

- **Mitigating Damages.** If a tenant defaulted on its lease, ancient law allowed a landlord to take no action to limit the landlord's damages (like trying to find a new tenant for the property). The more modern view of business contracts, as well as leases, is that a landlord should have some obligation to use reasonable efforts to limit (mitigate) the landlord's damages. Certainly, it is not in the landlord's interest to keep the defaulting tenant's space empty without rent when the landlord could have found another tenant for the space. Tenants should be aware, however, that this is a sensitive topic for landlords. Landlords are very wary about being second-guessed by a tenant who has already defaulted on its lease, as to whether the landlord has done enough to mitigate its damages. A tenant's request that the landlord include a mitigation-of-damages provision in the lease, will be better received if the tenant agrees the landlord does not have to accept below-market rent or make renting the defaulting tenant's space a priority over leasing other vacant space in the building.
- **Punitive Damages.** Arguably, a lease is in the nature of a business contract, setting out the parties' respective rights and obligations. The common principle is that punitive damages are not appropriate for an ordinary breach of a contract. Leases are not, however, universally regarded as contracts. A tenant should ask that both parties waive their claims for lost profits or punitive damages. Landlords may agree to such a change, though they often carve-out damages arising if a tenant holds-over at the end of the term and fails to move out of its space at lease expiration.



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Real Estate Counselors is a boutique law firm specializing in commercial real estate and business transactions.

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