivester, 262 S.C. at 69-70, 202 S.E.2d at 363. Both Baldus and Ivester, however, suggest that the defendant's equal opportunity makes the avoidable consequences doctrine irrelevant or even prejudicial to the jury's deliberations.
approach clearly differs from an inquiry into the plaintiff's reasonableness, which normally presents a jury question.

The problems with Sutherland's supporting authority—and by implication, the supporting authority of Sumner, the legal encyclopedias, and every case since—appear to justify an immediate rejection of the equal opportunity exception. Its creation seems more accidental than intentional. Cases concerning when a plaintiff should begin mitigation were read to involve the reasonableness of whether the plaintiff should mitigate at all. Inattention to the nuances of Sutherland's language produced a series of slight changes in language. An assessment of the plaintiff's reasonableness was eventually converted into an exception to the avoidable consequences doctrine that excused the plaintiff from any need to act reasonably—at least when the defendant had an equal opportunity to minimize the loss. The resulting shift in focus from the plaintiff’s uncertainty regarding whether the defendant will perform to the defendant’s opportunity to prevent the harm has never been explained. Therefore, courts should probably dismiss the equal opportunity exception altogether.

Before disposing of the exception entirely, however, we should consider its possible utility. This section will conclude with an inquiry into the usefulness of the equal opportunity exception in addressing the uncertain timing of the breach. Section IV addresses other purposes the equal opportunity exception might serve today, even though it was not initially designed to serve those ends.

B. Utility of the Exception
with Regard to Timing of the Breach

Cases persist in which the plaintiff cannot easily ascertain whether the time for mitigation has come. Several recent cases in which courts have resorted to the exception reflect the same situation.83 Efforts to minimize loss before a breach occurs involve substantial risk for plaintiffs. Interfering with the other party’s ability to perform can constitute a breach, which may entitle the other party to recover damages.84 When the obligation not to interfere with the other party’s performance derives from the implied covenant to act in good faith, a breach might be labeled bad faith85 and supra-compensatory


84. Cf. Walker & Co. v. Harrison, 81 N.W.2d 352 (Mich. 1957) (holding that the party who terminated a contract because of the other party’s immaterial breach was liable for damages for total breach). Goetz and Scott refer to this as the problem of “breacher status.” Goetz & Scott, supra note 19, at 990. Even if the contract contains no express provision to this effect, the obligation to perform in good faith, which is implicit in every contract, compels parties not to interfere with the other’s opportunity to perform. FARNSWORTH, supra note 66, § 8.15, at 637.

85. Courts have been largely unable to appreciate the difference between the breach of an
damages might be argued. As long as defendants continue to assert that plaintiffs should have taken matters into their own hands and minimized loss despite the defendants’ efforts to perform, courts will need to address plaintiffs’ uncertainty regarding when the need to minimize the loss begins.

An exception for equal opportunity is neither necessary nor sufficient to deal with uncertainty as to the timing of mitigation. The exception is unnecessary because the avoidable consequences doctrine permits a court or a jury to conclude that the uncertainty concerning the defendant’s conduct made the plaintiff’s decision not to minimize reasonable. The doctrine applies regardless of whether the uncertainty arose from the lack of a fixed time for performance in the agreement or from the defendant’s assurances of continued efforts to perform. Although hindsight might reveal the plaintiff could have taken a better course by acting earlier, the avoidable consequences doctrine does not require plaintiffs to take the best course a defendant’s attorneys can construct after the fact. In some cases that recite the exception, the court has determined that the plaintiffs chose a course that seemed reasonable at the time.

The equal opportunity exception is insufficient because uncertainty concerning whether the time for mitigation has come may arise in cases where the defendant did not have an equal opportunity to minimize the loss. Those cases produce the same difficulty for plaintiffs and require the same reasonableness analysis. An exception focused on equal opportunities may not respond to every situation in which uncertainty impedes the plaintiff’s mitigation efforts. The law needs a method for dealing with uncertainty that can be applied in all cases, even those where a court might not conclude that the defendant had an equal opportunity to minimize the loss. Assuming the law can address the issue of uncertainty effectively in cases where the equal opportunity exception does not apply, the rules governing uncertainty seem likely to work just as well in cases where the exception does apply. Courts must be able to respond to those cases appropriately and, presumably, in a manner consistent with other cases involving uncertainty. Cases involving identical assurances create identical uncertainty and identical issues regarding the plaintiff’s reasonableness in relying on assurances, even when the defendant’s opportunity to mitigate differs substantially from case to case.

86. This point currently represents fear more than reality. To date, courts have confined supra-compensatory damages to insurance contracts. While some cases suggest expanding supra-compensatory damages to breaches of good faith in other contexts, courts have thus far resisted this temptation. See, e.g., Foley v. Interactive Data Corp., 765 P.2d 373 (Cal. 1988) (denying supra-compensatory damages for breach of good faith in an employment contract).


88. A defendant’s complete inability to prevent the loss, if known to the plaintiff, might make the plaintiff’s reliance on the defendant’s assurances unreasonable. But cases applying the
The courts have effectively addressed timing concerns by allowing the plaintiff to clarify the defendant’s intention to perform. When a plaintiff has reasonable grounds to believe that the defendant may breach, the plaintiff may request assurances that the defendant will perform. Failure to provide assurances would constitute a repudiation, which the plaintiff could treat as an immediate breach. The plaintiff then could intervene and minimize the loss without fear that the intervention would constitute a breach. Since the inception of repudiation, courts have developed tools to handle uncertainty regarding the timing of a breach.

The equal opportunity exception may aim at a legitimate concern, but its inartistic phrasing, which focuses on the relative ability of each party to minimize the loss, focuses attention in the wrong direction. If the exception precludes an offset to recovery when a plaintiff reasonably postpones efforts to mitigate, the language of equal opportunity creates an unnecessary hurdle for plaintiffs while at the same time suggesting application to situations where timing of mitigation poses no serious issue. On the other hand, the avoidable consequences doctrine deals appropriately with a plaintiff’s reasonable delay in minimizing the loss.

IV. AN ALTERNATIVE EXPLANATION: DOES THE EXCEPTION MINIMIZE LOSS?

The foregoing examination of the origins of the equal opportunity exception suggests two conclusions. First, the creators of the exception may not have intended to create an exception at all. Second, the concerns that may have motivated the creation of the exception are addressed more effectively by other legal concepts, particularly repudiation. The exception’s origins, then, reveal no compelling reason, and perhaps no reason at all, to retain the equal opportunity exception in the common law.

New purposes for the exception may exist, however. A legal doctrine may serve other useful ends long after its original purpose becomes obsolete. Punitive damages, for example, were created to justify recoveries for harm to dignity or emotional distress at a time when the law refused to allow such recoveries directly. While the law now recognizes recovery for loss of

avoidable consequences doctrine can, and do, account for that difference by assessing reasonableness. See supra note 47 and accompanying text.

89. See RESTATEMENT (SECOND) OF CONTRACTS § 251 (1981) (allowing an obligee to treat obligor’s failure to provide adequate assurances as repudiation); U.C.C. § 2-609 (treat failure to provide adequate assurances within a reasonable time as repudiation).

90. See RESTATEMENT (SECOND) OF CONTRACTS § 205 cmt. d. Some grounds for uncertainty may remain. For instance, a court might conclude that the plaintiff lacked reasonable grounds for insecurity or that the plaintiff demanded assurances to which the plaintiff was not entitled. Nonetheless, the technique available for clarifying uncertain situations promises to reduce the number of cases in which uncertainty impedes minimizing the loss.

91. See Dorsey D. Ellis, Jr., Fairness and Efficiency in the Law of Punitive Damages, 56 S.
dignity and distress, punitive damages remain an effective, if underinclusive, means of redressing the law’s failure to include attorneys’ fees in consequential damages.

Similarly, the equal opportunity exception may serve a new purpose: minimizing waste. Nothing in the equal opportunity exception impedes efforts to minimize loss. Rather, the exception influences who reduces the loss, not whether the loss is reduced. By denying an offset when the defendant can reduce the loss more efficiently than the plaintiff, the exception seeks to reduce waste in the effort to avoid the loss. Standing alone, the avoidable consequences doctrine might induce the plaintiff to minimize the loss even if mitigation would require significant expenditures. The exception, however, encourages the defendant to minimize the loss when the cost to the defendant would be less than the cost to the plaintiff. Thus, the avoidable consequences doctrine and the equal opportunity exception can work together. The avoidable consequences doctrine encourages the parties to reduce waste by minimizing the losses; the equal opportunity exception encourages the parties to reduce waste by minimizing the cost of minimizing losses.

The equal opportunity exception has substantial appeal to the extent that it helps reduce waste. Many scholars believe that the law should allocate losses to the least-cost avoider in order to encourage that party to avoid the loss efficiently, rather than create incentives for others to incur larger expenses in order to achieve the same savings. A rule that allocates the avoidable losses to the party who could have avoided them more reasonably will effectuate that goal as long as one assumes that the cost of avoiding the harm equates with the reasonableness of the parties’ conduct. This approach accords with the policy of minimizing waste. Waste is reduced not only by preventing losses to the plaintiff, but also by preventing them at the lowest cost. The avoidable

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92. Some authorities suggest that the avoidable consequences doctrine does not require the plaintiff to minimize the loss if the effort would require more than trivial expense. Schneidt v. Absey Motors, Inc., 248 N.W.2d 792 (N.D. 1976). Most authorities recognize expense as one aspect of the inquiry into reasonableness. Thus, where the avoidable loss is large and the plaintiff’s resources are sufficient, it may be reasonable to expect a plaintiff to make substantial expenditures in order to minimize loss. In these circumstances, courts might limit recovery under the avoidable consequences doctrine if a plaintiff failed to make expenditures that were more than trivial. See 15 Am. Jur. Damages § 29 (1938).


94. Goetz and Scott argue that the parties to a contract, if they negotiated the avoidability of losses following breach, would try to minimize the joint cost of minimizing the loss. Generally, this means that the parties will allocate the burden of acting to the party who could avoid the loss at the least expense even though the burden to pay the cost of avoiding the loss will remain with the breaching party. See Goetz & Scott, supra note 19, at 973.
consequences doctrine encourages minimization of the consequential damages; the exception encourages minimization of the incidental costs.\textsuperscript{95} The equal opportunity exception, however, fails to serve the policy of minimizing waste. Even if courts properly implement the equal opportunity exception, it may increase waste by weakening the incentives for the plaintiff to minimize the loss even when the defendant will not prevent the loss. By obscuring which party should act in any given case, the exception increases the likelihood that neither will act, producing wasteful losses, or that both will act, producing wasteful precautions against losses.

Assume that the equal opportunity exception applies if, and only if, the defendant could have minimized the loss at less cost than the plaintiff. In that situation, it is less wasteful for the defendant to minimize the loss than for the defendant to pay the plaintiff to minimize the loss via a damage award. To the extent that the avoidable consequences doctrine seeks to minimize waste, the rationale seems consistent with a provision that encourages the defendant to act in these circumstances. To the extent that the equal opportunity exception provides the same incentive, it serves no purpose different from the avoidable consequences doctrine.

The equal opportunity exception offers an advantage only when four conditions coincide:

(1) the defendant would not have elected to avoid the loss for the plaintiff if the exception did not exist;
(2) the plaintiff elects not to avoid the loss;
(3) the defendant elects to avoid the loss for the plaintiff; and
(4) the defendant is the least-cost avoider.

When the first condition does not apply, the equal opportunity exception provides no net advantage over the avoidable consequences doctrine. Without the second condition, the equal opportunity exception threatens to encourage duplicative efforts to avoid the loss. When the third condition is missing, the equal opportunity exception threatens to increase waste by encouraging the plaintiff to allow reasonably avoidable losses to occur. If the fourth condition is missing, the equal opportunity exception threatens to encourage the wrong party to minimize the loss. Because the coincidence of all four conditions is

\textsuperscript{95} In this context, incidental cost refers only to the cost of minimizing the loss. This article will occasionally refer to this as minimizing the cost of minimizing the loss. Other transaction costs influenced by the exception include the cost of determining which party should act—that is, which one can avoid the loss at the least cost—and litigating issues regarding that party’s failure to act. The exception may increase these incidental costs dramatically. At least one commentator has expressed discontent with the entire avoidable consequences doctrine because litigating the reasonableness of plaintiff’s decisions concerning mitigation seems wasteful. See Richard A. Epstein, Beyond Foreseeability: Consequential Damages in the Law of Contract, 18 J. LEGAL STUD. 105 (1989).
likely to be rare, the exception might increase waste more often than it decreases waste.

In addition, cases that satisfy one, but not all, of the four conditions may produce consequences more severe than the consequences of not encouraging the least-cost avoider to act. Where neither party minimizes the loss, losses may greatly exceed the cost of prevention.

The preventable losses must exceed the cost of prevention; otherwise, it would be unreasonable to prevent them. Nonetheless, courts often find it reasonable for a plaintiff to refrain from preventive measures even when the amount saved by the measures would have exceeded their cost. Thus, when the cost of mitigation is substantial, even a plaintiff who could afford the cost may be permitted to recover full damages despite the failure to prevent the loss. 96 While some cases may take this point to extremes, 97 more moderate applications could occur. For example, a plaintiff reasonably could choose not to spend $999 to prevent the loss of $1000, especially if any uncertainty exists as to whether the savings would reach $1000. Thus, net savings from minimizing the loss probably will be substantial in any case where the avoidable consequences doctrine would apply. Courts will not reduce the award where the cost of minimizing the loss nearly equals the benefit.

On the other hand, the advantages offered by the equal opportunity exception might be modest. Because the equal opportunity exception applies when the cost to each party is identical, in some cases the savings will be zero. Even when one party has a cost advantage, the difference may be relatively small. Unless only one party has access to a particularly beneficial market, it seems likely that either party can locate a substitute performance for about the same price. The exception’s advantages pale in comparison to the cost of discouraging reasonable efforts to minimize the loss. Therefore, the disparity in the severity of consequences probably outweighs the possibility that savings will accrue in more cases.

Ultimately these conclusions might benefit from empirical study. If we could conclude that the four conditions will coincide more often than one of them will fail and that the amount of saving when they do coincide exceeds the marginal cost when cases fall through the cracks, the benefits of the equal opportunity exception would justify its continued existence. Apparently no such empirical data exists, which is understandable considering that the equal

96. See, e.g., Green v. Smith, 67 Cal. Rptr. 796 (Cal. Ct. App. 1968) (finding it reasonable not to spend $600 to prevent loss of $17,000).

97. Courts sometimes overstate the principle, announcing that the plaintiff reasonably may decide not to minimize the loss by means that require more than a trivial expense. See, e.g., Schneidt, 248 N.W.2d at 797. The converse is true: The plaintiff would be unreasonable if she failed to reduce the loss by means that required only a trivial expense. See, e.g., Nicola v. Meisner, 84 N.W.2d 702, 705-06 (N.D. 1957) (quoting 15 AM. JUR. DAMAGES § 27 (1938)). But that does not mean a plaintiff reasonably can refuse to minimize the loss when the expense of mitigation is more than trivial. Courts that twist the rule this way commit a logical fallacy familiar to every high school student ever forced to study symbolic logic.
opportunity exception was not created in order to minimize waste. Rather, the explanation is a modern effort to explain the existence of an exception created for very different reasons. Between the concerns expressed here and the absence of empirical data to support the waste minimization rationalization, the obsolescence of the exception's original explanation should suffice to justify the elimination of this questionable exception.

The failure of the equal opportunity exception to minimize waste is further explained by a discussion of why each of the four necessary conditions listed above is unlikely to occur.

A. The Exception is Unlikely to Influence the Defendant's Behavior

In theory the avoidable consequences doctrine provides sufficient incentive for the defendant to minimize the loss when the defendant can do so at less expense than the plaintiff. The defendant will pay the cost of prevention regardless of who actually minimizes the loss.\(^8\) Even if the plaintiff minimizes the loss in the first instance, the cost of mitigation will be recovered as incidental damages.\(^9\) Consequently, the defendant has a natural incentive to minimize the loss regardless of who initially bears the cost. A rational defendant who acknowledges liability will choose not to minimize the loss only when the defendant believes that the plaintiff can minimize the loss more efficiently.

Practice may not match theory. Only with idealistic assumptions, such as perfect information and the absence of strategic behavior, could one assert that the avoidable consequences doctrine will cause defendants to minimize loss when they can do so at less cost. But the same idealistic assumptions seem necessary in order to identify any advantage for the equal opportunity exception. A defendant considering whether to minimize the loss for the plaintiff will look at the bottom line, without much regard to whether the equal opportunity exception or the avoidable consequences doctrine imposes the costs involved. In practice then, the equal opportunity exception offers no advantage over the avoidable consequences doctrine.

The equal opportunity exception differs from the avoidable consequences doctrine in one important detail: the size of the penalty imposed for failing to minimize the loss. Under the exception, the defendant who fails to minimize the loss will be liable for the full amount of damages, including those either party could have prevented. Under the avoidable consequences doctrine, the

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8. Goetz & Scott, supra note 19, at 973.
9. The term "incidental damages" was coined by the drafters of the U.C.C. The term here describes the plaintiff's recovery for the cost of minimizing the loss rather well. Dobbs describes this as the affirmative application of the avoidable consequences doctrine. For a more thorough discussion of why the affirmative application is inherent in our normal rules of recovery, see Kelly, supra note 1, at 8-10.
defendant who fails to minimize the loss will be liable for the difference between the defendant’s cost to avoid the loss and the plaintiff’s cost to avoid the loss.100 If, as seems likely, the gap between preventable losses and the cost of prevention exceeds the gap between the two parties’ cost to prevent the loss, the equal opportunity exception will provide a greater incentive for the defendant to minimize the loss.

But this greater incentive is not necessarily an advantage. The added incentive stems from the in terrorem effect plaintiffs can achieve by threatening not to minimize the loss even though prevention would be reasonable. The deterrent thus arises because the equal opportunity exception might encourage plaintiffs to allow preventable losses to accrue. The equal opportunity exception gains its savings in incidental expenses, if at all, either by sacrificing the avoidable consequences doctrine’s savings in consequential losses or by making a plaintiff’s threat to sacrifice those gains credible.

The incentive thus created may not produce gains. By increasing the stakes, the equal opportunity exception may encourage too many defendants to minimize the plaintiffs’ losses. While efficiency justifies encouraging a defendant who is the least-cost avoider to act, efficiency suffers if a defendant who is not the least-cost avoider acts. The avoidable consequences doctrine pitches the incentive at the dollar value of the savings in prevention costs. Defendants, therefore, are encouraged to act only if they can in fact prevent the loss at less expense than plaintiffs.

The equal opportunity exception, by threatening a larger increase in the damages the defendant must pay, may actually encourage inefficient results. Threatened with a substantial increase in the plaintiff’s recovery if the defendant does not act, the defendant may act to minimize the loss even if the plaintiff could minimize the loss at a lower cost. For example, suppose the defendant can prevent $1000 of losses by spending $200, but the plaintiff could prevent the same losses by spending $100. Society should prefer, and the avoidable consequences doctrine would encourage, that the plaintiff minimize the loss.101 But a defendant who fears, say, a 25 percent chance that the jury might apply the equal opportunity exception may choose to minimize the loss if the plaintiff threatened not to act. The defendant will spend $200 to prevent the loss, $100 of which would have been paid anyway as incidental damages if the plaintiff had acted. The expected cost of inaction, however, is $250: $100 in extra damages times the 25 percent chance that the jury will award them. Consequently, the equal opportunity exception provides a greater incentive for the defendant to act, but not the optimal incentive.

100. Even if a plaintiff does not avoid loss, damages will be limited to the cost of avoiding the loss—plus any unavoidable losses, which the defendant will bear under either rule.

101. Goetz and Scott suggest that the parties themselves, ex ante, would prefer rules that would minimize their joint costs either of minimizing the consequences of breach or of adjusting to any other contingency that makes the contract less advantageous than it originally seemed. See Goetz & Scott, supra note 19, at 973.
One might attempt to justify this greater incentive on the ground that it counterbalances the possibility that defendants will engage in strategic behavior. The undercompensatory nature of contract damages and the pressure of litigation expenses may prevent optimal incentives from producing optimal results. Thus, additional incentives must be added to correct these other problems. It is not necessary to enter the debate over such topics as the American Rule on attorneys' fees, the foreseeability doctrine, emotional distress for breach of contract, or punitive damages in tort or contract, in order to conclude that the equal opportunity exception is an inappropriate method for solving any problems those doctrines build into damage remedies. Whatever opportunities for strategic behavior defendants may possess, allowing plaintiffs additional opportunities for strategic behavior, such as a threat to allow damages to increase unnecessarily, is a poor solution.

If rules governing damages can encourage efficient conduct, the avoidable consequences doctrine provides sufficient incentive for defendants to minimize the cost of minimizing the loss even without an equal opportunity exception. If defendants do not respond to damage rules, then the equal opportunity exception offers little or no improvement. The equal opportunity exception, in order to distinguish itself from the avoidable consequences doctrine, must set the price of the defendant's failure to minimize the loss well above the actual waste caused by that failure. This punitive measure will over-deter defendants if it has any effect at all. Instead of encouraging the least-cost avoider to act, the exception will encourage the defendant to act regardless of whether the defendant is the least-cost avoider. Even this punitive sanction, however, seems unlikely to produce any benefit.

B. Plaintiffs Might Minimize Losses Despite the Exception

If the equal opportunity exception did not exist, the plaintiff would bear the burden of acting to minimize loss when the burden is not extreme. When the burden is unduly great, the plaintiff may refrain from mitigation efforts, albeit at the risk that recovery might be less than the full amount of the loss if a jury ultimately disagrees with the plaintiff's assessment of the burden. All the pertinent facts, however, are obtainable by the plaintiff. The plaintiff can determine what actions might minimize the loss, what they will cost, and how much loss they are likely to prevent.


103. In contract settings, the parties could allocate the burden of minimizing the loss by agreement. Goetz and Scott conclude that the avoidable consequences doctrine probably duplicates the allocation that the parties would create in most cases. Goetz & Scott, supra note 19, at 986-1001.
The equal opportunity exception creates chaos for the parties as they try to determine which of them should act. The plaintiff can no longer focus exclusively on the relative merits of particular mitigation measures. The plaintiff now must consider whether the defendant might have an equal opportunity to minimize the loss. If so, the plaintiff can and should refrain from taking those measures. If the defendant does act, the plaintiff's inactivity will prevent wasteful duplication of effort. If the defendant fails to act, the plaintiff can recover the full loss in the damage award because the avoidable consequences doctrine will not apply. In theory, therefore, the plaintiff suffers no loss by failing to mitigate. The plaintiff also receives no gain by refraining, since defendant would have paid the cost of the plaintiff's efforts in the damage award. Society and the defendant, however, gain when the plaintiff refrains from acting by encouraging the prevention of the loss at the lowest cost.

Plaintiffs may elect to minimize their losses as if no exception existed. Even those who believe that the defendant can avoid the loss at less expense may prefer to prevent the loss early rather than waiting to recover after lengthy litigation. A loss avoided early has greater benefit than compensation received later, a fact the law acknowledges by allowing prejudgment interest on some recoveries. Litigation may ensue over any portion of the loss that the plaintiff could not prevent or over the cost of the plaintiff's mitigation efforts. But unless interest awarded on the avoidable but unavoidable losses exceeds the marginal cost necessary to collect the avoidable loss plus the time value of the avoidable loss, the plaintiff will prefer to avoid losses that can reasonably be prevented. The risk of duplicative mitigation efforts will not concern the plaintiff, because the defendant will bear the costs of all mitigation efforts that the court ultimately finds reasonable.

In addition, a plaintiff who fears that the real damage recovery may fall short of the theoretical recovery discussed above may minimize losses in order to prevent undercompensation at trial. Contract recoveries rarely compensate a plaintiff fully. Settlement to minimize the cost of litigation may encourage further compromise of the claim. Even a plaintiff who minimizes the loss

104. The cost of the mitigation efforts will fall on the breaching defendant no matter which party takes the action in the first instance. See Goetz & Scott, supra note 19, at 1021.
105. Arguably the defendant would pay for the duplication. The exception does not explicitly deny the plaintiff the right to recover expenses actually incurred in an effort to minimize the loss even if the plaintiff reasonably could have refrained from action in the expectation that the defendant would minimize the loss. If a court held that a plaintiff acted unreasonably by minimizing the loss in circumstances where the defendant should have acted, then the court theoretically could deny recovery of the cost plaintiff incurred trying to minimize the loss. It appears that no court has interpreted the exception in this way.
106. See, e.g., Cavnar v. Quality Control Parking, 696 S.W.2d 549 (Tex. 1985); Dobbs (2d), supra note 1, § 3.6(1). While Cavnar represents the most generous rule regarding prejudgment interest, most states allow prejudgment interest on liquidated claims. Dobbs (2d), supra note 1, § 3.6(1), at 247.
107. See, e.g., Wonnell, supra note 102, at 482-83; Macaulay, supra note 102, at 250-53.
may find that the full amount of the actual loss, including incidental expenditures to minimize the loss, will not be recovered. Thus, the plaintiff will prefer to keep the total loss as small as possible to reduce the magnitude, if not the likelihood, of losses that remain uncompensated following the judgment.108

These practical concerns undermine the ability of the equal opportunity exception to achieve its goal. The inadequacy of remedies gives the plaintiff an incentive to avoid the loss even when the defendant can prevent the loss more efficiently. To the extent that the exception also encourages the defendant to act, the exception may produce excessive investment in precautions against the consequences of breach by encouraging wasteful duplication. To the extent that it does not encourage a defendant to act, the exception accomplishes nothing; the plaintiff, even when the higher-cost avoider, will avoid the loss despite the exception.

Realistically, a plaintiff should assume that a breaching defendant will not make efforts to minimize the loss unless the defendant communicates a different intent. Because the defendant will bear the cost of duplicative efforts to minimize the loss, the defendant has every reason to ensure that the plaintiff does not take superfluous efforts.109 If the defendant does not communicate an intent to minimize the loss, the plaintiff may reasonably infer that the defendant does not plan to make such efforts.

Goetz and Scott suggest a second reason to support the plaintiff’s inference. They note that breach is simply one of several possible responses to contingencies that make a contract less advantageous than anticipated.110 Other responses include performance, despite losses, and renegotiation.111 A defendant who does not perform but who can take measures that will minimize the plaintiff’s loss seems likely to choose renegotiation instead of breach. “Breach is the obligor’s signal that: ‘My assessment of our relative capacities suggests that you enjoy the comparative advantage on all prospective adjustments. Therefore, please undertake all cost-minimizing adjustments and send me the bill.’”112 A plaintiff, having received this signal, could not realistically expect the defendant to minimize the loss without receiving further indication that the defendant intended to do so. “In essence, breach involves a [defendant’s] final commitment to quasi-performance (breach with damages) as the most efficient means of satisfying the original contractual obligation.”113 Despite the equal opportunity exception, plaintiffs seem likely to

108. Epstein suggests that the law could abandon the avoidable consequences doctrine entirely if it fixed compensatory damages below the plaintiff’s actual loss. Epstein, supra note 95, at 116-17.

109. If both parties attempt to minimize the loss, the defendant pays both for her own efforts directly and for the plaintiff’s efforts via the damage award.

110. Goetz & Scott, supra note 19, at 972-73.

111. Id.

112. Id. at 980.

113. Id.
minimize the loss because they generally will prefer to prevent the loss even if they can collect a damage award later.

C. Defendants Might Not Minimize Losses Despite the Exception

Assume that the equal opportunity exception will encourage some plaintiffs to refrain from mitigation on occasions when they otherwise would have minimized the loss. The defendant may accept the invitation to prevent the loss for the plaintiff. However, it is also possible that the defendant may not recognize the need to act on the plaintiff’s behalf.

Defendants might have several reasons for choosing not to minimize the loss even apart from the obscurity of the exception. A defendant may miscalculate the relative cost of efforts to minimize the loss. A defendant who believes that the plaintiff can minimize the loss more efficiently will not recognize that the exception applies and will not act.\textsuperscript{114} Indeed, the law should not encourage a defendant to minimize a loss if she was not the least-cost avoider.\textsuperscript{115} Alternatively, a defendant may hope that the plaintiff will not recover the full loss despite the exception. That hope may encompass strategic considerations, such as the possibility that the plaintiff may not sue or may settle for less than full recovery in order to reduce litigation costs. It also may encompass a good faith belief that the defendant committed no wrong and thus owes the plaintiff nothing. In short, defendants often will choose not to minimize the loss even if they know the requirements of the equal opportunity exception.

In cases where the defendant does not act, preventable losses will accrue to the plaintiff, at least initially. The equal opportunity exception would permit the plaintiff to shift those preventable losses to the defendant. But instead of persuading the least-cost avoider to act, the exception will encourage a plaintiff not to prevent losses in the hope that the defendant will prevent them. Moreover, where prevention might reduce the losses to zero or almost zero, the exception will increase the cost of litigation. A plaintiff who can prevent nearly all of the losses may decide not to sue. A defendant may also decide to pay the relatively small costs without dispute. The entire cost of such litigation could have been avoided if the exception had not created uncertainty regarding which party should have acted to minimize the loss.

\textsuperscript{114} See Goetz & Scott, supra note 19, at 979.

\textsuperscript{115} The exception, by providing defendants with an incentive to determine accurately which party can avoid the loss at the least cost, may foster communication between the parties in these situations. But the plaintiff’s lack of any incentive to cooperate with the defendant may impede sharing the information or any other cooperative solutions. Goetz & Scott, supra note 19, at 981.
D. The Plaintiff Might Be the Least-Cost Avoider

Assume that the equal opportunity exception may encourage the plaintiff to refrain from efforts to minimize the loss at the same time it encourages the defendant to minimize the loss. The theoretical advantages of the equal opportunity exception depend on an additional fact: that the defendant is the least-cost avoider. Courts, however, cannot control when the parties respond to the exception. Thus, to the extent the exception ever motivates conduct, it might motivate a plaintiff who is in fact the least-cost avoider to eschew mitigation efforts. If so, the equal opportunity exception will increase waste, though perhaps not by much.

The possibilities here are neither numerous nor complex. Both plaintiffs and defendants may make mistakes about which party can minimize the loss for less. Communication between the parties before either attempts to prevent the loss may actually increase mistakes. The plaintiff has an incentive to overestimate the cost of mitigation in order to persuade the defendant to act.\footnote{116} The defendant has a similar motive during the communication, but also has a greater incentive to reach an accurate result. The defendant ultimately pays the cost of prevention and, therefore, has reason to prefer that the least-cost avoider act. If the defendant believes the plaintiff's exaggerated estimate of the cost of prevention, the defendant will prefer to take less expensive measures. The defendant cannot gain by exaggerating costs. The defendant loses if the plaintiff takes measures that, in fact, cost more than the defendant would need to spend.\footnote{117}

Even a defendant who correctly determines that the plaintiff is the least-cost avoider may nevertheless decide to minimize the loss. Judges or juries may misperceive the least-cost avoider. If they do, the defendant may face liability for the entire avoidable loss even after accurately determining that efficiency demanded mitigation by the plaintiff. If the amount of avoidable loss exceeds the cost of prevention (each adjusted by the likelihood that the defendant will have to pay them), the defendant may minimize the loss even though the exception theoretically does not apply. Consequently, if the increased losses will substantially exceed the cost of prevention, even a small possibility of error may lead a defendant to minimize the loss when the plaintiff is the least-cost avoider.

The last argument might appear to undercut the suggestion of the preceding section: that defendants may decide not to minimize the loss even if they know about the equal opportunity exception. But each argument seems plausible in different cases. A defendant who expects to be held liable seems

\footnote{116} See Goetz & Scott, \textit{supra} note 19, at 981-82.

\footnote{117} Strategic considerations, plus any difference between the time value of money and the prejudgment interest rate, may affect these calculations. These facts exacerbate, rather than undercut, the possibility of mistakes, intentional or otherwise, that this paragraph seeks to identify.
likely to react as predicted in this section. The guilty defendant also seems more likely to discover the equal opportunity exception and to respond accordingly. However, a defendant who does not expect to suffer liability is more likely to react as suggested in the previous section.

E. Summary

The equal opportunity exception offers a small decrease in the incidental costs of minimizing losses in cases where (1) the defendant is the least cost avoider; (2) the defendant elects to avoid the loss for the plaintiff; (3) the plaintiff elects not to avoid the loss; and (4) the defendant would not have elected to avoid the loss for the plaintiff if the exception did not exist. The absence of any one of these factors produces, at best, no difference between application of the exception and application of the avoidable consequences doctrine. The amount of the savings will be the cost the plaintiff would have incurred to avoid the loss minus the cost the defendant did incur to avoid the loss. Even that advantage may not be unique to the equal opportunity exception because the avoidable consequences doctrine encourages the defendant who is the least-cost avoider to act.

On the other hand, the exception will produce net losses in several situations:

(1) where the defendant takes mitigation measures, even though not the least-cost avoider, but the plaintiff does not act to minimize the loss;
(2) where neither party elects to minimize the loss, but one of them would have minimized the loss if the exception did not exist;
(3) where both parties elect to minimize the loss, but one of them would not have taken mitigation measures if the exception did not exist.

The amount of the loss will be the sum of three components:

(a) the cost the defendant actually incurred to avoid the loss minus the cost the plaintiff would have incurred to avoid the loss in situation (1);
(b) the difference between the avoidable losses and the cost the plaintiff would have incurred to avoid them in situation (2);

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118. Defendants aware of their own liability are more likely to engage legal counsel to investigate the amount of damages than defendants who believe they have committed no wrong. Thus, the former will recognize the exception more often than the latter.

119. The plaintiff's cost is the appropriate baseline, regardless of which party is the least-cost
(c) the cost of the defendant's precautions in situation (3).  

Increased litigation expense resulting from increased uncertainty over who should act to reduce the loss augments the disadvantages of the exception.

These conclusions cast substantial doubt on the argument that the equal opportunity exception produces efficient results by minimizing the cost of prevention. The exception is unlikely to produce the claimed advantages often enough to outweigh the cost of uncertainty concerning which party should act to prevent the loss. The relatively clear avoidable consequences doctrine, with its intrinsic incentive for the least-cost avoider to act, will produce more efficient results with greater regularity than will an exception built on the hope that a judge or jury can identify the least-cost avoider and allocate the losses accordingly.

V. CONCLUSION

The equal opportunity exception serves no useful purpose. The cases decided under the exception almost invariably could have been decided on other grounds, often simply by evaluating the plaintiff's reasonableness as required by the avoidable consequences doctrine. The history of the equal opportunity exception reveals little justification for its creation. The law absent the exception addresses the situations that seemed to motivate the exception's creators. Even before the creation of the exception, courts recognized the reasonableness of a plaintiff who refrained from mitigation in reliance on assurances from the defendant. Concern for the plaintiff's uncertainty

Avoider, if we assume that under the existing law the plaintiff would have mitigated the loss even if the defendant was the least-cost avoider. Because a defendant who is the least-cost avoider has some incentive to minimize the loss personally rather than pay the higher cost for the plaintiff to minimize the loss, the defendant may minimize the loss even without the exception. It seems likely that a defendant willing to minimize loss in the absence of the equal opportunity exception would be equally willing to minimize loss in the presence of the exception. Thus, the situations most plausibly captured here are those in which the plaintiff would have borne the initial onus to minimize the loss if the exception did not exist.

120. Again the text assumes that, absent the exception, the plaintiff would have acted to minimize the loss. It seems unlikely that a plaintiff who would not have mitigated absent the exception would mitigate with the exception in place. The exception gives an incentive for a plaintiff to refrain from mitigation, but provides no reason for a plaintiff to mitigate. The exception, therefore, increases a defendant's efforts regardless of which party could have avoided the loss at the lowest cost. A defendant who was the least-cost avoider, however, might have chosen to minimize the loss even absent the equal opportunity exception. In those cases, the marginal cost attributable to the exception will be the plaintiff's expenses, not the defendant's. Absent the exception, and perhaps even with it, it seems relatively unlikely that a defendant will elect to minimize a plaintiff's loss without communicating that intention. Because communication would likely prevent duplication, this set of cases is likely to be relatively small. While the exception may encourage more defendants to minimize plaintiffs' losses, it is unlikely that communication would be discouraged.

121. See Epstein, supra note 95.
regarding when to begin mitigation has been addressed by advances in the rules governing repudiation and adequate assurances of performance. Furthermore, the desire to minimize waste offers little justification for the exception.

The equal opportunity exception may cause no harm. The paucity of cases invoking the exception suggests that the exception may be innocuous. The exception, however, resembles an unexploded bomb, harmless until it explodes. By referring to the equal opportunity exception as if it remains good law, courts have left this bomb in the field of the law. Perhaps no unsuspecting litigant will trigger it, but the potential for harm suggests that the time may have come to defuse this hazard.