

# **Restat 2d of Contracts, @ 350**

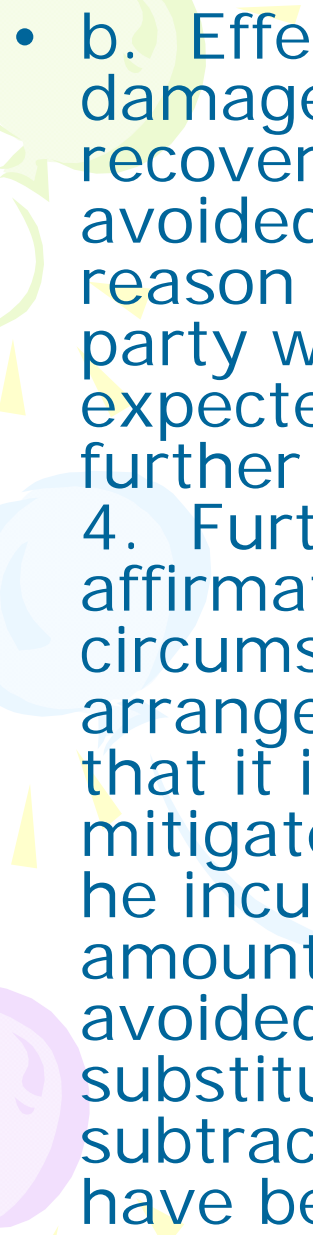
**(1) Except as stated in Subsection (2), damages are not recoverable for loss that the injured party could have avoided without undue risk, burden or humiliation.**

**(2) The injured party is not precluded from recovery by the rule stated in Subsection (1) to the extent that he has made reasonable but unsuccessful efforts to avoid loss**



COMMENTS & ILLUSTRATIONS: Comment:

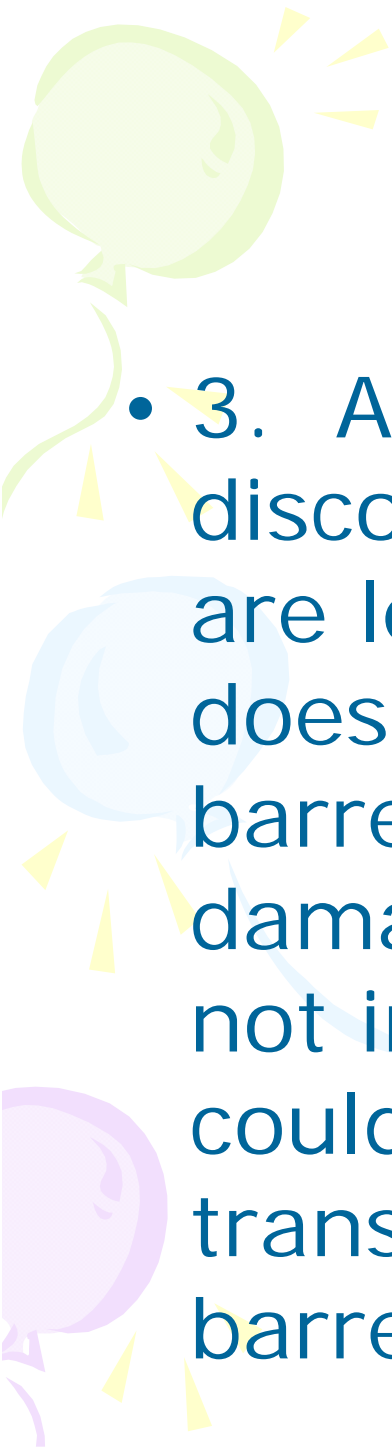
- a. Rationale. The rules stated in this Section reflect the policy of encouraging the injured party to attempt to avoid loss. The rule stated in Subsection (1) encourages him to make such efforts as he can to avoid loss by barring him from recovery for loss that he could have avoided if he had done so. See Comment b. The exception stated in Subsection (2) protects him if he has.

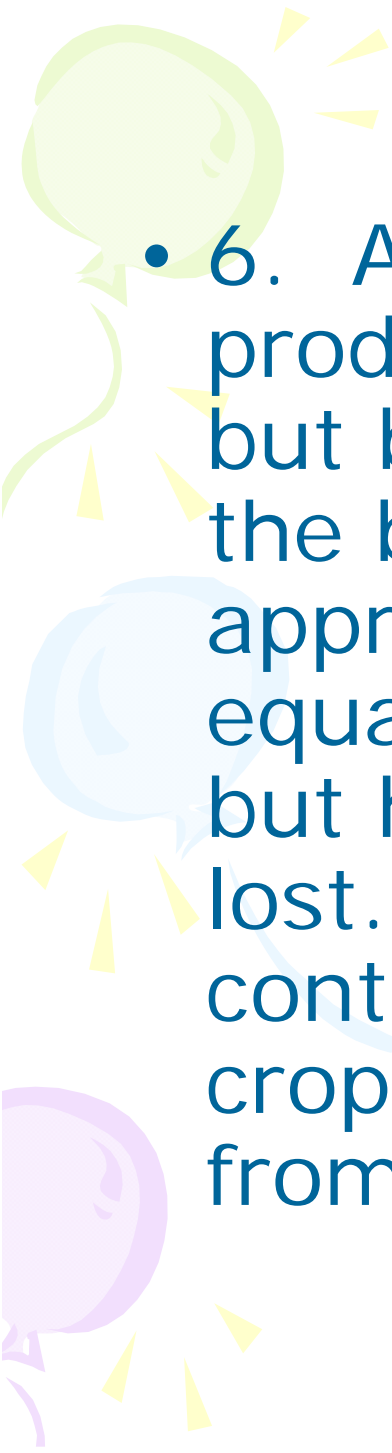
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- b. Effect of failure to make efforts to mitigate damages. As a general rule, a party cannot recover damages for loss that he could have avoided by reasonable efforts. Once a party has reason to know that performance by the other party will not be forthcoming, he is ordinarily expected to stop his own performance to avoid further expenditure. See Illustrations 1, 2, 3 and 4. Furthermore, he is expected to take such affirmative steps as are appropriate in the circumstances to avoid loss by making substitute arrangements or otherwise. It is sometimes said that it is the "duty" of the aggrieved party to mitigate damages, but this is misleading because he incurs no liability for his failure to act. The amount of loss that he could reasonably have avoided by stopping performance, making substitute arrangements or otherwise is simply subtracted from the amount that would otherwise have been recoverable as damages.




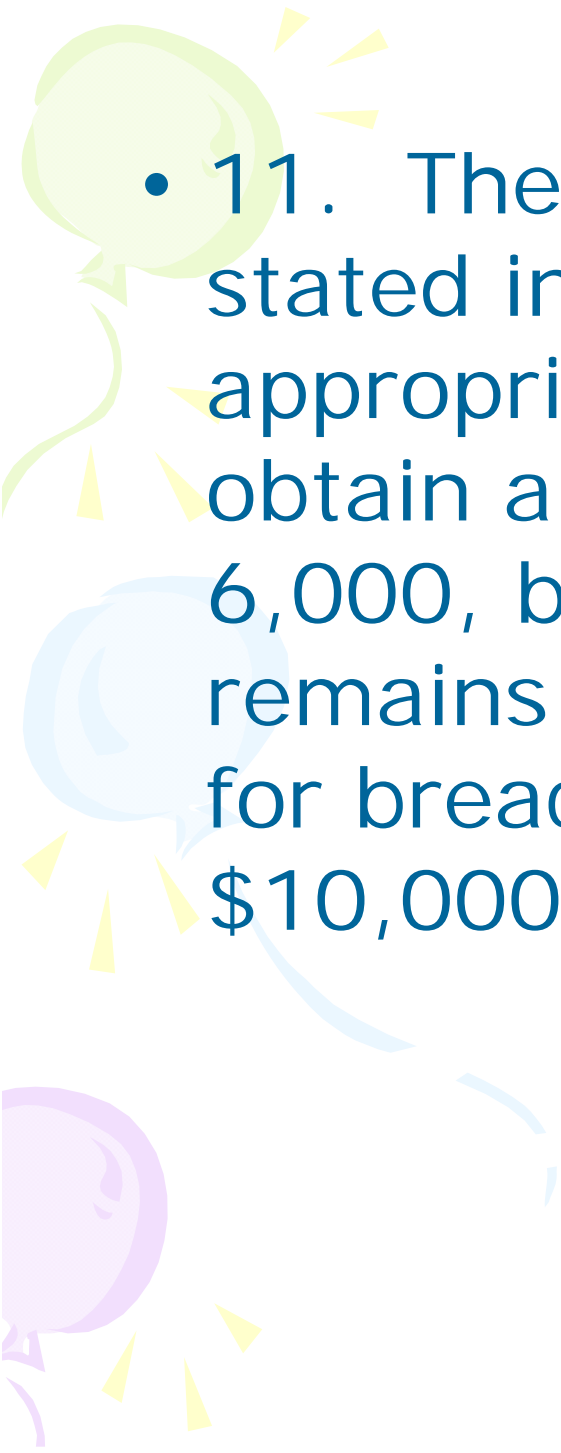
## Illustrations:

- 1. A contracts to build a bridge for B for \$ 100,000. B repudiates the contract shortly after A has begun work on the bridge, telling A that he no longer has need for it. A nevertheless spends an additional \$ 10,000 in continuing to perform. A's damages for breach of contract do not include the \$ 10,000.

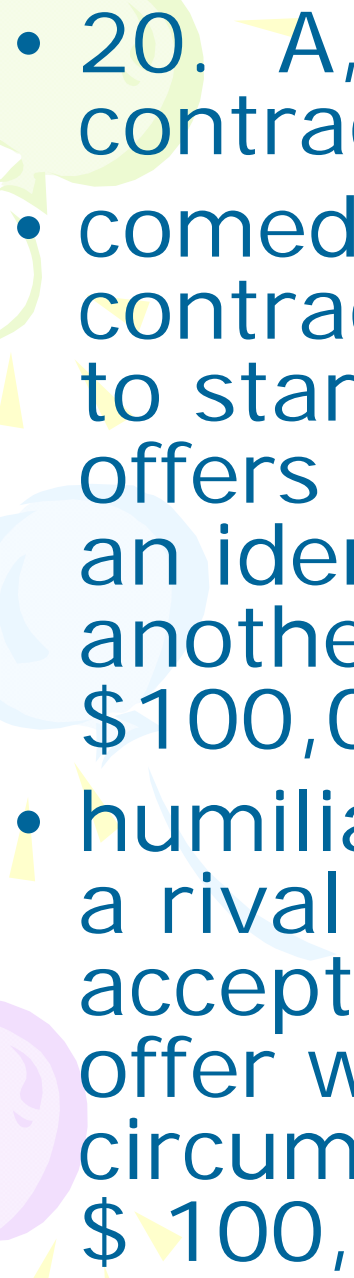
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- 3. A sells oil to B in barrels. B discovers that some of the barrels are leaky, in breach of warranty, but does not transfer the oil to good barrels that he has available. B's damages for breach of contract do not include the loss of the oil that could have been saved by transferring the oil to the available barrels.

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- 6. A contracts to supervise the production of B's crop for \$ 10,000, but breaks his contract and leaves at the beginning of the season. By appropriate efforts, B could obtain an equally good supervisor for \$11,000, but he does not do so and the crop is lost. B's damages for A's breach of contract do not include the loss of his crop, but he can recover \$ 1,000 from A.

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- 8. A contracts to employ B for \$ 10,000 to supervise the production of A's crop, but breaks his contract by firing B at the beginning of the season. By appropriate efforts, B could obtain an equally good job as a supervisor at \$ 100 less than A had contracted to pay him, but he does not do so and remains unemployed. B's damages for A's breach of contract do not include his \$ 10,000 loss of earnings, but he can recover \$ 100 from A.

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- 11. The facts being otherwise as stated in Illustration 8, by appropriate efforts B could only obtain a job as a farm laborer at \$ 6,000, but he does not do so and remains unemployed. B's damages for breach of contract include his \$10,000 loss of earnings.

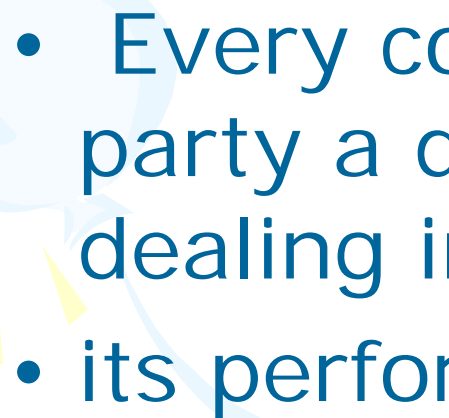



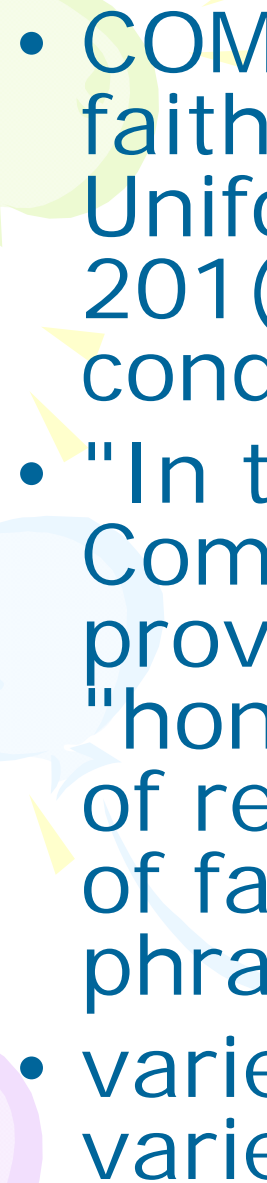
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- 20. A, a motion picture company, contracts to have B star in a musical comedy for \$ 100,000. A breaks the contract and engages C, a rival of B, to star in the musical comedy, but offers B an equally good role under an identical contract as a star in another musical comedy for \$100,000. Because B would be
  - humiliated to work for A after A hired a rival in B's place, B refuses to accept the offer. If rejection of the offer was reasonable in the circumstances, B can recover the full \$ 100,000. Compare Illustration 8.





# Restat 2d of Contracts, @ 205


## @ 205 Duty of Good Faith and Fair Dealing

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- Every contract imposes upon each party a duty of good faith and fair dealing in
  - its performance and its enforcement.
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- COMMENTS a. Meanings of "good faith." Good faith is defined in Uniform Commercial Code @ 1-201(19) as "honesty in fact in the conduct or transaction concerned."
  - "In the case of a merchant" Uniform Commercial Code @ 2-103(1)(b) provides that good faith means "honesty in fact and the observance of reasonable commercial standards of fair dealing in the trade." The phrase "good faith" is used in a
  - variety of contexts, and its meaning varies somewhat with the context.

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- A decorative graphic on the left side of the slide features three balloons: a light green one at the top, a light blue one in the middle, and a light purple one at the bottom. Each balloon has several small yellow triangular rays emanating from it, suggesting a bright or celebratory theme.
- Good faith performance or enforcement of a contract emphasizes faithfulness to an agreed common purpose and consistency with the justified expectations of the other party; it excludes a variety of types of conduct characterized as involving "bad faith" because they violate community standards of decency, fairness or reasonableness. The appropriate remedy for a breach of the duty of good faith also varies with the circumstances.

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- e. Good faith in enforcement. The obligation of good faith and fair dealing extends to the assertion, settlement and litigation of contract claims and defenses. The obligation is violated by dishonest conduct such as conjuring up a pretended dispute, asserting an interpretation contrary to one's own understanding, or falsification of facts. It also extends to dealing which is candid but unfair, such as taking advantage of the necessitous circumstances of the other party to extort a modification of a contract for the sale of goods without legitimate commercial reason.

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- A decorative graphic on the left side of the slide features three balloons in light green, light blue, and light purple, each with yellow streamers and small yellow triangular flags.
- Other types of violation have been recognized in judicial decisions: harassing demands for assurances of performance, rejection of performance for unstated reasons, willful failure to mitigate damages, and abuse of a power to determine compliance or to terminate the contract.
  - For a statutory duty of good faith in termination, see the federal Automobile Dealer's Day in Court Act, 15 U.S.C. §§ 1221-25 (1976).