1. Producer Marty Rosen hired Walt Price to direct, and Joseph Turner White to write the screenplay for, the movie “The Old Mill,” starring box office darlings Bob Berrenger and Claire Wellesley. The movie is set in nineteenth century New England, and the concept for the movie prominently features a water-driven mill and a torrid sexual encounter between Berrenger’s and Wellesley’s characters. Price is on a fairly tight budget and must finish shooting the movie by a specified date. Rosen and Price initially selected a town in New Hampshire as the location to shoot the movie, and spent a significant part of the film’s budget constructing a mill like the one White described in the script. However, Berrenger’s fondness for underage women forced the production to flee New Hampshire and relocate to Waterford, Vermont (“Go, you Huskies!”), leaving their newly-constructed “old mill” behind.

A. Price and his assistant director, Bill, settled on Waterford after reading a brochure about “The Historic Waterford Mill.” Alas, the mill burned down in the 1970s as part of a spate of suspicious fires believed to have been set by a disturbed Waterford teen. Not having the money to build a new “old mill,” and unable to move the one they built in New Hampshire to the new location, Price has instructed White to rewrite the script to remove all references to the mill.

1). If White refuses to do so, because he believes the mill was the essence of the script, and Price fires him and refuses to pay the balance due White on his contract, could Price successfully defend a breach of contract suit by White? Please explain.

(5 Points) Probably so. If White clearly and unequivocally manifested his intent to Price not to rewrite the script, White anticipatorily repudiated his contract, entitling Price to terminate the contract. See R2 § 250. That said, White may be entitled to restitutionary damages for the “reasonable value” of any uncompensated services he performed for Price’s benefit prior to White’s termination. See R2 § 374.

2). If White refuses to do so, because he believes the mill was the essence of the script, could White successfully defend a breach of contract suit by Price and Rosen? Please explain.

(10 Points) White would have to either have to establish that Price’s and Rosen’s insistence that he write a different screenplay than the one he signed on to write constituted a total material breach of his contract, which relieved White of any duties he still owed under the
contract. *See R2 §§ 241 & 243, or argue frustration of purpose. See R2 § 265.* The latter is more promising, given that the facts refer to “the balance due White on his contract.” This suggests that Price/Rosen had already paid White a part of the contract price, which may bar White from establishing total breach.

R2 § 265 provides that a party’s duty to perform may be discharged if (1) an event occurs the non-occurrence of which was a basic assumption on which the contract was made, and (2) as a result, the party’s principal purpose was substantially frustrated. In order to successfully defend Price/Rosen’s breach of contract suit, White will have to prove that (1) the availability of an old mill was a basic assumption on which he and Price/Rosen contracted, (2) White’s principal purpose was to write a screenplay revolving around (pun intended) said old mill, and (3) the unavailability of an old mill substantially frustrated White’s principal purpose in contracting with Price/Rosen.

B. Wellesley’s contract with Rosen and the studio financing the production expressly calls for her to appear nude in one scene. Three days before shooting is to begin, Wellesley informs Price that she refuses to do the nude scene. When Price, and then Rosen, insist that Wellesley perform the nude scene as called for in her contract, Wellesley demands an addition $800,000. When Rosen tells Wellesley that she must do the scene for the salary she agreed to, she walks off the set.

1). Did Wellesley repudiate her contract by refusing to do the nude scene? Please explain.

(5 Points) Yes. Wellesley clearly and unequivocally manifested to Price her intent not to perform the nude scene she was contractually obligated to perform. In so doing, Wellesley anticipatorily repudiated her contract with Price/Rosen. *See R2 § 250.*

2). Did Wellesley repudiate her contract by insisting on being paid $800,000 more to do the nude scene and then quitting the film when Rosen refused to pay the extra money? Please explain.

(5 Points) Yes. While asking for more favorable terms does not constitute an anticipatory repudiation, *see Truman L. Flatt & Sons Co. v. Schupf,* demanding more favorable terms, and refusing to perform unless the other party agrees to the demand, does constitute an anticipatory repudiation, *see R2 § 250 cmt. b.*

3). If Wellesley returned to the set the next day and told Rosen and Price she would perform the nude scene as agreed and without additional compensation, could Rosen and Price refuse to allow her to perform in the movie if they had, as yet, made no arrangements for another actress to play the part? Please explain.

(5 Points) No. A repudiating promisor may retract her repudiation, as long as the retraction comes to the nonrepudiating promisee’s attention before the latter materially changes his position in reliance on the repudiation or indicates to the promisor that he considers the
repudiation to be final. R2 § 256(1). If Price/Rosen did not act on Wellesley’s repudiation before Wellesley retracted her repudiation, Price/Rosen would have lost the right to cancel, bring suit, or otherwise act in reliance on Wellesley’s repudiation.

Before answering subpart “C,” read the edited versions of *Alaska Packers’ Ass’n v. Domenico*, 117 F. 99 (9th Cir. 1902), and *Angel v. Murray*, 322 A.2d 630 (R.I. 1974), which appear in the EMP casebook at pp. 389-398.

C. Use the same facts as Problems 1.B.1 & .2. Suppose that, unable to think of another solution to keep the production on schedule because of the timing of Wellesley’s demands, and facing extreme financial consequences if he fails to keep the production on schedule, Rosen agrees to pay Wellesley the additional $800,000 to do the nude scene. If, once production is completed, Rosen and the studio fail to pay Wellesley the additional $800,000,

1). Will Wellesley have a viable claim against Rosen and the studio for breach of contract? Please explain.

(5 Points) Probably not. The first question, here, is whether this situation more closely resembles *Alaska Packers’* or *Angel* – that is to say, does this appear to be a (forced) modification or a (voluntary) substituted agreement? If it is a modification, then it requires additional consideration. If it is a substituted agreement, then any consideration not yet performed that would have been sufficient to support the original contract will support the substituted agreement. Given the timing of Wellesley’s demand, and the extreme financial consequences Rosen faces if he fails to keep the production on schedule, Rosen – like Domenico – had no choice but to acquiesce to Wellesley’s demand. As such, this was a forced modification and the court should not enforce it except to the extent that Rosen would be unjustly enriched.

2). Will Wellesley have a viable claim against Rosen for promissory estoppel? Please explain.

(5 Points) Probably not. While Wellesley can establish that Rosen made a promise, on which she reasonably and foreseeably relied to her detriment, she will have a difficult time convincing a court that it can avoid injustice only by enforcing Rosen’s promise. R2 § 90(1). (This contract can be fully performed in one year or less; therefore, neither it nor any modification to it need be evidenced by a signed writing. So, R2 § 139 is not in play.) Wellesley was being well paid to perform a particular role in the movie, and knew, before or at the time she agreed to the contract, that she would be asked to appear nude in one scene. It is difficult to see how receiving what he had bargained for unjustly enriched Rosen.

D. Berrenger’s contract with Rosen and the studio includes a “morals clause,” which expressly requires Berrenger, among other things, to avoid sexual encounters with underage women during the duration of the production. If Berrenger fails to comply, in addition to the criminal charges that he might face if found out, the contract gives Rosen and the studio the option to terminate Berrenger’s contract, withhold any unpaid salary, and recover any paid salary, signing bonuses, etc.
Despite the presence of this clause in their contract, Rosen and the studio did not exercise their right to fire Berrenger after he violated the “morals clause” in New Hampshire. Soon after arriving in Waterford, Berrenger became enamored of a young woman named Carla Taylor and, shortly thereafter, had sex with her. If Rosen found out about the tryst and exercised the “morals clause” in Berrenger’s contract to terminate him, on what basis, if any, could Berrenger argue that Rosen and the studio breached their contract with him by firing him over his affair with Taylor? Please explain.

(10 Points) Berrenger would have at least two colorable claims. First, while the contract did contain a “morals clause,” Berrenger’s breach of that clause was not a material breach unless it compromised his ability to perform the gist of the contract: playing his role in the movie. Nothing in the facts indicates that Berrenger’s tryst with Carla will keep him from acting in the movie. Therefore, his breach was not so dominant or pervasive as to frustrate Rosen’s purpose in contracting with Berrenger. *Jacobs & Young v. Kent*. Because the breach was arguably not material, and was certainly not total, Rosen was not relieved of his obligation to perform his part of the contract, making him the party in breach when he fired Berrenger for the latter’s less-than-total breach.

Second, because Rosen did not exercise the “morals clause” to terminate Berrenger following the New Hampshire incident, Rosen waived his right to terminate Berrenger, or is estopped from terminating Berrenger, for his tryst with Carla. *See Clark v. West.*

2. During a morning broadcast on May 1, 2003, Las Vegas disc jockey Ben Boulder announced that his station, KOOK, would provide backstage passes and concert tickets for the May 4th Ozzy Lavigne concert to the first twenty people who presented themselves at KOOK’s booth outside the concert venue with a temporary “KOOK Rock” tattoo on their forehead. He further said that KOOK would pay $30,000 a year for five years to anyone who got the station’s logo permanently tattooed on his or her forehead and then notified KOOK. Loyal KOOK listeners Lloyd Christmas and Harry Dunne heard Boulder’s show, almost immediately called the radio station to confirm that the promotion was legitimate, and then notified KOOK. Loyal KOOK listeners Lloyd Christmas and Harry Dunne heard Boulder’s show, almost immediately called the radio station to confirm that the promotion was legitimate, and then drove to the station later that morning to talk to station officials in person for further confirmation. Station management assured them both over the phone and in person that it was a legitimate promotion. On the morning of May 2, Lloyd and Harry went to The Skorpion’s Sting tattoo parlor and had the “KOOK Rock” logo tattooed on their foreheads. They then drove together to the station, where KOOK personnel took photos of their new tattoos and posted them to the station’s web site (http://www.kookrock.net) under the heading “And The Winners Are:” As if you couldn’t see it coming, KOOK failed to pay either Lloyd or Harry any of the $150,000 each thought they had coming to them. Both men were fired from their jobs on May 3 for “looking ridiculous.”

At the time he was fired, Lloyd worked as a local sales agent for a medical supply company, earning $48,000 per year, plus expenses. After being unable to find work for six months, Lloyd paid a local cosmetic surgeon $6,000 to have the tattoo removed and the...
appearance of his forehead restored. Shortly thereafter, Lloyd was hired back by his former employer (who had told its customers on Lloyd’s route that he was on medical leave) at the same salary and with the same benefits as before. However, his employer refused to reimburse him for the cost of the cosmetic surgery or for any unpaid salary.

At the time he was fired, Harry was earning $500 per week as an orderly at a local nursing home. Harry lacked the financial resources to have cosmetic surgery to remove the tattoo, and has been unable to find work – other than a few odd jobs like those he occasionally did during his spare time when he worked at the nursing home. What’s more, Harry became so upset over what a foolish thing he had done and how badly the radio station had treated him that he tried to hang himself, after which his housemates decided to help him out by beating him with a baseball bat, breaking several bones and causing him other serious physical injuries, until police intervened. Harry incurred $10,000 worth of (uninsured) medical expenses as a result of his injury, for which he is suing his housemates. However, because his housemates were just scraping by before they were arrested and have lost their jobs while in jail awaiting trial on both criminal and civil charges, Harry figures he is unlikely to get any money out of them, and their renter’s insurance did not cover intentional assault or battery or attempted suicide.

Assume that Boulder was an authorized agent of KOOK; and, therefore, KOOK is liable for anything Boulder said or did during any of his shows broadcast by KOOK. Assume, further, that Nevada has adopted comprehensive “tort reform” legislation, the net result of which is that Lloyd and Harry have no viable tort claim against KOOK.

A. If Lloyd and Harry wanted to recover the net present value of the $150,000 KOOK promised each of them, should they sue for expectation damages, reliance damages, restitutionary damages, or specific performance? Please explain.

(16 Points) Lloyd and Harry should sue for their expectation damages if they wish to receive the net present value of the sum KOOK promised to pay each of them over a five-year period. Expectation damages seek to put a non-breaching party in as good a position as he would have been in had the breaching party fully performed by awarding the non-breaching party the difference between the value of the performance promised by the breaching party and the performance, if any, actually received. See R2 § 344(a) & cmt. a. If KOOK had fully performed, Harry and Lloyd would have received $30,000 each for each of the next five years. Because money today is legally presumed to be worth more than money tomorrow, a court would award Harry and Lloyd the net present value of a stream of five annual payments of $30,000 each.

Reliance damages seek to put a non-breaching party in as good a position as he would have been in had he never entered into the contract by reimbursing the non-breaching party for any expenses he actually incurred in reliance on the breaching party’s promise to perform. See R2 § 344(b) & cmt. a. If Harry and Lloyd were trying to recover the cost of the tattoos, reliance damages would allow them to do so. Reliance damages will not allow them to recover the unpaid sums promised by KOOK.
Restitutionary damages seek to ensure that breaching party is not unjustly enriched by its restoring to the non-breaching party the “reasonable value” of his services, which is typically measured in terms of what it would have cost the breaching party to obtain similar services from someone else in the non-breaching party’s position. See R2 § 344(c) & cmt. a. Here it would be mere fortuity for the finder of fact to decide that the “reasonable value” of Lloyd’s and Harry’s services was precisely the net present value of amount KOOK promised to pay them. Moreover, R2 § 373(2) forecloses restitutionary damages for breach of contract where the non-breaching party has fully performed (even if his performance is unsatisfactory) and all that remains is for the breaching party to pay a “sum certain of money.” Lloyd and Harry fully performed by getting their tattoos. All that remained at the time of KOOK’s breach was for KOOK to pay them the $150,000 each it promised them.

Specific performance orders the breaching party to perform (or refrain from performing, in “negative enforcement” cases) as is called for in the contract. So, if available here, an order of specific performance would require KOOK to pay Harry and Lloyd $30,000 each for each of the next five years. That is not the same as the net present value of $30,000 each for each of the next five years. And, in any event, a court should not award specific performance if, inter alia, there is any other adequate remedy available (e.g., money damages). See R2 §§ 359-60.

B. Would the cost of Lloyd’s cosmetic surgery be better characterized as incidental or consequential damages? Please explain.

(6 Points) Incidental damages. A non-breaching party suing for money damages has a duty to take reasonable steps to mitigate those damages. R2 § 350(1). Incidental damages are costs the non-breaching party incurred in a reasonable effort to avoid or mitigate damages caused by the breaching party’s breach. R2 § 347 cmt. c. Consequential damages include reasonably foreseeable injuries to a person, business, or property caused by the breaching party’s failure to fully and properly perform (e.g., lost income due to the loss of a job as a result of the other party’s breach). Id. Lloyd had his cosmetic surgery so he could get a job, reducing the total amount of income he would otherwise have lost due to KOOK’s breach.

C. What remedy or remedies afford(s) Lloyd the chance to recover the cost of his cosmetic surgery? Please explain.

(8 Points) Expectation damages or reliance damages. As discussed in the answer to subpart “B,” a party suing for any form of money damages is obligated to make a reasonable effort to mitigate those damages. A non-breaching party may recover the reasonable cost of those mitigation efforts either as incidental damages, in a claim for expectation damages, or as unreimbursed expenses, in a claim for reliance damages. Because Lloyd is foreclosed from seeking restitutionary damages (as explained in the answer to subpart “A”), it is irrelevant whether he could recover the cost of the surgery as part of his restitutionary damages. That said, it is hard to see how he could.
D. Would the salary that Lloyd lost during the six months he was out of work after being fired for having KOOK’s logo tattooed on his forehead be better characterized as incidental or consequential damages? Please explain.

(6 Points) Consequential damages, as explained in the answer to subpart “B.” Assuming that KOOK should have reasonably foreseen that a person accepting Ben Boulder’s offer might suffer adverse employment consequences by showing up to work with a “KOOK Rock” logo tattooed on their forehead, the Lloyd should be able to recover his lost salary (and, for that matter, Harry should be able to recover his lost wages) as consequential damages.

E. What remedy or remedies afford Lloyd the chance to recover his lost salary? Please explain.

(6 Points) Expectation damages. Whereas a party suing for any form of money damages is obligated to make a reasonable effort to mitigate those damages, and may recover the reasonable cost of those mitigation efforts either as incidental damages or as unreimbursed expenses, only a party seeking expectation damages may recover consequential damages.

F. Assuming for sake of argument that Harry is eligible to recover incidental and consequential damages attributable to KOOK’s breach of contract or breach of promise, explain why KOOK should or should not be liable for Harry’s uninsured medical expenses, as well as any claim for pain and suffering, arising from the beating his housemates inflicted upon him after he lost his job due to having KOOK’s logo tattooed on his forehead.

(8 Points) No, because such damages were not reasonably foreseeable to KOOK at the time it made its agreement with/promise to Harry, see R2 § 351(1), and because the actions of Harry’s roommates were an independent, intervening cause that broke the chain of causation between KOOK’s breach of its contract with/promise to Harry.