

A mother whose adult son was a law school graduate contracted with a tutor to give the son a bar exam preparation course. "If my son passes the bar exam," the mother explained to the tutor, "he has been promised a job with a law firm that will pay \$55,000 a year." The tutor agreed to do the work for \$5,000, although the going rate was \$6,000.

Before the instruction was to begin and before any payment was made, the tutor repudiated the contract. Although the mother or the son reasonably could have employed, for \$6,000, an equally qualified instructor to replace the tutor, neither did so. The son failed the bar exam, and the law firm refused to employ him. It can be shown that had the son received the tutor's instruction, he would have passed the bar exam.

If the mother and the son join as plaintiffs and sue the tutor for breach of contract, how much, if anything, are they entitled to recover?

- A. \$1,000, because all other damages could have been avoided by employing another equally qualified instructor.
- B. \$55,000, because damages of that amount were within the contemplation of the parties at the time they contracted.
- C. Nominal damages only, because the mother was not injured by the breach and the tutor made no promise to the son.
- D. Nothing, because neither the mother nor the son took steps to avoid the consequences of the tutor's breach.

## Explanation:

### Expectation (ie, benefit-of-the-bargain) damages

**Definition** Losses arising naturally & obviously from breach

**Purpose** Place nonbreaching party in same position as if contract had been performed

**Measure** General rule – difference between contract price & market price (or cost of purchasing substitute performance)  
Construction contracts – difference between contract price & cost of construction by another builder

The primary goal of contract damages is to place the nonbreaching party in the same position as if the contract had been fully performed. This typically means that the **nonbreaching party can recover**:

**consequential damages** – losses arising from the **nonbreaching party's special circumstances** that the breaching party could **reasonably foresee** when the contract was made *and/or*

**expectation damages** – losses arising naturally and obviously from the breach, which can be measured by the **difference between the contract price** and the **market price**.

However, damages that could have been **mitigated** (ie, avoided or minimized) through **reasonable efforts** are **not recoverable**.\*

Here, the tutor repudiated the contract prior to performing. Although it was foreseeable that the son would lose his job offer if he failed the bar exam, that loss could have been avoided by employing an equally qualified instructor for \$6,000. As a result, the mother and son cannot claim \$55,000 in *consequential* damages for the son's lost salary **(Choice B)**. However, this does not prevent them from recovering the difference between the \$5,000 contract price and the \$6,000 market price—a total of \$1,000 in *expectation* damages **(Choice D)**.

\*The nonbreaching party will not be precluded from recovery to the extent that he/she has made reasonable but unsuccessful efforts to avoid loss.

**(Choice C)** Although the tutor made no promise to the son, the mother-tutor contract was made to benefit the son (the one who would be receiving tutoring). This means that the son was an intended third-party beneficiary of the contract. As a result, both the mother and the son were entitled to sue for damages. In addition, they can recover \$1,000 in expectation damages—not merely nominal damages.

### Educational objective:

The nonbreaching party cannot recover damages for losses that could have been mitigated (ie, avoided or minimized) through reasonable efforts.

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