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THE RULE OF AVOIDABLE CONSEQUENCES IN ANTITRUST CASES: A LAW AND ECONOMICS APPROACH

Amanda Kay Esquibel*

I. INTRODUCTION

It is often said that a plaintiff seeking damages is under a duty to mitigate. Technically, this is incorrect because a failure to mitigate, unlike the breach of a true duty, does not subject a plaintiff to any liability. More precisely, a rule of mitigation or avoidable consequences is a damages rule that limits damages that a plaintiff may recover. Generally, if a plaintiff has not taken reasonable efforts to avoid harm, the law

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1. See generally Jeffrey K. Riffer & Elizabeth Barrowman, Recent Misinterpretations of the Avoidable Consequences Rule: The “Duty” to Mitigate and Other Fictions, 16 HARV. J.L. & PUB. POL’Y 411 (1993) (criticizing district courts that have stricken the mitigation defense in government-initiated savings and loan litigation).

2. See RESTATEMENT (SECOND) OF CONTRACTS § 350 cmt. b (1981) (discussing how the general view that a party has a “duty” to mitigate damages is inherently misleading since it presumes that such a party incurs liability for failing to act).

3. See id. “It is a general principle of American law that the plaintiff who claims to have been injured by an actionable wrong may not recover any damages for resulting injury which the plaintiff might, by reasonable action, have avoided.” CHARLES L. KNAPP, COMMERCIAL DAMAGES: A GUIDE TO REMEDIES IN BUSINESS LITIGATION ¶ 4.01 (Charles L. Knapp ed., 1995). One may view the rule of avoidable consequences as an incentive to make profitable investments. A plaintiff is encouraged to invest a little effort to prevent a considerable harm. As the old adage goes, “An ounce of prevention is worth a pound of cure.” Wolfgang Mieder, “An Apple a Day Keeps the Doctor Away”: Traditional and Modern Aspects of English Medical Proverbs, I DE PROVERBIO 1, ¶ 9 (1995) <http://info.utas.edu.au/docs/flonta/> (citing BENJAMIN FRANKLIN, POOR RICHARD’S ALMANAC (1735), providing a historical account of the use of the proverb, and discussing how it continues to be used today).
will not require the defendant to pay for that harm. The classic rationale for this rule is that it prevents economic waste.

The rule of avoidable consequences is well-entrenched in the law of contract and tort. It has also been applied in antitrust cases. While the rule of avoidable consequences has received significant attention from courts, practitioners, and scholars in the areas of contract and tort law, it has been subject to little analysis in antitrust case law and scholarship.

This Article will offer some analysis and refinement of the rule of avoidable consequences in the context of antitrust actions. Part II of this Article will discuss the economic justification for the rule of avoidable consequences in contract and tort cases, as well as the propriety of such a rule in the context of antitrust actions. In Part III, this Article will review some antitrust decisions raising the mitigation issue. Part IV will then propose an alternative methodology for applying the rule of avoidable consequences in the antitrust arena. Lastly, this Article will conclude that an improved framework for dealing with mitigation questions will rationalize antitrust theory and practice.

4. See Restatement (Second) of Contracts § 350 cmt. b; see also 1 Dan B. Dobbs, Law of Remedies § 3.2, at 292 (Practitioner Treatise Series, 2d ed. 1993) (explaining that the avoidable consequences rule states that "if a plaintiff did not avoid a loss but could have done so by reasonable effort and expense," the plaintiff's loss that could have been avoided will be denied).

5. See Restatement (Second) of Contracts § 350 cmt. a (stating that the policy behind the mitigation rule is to encourage injured parties to try and avoid further losses); see also Restatement (Second) of Torts § 918 cmt. a (1979) (explaining that an injured party is precluded from recovery when "it is in part the result of the injured person's lack of care, and public policy requires that persons should be discouraged from wasting their resources, both physical or economic").

6. See infra notes 10-15 and accompanying text. A rule of avoidable consequences may also be viewed as being related to the concept of proximate cause. The injuries which result from a plaintiff's failure to make reasonable mitigation efforts are not so much caused by the original tortious conduct of the defendant as they are caused by the plaintiff's subsequent conduct. See Restatement (Second) of Torts § 918 cmt. a; see also id. § 918 cmt. c (explaining that a party's failure to take reasonable action has to be a legally contributing cause to that party's resulting harm if such failure is to be used to reduce that party's recovery).

7. See infra notes 70-125 and accompanying text.


9. See Neil Hamilton & Virginia B. Cone, Mitigation of Antitrust Damages, 66 Or. L. Rev. 339, 340 (1987) (noting that some courts have expressly held that a "duty to mitigate" exists in antitrust cases while others have simply applied the basic mitigation principles, and suggesting the latter courts may not expressly require mitigation merely because it is accepted without question).
II. THE RULE OF AVOIDABLE CONSEQUENCES IN CONTRACT AND TORT CASES

A. General Principles in Contract and Tort Cases

Both the Restatements of Contracts and Torts address principles of mitigation. Both recognize that a plaintiff generally may not recover for harm that could have reasonably been avoided. Two hypotheticals, the first involving contract law and the second involving tort law, illustrate the operation of the rule of avoidable consequences.

Contract Hypothetical:

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 [and unnecessary] $10,000 in continuing to perform. A's damages for breach of contract do not include the $10,000.

See RESTATEMENT (SECOND) OF CONTRACTS § 350 (declaring that damages will not be recoverable for losses an injured party could have prevented without incurring a heavy burden or risk); RESTATEMENT (SECOND) OF TORTS § 918 (stating that an individual cannot recover damages for harm that could have been reasonably avoided after he or she has been hurt by the tort of another). It has been held that the "duty to mitigate" requires the injured party "to take advantage of any reasonable opportunity he may have had under the circumstances to reduce or minimize the loss." Sheldon v. Munford, Inc., 950 F.2d 403, 408 (7th Cir. 1991).

Specifically, the Restatement (Second) of Contracts mentions the following when discussing principles of mitigation:

§ 350. Avoidability as a Limitation on Damages
(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.

RESTATEMENT (SECOND) OF CONTRACTS § 350.

In addition, the Restatement (Second) of Torts discusses principles of mitigation:

§ 918. Avoidable Consequences
(1) Except as stated in Subsection (2), one injured by the tort of another is not entitled to recover damages for any harm that he could have avoided by the use of reasonable effort or expenditure after the commission of the tort.
(2) One is not prevented from recovering damages for a particular harm resulting from a tort if the tortfeasor intended the harm or was aware of it and was recklessly disregardful of it, unless the injured person with knowledge of the danger of the harm intentionally or heedlessly failed to protect his own interests.

RESTATEMENT (SECOND) OF TORTS § 918.

The second part of this section makes it possible for a plaintiff who has been the victim of an intentional tort to recover even if his mitigation efforts are unreasonable so long as such efforts do not constitute a heedless failure to protect his own interests.

10. See RESTATEMENT (SECOND) OF CONTRACTS § 350 cmt. b, illus. 1.

Tort Hypothetical:

A, a trespasser upon B's pasture, negligently leaves open a fencegate. B sees that the gate is open, but carelessly fails to close it. As a result, B's cattle escape and are lost. B is not entitled recover damages for the loss of his cattle.  

These hypotheticals underscore the essential policy justification for the rule of avoidable consequences (whether it be contract or tort)—that of preventing loss. The rule discourages the wasting of a party's (and, hence, society's) resources.

This public policy is essentially an economic one. One of the most basic tenets of economic theory is the scarce resource principle. As resources are scarce, rules should encourage people to conserve them where the cost of doing so is not prohibitive. A corollary of this policy is that resources should be put to their highest and best use, as

13. See RESTATEMENT (SECOND) OF TORTS § 918 cmt. a, illus. 2.
14. See 2 MARYLIN MINZER ET AL., DAMAGES IN TORT ACTIONS § 16.01[1], at 16-5 (1997) (explaining that the mitigation rule reflects the societal belief that "[a] plaintiff cannot stand by and watch his or her losses accumulate when it would be reasonable under the circumstances to undertake some action").
15. See supra note 5 and accompanying text.
16. Hamilton and Cone state:
"Given the current trend of using economic efficiency as a basis for analyzing antitrust violations, the requirement that an antitrust plaintiff minimize his loss follows naturally. Mitigation of damages is based upon the premise that 'legal rules and doctrines are designed not only to prevent and repair individual loss and injustice, but to protect and conserve the economic welfare and prosperity of the whole community.' By relieving the defendant of mandatory treble payment for avoidable losses, plaintiffs will be encouraged to put those resources to more efficient use."
Hamilton & Cone, supra note 9, at 354 (footnotes omitted) (quoting CHARLES T. MCCORMICK, HANDBOOK OF THE LAW OF DAMAGES § 33 (1935), which discusses how the "mitigation of damages" rule serves the purpose of protecting, as well as conserving, the economic welfare of society).
17. See, e.g., ROBERT E. HALL & JOHN B. TAYLOR, MACRO-ECONOMICS: THEORY, PERFORMANCE, AND POLICY 484 (1988) (explaining that "scarcity is the most fundamental problem in economics").
18. In fact, recovery for the cost of mitigation is authorized in the Restatement (Second) of Torts:
§ 919. Harm Suffered and Expenditures Made in Efforts to Avert Harm
(1) One whose legally protected interests have been endangered by the tortious conduct of another is entitled to recover for expenditures reasonably made or harm suffered in a reasonable effort to avert the harm threatened.
(2) One who has already suffered injury by the tort of another is entitled to recover for expenditures reasonably made or harm suffered in a reasonable effort to avert further harm.
RESTATEMENT (SECOND) OF TORTS § 919.
any other use is, to an extent, a "waste."  

A simple economic analysis demonstrates the utility of a rule of avoidable consequences. For example, in the first hypothetical, plaintiff may easily prevent $10,000 of harm by ceasing work when apprised of the repudiation. Plaintiff’s cost of ceasing work should be minimal. In essence, plaintiff can save $10,000 by doing very little.

However, if plaintiff does not cease work, it is not just the plaintiff and defendant who are disadvantaged but also society. The resources devoted to continuing work represent a deadweight loss to society. Those resources do not go to produce any socially desired "good." In fact, these resources have been invested in a "good" that has been rejected by the would-be consumer, and they cannot, or easily, be recovered.

A similar analysis applies to the tort hypothetical set forth above. In that hypothetical, the cost of preventing the aggravated harm is also very small—the cost of closing the gate. On the other hand, the harm that could have been prevented is considerable, easily measured by the value of the wayward cows. Again, there is a deadweight social welfare loss caused by the failure to mitigate.

19. See Hamilton & Cone, supra note 9, at 357 (discussing the fact that resources are better utilized under a rule which deters individuals from wasting their own physical, as well as economic, resources).

20. The rule of avoidable consequences has also been incorporated into Article 2—Sales of the Uniform Commercial Code. See U.C.C. § 2-715(2)(a) (1989) (providing that consequential damages may be recovered only if they "could not reasonably be prevented by cover or otherwise"); see also James L. White & Robert S. Summers, Uniform Commercial Code § 10-4(a), at 577 (4th ed. 1995) ("The Restatement may be regarded as an articulation of the rules embodied in the adverb 'reasonably' in 2-715.").

21. See supra notes 3-6, 10-12 and accompanying text.

22. In other words, he can simply leave the site and go about his other business.

23. See supra notes 3-6, 10-12 and accompanying text.

24. See supra notes 5, 14-19 and accompanying text.

25. See B. Peter Pashigian, Price Theory and Applications 355 (1995) ("Deadweight loss is the loss in value suffered by some group (consumers or producers) that is not offset by a rise in value to some other group.").

26. Deadweight losses are measures of such things as allocative inefficiency, a less than optimal allocation of society’s resources, and x-inefficiency, a wasting of society’s resources due to managerial slack. See Roger D. Blair & David L. Kaserman, Antitrust Economics 35-41 (1985) (discussing welfare effects of monopoly).

27. These resources cannot be recovered in the sense that A cannot easily, if at all, take back his time and materials invested in building the bridge. But for the rule of avoidable consequences, A might attempt to recover the value of those resources through litigation.

28. See Restatement (Second) of Torts § 918 cmt. a, illus. 2 (1979).

29. See id.

30. See id.

31. See supra notes 25-26 and accompanying text.
Hence, a basic economic rationale supports the rule of avoidable consequences in both contract and tort actions. The rule also seems to be consistent with basic notions of fairness. Indeed, one can see how it would be unfair to hold a defendant liable for harm that a plaintiff could have easily prevented at little or no cost.

B. Special Principles in Some Intentional Tort Cases

The Restatement of Torts also contains a special mitigation rule for victims of some intentional torts. Specifically, this provision provides that where a tortfeasor intends a particular harm or was recklessly disregardful of it, the avoidable consequences rule does not apply "unless the injured person with knowledge of the danger of the harm intentionally or heedlessly failed to protect his own interests."

The comment sheds further light on this provision. It states that the language imposing the avoidable consequences rule (only when the victim "intentionally or heedlessly" fails to protect his interest) is designed to protect the merely careless or stupid person who may not, in response to the intentional tort, pursue the most prudent course of conduct. Instead, it is only those who stubbornly refuse to protect their own interests that have their recovery limited by this rule.

The following illustration from the Restatement is useful:

A sets fire to a haystack near B's barn, not caring whether B's barn with its contents will be destroyed. The fire spreads to the barn. B sees the fire but instead of using an available hose to put out the comparatively small blaze as a reasonable man would have done, he runs to the neighboring farm to spread the alarm. On his return it is too late to

32. There are many cases that illustrate the operation of the rule of avoidable consequences in various commercial contexts. See, e.g., Barry & Sewall Indus. Supply Co. v. Metal-Prep of Houston, Inc., 912 F.2d 252, 259 (8th Cir. 1990) (finding that the rule of avoidable consequences limited plaintiff's damages because he elected not to replace the defective product); Erdman v. Johnson Bros. Radio & Television Co., 271 A.2d 744, 751-52 (Md. 1970) (holding that where a consumer observes his television sparking and otherwise malfunctioning, but does not unplug it, that consumer cannot recover damages for destruction of his home when the television ultimately catches on fire); see also WHITE & SUMMERS, supra note 20, § 10-4(f) (discussing U.C.C. § 2-715, the Restatement of Contracts, the cases cited supra in this note, and others).

33. See supra notes 3-6, 10-13 and accompanying text.

34. One may view the harm described in the above hypotheticals as proximately caused by plaintiff's (not defendant's) failures or actions. See supra note 6 and accompanying text.

35. See RESTATEMENT (SECOND) OF TORTS § 918(2) (1979). The section is fully quoted supra note 11.

36. Id.

37. See id. § 918(2) cmt. a.

38. See id.
save the barn. In an action for trespass to land, B can recover damages for the loss of the barn. 39

Hence, when victimized by such a tort, a plaintiff who has merely acted unreasonably in response need not fear the rule of avoidable consequences. However, even a plaintiff faced with these circumstances may not act in a heedless fashion. Indeed, the Restatement varies the hypothetical to show how the rule of avoidable consequences might operate in the face of an intentional tort.

For example, assume the same facts as above, "except that when B, whose barn is heavily insured, sees the fire, he fails to take any measures for its protection because he does not care whether or not it burns. B is not entitled to recover damages for the loss of the barn." 40 While the rule of avoidable consequences shows a special solicitude for the victims of intentional torts, it does not tolerate opportunistic behavior by such victims. 31

The above discussion demonstrates that the rule of avoidable consequences applies to parties victimized by breaches of contract and tort, even intentional ones. 42 We will now consider whether a rule of avoidable consequences is appropriate for antitrust cases. The relevant question here is whether it makes sense, from a public policy perspective, to transfer some formulation of the rule of avoidable consequences to antitrust cases. 43

39. Id. § 918(2) cmt. a, illus. 6.
40. Id. § 918(2) cmt. a, illus. 7.
41. See id.; see also, e.g., Barry & Sewall Indus. Supply Co. v. Metal-Prep of Houston, Inc., 912 F.2d 252, 259 (8th Cir. 1990) (reducing a corporation's consequential damages award based on the fact that it chose not to replace a defective product when it could have easily done so, thereby minimizing the harm it suffered in lost profits).
42. See RESTATEMENT (SECOND) OF TORTS § 918 cmt. a. As the comment states, generally "the rule applies irrespective of the motive or state of mind of the tortfeasor. Thus it applies although the defendant intended to commit a tort or was reckless in its commission." Id. The following is an example of a situation where the victim of an intentional tort must nonetheless act reasonably:

A intentionally strikes B, causing a slight wound on B's hand. B unreasonably delays in taking antiseptic measures and the wound becomes infected, as a result of which B is unable to use his hand for six weeks. B sues A, claiming damages, including loss of six weeks' earnings. A files an answer stating that B was neglectful in not having the wound attended to. The answer is not a defense to B's action, but B is entitled to damages only for the pain, loss of earnings and other elements of damages that B would have suffered if he had used reasonable care.

Id. § 918 cmt. a, illus. 1.

Hence, not all intentional tort victims get the benefit of a relaxed rule of avoidable consequences.

43. It has been said that the goal of the antitrust laws is to promote a market system that maximizes societal wealth by allocating our resources in an efficient manner. See RICHARD A.
C. Antitrust Actions

Antitrust actions, as they typically incorporate at least some tort principles, are a specie of tort. However, they are special claims designed to redress a very specific type of harm known as “antitrust injury.” This type of injury represents harm to the competitive process which the antitrust laws are designed to prevent. The process is protected because it is believed to lead to the maximization of consumer welfare.

“Antitrust injury” is really an issue of causation. The purpose of such a requirement is to distinguish compensable harm caused by a defendant’s anticompetitive actions from “harm” a plaintiff may suffer (but may not recover for) from legitimate competitive efforts of a de-

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44. See Burlington Indus., Inc. v. Milliken & Co., 690 F.2d 380, 391 (4th Cir. 1982) (explaining that historically, courts have handled violations of the antitrust laws as something “akin to torts”). In addition, antitrust actions also involve contract principles. Among the most notable is the prohibition in section one of the Sherman Act against “[e]very contract, combination . . . or conspiracy in restraint of trade.” 15 U.S.C. § 1 (1994).

45. See American Soc’y of Mechanical Eng’rs, Inc. v. Hydrolevel Corp., 456 U.S. 556, 565-69 (1982) (drawing an analogy between tort law and antitrust laws); Grip-Pak, Inc. v. Illinois Tool Works, Inc., 694 F.2d 466, 473 (7th Cir. 1982) (applying the “age-old tort principle of remoteness of damage to the novel statutory tort created by the federal antitrust laws”); see also Edward D. Cavanagh, Contribution, Claim Reduction, and Individual Treble Damage Responsibility: Which Path to Reform of Antitrust Remedies?, 40 VAND. L. REV. 1277, 1278 (1987) (discussing the fact that antitrust violations have been typically analyzed as statutory torts, even though federal courts have declined to extend some tort principles of damage allocation to antitrust cases).

46. See Atlantic Richfield Co. v. USA Petroleum Co., 495 U.S. 328, 333 (1990) (finding that distributor actually benefited from the alleged wrong and thus suffered no antitrust injury as a consequence of maximum resale price fixing scheme); Cargill, Inc. v. Monfort of Colorado, Inc., 479 U.S. 104, 122 (1986) (declaring that in antitrust actions where a plaintiff seeks injunctive relief, he or she must show that there was antitrust injury and that damages based solely on an increase in competition is not such an injury); Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 584-85 n.8 (1986) (explaining that one does not suffer an antitrust injury unless one can show that there was a conspiracy to drive one out of a particular market by establishing that another predatorily underpriced the product); Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 489 (1977) (defining “antitrust injury” as injury that is of the type of harm antitrust laws were designed to prevent and that stems from activity that is unlawful).

47. See POSNER, supra note 43, at ix (explaining the widely held belief that the goal of antitrust laws is the promotion of competition). For a discussion of the relevant goals of antitrust and the meaning of competition, see Sam D. Johnson & A. Michael Ferrill, Defining Competition: Economic Analysis and Antitrust Decisionmaking, 36 BAYLOR L. REV. 583 (1984) (discussing how economic theory has played an exceedingly dominant role in issues involving antitrust).

48. See BLAIR & KASERMAN, supra note 26, at 22; supra text accompanying note 26.

49. See Matsushita Elec. Indus. Co., 475 U.S. at 584-85 n.8 (explaining that where a plaintiff asserts that he or she has suffered an antitrust injury, it must be shown that the defendant actually planned to force plaintiff out of a certain market in an anticompetitive fashion).
fendant. Condemning pro-competitive practices or effects would be counter-productive.

From the plaintiff's perspective, the benefit of showing antitrust injury is that it may lead to an award of treble damages. This remedy remains available to private plaintiffs as a component of a tripartite enforcement scheme also involving the Federal Trade Commission and the Justice Department.

There is perhaps a cogent argument against requiring mitigation that can find support in this congressional decision to give victims of the antitrust laws a private cause of action for treble damages. Some of the policies promoted by such a legislative choice—private enforcement, punishment, and deterrence—are not ostensibly concerned with, and are, in part, arguably at odds with principles minimizing or limiting a plaintiff's recovery. One wishing to exalt these antitrust policies

50. See id.; see also Datagate, Inc. v. Hewlett-Packard Co., 941 F.2d 864, 869 (9th Cir. 1991) (holding that competitor did not suffer antitrust injury from policies that deterred potential competition); Anesthesia Advantage, Inc. v. Metz Group, 759 F. Supp. 638, 645 (D. Colo. 1991) (holding that nurse anesthetists suffered no antitrust injury from alleged price fixing by anesthesiologists).

51. See infra note 60 and accompanying text.

52. See 15 U.S.C. § 15(a) (1994) ("Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws . . . shall recover treble the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.").

53. For a discussion of other proposed enforcement schemes, see William H. Page, Optimal Antitrust Penalties and Competitors' Injury, 88 MICH. L. REV. 2151 (1990). But cf. Herbert Hovenkamp, Antitrust's Protected Classes, 88 MICH. L. REV. 1, 1 (1989) (disagreeing and contending that there should be a wider range of lawsuits permitted even if one accepts the proposition that efficiency should be the only goal of antitrust enforcement). See also infra note 61 and accompanying text (discussing the impact of treble damages).


55. Consistent with the policy of deterrence, the Supreme Court has held that there is no claim for contribution among antitrust co-conspirators. See Texas Indus., Inc. v. Radcliffe Materials, Inc., 451 U.S. 630, 646 (1981) ("[N]either the Sherman Act nor the Clayton Act confers on federal courts the broad power to formulate the right to contribution sought here.").

56. See Hanover Shoe, Inc. v. United Shoe Mach. Corp., 392 U.S. 481, 494 (1968) (holding that a defendant could not reduce its liability by proving that the overcharged direct purchasers had "passed on" the overcharge to others down the chain). In essence, the Court decided that any principles of mitigation had to yield to what it perceived to be larger issues of effective antitrust enforcement. See id. at 491-94. In so doing, the Court did not analyze the conservation of resources policy underlying the rule of avoidable consequences.

The Court may have assumed that the misallocation or misuse of resources occurred when the price-fixing or monopolizing manufacturer restricted output and correspondingly increased the price of his good. If this allocative efficiency was the "waste" of resources of principal concern to the Court, then there was nothing that the plaintiff could do to mitigate this. The harm was already done by the restriction in output. Consumers, willing to pay more than the marginal cost of the good, were unable to obtain supply. Plaintiff's ability or inability to pass on an overcharge would
might argue that a plaintiff's mitigation efforts are no legitimate concern of the antitrust laws. 57

Such a stance, however, would require a view of antitrust violations as so pernicious that every prophylactic and remedial measure must be employed in opposition to each one. 58 While this may be true of certain anticompetitive practices, it hardly seems that the same can be said of all antitrust violations. 59 The literature is replete with examples of judicial condemnation of pro-consumer practices offered as evidence of a failed antitrust policy. 60 There is also much criticism of the treble damage remedy which magnifies the effect of any rule of avoidable consequences. 61 Acknowledging that there are arguably “unintentional”

simply determine whether the overcharge would continue through the distribution chain or come to rest with the plaintiff.

57. Several years ago, a professor and practitioner put forth the following propositions after analyzing how courts have reviewed principles of mitigation and antitrust laws:

"In the damages area, the problem of goals arises in the basic question of whether antitrust damages should emphasize deterrence or compensation... Thus, depending upon the goals emphasized by a particular court there is likely to be a great divergence in whether an antitrust plaintiff will be required to mitigate damages. If, for example, a court focuses on the deterrent/enforcement/punitive aspect of the law, it is not likely to require a plaintiff to mitigate his damages. If a court emphasizes the compensatory nature of treble damages, then, just as in the law of torts or contracts, the court is likely to find mitigation of damages mandatory and impose such a duty.

When the emphasis of the court stresses both compensatory and deterrent policies on the damages issue, mixed and matched with any or all of the overall goals of the antitrust law, then the mitigation principles will likely be applied on a case by case basis, with the result dependent upon the facts and circumstances of each situation. This may account for the many "implied duty" cases in which courts have called for the antitrust plaintiff to mitigate damages but have stated no affirmative duty to do so.

Hamilton & Cone, supra note 9, at 347-48 (footnotes omitted).

58. Of course, this view would require all antitrust infractions to be treated as per se violations of the law.

59. See Cavanagh, supra note 45, at 1300 (arguing that a blanket rule that prevents a claim of contribution for antitrust violations should not be enforced against those who commit such violations unintentionally).

60. See Robert H. Bork, The Antitrust Paradox: A Policy at War with Itself 4 (1978) (contending that the Supreme Court's jurisprudence in the area of antitrust has had the practical effect of stifling effective business practices and driving prices higher for consumers).

violations and considerable and thoughtful criticism of the standards applied by courts in interpreting the antitrust laws, it seems too radical a posture to dispense in all instances with the rule of avoidable consequences.

Moreover, the rule of avoidable consequences is consistent with another goal of the antitrust laws—compensation. 62 This is a principal goal operating in the contract and tort arena where the rule of avoidable consequences has long existed. 63 If plaintiff’s subsequent passivity or

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62. See Esquibel, supra note 54, at 165-66; see also Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 485-86 (1977) (stating that damages subject to trebling are compensatory in principle).

63. However, cases in these areas of law are far from consistent. See, e.g., Barnard v. Compugraphic Corp., 667 P.2d 117, 120 (Wash. Ct. App. 1983) (allowing plaintiff to recover full measure of claim despite failure to mitigate).
bad judgment is more responsible for plaintiff's harm than the defendant's original action, plaintiff is equitably denied compensation by the rule. Therefore, in a sense, the policy of compensation operates to the minimum extent necessary. The rule of avoidable consequences facilitates this.

In doing so, however, it does not necessarily undermine the punishment and deterrent effect of the law. As with any tort or contract claim, an antitrust plaintiff who cannot fully mitigate will have an incentive to bring an action. The defendant will still need to fear this. Also, it does not seem that the defendant's reliance on a rule of avoidable consequences would make him a secure violator of the antitrust laws. He cannot be sure of what, if anything, the plaintiff can reasonably accomplish through mitigation. The trebling of whatever remains "unmitigated" serves to promote the policies of punishment and deterrence.

Hence, the prudent and practical position is that the rule of avoidable consequences has a role to play in the antitrust laws. Consistent

64. See William H. Page, Antitrust Damages and Economic Efficiency: An Approach to Antitrust Injury, 47 U. Chi. L. Rev. 467, 487 (1980) (stating that if plaintiff's conduct increases harm, it should not be compensable).

65. Additionally, when one deems the rule of avoidable consequences as a principle designed to properly measure the true loss caused by the defendant, the rule can be viewed as consistent with antitrust policies of private enforcement, punishment, and deterrence. See, e.g., Hanover Shoe, Inc. v. United Shoe Mach. Corp., 392 U.S. 481, 494 (1968) (recognizing deterrent effect of the antitrust laws).


67. See id.

68. See Roger D. Blair & William H. Page, "Speculative" Antitrust Damages, 70 Wash. L. Rev. 423, 448 (1995) (explaining that when examining a plaintiff's claim of antitrust damages against a defendant, any poor decisions made by the plaintiff during the damage period should be accounted for in computing a basis for damages). In formulating an antitrust damage model, the authors repeatedly acknowledge the necessity of considering the mitigation efforts of the plaintiff. The following excerpts are illustrative:

If a plaintiff who is illegally foreclosed from one profitable opportunity uses its resources to pursue the next-best alternative, its calculation of its actual condition must net out the compensating gains. Indeed, because the plaintiff is required to take reasonable steps to mitigate damages, a court may make such a deduction even if the plaintiff does not actually pursue the alternative opportunity. When a plaintiff is illegally excluded from one opportunity, its harm is the expected value of that opportunity. Any valuation of that opportunity must take account of costs the plaintiff would have incurred in pursuing it, including the cost of giving up the next-best alternative open to the plaintiff. If an excluded plaintiff unreasonably fails to pursue the next-best opportunity, then the plaintiff's own actions, not the defendant's illegal conduct, are responsible for that loss.

Id. at 431-32 (footnotes omitted).
with this, mitigation principles in antitrust actions incorporate the Restatement's general precepts. However, it is not clear that the general language of the Restatement is the best formulation of a rule of avoidable consequences for the antitrust laws.

A look at some of the antitrust case law using mitigation principles may help to develop a better framework.

III. THE RULE OF AVOIDABLE CONSEQUENCES IN ANTITRUST CASES

The rule of avoidable consequences receives the most attention in antitrust cases where a plaintiff is suing to recover profits that his business has lost due to an antitrust violation. Most commonly in the re-

Related to these points is the possibility of mitigation efforts by the plaintiff. If the plaintiff could have reduced its harm by alternative uses of its resources, the damage model must take those opportunities into account. In effect, the plaintiff's actual condition must be adjusted for rational mitigation efforts before it is compared with the but-for condition.

Id. at 456-57 (footnotes omitted).

69. See supra notes 10-13, 18, 35-44 and accompanying text.

70. For a compilation of some of the pre-1987 antitrust cases involving mitigation, see Hamilton & Cone, supra note 9, at 360-61. The authors, mindful of the importance of both economic efficiency and the deterrent effect of the antitrust statutes, recommend that plaintiffs should have a "duty to mitigate" their damages, but that the defendants should have the burden of showing by clear and convincing evidence that the plaintiff failed to discharge this "obligation." See id. at 342.

71. Unlike the cases discussed herein, in many price-fixing and monopolization cases, the plaintiff is frequently an overcharged consumer of the goods that are subject to the monopolization or price-fixing arrangement and is seeking to recover the amount of the overcharge. Here, the mitigation principle has been rendered moot in large part by a pair of cases dealing with the issue of "passing on." "Passing on" is a phenomenon of the chain of distribution. See Hanover Shoe, Inc. v. United Shoe Mach. Corp., 392 U.S. 481, 487-88 (1968). A distributor who has been overcharged by virtue of the antitrust violation generally will attempt to pass this overcharge on to someone lower in the distribution chain. See id. Tracing this increased cost as part of a damage calculation is no small feat. It is one that the Supreme Court resisted in two seminal cases raising this issue.

In the first case, Hanover Shoe, 392 U.S. at 481, the Court dealt with a shoe manufacturer who sued a lessor of shoe manufacturing equipment who refused to sell that equipment to the plaintiff. See id. at 483-84. The plaintiff alleged that this was an act of monopolization. See id. at 483. On appeal, the defendant argued that the plaintiff had suffered no harm because the increased costs associated with renting over buying the machines had been "passed on" to customers who purchased shoes. See id. at 487-88. In a sense, the defendant argued that the plaintiff had fully mitigated its damages.

However, the Court rejected this argument on several grounds. First, the Court felt that the plaintiff absorbed the loss because "had the price paid been lower his profits would have been higher." Id. at 489. Secondly, the Court opined on the enormous practical problems that permitting the "pass on" defense would present.

Having answered negatively the question of whether "passing on" could be used defensively, the question of whether it could be used offensively still remained for the Court. In Illinois Brick Co. v. Illinois, 431 U.S. 720 (1977), the Court considered the case of a plaintiff, an indirect
ported cases, this has been where a distributor of a good is terminated or a competitor is otherwise excluded from the market. As seen below, the rule of avoidable consequences is invoked by defendants seeking to reduce these damages. Additionally, mitigation principles are often applied in antitrust cases in evaluating whether the plaintiff has suffered antitrust injury and whether plaintiff, in fact, suffered harm. The fol-

72. See infra notes 75-125 and accompanying text.

73. For example, in Lee-Moore Oil Co. v. Union Oil Co., 599 F.2d 1299 (4th Cir. 1979), the plaintiff was a gasoline "jobber" who had a contract with an oil supplier to supply a brand-name gasoline to retailers. See id. at 1300. The plaintiff's contract was canceled and plaintiff had difficulty finding an alternative brand-name supply. See id. at 1300-01. The plaintiff alleged that this cancellation was part of a conspiracy to create an oil shortage and increase the price of gasoline by driving some fiercely competitive jobbers from the market. See id. at 1301. The plaintiff sought to recover the difference between the higher price paid for the alternative and the lower price it would have paid under the contract. See id. at 1306. The plaintiff also wanted to recover administrative expenses in seeking new suppliers and assisting customers in switching brands. See id. at 1306.

In considering whether the plaintiff suffered antitrust injury, the court stated that the mere availability of alternative brands did not bar an antitrust claim. See id. at 1305. The majority held that the damages sought by the plaintiff were appropriate because they allegedly were incurred by the plaintiff in mitigating the anticompetitive effects of defendant's antitrust violation. See id. at 1305. The dissent argued:

Under the majority's theory, the plaintiff has suffered an antitrust injury from a lost sale of one brand of a product although the sale of another brand was made, and such an injury from a lost customer although another customer took his place. I do not believe that either correctly states the law. I believe, for antitrust damages, the sale of one brand is as good as another, and the sale to one customer is as good as to another.

Id. at 1309 (Widener, J., concurring and dissenting).

74. Mitigation principles were applied to determine whether the defendant caused harm in Elder-Beerman Stores Corp. v. Federated Department Stores, Inc., 459 F.2d 138 (6th Cir. 1972). The defendants in Elder-Beerman were accused of unlawfully restraining trade and attempts to monopolize by allegedly foreclosing avenues of supply to the plaintiff. See id. at 139-41. In considering whether the jury verdict in favor of the plaintiff, a competitor of the defendant, should stand, the court stated that "[a]n essential element in attempting to establish the fact of damage because of exclusion from a specified source of supply is the lack of an alternative comparable substitute for the desired merchandise." Id. at 148. In reviewing the evidence, the court stated that while there was some employee testimony that plaintiff could have done better if it had been able to get the brands it desired, there was no independent evidence as to the uniqueness of the desired brands. See id. at 149. Since the court had already reversed the judgment on other grounds, it did not reverse on this ground as well, but it expressed grave doubt about the sufficiency of plaintiff's evidence. See id.

This same issue arose in Beach v. Viking Sewing Machine Co., 784 F.2d 746 (6th Cir. 1986). Here, the plaintiff, a discount dealer of sewing machines, alleged a conspiracy to maintain the retail prices of sewing machines and a concerted refusal to deal. See id. at 747-48. The defendants claimed that plaintiff did not receive a dealership because plaintiff did not provide adequate
lowing are some of the experiences the federal circuit courts have had with the rule of avoidable consequences in antitrust cases.

The Second Circuit applied the rule of avoidable consequences to an antitrust plaintiff in *Borger v. Yamaha International Corp.*

Here, the plaintiff sought to become a distributor of defendant’s name-brand audio products, and the plaintiff believed he had such a contract with the defendant. Subsequently, however, as part of an allegedly illegal boycott, the defendant supposedly refused to deal with the plaintiff. The defendant asserted that the plaintiff was rejected based on a dealer canvass that produced a less than enthusiastic response. Defendant appealed an award of damages to plaintiff and contested, among other issues, a jury instruction that said the proper measure of damages was the lost profits that it would have earned from the dealership had the plaintiff received it.

The appellate court found this instruction inaccurate because it did not take into account the plaintiff’s “duty to mitigate.” The court held that the proper measure was the overall harm done to plaintiff’s business due to the absence of defendant’s line. The court stated that plaintiff’s “duty to mitigate” compelled the plaintiff to take reasonable steps to merchandise substitute lines. In fact, plaintiff may have devoted its efforts to other products, and profits from these efforts may have increased. According to the court, if this were true, plaintiff could not recover these sums from the defendant. However, if this were not true and the impact of the loss could not be reduced by selling other lines, this too should have been made clear to the jury.

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75. 625 F.2d 390 (2d Cir. 1980).
76. See id. at 392-94.
77. See id. at 398-99.
78. See id. at 399.
79. See id. at 398-99.
80. See id. at 399.
81. See id.
82. See id.
83. See id. at 398-99. Previously, in *Triebwasser & Katz v. American Telephone & Telegraph Co.*, 535 F.2d 1356 (2d Cir. 1976), the Second Circuit had addressed a plaintiff’s “duty to mitigate” in an antitrust action seeking injunctive relief. See id. at 1360. In this case, the plaintiff, a detective agency, sued the publisher of the yellow pages phone directory when it refused to publish the plaintiff’s advertisement. See id. at 1357-58. The plaintiff alleged that this was part of a

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*Esquibel: The Rule of Avoidable Consequences in Antitrust Cases: A Law and Published by Scholarly Commons at Hofstra Law, 1998*
Likewise, the Fifth Circuit has addressed mitigation issues in antitrust cases. In *Golf City, Inc. v. Wilson Sporting Goods, Inc.*, the Golf City specialty retail store sued the Professional Golfers’ Association of America and fourteen manufacturers of golf equipment. Golf City alleged that a conspiracy existed among the defendants and that the result of that conspiracy was a refusal to sell prestige lines of golf equipment to Golf City in violation of the antitrust laws. Ultimately, Golf City was awarded treble damages, interest, and attorneys’ fees. On appeal, the defendants raised numerous challenges to the liability finding and damage award, including the district court’s failure to deal with the question of mitigation of damages.

In its opinion, the Fifth Circuit acknowledged an antitrust plaintiff’s “duty to mitigate.” The court stated that Golf City might have mitigated in either of two ways. The first option was to purchase “leaked” pro-line equipment from pro shops. The second was to increase its sales volume of store-line merchandise to compensate for the inability to obtain pro-line goods.

Golf City asserted that the bootleg market was unreliable and “leaked” goods were more expensive. Furthermore, it claimed there

conspiracy to restrain competition in violation of the Sherman Act. See id. at 1358. The court stated that the plaintiff had an obligation to mitigate its damages, and that “[w]hile the court below accepted ... testimony that similar coverage would entail prohibitive costs ... there is no indication that the defendants are financially unable to respond in damages in the event judgment is eventually entered against them.” Id. at 1360. Hence, the comparable advertising could serve to permit plaintiff to prove its harm. Therefore, the plaintiff did not satisfy the irreparable harm element required for injunctive relief. See id. at 1359-60. For this reason, among others, the court reversed the entry of the preliminary injunction. See id. at 1360; see also Litton Sys., Inc. v. American Tel. & Tel. Co., 700 F.2d 785, 820 (2d Cir. 1983) (rejecting defendant’s argument that plaintiff failed to mitigate because it was inconsistent with defendant’s other arguments and it was an affirmative defense which defendant failed to plead or prove).

84. 555 F.2d 426 (5th Cir. 1977).
85. See id. at 429. However, by the time this case reached the court, all but one of the manufacturers had settled with Golf City. See id.
86. See id. The court noted that “[g]olf equipment merchandising in the United States is two-tiered.” Id. In most cases, equipment manufacturers have a store-line and a pro-line. The former was sold to qualifying retail stores while the latter was sold to pro shops. See id. at 429-30. Golf City was a retail store. See id. at 430.
87. See id. at 429.
88. Id. at 436.
89. See id. at 436. This “leaked” equipment was really a bootleg market created by pro shops willing to sell pro-line equipment to retailers who could not obtain such goods directly from the manufacturers. See id. at 431. The concerted efforts by manufacturers to stop “leakage” was also a feature of the liability finding. See id. at 431.
90. See id. at 436. In addition, the court noted that the record contained no findings whatsoever about mitigation of damages. See id.
91. See id.
was little cross-elasticity of demand between store-line and pro-line goods, rendering infeasible the second option.\textsuperscript{92} Despite this, the court found that Golf City remained under a "duty to mitigate" and remanded the case for findings about mitigation.\textsuperscript{93}

The Fifth Circuit took another look at the mitigation issue in \textit{Malcolm v. Marathon Oil Co.}\textsuperscript{94} The plaintiff in \textit{Malcolm}, an independent gasoline retailer, sued several gasoline retailers and alleged price-fixing, predatory pricing, and a concerted refusal to deal.\textsuperscript{95} The predatory pricing and refusal to deal allegedly undertaken to support the price-fixing conspiracy.\textsuperscript{96} In connection with plaintiff’s damages claim for the refusal to deal, the court looked at plaintiff’s "duty to mitigate."\textsuperscript{97} The defendant argued that its actions did not exhaust plaintiff’s supply of gasoline and that the plaintiff abandoned his business without seeking alternative sources of supply.\textsuperscript{98}

The court discussed this problem of causation and the fact that an antitrust victim must take efforts to minimize his damages.\textsuperscript{99} The court held that while the plaintiff had to take reasonable steps to find an alternative supply, the burden of establishing this was on the defendant.\textsuperscript{100} The defendant’s only proof was plaintiff’s failure to contact a few suppliers.\textsuperscript{101} This was held to be insufficient, especially in light of the plaintiff’s proof that he made numerous, albeit unsuccessful, phone calls to secure an alternative supply source.\textsuperscript{102}

\textsuperscript{92} See \textit{id.}.

\textsuperscript{93} See \textit{id.} Although remanding for findings, the court’s unwillingness to accept the plaintiff’s assertion about the bootstrap market indicates that, at a minimum, it expected some proof of that beyond a mere assertion.

\textsuperscript{94} 642 F.2d 845 (5th Cir. Unit B Apr. 1981).

\textsuperscript{95} See \textit{id.} at 847.

\textsuperscript{96} See \textit{id.}

\textsuperscript{97} \textit{id.} at 863 (citing \textit{Golf City, Inc. v. Wilson Sporting Goods, Inc.}, 555 F.2d 426 (5th Cir. 1977)).

\textsuperscript{98} See \textit{id.} at 862.

\textsuperscript{99} See \textit{id.} at 863.

\textsuperscript{100} See \textit{id.}

\textsuperscript{101} See \textit{id.}

\textsuperscript{102} See \textit{id.} Furthermore, the court found that:

Even if the burden was on Malcolm, he would still prevail on this point. Requiring an antitrust plaintiff to prove such a negative as a lack of alternative supply places too great an obstacle in the way of antitrust recovery. The greatest burden that reasonably could be placed on him would be the burden to show the reasonableness of his mitigation efforts. And even if Malcolm had that burden, we would hold that he has met this burden by introducing evidence of his efforts to obtain alternative suppliers of gasoline. This proof consisted of Malcolm’s testimony that his numerous calls to gasoline suppliers failed to secure him any gasoline.

\textit{id.} at 863.
In another Fifth Circuit case, Pierce v. Ramsey Winch Co., a defendant appealed an adverse verdict of liability and damages for violating section one of the Sherman Act. The plaintiff was a terminated distributor who alleged that the defendant manufacturer terminated plaintiff, a price-cutting distributor, in furtherance of a resale price maintenance scheme. The defendant claimed that the plaintiff failed to adequately perform its warranty and service obligations. The defendant also contended that plaintiff’s solicitation of orders from other of the defendant’s distributors was disrupting defendant’s distribution system. Additionally, many of defendant’s distributors complained to defendant that plaintiff’s prices were too low.

In reviewing the jury’s award to the plaintiff, the court considered the following instruction given by the trial court on mitigation:

You are instructed that Plaintiff[ ] is not entitled to recover an element of damages which could have been avoided through the exercise of reasonable efforts on [its] part. Plaintiff[ ] is not entitled to increase [its] damages through inaction, but must have taken all reasonable steps to mitigate [its] damage and reduce [its] loss.

Should you find that Plaintiff[ ] could reasonably have avoided the losses claimed, you must limit [its] damages to those losses which [it]...
would have suffered had [it] attempted to mitigate [its] damages.\textsuperscript{109}

The court also examined the defendant’s proposed instruction, which read as follows:

You are instructed that a distributor of goods who alleges that it has been unlawfully terminated by its manufacturer has the duty to mitigate any damages it may have suffered by reason of such action. That is to say, it must take reasonable steps to reduce any such damages, such as securing a supply of similar goods to replace those previously furnished by the terminating manufacturer. You are further instructed that a plaintiff cannot recover any damages that it reasonably could have mitigated but did not.\textsuperscript{110}

The defendant’s instruction, unlike the court’s, provided a specific example of a reasonable step to avoid damages: “securing a supply of similar goods to replace those previously furnished by the terminating manufacturer.”\textsuperscript{111} The court rejected the defendant’s argument that the omission of this example was reversible error.\textsuperscript{112}

In so holding, the court said that it was undisputed that the plaintiff had secured an alternative source of supply following its termination.\textsuperscript{113} Plaintiff’s damage model, which the jury accepted, accounted for these substitute sales.\textsuperscript{114} Instead, the defendant complained that the jury did not reduce damages by plaintiff’s profits on other types of products.\textsuperscript{115} This alleged form of mitigation was not contained in defendant’s proposed instruction.\textsuperscript{116} Consequently, the court held that there was no error by the trial court in refusing to give the defendant’s instruction.\textsuperscript{117}
The mitigation issue arose again in the Seventh Circuit case of Trabert & Hoeffer, Inc. v. Piaget Watch Corp.\textsuperscript{118} Here, several watch manufacturers were accused by a terminated jewelry retailer of engaging in a vertical price-fixing conspiracy.\textsuperscript{119} After the plaintiff was awarded damages, the defendants appealed, maintaining that the evidence supported neither the fact nor amount of damage.\textsuperscript{120} To support their assertion of no damage, the defendants argued that there was no evidence regarding the lack of substitute watches.\textsuperscript{121}

The court rejected defendant's argument and cited several cases for the proposition that defendant's termination of plaintiff as a dealer was sufficient harm in and of itself.\textsuperscript{122} The court further stated that even if the termination did not constitute such injury, the evidence showed that procuring substitutes would not have prevented plaintiff's loss.\textsuperscript{123} As the defendant's products had considerable name-brand recognition, the loss of these products hurt plaintiff's goodwill and image.\textsuperscript{124}

\textsuperscript{118} 633 F.2d 477 (7th Cir. 1980).
\textsuperscript{119} See id. at 479-80.
\textsuperscript{120} See id. at 482.
\textsuperscript{121} See id.
\textsuperscript{122} See id.
\textsuperscript{123} See id. at 482-83.
\textsuperscript{124} See id. at 483. Likewise, the court acknowledged the significance of product differentia-
As can be seen from the above, the issue of mitigation does arise in antitrust actions. Despite this, it has received only cursory attention in court opinions. The above cases do little more than restate the rule of avoidable consequences. An attempt will now be made to synthesize the difficulties presented by them into a better rule of avoidable consequences specific to antitrust cases.

The Eleventh Circuit seems to have more than its fair share of experience with this issue. See DeLong Equip. Co. v. Washington Mills Electro Minerals Corp., 990 F.2d 1186, 1198 (11th Cir. 1993) (finding that because the primary customer of plaintiff had very high standards for approving product, the court rejected defendant's argument that there was no causal connection between plaintiff's termination and the alleged lost profits because substitutes were supposedly available). The DeLong court also rejected defendant's contention that plaintiff had not suffered antitrust injury because even if the plaintiff could have continued to compete in the media market with another manufacturer's product, the defendant's product had certain competitive advantages. See id. at 1199; see also Construction Aggregate Transp., Inc. v. Florida Rock Indus., Inc., 710 F.2d 752, 784-85 (11th Cir. 1983) (rejecting the defendant's mitigation argument where plaintiff diligently tried to replace customer with a comparable customer but was not totally successful); Graphic Prod. Distrib., Inc. v. Itek Corp., 717 F.2d 1560, 1583 & n.43 (11th Cir. 1983) (rejecting defendant's mitigation argument where there was ample evidence supporting plaintiff's efforts to mitigate damages even under adverse conditions and where defendant, on whom the burden rested, neither challenged the evidence nor presented any conflicting evidence of its own); McClure v. Undersea Indus., Inc., 685 F.2d 1309, 1310-11 (11th Cir. 1982) (finding that where there was evidence of both availability and purchases of scuba gear on favorable terms, plaintiff could not demonstrate causation of injury in fact).

While the case discussion focuses on circuit court opinions, mitigation principles have also been applied by district courts in antitrust cases. See In re Airline Ticket Comm'n Antitrust Litig., 918 F. Supp. 283, 286 (D. Minn. 1996) (declaring that while generally an antitrust plaintiff has a duty to mitigate, "[i]n a horizontal price-fixing case mitigation and offset generally do not affect the ultimate measure of damages"); Three Crown Ltd. Partnership v. Salomon Bros., 906 F. Supp. 876, 887 (S.D.N.Y. 1995) (rejecting plaintiff's mitigation argument, which alleged that plaintiff suffered losses liquidating assets transferred to it by victims of illegal conduct); United States v. Stauffer Chem. Co., Civ. No. 4-82-990, 1983 WL 1927, at *3 (D. Minn. Oct. 24, 1983) (recognizing speculative nature of damage claim which was subject to reduction due to failure to mitigate); Nurse Midwifery Assoc. v. B.K. Hibbett, M.D., 549 F. Supp. 1185, 1191 n.5 (M.D. Tenn. 1982) (recognizing that the total foreclosure of an alternative source was not essential to state boycott claim under Sherman Act and the "availability of an alternative source of coverage may be relevant to other issues not before the Court, however, such as plaintiffs' proof of damages"); Westman Comm'n Co. v. Hobart Corp., 541 F. Supp. 307, 312-15 (D. Colo. 1982) (finding that while an antitrust plaintiff's "duty to mitigate" might even impose on plaintiff an obligation to buy goods it cannot otherwise obtain through a bootleg market, such efforts were not feasible or cost-effective and therefore defendant's mitigation argument was rejected). In addition, the Hobart court also rejected the argument that the plaintiff failed to mitigate its damages by not promptly seeking an injunction. See Hobart, 541 F. Supp. at 314-15.
IV. A BETTER RULE OF AVOIDABLE CONSEQUENCES FOR ANTITRUST CASES

The cases discussed above illustrate the common contexts in which antitrust defendants invoke the rule of avoidable consequences. They do little, however, to develop reliable guideposts to assist the fact-finder (or potential litigants) in ascertaining whether plaintiff's damages ought to be limited by the rule. Jury instructions typically talk about the plaintiff's obligation to take "reasonable" efforts to avoid or minimize loss. Cases speak in somewhat conclusory terms about whether plaintiff fulfilled this obligation, or whether the defendant proved the contrary. In an effort to refine the rule of avoidable consequences in antitrust cases, attention must be given to the context in which it will be applied, specifically the policies promoted by the antitrust laws and the nature of an antitrust action.

A. An Economic View of Plaintiff's Mitigation Efforts

The science of economics has been used to rationalize many areas of antitrust law. The rule of avoidable consequences should be no exception. The following suggestions for improving this rule incorporate economics and borrow from another related and well-developed area of the law—the law of corporations.

126. See supra notes 75-125.
127. See, e.g., Graphic Prod. Distrib., Inc. v. Itek Corp., 717 F.2d 1560, 1583 (11th Cir. 1983) (holding that a plaintiff had fulfilled its obligation to mitigate damages and the defendant failed to present any evidence challenging such decision).
128. See, e.g., BLAIR & KASERMAN, supra note 26, at ix ("If the subject of industrial organization is, as many have argued, primarily applied microeconomics, then a presentation that ties the analysis directly to public policy applications should serve to vivify the otherwise dry theoretical models.").

Gellhorn and Kovacic write:
"In economic terms, competition maximizes consumer welfare by increasing both allocative efficiency (making what consumers want as shown by their willingness to pay) and productive efficiency (producing goods or services at the lowest cost thus using the fewest resources), and by encouraging progressiveness (rewarding innovation). Competition maximizes society's total wealth but does not necessarily result in optimal income distribution. By emphasizing competition, current antitrust policy focuses mainly on maximizing the size of society's economic pie."

ERNEST GELLHORN & WILLIAM E. KOVACIC, ANTITRUST LAW AND ECONOMICS 42 (1994).

Furthermore, Waldman comments:
"Economists often disagree about the economic impact of the antitrust laws. Virtually all economists would agree, however, that a major objective of antitrust policy should be a more efficient economic system. An obvious starting point in our evaluation of antitrust policy is an understanding of the concept of economic efficiency."

The first point that must be made is another basic tenet of economics. Our great confidence in the market economy is predicated on a basic assumption of human behavior. This assumption is that market participants seek to maximize their wealth. Collectively, we assume that this conduct will generally result in an optimal allocation and use of resources. While this wealth maximization principle may be at times violated, modern economic theory relies heavily upon it. Likewise, it is a prominent feature of antitrust economics. Hence, it seems reasonable to first analyze what effect that assumption has on a rule of avoidable consequences.

In so doing, a useful way to view an antitrust plaintiff's mitigation efforts is to see them as ordinary business decisions. Simply put, a plaintiff injured in his business or property by an antitrust violation, must make a business decision as to how to respond. Just as a plaintiff would have to respond to legitimate competitive efforts of its competitors, he must also respond to illegitimate ones.

This basic process is identical to the one that faces a business per-

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129. See Blair & Kaserman, supra note 26, at 5-16, 28-32 (discussing profit maximization by the firm facing perfect competition and by the monopolist); Gellhorn & Kovacic, supra note 128, at 48-52 (“Economic theory generally assumes that each business has one primary goal—to make as much money (more particularly, profit—the amount by which revenues exceed costs) as possible.”); Waldman, supra note 128, at 5, 7 (discussing profit maximization as indicated above).


"The terms 'value' and 'efficiency' are technical terms. 'Efficiency' means exploiting economic resources in such a way that 'value'—human satisfaction as measured by aggregate consumer willingness to pay for goods and services—is maximized. . . . Efficiency is . . . determined by willingness to pay, and the only way in which willingness to pay can be determined with certainty is by actually observing a voluntary transaction. Where resources are shifted pursuant to a voluntary transaction, we can be reasonably confident that the shift involves a net increase in efficiency. The transaction would not have occurred if both parties had not expected it to make them better off. This implies that the resources transferred are more valuable in their new owner's hands."

Id. (alteration in original).

131. See supra notes 128-30 and accompanying text; see also F.M. Scherer & David Ross, Industrial Market Structure and Economic Performance 52 (3d ed. 1990) (concluding that deviations from the profit maximization principle occur but are checked by competitive pressures and shareholders seeking to maximize their investment in the firm).

132. For examples of the extensive literature on antitrust economics, see supra notes 9, 26, 43, 45, 53, 54, 60, 61, 64, 68, 128, 130, and 131 and infra notes 137, 145, 148, and 149.

133. See, e.g., Sierra Wine & Liquor Co. v. Heublein, Inc., 626 F.2d 129, 132 (9th Cir. 1980) (rejecting plaintiff's argument that its acquisition of another distributorship would have happened anyway and was not mitigation because it would not make sense in the normal course of business for the plaintiff to have two distributorships).
son at every stage of his operation. When he begins, he must choose his line of business. As he operates, he must choose various methods. When he ceases doing business, he must choose a method of liquidation or sale. At every stage, an array of options present themselves and the business person chooses one based on the wealth maximization principle.

The array, however, is not static. It may, due to a variety of reasons, change over time. Hence, new options may become available, while others are lost. The additional difficulty is that, lacking clairvoyance, the business person must make these decision without certainty as to their outcomes.

Professors O'Kelley and Thompson give the following explanation of this phenomenon:

Participants in our market economy are constantly faced with investment decisions. Every participant has a store of human capital—a set of skills or an ability to render services. And many participants also have money capital—cash, cash equivalents, or other investment property that can be valued in terms of money. Economists assume that a rational person chooses her career, and adjusts that choice as circumstances change, in order to maximize the value of her human capital. Likewise, rational individuals with money capital deploy and redeploy those resources in a search for maximum value.

The search for maximum value requires rational investors to take both a comparative and an ex ante perspective. The perspective is comparative because a determination of the best investment decision involves a weighing of plausible alternatives. The perspective is ex ante because the goal is to predict which investment strategy will yield the optimal result. It may turn out afterwards, from an ex post perspective, that some road other than the one actually taken would have been more advantageous. Nevertheless, all of us must make our investment decisions before actual outcomes are known.134

Just as he would with respect to any other business decision, the plaintiff will choose the mitigation option which he believes, ex ante, will maximize his profits (or, in some cases, minimize his loss). Ideally, therefore, one might be inclined to say that such an analysis obviates the need for any rule of avoidable consequences.135 Market participants, antitrust victims included, will arguably act in such a way as to render

135. See supra notes 129-34 and accompanying text.
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In other words, they will always mitigate to the maximum extent possible. It seems likely that many plaintiffs will do just that.

One option for a plaintiff victimized by an antitrust violation is litigation. In considering this option, the would-be plaintiff must pursue litigation like any other investment and determine the money, time, and diversion that a lawsuit will involve and balance that against the potential damages (or other relief) to be obtained. Additionally, the plaintiff must assess whether litigation is the exclusive option, or whether it can be joined with (or replaced by) other efforts.

Relying on the vagaries of litigation is often unwise. Business people know, and if they do not, their lawyers soon teach them, that litigation is at best an uncertain process.

Moreover, litigation requires the investment of considerable time, effort, and other intangibles which may be invested more profitably elsewhere. While it may be that a prudent business person will pursue litigation, there are many that will nonetheless say that it is “better to avoid litigation than to win it.” Even if victims ultimately must resort to litigation, it will be only a part of a strategy involving other options with more social utility.

See, e.g., Sierra Wine & Liquor, 626 F.2d at 130-32 (discussing how the plaintiff was terminated from a wine distributorship agreement with the defendant, but proceeded to enter into another distributorship agreement with another company). In essence, it is in some senses contrary to a market economy’s basic behavioral assumption to need such rules.

Similarly, those with greater faith in the market than in our courts will undoubtedly favor less regulation. See William H. Page, Ideological Conflict and the Origins of Antitrust Policy, 66 Tul. L. Rev. 1, 5 (1991) (explaining how some believe that “judicial efforts to deter even truly monopolistic practices are likely to be inept, counter-productive, and long-lasting”).

Generally speaking, when the potential benefits of litigation outweigh these costs, we expect litigation to be initiated.

For example, one may seek to settle a case in advance of filing suit. Then, if the dialogue stalls, litigation can be commenced. At that point, settlement talks may or may not re-open. Alternatively, if settlement talks are not successful prior to initiating litigation, the aggrieved party may be able to convince the alleged wrongdoer to arbitrate the parties’ dispute.

Competent counsel will no doubt explain that a case’s outcome can turn on such things as the judge, jury, opposing counsel, opposing expert, supporting expert, and the credibility of the witnesses.

Given the protracted and expensive nature of antitrust litigation, it may often be the case that investing monies and efforts elsewhere may yield a greater return than the payment of those same funds to counsel and an array of experts.

See William D. Hawkland, Commercial Paper and Banking (Teacher’s Manual) 5 (1995). A practitioner interviewed in connection with this Article has consistently avoided litigation when it comes to his personal matters, even where he has lost substantial sums of money. As he put it, “a bad settlement is often better than a good lawsuit.” See Interview with Harry R. Schafer, supra note 8.
In light of all this, it seems even more reasonable to assume that a plaintiff will avail himself of all the extra-judicial opportunities available to recover from the harm he has suffered. This analysis, however, overlooks a few important points. The first of these is that an antitrust plaintiff may be strategically and opportunistically pursuing a lawsuit. A plaintiff might perceive litigation as a wealth maximizing alternative and not pursue other alternatives. Society generally seeks to discourage this because investments in litigation generally do not redound to

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144. Generally, this would include the plaintiff's efforts to mitigate its damages, as well as informally settle the dispute.

145. See William Breit & Kenneth G. Elzinga, Antitrust Penalty Reform: An Economic Analysis 36-39 (1986) (describing Golf City, Inc. v. Wilson Sporting Goods, Inc., 555 F.2d 426 (5th Cir. 1977), as judicial recognition of the inefficiency involved in antitrust litigation because some plaintiff's will purposely attempt to run up damages under the system of treble damages). The authors state that there are three economic costs associated with antitrust liability:

The first of the inefficiencies is that of perverse incentives. Under a system of treble damages, private parties may alter their economic behavior so as to contract the wealth of the economy. Under a system of treble damages, a customer of a cartel or monopolist has less motive to seek out substitutes. Indeed the customer may shop strategically, seeking to suffer damages in order to benefit from the collection of triple the amount of damages actually sustained. This is a variant of the moral hazard problem in insurance markets. . . .

. . . .

In response to the perverse incentives effect, courts now are more likely to expect plaintiffs to seek to mitigate their damages, a laudable situation.

. . . .

The second of the inefficiencies, the misinformation effect, is the propensity for a private litigant to fabricate antitrust cases where no anticompetitive situation exists. The distinction between this effect and perverse incentives is that in the latter an actual trade restraint may exist (and provoke inefficient behavior). Misinformation effects (or nuisance suits) are provoked by the lure of treble damages but involve no actual trade restraints. To be sure, such suits could be brought by public enforcement agencies, themselves acting under misinformation or out of base motives. But they would not be provoked by the lure of treble damages.

. . . .

There is a third inefficiency associated with private antitrust enforcement: reparations costs. While it is possible that society will incur costs of the misinformation effect even under a regime of public antitrust enforcement, reparations costs, like those associated with perverse incentives, are unique to private enforcement. These are the costs of resources used in determining and allocating damages (in contrast to public enforcement, which provides for no reparations).

Id. at 36-41 (footnotes omitted); see also Kenneth G. Elzinga & William Breit, The Antitrust Penalties: A Study in Law and Economics 84-96 (1976) (discussing further the three major sources of inefficiency stemming from antitrust actions).

146. See supra notes 135-45 and accompanying text; see also infra notes 156-58 and accompanying text (explaining how the business choices facing a victim of an antitrust violation can appear significantly different when viewed in hindsight).
Avoidable Consequences in Antitrust

In such a case, one might be inclined to give the defendant all available tools to limit the plaintiff's damages. In other words, we would prefer the plaintiff to invest in options other than litigation—options which may have more social utility. The rule of avoidable consequences encourages this.

Another way society accomplishes this objective is by giving federal courts the authority to impose sanctions on a party for filing a frivolous lawsuit. See Fed. R. Civ. P. 11. Antitrust cases present extremely difficult issues of damage calculation. This underscores the importance of a well-developed rule of avoidable consequences in antitrust cases. Indeed, in Fishman v. Estate of Wirtz, 807 F.2d 520 (7th Cir. 1986), the court was split as to whether it was discussing an issue of mitigation in the context of a complicated damage calculation. The plaintiff in Fishman, an unsuccessful bidder for a professional basketball franchise, brought an antitrust action under the Sherman Act against the defendants, the successful bidder for the franchise and the owner of the sports arena which the franchise called home. See id. at 525.

After affirming the lower court's finding of an antitrust violation, the court was confronted with the issue of damages. See id. at 547. Specifically, the lower court had declared that it would have been reasonable for the plaintiff to mitigate its damages by investing his risk capital in three-month treasury bills for several years while a satisfactory alternative investment was sought. See id. at 558-59. However, the court found that "leaving equity funds indefinitely in treasury bills could discourage enterprise and would not be a proper assumption for the computation of the opportunity cost of equity in the long run." Id. at 559-60. Furthermore, it decided that an opportunity cost of equity would have to be established on remand for the time that was after the initial term when funds would be left justifiably in treasury bills. See id. at 560. The dissent took issue with the characterization of opportunity cost as a mitigation principle. See id. Instead, the dissent said the opportunity cost of the equity would have been an element in the profit calculation. See id. at 581. The dissent admitted a conservative approach was appropriate for a mitigation problem, but did not see this as such, principally because it did not involve an analysis of plaintiff's conduct, but instead defendant's costs. See id. at 582. However, the dissent adamantly maintained that the opportunity cost should be deducted from profits. See id. at 581.

For further discussion of damage calculation involving opportunity costs, see Robert F. Lanzillotti & Amanda K. Esquibel, Measuring Damages in Commercial Litigation: Present Value of Lost Opportunities, 5 J. ACCT., AUDITING & FIN. 125 (1990) ("This ... article identifies some indirect opportunity costs that a plaintiff may suffer because of a defendant's wrongful act.").

Although they no doubt exist, strategic opportunities may not be as great as some might suggest. For example, if litigation is frivolous, there are numerous procedural and substantive safeguards that should frustrate the plaintiff. See Lande, supra note 61, at 171 (suggesting higher awards might be appropriate); see also Fed. R. Civ. P. 12(b)(6) (allowing a litigant to dismiss a claim by motion if relief cannot be granted by a court); Fed. R. Civ. P. 56(c) (allowing judgment for the moving party where there are no legitimate issues in relation to a material fact). But see Edward A. Snyder & Thomas E. Kauper, Misuse of the Antitrust Laws: The Competitor Plaintiff, 90 MICH. L. REV. 551, 551-54 (1991) (concluding that the private antitrust remedy is being misused by competitors claiming exclusionary conduct and that existing legal doctrines are ineffective screens). Both authors further recommend that the private antitrust remedy be eliminated and that instead we adopt a system whereby the authority of federal antitrust agencies to collect judgments on behalf of competitor plaintiffs is enlarged in case an antitrust violation truly does harm competitors. See id. at 597.

See Hamilton & Cone, supra note 9, at 341. The authors cite American Can Co. v. Russellville Canning Co., 191 F.2d 38, 55 (8th Cir. 1951), as a good example of a case where a plaintiff intentionally may have compounded his harm and was prevented from recovery for that unnecessary harm. See Hamilton & Cone, supra note 9, at 352.
On the theoretical balance, it is difficult to weigh a rule of avoidable consequences. However, the cost of having such a rule is probably rather low. It is merely one issue in a piece of litigation that is, more than likely, considerably complex. Furthermore, as illustrated by the cases discussed above, the proof of mitigation (or lack thereof) is also often proof of other important elements such as "antitrust injury" or "fact of harm."

As the rule of avoidable consequences does not seem to impose a great marginal cost on the litigants or the process and holds the promise of conservation of society's resources, it is logical to presume such a rule efficient and to make it available to litigants. There may be times when a plaintiff does not take efficient efforts to minimize his antitrust damages. In such a case, his damages should be limited. If plaintiff does take such measures, his damages will not be limited even in the presence of a rule of avoidable consequences. Such a rule, in addition to providing a more equitable outcome to the defendant, also provides an incentive to others to act more prudently when faced with a similar situation, without punishing any party that acts responsibly.

The above analysis suggests that a rule of avoidable consequences has utility. A different approach to mitigation, however, may be better than the traditional formulation of the rule of avoidable consequences, which in essence places the burden on the defendant to plead and prove that the plaintiff acted unreasonably or unlike the ordinarily prudent person. This formulation is vague. Moreover, case discussion fails to flesh it out. Furthermore, while this standard has a rich and useful common law tradition, it is not tailored to the special policies of the

151. An illustration of this would be a wrongfully terminated distributor of produce who abandons his property and takes no steps to secure an alternative supply of produce.

152. When the doctrine of avoidable consequences is at issue, the burden of establishing that the plaintiff has not discharged his "duty to mitigate" is almost always held to rest upon the defendant. See KNAPP, supra note 3, ¶ 4.07(1); see also MINZER ET AL., supra note 14, § 16.01 (declaring that to be successful in reducing damages for failure to mitigate the defendant must show that the plaintiff failed to take reasonable steps to lessen the damages and that the failure to take these reasonable steps enhanced the damages the plaintiff suffered); id. § 16.02 (explaining that before the defendant can avail himself of the mitigation defense, the defendant must prove that mitigation was reasonably possible and the plaintiff did not reasonably attempt to mitigate).

153. See United States Football League v. National Football League, No. 84 Civ. 7484 PKL, 1986 WL 10620, at *34 (S.D.N.Y. July 31, 1986) (providing a basic instruction to a jury on the plaintiff's responsibility to act "reasonably" when faced with a situation where it will suffer injury due to the illegal business conduct of another and the defendant's burden of proving that plaintiff did not).

154. See MODEL BUS. CORP. ACT § 8.30 official cmt. 1 (1991) (explaining that the "reference to 'ordinarily prudent person' embodies long traditions of the common law").
federal antitrust laws, which are different creatures than those existing at common law.  

In antitrust actions, the defendant-violator does something to unlevel the competitive playing field. As previously discussed, the victim, injured in his business, must now, in the face of uncertainty, choose among an array of business responses. In light of this, it seems appropriate to give a degree of deference to the plaintiff’s response decision and to place any burden of demonstrating its inadequacy on the defendant. Additionally, the substitution of the fact-finder’s hindsight judgment for that of the business person/plaintiff should be discouraged. Vague rules of law and instructions to the fact-finder that the plaintiff must do what is reasonable increase the risk of this substitution.

This risk of substitution of judicial judgment for business judgment has been extensively addressed in the law of corporations. There, a formulation has been reached which marries economic reality, the strengths and limits of judicial process, and the underlying policies served by the law. In essence, the improvement to the traditional formulation of the rule of avoidable consequences suggested by this Article is to borrow the business judgment rule from the law of corporations and apply it to an antitrust plaintiff’s mitigation efforts. To understand how a business judgment rule of avoidable consequences might work,

155. The federal antitrust laws play the special role of the vanguard of competition. See Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 488 (1977) (discussing the fact that antitrust laws were enacted by Congress for the purpose of guarding competition and not for protecting competitors).

156. For example, the defendant may engage in predatory pricing in order to eliminate competition. See William Inglis & Sons Baking Co. v. I.T.T. Continental Baking Co., 668 F.2d 1014, 1035-36 (9th Cir. 1982) (explaining that if plaintiff proves defendant’s prices were below average variable cost, plaintiff establishes prima facie case of predatory pricing).

157. See Gries Sports Enter., Inc. v. Cleveland Browns Football Co., 496 N.E.2d 964 (Ohio 1986) (explaining that the business judgment of a corporation’s board of directors will not be disturbed by the courts so long as it is not abused).

158. See, e.g., Gries Sports, 496 N.E.2d at 963-64. The court held:

The business judgment rule is a principle of corporate governance that has been part of the common law for at least one hundred fifty years. It has traditionally operated as a shield to protect directors from liability for their decisions. If the directors are entitled to the protection of the rule, then the courts should not interfere with or second-guess their decisions. If the directors are not entitled to the protection of the rule, then the courts scrutinize the decision as to its intrinsic fairness to the corporation and the corporation’s minority shareholders. The rule is a rebuttable presumption that directors are better equipped than the courts to make business judgments and that the directors acted without self-dealing or personal interest and exercised reasonable diligence and acted with good faith. A party challenging a board of directors’ decision bears the burden of rebutting the presumption that the decision was a proper exercise of the business judgment of the board.

Id. (footnotes omitted).
one must first acquire an understanding of the business judgment rule.

B. The Utility of a Business Judgment Rule of Avoidable Consequences

The business judgment rule presumes that directors of a corporation will exercise their business decisions "on an informed basis, in good faith, and in the honest belief" that they are acting in the company's best interests. The foundation for the business judgment rule is the standard of care and loyalty that a director owes his corporation. The business judgment rule attempts to balance the need for shareholders to have the benefit of enforceable fiduciary duties running to the board of directors of a corporation with the need to give directors the latitude to make risky decisions under uncertainty without unnecessarily fearing liability in the event hindsight reveals a poor decision.


160. One formulation of directors' standards is stated in the Model Business Corporation Act which provides that:

(a) A director shall discharge his duties as a director, including his duties as a member of a committee:
   (1) in good faith;
   (2) with the care an ordinarily prudent person in a like position would exercise under similar circumstances; and
   (3) in a manner he reasonably believes to be in the best interests of the corporation.

(b) In discharging his duties a director is entitled to rely on information, opinions, reports, or statements, including financial statements and other financial data, if prepared or presented by:
   (1) one or more officers or employees of the corporation whom the director reasonably believes to be reliable and competent in the matters presented;
   (2) legal counsel, public accountants, or other persons as to matters the director reasonably believes are within the person’s professional or expert competence . . .

(c) A director is not acting in good faith if he has knowledge concerning the matter in question that makes reliance otherwise permitted by subsection (b) unwarranted.

(d) A director is not liable for any action taken as a director, or any failure to take any action, if he performed the duties of his office in compliance with this section.

MODEL BUS. CORP. ACT § 8.30 (1991)

161. For example, the official comment to the Model Business Corporation Act expounds on the proper judicial perspective in determining the liability of directors. See id. §8.30 official cmt. (explaining that due to the fact that corporate directors will often make decisions that involve certain risks associated with an enterprise, liability therefore should be limited to times when a director did not comport with the requirements of section 8.30). The standard for director liability alone provides a better basis for an instruction to the fact-finder on mitigation. Such an instruction would focus the jury's attention on the fact that in assessing plaintiff's mitigation efforts, they must consider "the care an ordinarily prudent person in a like position would exercise under similar circumstances." Id. § 8.30(a)(2). This language, as the Model Business Corporation Act points out, incorporates the traditional common law standard, but refines it by adding language which pays special attention to the need for innovation in business, while at the same time keeping focus on
The business judgment rule, therefore, is a rebuttable presumption of regularity that a court will apply to the actions of directors in managing a corporation. In essence, through the vehicle of the business judgment rule, a court gives great deference to the actions of directors, presuming that they exercise informed judgment, in good faith, and with the best interests of the corporation they serve in mind. If the presumption is not rebutted, a court will not second guess decisions, even disastrous ones, made by a board of directors.

The business judgment rule, however, does not fully insulate a director from liability for his actions. When the challenging party proves that the director acted illegally, fraudulently, under a conflict of basic director qualities of "common sense, practical wisdom, and informed judgment." Id. § 8.30 official cmt. 1. Regarding this, the official comment to section 8.30 states:

The phrase "in a like position" recognizes that the "care" under consideration is that which would be used by the "ordinarily prudent person" if he were a director of the particular corporation.

The combined phrase "in a like position ... under similar circumstances" is intended to recognize that (a) the nature and extent of responsibilities will vary, depending upon such factors as the size, complexity, urgency, and location of activities carried on by the particular corporation, (b) decisions must be made on the basis of the information known to the directors without the benefit of hindsight, and (c) the special background, qualifications, and management responsibilities of a particular director may be relevant in evaluating his compliance with the standard of care. Even though the quoted phrase takes into account the special background, qualifications and management responsibilities of a particular director, it does not excuse a director lacking business experience or particular expertise from exercising the common sense, practical wisdom, and informed judgment of an "ordinarily prudent person."

Id. § 8.30 official cmt. 1.

An instruction based on these standards and this comment would be an improvement over the vague reasonableness instruction given by many courts in antitrust cases sharpening the fact-finder's focus on a business decision made in the face of uncertainty.

162. See Aronson v. Lewis, 473 A.2d 805, 812 (Del. 1984) (explaining that the business judgment rule rests on a presumption that a director has exercised his or her business decision after being fully informed, made in good faith, and in a sincere belief that the action undertaken was in the best interests of the corporation).

163. See id. at 812; see also Smith v. Van Gorkom, 488 A.2d 858, 872 (Del. 1985) (explaining further the business judgment rule).

164. See Washington Bancorporation v. Said, 812 F. Supp. 1256, 1267-68 (D.D.C. 1993) (insulating directors from improvident, but well-intentioned and informed decisions); Sinclair Oil Corp. v. Levien, 280 A.2d 717, 720 (Del. 1971) (declaring that a court will presume directors to have exercised proper business judgment and will not disturb the directors' decision provided that a rational business purpose can be attributed to it).

165. See, e.g., Pittsburgh Terminal Corp. v. Baltimore & Ohio R.R., 875 F.2d 549, 552-53 (6th Cir. 1989) (declaring that where facts are established which overcome a presumption of the business judgment rule, the business transaction at issue will be examined to determine its fairness); In re Tri-Star Pictures, Inc. Litig., 634 A.2d 319, 333 (Del. 1993) (explaining that a breach of a director's duty of loyalty rebuts the presumption of the business judgment rule and requires a director to then prove that the business transaction in question was fair to the corporation).
interest, in bad faith, or without informing himself with respect to the
decision, or even committing corporate waste, the presumption is rebut-
ted and the trier of fact then will examine the fairness of the transaction
(which may or may not subject the director to liability).

This rule, well-entrenched in corporate law, is based on the com-
pelling policy that directors, not courts, are better equipped to make
business decisions. The policy judgment is made that if the described
conditions are met, the corporation has been adequately protected and
its stewards should not fear a reviewing court. This promotes entre-
preneurial activity and recognizes that such activity takes place in the
face of uncertainty. A court, however, will intervene if it becomes
obvious that the decision making process was irregular in one of the
identified respects. Hence, the proper inquiry is into the propriety of
the directors’ decision making process, not into the result viewed in hind-
sight.

A court considering whether to limit a plaintiff’s antitrust damages
based on the rule of avoidable consequences should, in essence, give the
plaintiff business judgment rule protection. Thus, there would be a pre-
sumption that in mitigating his damages, the antitrust plaintiff acted on
an informed basis, in good faith, and in the honest belief that the action
taken was in the best interest of his business. This is sensible, as an anti-
trust plaintiff is acting like (and may in fact be) a director of a corpora-
tion making a business decision.

Giving an antitrust plaintiff the benefit of this presumption, how-

166. See Unocal Corp. v. Mesa Petroleum Co., 493 A.2d 946, 958 (Del. 1985) (explaining
that unless a plaintiff shows by a preponderance of the evidence that directors have exercised their
business decisions under a conflict of interest or another breach of fiduciary duty, a court will not
perturb the director’s judgment); Saxe v. Brady, 184 A.2d 602, 610 (Del. Ch. 1962) (explaining
that waste may be found where it is discovered that what the corporation has received is so inade-
quate that no reasonable person exercising ordinary business judgment would find it worth what
the corporation has spent).

held view that courts should refrain from substituting the decisions of board of directors with their
own based on the simple fact that judges are not experts in the field of business).

the rationale behind the business judgment rule which is to allow directors to manage a corpora-
tion without being constricted by the judiciary).

169. See Joy v. North, 692 F.2d 880, 886 (2d Cir. 1982) (discussing the fact that an
“entrepreneur’s function is to encounter risks and to confront uncertainty, and a reasoned decision
at the time made may seem a wild hunch viewed years later against a background of perfect
knowledge”).

(explaining how after-the-fact litigation is an imperfect way of evaluating corporate business
decisions).
ever, would not fully insulate a plaintiff from the avoidable consequences rule. Instead, it would give the plaintiff the benefit of the doubt and recognize that plaintiffs make mitigation decisions in the face of uncertainty and in response to tortious conduct.171

As with the business judgment rule, the presumption could be rebutted by showing that the plaintiff did not act on an informed basis or acted in bad faith.172 The defendant’s proof in such case would have to be focused on the antitrust plaintiff’s efforts as a prudent business person running a firm victimized by an antitrust violation and, of course, facing uncertainty. If the defendant proves the plaintiff’s efforts were grossly negligent in investigating his options (such as the complete failure to investigate such options), the presumption would be rebutted.173 In that case, the antitrust plaintiff could still attempt to prove that even if the requisite care had been exercised in investigating options, the plaintiff would not have been in a better situation.174

A defendant might also prove that the plaintiff was acting opportunistically with respect to the litigation. In other words, the defendant might establish that the plaintiff was compounding his damages in the hopes of recovering them trebled.175 This would be analogous to a director acting illegally, fraudulently, or in bad faith under the business judgment rule analysis. Under these circumstances, the business judgment rule would not protect a director, and neither should an antitrust plaintiff acting this way be insulated from the rule of avoidable consequences.

171. This is analogous to how the entrepreneur in a corporate setting encounters risks and confronts uncertainty. See Joy, 692 F.2d at 886; supra notes 129-36 and accompanying text.

172. See supra notes 165-66 and accompanying text.

173. One of the most famous business judgment rule cases resulted in a finding that a board of directors did not reach an informed business judgment to sell the company and hence, breached their procedural duty of care to the company. See Smith v. Van Gorkom, 488 A.2d 858, 874 (Del. 1985) (finding directors’ actions in approving the sale of the corporation they worked for grossly negligent as it was done within the span of only two hours, with no prior notice, and without a justifiable excuse such as a crisis or emergency).

174. The case of Delong Equipment v. Washington Mills Electro Minerals Corp., 990 F.2d 1186 (11th Cir. 1993), illustrates how an antitrust plaintiff can successfully show that although it failed to investigate other alternatives after being injured by the defendant’s alleged conduct, it still would not have been put in a much better position. In Delong, the plaintiff was a distributor of “media,” which is a term of art used to describe abrasive materials that are put in vibratory machinery with other metal parts for polishing. See id. at 1190. The defendant was the manufacturer of media and terminated its contract with the plaintiff for allegedly failing to participate in a price-fixing scheme. See id. at 1193. Although the plaintiff suffered damages from its own failure to purchase identical media from other manufacturers, the court found that the plaintiff still would have incurred damages because the defendant’s product “had certain competitive advantages over alternative media.” Id. at 1199.

175. See supra notes 145-50 and accompanying text.
However, if the presumption applies and is not rebutted, the defendant could not offer proof that another option would have produced a greater return. Also, if the defendant failed to offer any proof, then the presumption would operate automatically in plaintiff's favor and the business judgment rule of avoidable consequences would not operate to limit plaintiff's damages.

In sum, the effect of a business judgment rule of avoidable consequences would not be to put the antitrust plaintiff under a "duty to mitigate," but to give him a presumption of having acted in response to the defendant's violation like a rational business person. This would be consistent with the strong deterrent policy expressed in the antitrust laws. It also would recognize the policy that a plaintiff injured by illegal conduct should not have to bear undue risk in mitigating. Moreover, it acknowledges that the traditional formulation of the rule of avoidable consequences in tort actions is relaxed where the defendant intended a particular harm.

On the other hand, courts still would have a way to limit a plaintiffs' damages in some instances where plaintiffs have not acted on an informed basis or acted in bad faith. Finally, it gives the fact-finder more information and a considerably better perspective for assessing plaintiff's mitigation efforts than a mere instruction regarding "reasonable" efforts.

This also helps ameliorate another problem observed by some commentators with respect to a mitigation defense—that of manipulation by expert witnesses. A clever expert (of whom there are many) might easily be able to develop, in retrospect, mitigation scenarios that the plaintiff should have pursued. The plaintiff, unlike the expert, does not have the benefit of hindsight and, moreover, faces uncertainty in deci-

176. See supra notes 159-64 and accompanying text.
177. See supra notes 52, 54-56 and accompanying text.
178. See Fishman v. Estate of Wirtz, 807 F.2d 520, 558 (7th Cir. 1986) (declaring that a plaintiff should not be required to take undue risks in mitigating damages); supra note 156; see also RESTATEMENT (SECOND) OF CONTRACTS § 350(1) (1981) (explaining that the rule of avoidable consequences does not require assumption of "undue risk, burden or humiliation").
179. An antitrust violator often specifically intends, through his anticompetitive actions, to harm or exclude his competitor. See supra notes 35-41 and accompanying text.
180. See supra notes 165-66 and accompanying text.
181. See Hamilton & Cone, supra note 9, at 367 (arguing that "[t]he most difficult problem raised by these antitrust applications of mitigation principles is the possibility of substantial speculation by damages experts hired by a well-endowed defendant concerning what mitigation efforts an antitrust plaintiff might 'reasonably' be expected to undertake").
182. Even within the confines of an expert's ethical standards, endless scenarios may be created.
sion making (and often enormous pressure associated with defendant's violation). This supports an avoidable consequences rule that limits an expert witness’s ability to second-guess the plaintiff's efforts, unless the defendant can establish that the plaintiff did not act in good faith, was opportunistically seeking to rely on the ongoing litigation, or otherwise grossly negligent in the exploration of his mitigation options.

C. A Comparison of the Traditional Formulation and the Business Judgment Rule of Avoidable Consequences

A hypothetical is useful to illustrate the improvement offered by this business judgment rule of avoidable consequences in an antitrust case. Assume that a luxury sports car dealership is terminated in violation of the antitrust laws. The owner of this dealership now must assess his possible responses to this termination. Some (but certainly not all) of these options are identified below:

1. The owner will do nothing other than file an antitrust lawsuit against the violator.
2. The owner will assess his options, dismantle his dealership in an orderly fashion, lease his building to another car dealer at a fair market value, and file suit against the violator.
3. The owner will diligently seek, but will nonetheless be unsuccessful in obtaining, a substitute dealership in another brand of luxury automobiles and file suit against the violator.
4. The owner will obtain a substitute dealership in another brand of luxury automobiles, have no success in this venture, and file suit against the violator.
5. The owner will obtain a substitute dealership in another brand of luxury automobiles, achieve remarkable success in this venture, and file suit against the violator.

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183. See supra notes 133-34, 163-64, 167-70 and accompanying text.
184. See supra notes 145, 172-75 and accompanying text.
185. Another option may be for the owner to undertake some action, possibly including one of those identified above in Options #(2)-(5), and forego filing suit against the violator. The frequency of the pursuit of this option is difficult to empirically assess. However, as business people assess litigation on a cost-benefit basis, there are undoubtedly times when litigation is not pursued, not because there has not been harm, but because of the opportunity costs associated with the litigation. See Lande, supra note 61, at 118 (discussing briefly the high transaction costs associated with litigating antitrust cases); see also supra notes 141-44 and accompanying text (discussing alternatives to litigation).

If this is a significant phenomenon, then it weakens concerns about plaintiffs opportunistically relying on litigation as in Option #1. It also means that plaintiffs try to mitigate in ways other than litigation, perceiving that to be a more rational (or greater wealth achieving) alternative to
Under a business judgment rule of avoidable consequences, the plaintiff's damages would be limited if he pursued Option #1. It seems that no effort by the plaintiff to mitigate may be deemed grossly negligent or bad faith conduct. Such inaction would be difficult to categorize as one that a prudent businessman would undertake in the same situation. At a minimum, he should have investigated his options for reducing his harm.  

Similarly, under the traditional formulation of reasonableness, one would expect the same result if the injured party followed Option #1. Although a jury instruction using only the words "reasonable efforts" does not effectively focus the jury's inquiry as the business judgment rule formulation, one could certainly still expect a jury to deem the conduct of Option #1 to be unreasonable. In fact, instructions to the fact-finder often state that the plaintiff may not do nothing.

If plaintiff undertakes Option #2, the business judgment rule of avoidable consequences provides the plaintiff more protection than the traditional "reasonable efforts" formulation. A prudent businessman may decide that it is best to invest in liquidation of his dealership and that he does not wish to incur the risk of another option, such as obtaining a substitute dealership. In such a case, deference to that judgment is appropriate. No one is better equipped to assess that situation than the businessman who finds himself in the midst of it. He understands his situation and risk profile better than anyone else and he must make a decision not knowing how all will work out. Additionally, he has been merely filing suit. This would suggest that plaintiffs deserve the deference recommended by this Article.

186. From a policy perspective, this result is satisfactory because it discourages efforts to rely solely on litigation without some resort to presumably more efficient methods of self-help. Those who undertake to compete in the business arena should be expected to react as vigorously, although perhaps not as successfully, to an anticompetitive threat as a competitive one. See supra notes 145-50 and accompanying text.

187. See United States Football League v. National Football League, No. 84 Civ. 7484 PKL, 1986 WL 10620, at *34 (S.D.N.Y. July 31, 1986) (instructing a jury that when faced with the chance that it may incur injuries from the unlawful business conduct of another, a business cannot sit idly by, do nothing, and wait while damages mount up); supra note 123.

188. The Uniform Commercial Code incorporates a mitigation standard that expressly acknowledges the commercial context in which it operates. See U.C.C. § 2-704(2) (1989) (explaining that where an aggrieved seller has not finished manufacturing the goods, he can "in the exercise of reasonable commercial judgment for the purposes of avoiding loss and of effective realization either complete the manufacture and wholly identify the goods to the contract or cease manufacture and resell for scrap or salvage value or proceed in any other reasonable manner"). A reference to "reasonable commercial judgment" would be an improvement over the "reasonable efforts" formulation. See WHITE & SUMMERS, supra note 20, § 7-15 (discussing the same).
placed in this unfortunate situation by the defendant. 189

Conversely, by applying the traditional formulation to Option #2, a defendant might readily characterize the plaintiff's choice as unreasonable. That word may invite an ex-post assessment which may be inappropriate. A party armed with hindsight may, all too quickly, deem Option #2 as a mistake. One can envision the list of alternative actions that a well-versed expert can conjure up. The traditional formulation does not safeguard against this.

With respect to Options #3 and #4, the same result under the business judgment rule of avoidable consequences is obtained as in Option #2, and the same risks are attendant with the application of the traditional formulation. Indeed, on these facts, defendant may argue that the reasonable thing to do was to pursue Option #2. Alternatively, defense experts may contend that the plaintiff should have entered the non-luxury sports car market and promptly adapted to the nuances of such business. 189

Furthermore, in Options #3 and #4, the plaintiff should not be subject to the rule of avoidable consequences merely because of a lack of success. Failure should not be equated with "unreasonable efforts" to mitigate. 191 The traditional formulation presents this danger. The business judgment rule of avoidable consequences lessens it because it does not look at the outcome. Instead, the fact-finder focuses on the plaintiff's decision making process and the inherently uncertain nature of it.

Lastly, if Option #5 is pursued, mitigation may not be an issue because a court may view the plaintiff as lacking harm or damages altogether. 192 Here, the plaintiff's efforts will not be criticized but embraced by the defendant, who will argue that the plaintiff has not suffered even

189. In light of this, it is inappropriate to force the plaintiff, through a rule of avoidable consequences, to assume risk he was not otherwise willing to assume. Hence, the injured party should not be too harshly judged when he, with bounded rationality, must respond to his injury. See Fishman v. Estate of Wirtz, 807 F.2d 520, 558 (7th Cir. 1986) (upholding the prevailing view that a plaintiff should not be required to take undue risks in mitigating damages); supra note 156; see also RESTATEMENT (SECOND) OF CONTRACTS § 350(1) (1981) (declaring that a rule of avoidable consequences will not require an injured party to take undue risk).

190. As one may glean, the traditional approach can allow for limitless forms of after-the-fact criticism.

191. See RESTATEMENT (SECOND) OF CONTRACTS § 350(2) (declaring that an injured party will not be precluded from recovery if he or she has undertaken reasonable, but unsuccessful, efforts to avoid loss).

192. See supra notes 73-74 and accompanying text. But see Trabert & Hoeffer, Inc. v. Piaget Watch Corp., 633 F.2d 477, 482-83 (7th Cir. 1980) (rejecting a defendant's contention that even if its conduct against the plaintiff violated antitrust laws, treble damages should not be awarded to a plaintiff who fails to show that it suffered actual injury from the defendant's actions).
an injury-in-fact. 193

One criticism of the business judgment rule of avoidable consequences could be that plaintiffs might not be as diligent in mitigating under a rule that is perceived by them to be a relaxed rule in comparison to the traditional formulation. This is a possibility. However, it seems that the business judgment rule of avoidable consequences is supported by the same policies that have supported the traditional formulation. In other words, it does not seek to change the rule of avoidable consequences as much as it seeks to more certainly define it, so that the parties can tailor their proof and the fact-finder can more reliably apply the rule in a given case. Such refinement reduces legal uncertainty and the ability of parties to opportunistically use the traditional formulation to their advantage in litigation.

V. CONCLUSION

The topic of mitigation in antitrust cases deserves more scholarly attention than it has received. 194 Additionally, the rule of avoidable consequences may be underutilized by practitioners in antitrust litigation. 195 This Article has explored the application of mitigation principles in the antitrust context and offers a superior conceptual approach to evaluating the plaintiff's mitigation efforts. 196 This approach marries law and economics so as to produce a more rational rule of avoidable consequences. 197 By recognizing a plaintiff's mitigation efforts to be the business decisions that they are, the rule can be refined not just in antitrust cases as discussed herein, but in other commercial torts as well.

193. In Bhan v. NME Hospitals, Inc., 669 F. Supp. 998 (E.D. Cal. 1987), a nurse anesthetist brought an antitrust action against the defendant for implementing a policy which only allowed M.D. anesthesiologists to administer anesthesia, thus making his employment at a hospital run by the defendant no longer necessary. See id. at 1003, 1009. However, the court expressly noted that there was no evidence indicating that the plaintiff suffered any monetary damages as a result of his termination. See id. at 1009. In fact, the court found after reviewing his tax records that his income increased after leaving the hospital. See id. In short, in this case, it appeared that the plaintiff had fully mitigated his damages. See id. at 1009-10. Nonetheless, despite the existence of such information, the court said:

The fact that [plaintiff] was able to mitigate his damages by successfully creating another business does not negate the fact that he sustained damages. Indeed, the principle of mitigation presumes that there are damages to mitigate. To provide an antitrust violator immunity from suit simply because the victim successfully mitigates his damages would undermine the antitrust laws' broad goal of restraining anticompetitive conduct.

Id. at 1014. This begs the question of what relief plaintiff should be awarded.

194. See supra notes 9, 61, 64 & 145 and accompanying text.

195. See supra notes 9, 61, 64 & 145 and accompanying text.

196. See supra notes 125-95 and accompanying text.

197. See supra notes 125-93 and accompanying text.