When negotiating a commercial lease, one party or both parties often raise the issue of mitigation, generally meaning to make less severe. In the commercial lease context, it is most often discussed in the defaults and remedies sections. When a tenant commits an event of default under its lease, to what extent is the landlord required to act to lessen the landlord’s own damages?

First, be sure to know how the state laws that govern your lease view mitigation. Certain states impute this obligation on a landlord by virtue of a statute or through common law. If you represent a tenant, beware states requiring that a lease must affirmatively say that a landlord must mitigate its damages due to a tenant’s default or the landlord will not have any obligation to do so.
Second, mitigation comes in many flavors. The vanilla approach is a statement that a landlord must mitigate or that it will use commercially reasonable efforts to mitigate following a tenant’s default. Note that it is not uncommon that a landlord’s obligation will simply be to try to relet the premises if a tenant defaults. The more complicated flavor (the rocky road, if you will) will delve into which exact efforts a landlord must undertake and put certain restrictions on them, and often times what obligations a tenant must first satisfy in order to trigger a landlord’s obligations (for example, the surrender of the leased premises in the condition required by the lease). In terms of a landlord’s efforts, a lease could specify that the landlord must list the space with its usual broker, conduct tours of the premises when requested by a prospective tenant, or undertake other customary marketing for the space. With respect to restrictions on a landlord’s obligations, a landlord will often provide that it can lease other space in the building first and sometimes this extends to the rest of the project or other properties owned by the landlord or its affiliates. In addition, a landlord may set forth a set of tenants to which it does not have to lease in the context of mitigation, including but not limited to:

- a tenant that would not otherwise meet its financial requirements
- a tenant with a use that would violate another tenant’s exclusive use or otherwise upset the tenant mix of the property
- a tenant for a use that is unusual for the building (this is sometimes used to exclude high-traffic users in an office building)
- a tenant with excessive parking requirements
- a tenant that does not have the requisite business experience (this is likely most relevant in the retail context).

The key takeaway is that, as a tenant, it is important to address mitigation in some manner in your lease, and, as a landlord, it is imperative that you are clear as to what your obligations are if a tenant defaults.