**24.10A AVOIDABLE CONSEQUENCES**

[Defendant] claims that [he she it] should not be required to pay damages to [plaintiff] because [plaintiff] could have avoided the losses that [he she it] is claiming.

[Plaintiff] is not entitled to be paid for a loss if [he she it] could have avoided the loss by making reasonable efforts and without undue risk, hardship or embarrassment.

If you decide that it is more likely true than not true that [plaintiff] could have avoided a loss by making reasonable efforts and without undue risk, hardship or embarrassment, you may not require [defendant] to pay for that loss. Do not include any such amounts in an award of damages to [plaintiff].

**Use Note**

This instruction should be given in conjunction with the instructions on general and special damages if the defendant claims a failure to mitigate.

Plaintiff is entitled to recover any costs incurred in making a reasonable effort to avoid or reduce losses caused by defendant's failure to perform. *See* Instruction 24.10B.

**Comment**

It is a cardinal rule in the law of damages that a plaintiff, with an otherwise valid right of action, is denied recovery for so much of the losses as are shown to have resulted from failure on his part to use reasonable efforts to avoid or prevent them. This rule applies where the action is in tort or breach of contract and is known as the avoidable consequences rule.

*Anchorage Indep. School Dist. v. Stephens*, 370 P.2d 531, 533 (Alaska 1962); *see also University of Alaska v. Chauvin*, 521 P.2d 1234, 1239 (Alaska 1974).

Failure to mitigate is an affirmative defense. Thus, the defendant has the burden to show that the loss could have been avoided by reasonable efforts, and the plaintiff’s failure to make such efforts. *Winn v. Mannhalter*, 708 P.2d 444, 450 (Alaska 1985); *Alaska Children’s Servs., Inc. v. Smart*, 677 P.2d 899, 902 (Alaska 1984); *West v. Whitney-Fidalgo Seafoods, Inc*., 628 P.2d 10, 18 (Alaska 1981). The reasonableness of mitigation efforts and whether such efforts would require undue risks or burdens are factual questions for the jury. *Id*.; *Murray E. Gildersleeve Logging Co. v. Northern Timber Corp*., 670 P.2d 372, 379-80 (Alaska 1983).

Although plaintiff is required to undertake reasonable efforts to mitigate losses, the plaintiff is not required to encounter undue risk, expense, hardship or embarrassment. *West*, 628 P.2d at 18; *University of Alaska*, 521 P.2d at 1240; *see also* *City of Fairbanks v. Rice*, 20 P.3d 1097 (Alaska 2000); Restatement (Second) of Contracts § 350. Almost any risk of considerable loss to the plaintiff raised by the proposed mitigation efforts is considered an “undue” risk. *West,* 628 P.2d at 18. The plaintiff’s lack of money to undertake mitigation efforts should be considered. *Id*.