Articles

Hoffman v. Red Owl Stores: The Rest of the Story

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Hoffman v. Red Owl Stores *is one of the most famous twentieth-century cases in American contract law, usually credited both with expanding the reach of the promissory estoppel doctrine and with opening up the issue of liability for precontractual reliance. It is a staple in contracts casebooks. By fortunate circumstance, we have located the plaintiff, who retains a vivid memory about many of the circumstances in his famous case. We have interviewed him and we have examined the full trial record, as well as the briefs on appeal. In this Article we tell the story of what we have learned about this famous case, including what happened after the appellate decision. We conclude that a fuller understanding of the facts provides information about a promise that was made, yet was not described in the Court's opinion. This promise supports the outcome of the litigation. Justice was done! The plaintiff substantially relied to his detriment after receiving specific assurances from an authorized agent of the defendant that he would receive a franchise if he relied by selling his bakery building and business. Reimbursing precontractual reliance in this circumstance can be done without creating a rule that would justify reimbursement of precontractual reliance in all circumstances.*

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INTRODUCTION

A pair of bargainers negotiate but fail to conclude a legally enforceable contract. Has one any rights against the other? In conversation, Ian Macneil, the great theorist of relational contract, said that classical contract law treats contract formation as if it were a light switch. It is either on or off—either there is a contract and the possibility of liability or there is not and the parties are free to walk away without

obligations to each other.[1] Macneil, however, said that in many cases, particularly where there are strong relational elements, the situation is like a rheostat.[2] It is hard to say when the light is on or off as power is fed little by little to the light as the dial is turned. Relational bargains evolve as the parties work toward a deal little by little. This means that one bargainer may have influenced the other to do something to her detriment that she would not have done but for the expectation that there certainly would be a deal. While courts sometimes bent the rules of formation and found that the parties had concluded a contract when one was responsible for serious reliance by the other,[3] there was no recognized rule providing for recovery by the relying party when the ultimate deal was not concluded. However, over forty years ago things began to change in many states. And ever since then, there has been scholarly debate about the problem.

Hoffman v. Red Owl Stores, Inc.,[4] is the most famous of the cases that founded a new area of contract law by allowing recovery of reliance expenses incurred before a contract had been formed. *Hoffman* also has been the most influential case in framing the issue of the rights of a relying party. It was also an influential decision giving meaning to the then–relatively new doctrine of promissory estoppel.[5] *Hoffman* has now become a staple of contracts casebooks,[6] and it is routinely discussed in

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1. For a discussion of the history of the problem, see 1 E. ALLAN FARNSWORTH, FARNSWORTH ON CONTRACTS § 3.26 (3d ed. 2004).

2. *See id.*

3. *See, e.g.*, Hill's, Inc. v. William B. Kessler, Inc., 246 P.2d 1099, 1101 (Wash. 1952) (bending the usual rules that allow an offer to dictate what will constitute an acceptance); Davis v. Jacoby, 34 P.2d 1026, 1030 (Cal. 1934) (finding acceptance by performance when it seemed an offer had been revoked before notification of acceptance); Kearns v. Andree, 139 A. 695, 698 (Conn. 1928) (awarding restitution for services that provided no benefit to the defendant when a contract was too indefinite to be enforced).

4. 133 N.W.2d 267 (Wis. 1965).

5. The doctrine of promissory estoppel is widely viewed as having been created by the famous section 90 of the first *Restatement of Contracts*, published in 1930. *See* RESTATEMENT OF CONTRACTS § 90 (1930). A Restatement section does not automatically become law, but today most if not all jurisdictions have case law adopting the doctrine of promissory estoppel. *See* 3 ERIC MILLS HOLMES, CORBIN ON CONTRACTS § 8.12 (rev. ed. 1996) ("All American jurisdictions . . . adopt and apply a theory of promissory estoppel grounded in section 90 of the Contracts' Restatement."). *Hoffman* was the first case to adopt the principle of promissory estoppel as the law of Wisconsin. *See* 133 N.W.2d at 275. As slightly amended by the RESTATEMENT (SECOND) OF CONTRACTS, published in 1981, the section now reads:

> A promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise. The remedy granted for breach may be limited as justice requires.

RESTATEMENT (SECOND) OF CONTRACTS § 90 (1981). *Hoffman* was immediately recognized as a significant case, one that framed the problem of protecting precontractual reliance in terms of promissory estoppel, whereas it had been framed as an issue of a duty to bargain in good faith in other countries. *See* Charles Knapp, *Contracts*, *in* 1966 ANN. SURV. AM. L. 138, 138–43 (1967).

6. *See, e.g.*, IAN AYRES & RICHARD E. SPEIDEL, STUDIES IN CONTRACT LAW 454 (7th ed. 2008); GERALD E. BERENDT ET AL., CONTRACT LAW AND PRACTICE 313 (2d ed. 2007); BRIAN A. BLUM & AMY C.

law review articles and textbook discussions about recovery for "precontractual reliance."[7] Some courts in other states have adopted the *Hoffman* rule while others have rejected it.[8]

We have had the unexpected good fortune to locate and interview Joseph Hoffmann,[9] the plaintiff in this famous case.[10] We have been

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BUSHAW, CONTRACTS: CASES, DISCUSSION, AND PROBLEMS 348 (2d ed. 2008) (note case); THOMAS D. CRANDALL & DOUGLAS J. WHALEY, CASES, PROBLEMS, AND MATERIALS ON CONTRACTS 223 (5th ed. 2008); JOHN P. DAWSON ET AL., CONTRACTS: CASES AND COMMENTS 284 (9th ed. 2008); E. ALLAN FARNSWORTH ET AL., CONTRACTS: CASES AND MATERIALS 230 (7th ed. 2008); BRUCE W. FRIER & JAMES J. WHITE, THE MODERN LAW OF CONTRACTS 78 (2d ed. 2008) ("A critic of the decision might challenge it as follows: 'must the law save every fool, however gullible?'"); LON L. FULLER & MELVIN ARON EISENBERG, BASIC CONTRACT LAW 576 (7th ed. 2001); ROBERT W. HAMILTON ET AL., CONTRACTS: CASES AND MATERIALS 581 (2d ed. 1992); JAMES F. HOGG ET AL., CONTRACTS: CASES AND THEORY OF CONTRACTUAL OBLIGATION 269 (2008) (note case); FRIEDRICH KESSLER ET AL., CONTRACTS: CASES AND MATERIALS 223 (3d ed. 1986) (note case); CHARLES L. KNAPP, NATHAN M. CRYSTAL & HARRY G. PRINCE, PROBLEMS IN CONTRACT LAW: CASES AND MATERIALS 134 (6th ed. 2007) (note case); 1 STEWART MACAULAY, JOHN KIDWELL & WILLIAM WHITFORD, CONTRACTS: LAW IN ACTION 390 (2d ed. 2003); IAN R. MACNEIL & PAUL J. GUDEL, CONTRACTS: EXCHANGE TRANSACTIONS AND RELATIONS 679 (3d ed. 2001); ARTHUR ROSETT & DANIEL J. BUSSEL, CONTRACT LAW AND ITS APPLICATION 661 (6th ed. 1999); ROBERT E. SCOTT & JODY S. KRAUS, CONTRACT LAW AND THEORY 287 (4th ed. 2007); ROBERT S. SUMMERS & ROBERT A. HILLMAN, CONTRACTS AND RELATED OBLIGATIONS: THEORY, DOCTRINE, AND PRACTICE 96 (4th ed. 2001). It also appears in IAN R. MACNEIL, CONTRACTS: INSTRUMENTS FOR SOCIAL COOPERATION: EAST AFRICA—TEXT, CASES AND MATERIALS 530 (1968).

7. *E.g.*, STEVEN J. BURTON & ERIC G. ANDERSEN, CONTRACTUAL GOOD FAITH: FORMATION, PERFORMANCE, BREACH, ENFORCEMENT § 8.3.2.2, at 343–45, (1995); Avery Katz, *When Should an Offer Stick? The Economics of Promissory Estoppel in Preliminary Negotiations*, 105 YALE L.J. 1249, 1254–55 (1996); Juliet P. Kostritsky, *Uncertainty, Reliance, Preliminary Negotiations and the Holdup Problem*, 61 SMU L. REV. 1377, 1382 (2008).

8. For a good summary of the case law as of 1995, see generally *Neiss v. Ehlers*, 899 P.2d 700 (Or. Ct. App. 1995). In *Neiss*, an Oregon Court of Appeals chose to adopt *Hoffman* and allow recovery. *Id.*; *see* Jay M. Feinman, *Promissory Estoppel and Judicial Method*, 97 HARV. L. REV. 678, 691–92 (1984).

Hoffman was also innovative in its application of promissory estoppel doctrine in holding that the court could limit damages to reliance recovery. *See* 133 N.W.2d at 276–77. This principle is now incorporated in section 90 of the *Restatement (Second) of Contracts*. *See supra* note 5. We will ignore this part of the case in this Article, however, because there was no possibility of recovering anything other than reliance damages in the *Hoffman* case. *See infra* note 221.

9. Mr. Hoffmann has always spelled his name with two *n*'s, as is made clear in the trial record. Transcript of Trial at 2, Hoffmann v. Red Owl Stores, Inc., No. 14954 (Wis. Cir. Ct. Oct. 21, 1963), *microformed on* File No. 14,900–14,954 C1985/026, Roll CC-159 POS (State Historical Soc'y of Wis.). For unknown reasons, the Wisconsin Supreme Court used only one *n*, and the case name has been spelled that way ever since. In this Article we will use the correct spelling of the name except when referring to the Wisconsin Supreme Court decision itself.

10. At a reunion dinner of the Wisconsin Law School class of 1968, Professor Whitford happened to be seated with Mr. Thomas Kubasta. Mr. Kubasta has made his career as a lawyer in Wautoma, where most of the events leading up to this litigation occurred and where Joe Hoffmann then lived. In the course of conversation, Whitford told Kubasta about the case that had made Wautoma famous in contracts casebooks and expressed an interest in locating Hoffmann. Though Hoffmann left Wautoma for good in December 1961, Kubasta vowed to do what he could to find somebody in town who knew whether Hoffmann was still alive and, if so, where he lived. After considerable effort Kubasta located the one family still living in Wautoma with whom the Hoffmanns currently exchange Christmas cards. From this contact came an address in St. Joseph, Michigan, and later a telephone call from Whitford to Hoffmann. Hoffmann verified that he was indeed the plaintiff in the famous case, and agreed to be interviewed about it. All our interviews with Hoffmann have been by telephone.

delighted to discover that Mr. Hoffmann remains in good health.[11] And despite the many years that have passed since the events involved in the case, he still has a sharp recollection of many of the events leading up to the trial and appeal. Mr. Hoffmann told us many things about the events that provoked the litigation as well as the litigation itself. He raised points not reflected in the decision or in the scholarly literature spawned by the case. We have verified much of what he has told us from the full trial record.[12] We have also looked at the appellate briefs and Red Owl's Annual Reports.

We have decided to tell a fuller story of *Hoffman v. Red Owl Stores* as we now understand it. Investigating the detailed background of famous cases is now widely accepted as a useful form of scholarship.[13] Among important insights that stories about well-known cases can offer are the following: First, they are almost certain to reveal that the "facts" stated in an appellate opinion are carefully selected and omit events that many would consider highly relevant to an evaluation of the proper outcome of the litigation. These limitations on facts as stated in appellate opinions are not just because the judge or judges writing opinions select what they choose to report, but also because the litigation strategies of the parties, and the evidentiary rulings of the trial judge, keep certain events from getting into the record. Learning about these matters teach important practical lessons about the operation of the legal system. Second, we all like to speculate about the wisdom of a decision, and a fuller explication of the facts can enrich such a discussion. This is especially valuable when the story is about a foundational case like

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11. Life has been good to Mr. Hoffmann and his family. They have been successful and they are well off. But the events leading up to the case had a significant impact on the course of their lives, so Mr. Hoffmann's ability to remember them in great detail is not surprising. For some years Hoffmann has been aware of the fame of his case in law schools because one of his daughters attended law school and studied the case.

12. Under Wisconsin practice, the parties edit the transcript to produce the document that goes to the supreme court of the state. This version of the transcript is widely available to those who have access to the briefs presented to the Wisconsin Supreme Court. *See, e.g.*, Appellants' Brief at 101–242, *Hoffman*, 133 N.W.2d 267 (No. 14954). A much fuller trial record is available in microfiche through the State Historical Society of Wisconsin. *See* Transcript of Record, *Hoffman*, No. 14954 (Wis. Cir. Ct. Oct. 21, 1963), *microformed on* File No. 14,900–14,954 C1985/026, Roll CC-159 POS (State Historical Soc'y of Wis.). The certified transcript contained in this trial record is the one we have cited as "Transcript of Trial," *supra* note 9. Page numbers in references to the "Transcript of Record" hereinafter in this document correspond to fuller trial record. *See infra* note 18.

13. There are two books containing "stories" about contract cases that are now widely used as supplementary materials in contracts courses. We have long used one in our teaching: RICHARD DANZIG & GEOFFREY WATSON, THE CAPABILITY PROBLEM IN CONTRACT LAW (2d ed. 2004). A more recent addition to the literature is DOUGLAS BAIRD, CONTRACTS STORIES (2007). For discussion of the advantages of what Professor Judith Maute calls "legal archaeology," see Stewart Macaulay, *Contracts, New Legal Realism, and Improving the Navigation of* The Yellow Submarine, 80 TUL. L. REV. 1161, 1175–77 (2006); Judith L. Maute, Response, *The Values of Legal Archaeology*, 2000 UTAH L. REV. 223, 224–31.

Hoffman v. Red Owl Stores. Although the current vitality of any principle in the area of precontractual reliance perhaps ought to be independent of the wisdom of a decision now forty-five years old, in fact the current assessment of the wisdom of the outcome of the *Hoffman* case is likely to subtly influence many people's attitudes about the law.[14]

We have an additional reason for exploring the background of *Hoffman v. Red Owl Stores.* Several years ago, Professor Robert Scott also obtained the full trial record and wrote an article arguing that the case was wrongly decided.[15] We have a somewhat different perspective on the case. We also have additional information to add to the story, mostly gained from several interviews with Joe Hoffmann. While Professor Scott would have a strong argument for his position if the facts were as he assumed them to be, we believe the available information about the events leading to the litigation suggests a story supportive of the ultimate outcome in this litigation, though not necessarily all parts of the Wisconsin Supreme Court's opinion. We have decided to tell the story as we now understand it. Only the most important differences in our story and Professor Scott's account will be noted, mostly in a few footnotes.[16]

After we have related our story in full, in the conclusion we will return to the benefits of storytelling, and indicate what we think we have learned from our study of the full facts of *Hoffman v. Red Owl Stores.* These findings suggest that the case reached a just result, and one that would be less controversial if facts not previously fully known had been understood in the many discussions of this famous case.

I. SETTING THE STAGE

Although many readers will have studied *Hoffman v. Red Owl Stores* in law school, most will find it useful to have their memories refreshed on the basic facts before we begin discussing the facts in detail. And for those who are not deeply engaged in the debate about recovery for precontractual reliance, it will be helpful to sketch some of the

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14. Professor Robert Scott has attributed what he regards as the "delay" in understanding the law of precontractual reliance "at least in part, to . . . the unfortunate case of *Hoffman v. Red Owl Stores, Inc.*" Robert E. Scott, Hoffman v. Red Owl Stores *and the Myth of Precontractual Reliance*, 68 OHIO ST. L.J. 71, 101 (2007).

15. *Id.* Scott's article is also published as a chapter in BAIRD, *supra* note 13, at 62.

16. We had to decide whether to write the text as a debate with Professor Scott point by point or to tell the full story in a way that could be understood by a reader not familiar with Scott's work. We think that only a few readers would be interested in a paper focused on an article by another scholar. We hope that our Article will be useful to anyone studying the case or concerned with precontractual reliance.

Though in this Article we are critical of Professor Scott's earlier work on *Hoffman v. Red Owl Stores*, we have been and remain admirers of many of his numerous contributions to contracts scholarship. He is one of the giants of our generation of contract scholars.

possible contending positions. In this Part, we will try to accomplish both objectives by providing several hypotheticals that draw on the basic facts of *Hoffman* but then vary them to illustrate the continuum of situations where courts might and might not find liability for precontractual reliance.

Red Owl Stores ran a chain of franchised grocery stores in a vacation area where business was much better in the summer than in the winter. The home office made the final decision whether to make a contract with a person who wanted to be a Red Owl franchisee. However, corporations act through people who are and are not authorized agents. Ed Lukowitz was a Red Owl Divisional General Manager. Joe Hoffmann was a baker who owned his own growing business and worked there. He wanted to improve his financial situation by becoming a Red Owl franchisee in a central Wisconsin town. Ed and Joe worked together to find a suitable location for such a grocery store and to arrange Joe's finances so that the Red Owl home office would find Joe acceptable and award him the contract. At the time when our various scenarios begin, Red Owl and Joe have not agreed on important terms such as in which city the store would be located, how much Joe would invest, and whether Joe would accept Red Owl's franchise form contract that listed many obligations of franchisees. Red Owl has a standard form contract, and Joe is not going to be able to make many changes in the way the corporation runs its franchise division.

Assume first that Joe takes steps to make himself a more attractive potential franchisee without Red Owl's request or knowledge. Suppose, for example, that he sells assets at a loss so that he has more money in the bank that he can devote to a new franchise. Then negotiations fail, and Joe seeks to recover for the loss on the sale. We would expect that courts would not charge Red Owl with Joe's loss. Joe ought to have known that he was taking the risk that the sale might not be enough to land the franchise. There is nothing that could be considered a promise. Reliance on the mere hope for a contract is not enough to establish liability.[17]

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17. Professor Farnsworth looked at the American cases in detail in E. Allan Farnsworth, *Precontractual Liability and Preliminary Agreements: Fair Dealing and Failed Negotiations*, 87 COLUM. L. REV. 217, 221 (1987). He noted, "[A] party that enters negotiations in the hope of the gain that will result from ultimate agreement bears the risk of whatever loss results in the other party breaks off the negotiations." Seventeen years later, in the fourth edition of his textbook, he brought the material up to date. *See* E. ALLAN FARNSWORTH, CONTRACTS 190 (4th ed. 2004) [hereinafter FARNSWORTH, CONTRACTS]. He stated:

> In recent decades, courts have shown increasing willingness to impose pre-contractual liability. The possible grounds can be grouped under four headings: (1) unjust enrichment resulting from the negotiations; (2) a misrepresentation made during the negotiations; (3) a specific promise made during the negotiations; (4) an agreement to negotiate in good faith.

Id. at 192. Farnsworth reported further that "American courts . . . have . . . declined to find a general

Assume second that Ed says to Joe: "I can't be sure what the guys at the home office will decide, but, based on my experience with them, I think that they will give you the franchise if you sell the bakery now. This way you'll be ready to set up and operate the grocery store, and you'll have some more cash available to invest." Joe sells the bakery and receives less than its fair market value because of the pressure to conclude a transaction immediately. Nonetheless, the people at the home office refuse to grant Joe a franchise. As we have stated the situation, it is very unlikely that Red Owl would be liable. Ed stated an opinion, but Joe knew that Ed could not award the franchise. A trier of fact would likely read Ed's statement as equivalent to "I don't know if it will be enough, but, based on my experience, you have no chance unless you sell the bakery now."

Now change the case somewhat: After Joe has told Red Owl how much he can invest, and with the knowledge and seeming approval of Red Owl officers has acquired an option on a lot in a central Wisconsin town that would be appropriate for a supermarket, Ed tells Joe that he has received a message from the home office. Ed says that those who make decisions there have said that if Joe sells his bakery immediately, Red Owl will award him the franchise. Joe sells the bakery immediately at a substantial loss. However, Red Owl refuses to award the franchise because the corporation's business changed, and its officials do not want to take new risks. Assume a court would decide that Ed had apparent authority as an agent to pass along messages from the home office to Joe in the field. Ed's statement could be construed as a promise made on behalf of Red Owl. If a court recognizes precontractual liability, we have a strong case for liability.

We can continue to add facts that might change the result. Suppose that Red Owl informed Joe that he had to have a certain amount of cash to invest in the business in order to set up a store. Joe represented that he had the required amount of cash, and Ed represented that Red Owl had agreed to grant the franchise if Joe would sell the bakery. Joe sells the bakery at a loss. When Red Owl's home office officials discovered that Joe did not have the required amount of cash, they ended negotiations with Joe. If a trier of fact found this to be the case, it seems unlikely that Joe could recover for his loss in selling the bakery. Joe has not satisfied a clearly implied condition of Red Owl's promise. Joe was responsible, under this scenario, for misleading Red Owl, and it would seem hard to argue that a court should award damages to avoid injustice.

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obligation that would preclude a party from breaking off negotiations, even when success was in prospect." *Id.* at 198. As we have posed the hypothetical situations in the text, none of the four groups identified by Farnsworth are present.

II. WHAT HAPPENED IN *HOFFMAN V. RED OWL STORES*[18]

Joseph Hoffmann, born in 1932, was raised on a farm, and moved to Appleton, Wisconsin, while attending high school. He learned the baking trade while working in a bakery during high school and in the early years thereafter. By 1956, already married and with children, he was ready to acquire his own business. He located a small bakery business for sale in Wautoma, which is located in central Wisconsin about sixty miles southwest of Appleton. In the late 1950s, Wautoma had a population of about 1500.[19] Wautoma is located near many lakes, which are sites for second homes of residents of larger cities and several resorts. Consequently, Wautoma's population increased by about 5000 persons in the summer, making the summer the most profitable time for retailers. Hoffmann worked particularly hard just before each summer weekend to get ready for the summer weekend rush which was such an important part of retail sales in Wautoma.[20] The bakery business was successful. By 1959, Joe and his wife were able to purchase the building in which the business was operated.[21]

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18. Our sources for the facts presented in this Part are primarily the trial record, see *supra* note 12, and our telephone interviews with Joe Hoffmann, conducted on October 14, 2008; February 10, 2009; and March 25, 2009. We have relied on the trial record wherever possible since that testimony was subject to cross-examination and given closer in time to the actual events. We will cite to our Hoffmann interview notes when we report information obtained solely from these interviews. Copies of our interview notes can be obtained by writing Professor Whitford. We have located Ed Lukowitz, who is alive and living in Green Bay, but he has not been willing to provide us his recollections. We would have liked to interview both him and the other Red Owl officials involved in the case. We tried to trace the latter without success, and it is likely some or all of them are deceased. We know that the lawyers involved in the litigation are all dead. We do have three letters from Gerry Van Hoof, Mr. Hoffmann's lawyer, written not long after the case was decided, and we will cite from them when appropriate.

The trial record does not contain the pretrial depositions except to the extent that parts of them were read into the record at trial, and it does not contain the lawyers' closing arguments to the jury. The record contains mostly exhibits, which we will cite by number, and the trial transcript, which we will cite by the transcript page number typed by the court reporter. Scott, when citing to the transcript, cited a handwritten number which is the "record" page. Because not all pages of the record contain this handwritten number, and because the handwritten number is sometimes hard to decipher, we choose to cite to the transcript page. An inevitable consequence is that both Scott and we may at times be citing to the same dialogue from the transcript, but different page numbers will appear in the citations.

A transcript of a trial usually reports differences in the accounts of the witnesses about events. The jury found for Mr. Hoffmann, and the Supreme Court of Wisconsin affirmed this decision on the question of liability. *See* Hoffman v. Red Owl Stores, Inc., 133 N.W.2d 267, 275 (1965). As a result, we will report the version most supportive of his case that Red Owl Stores should be held liable. However, where there was important evidence presented countering this version of key events, we will report these differences in footnotes as well.

19. The 1960 population was 1466. 1 U.S. DEP'T OF COMMERCE, BUREAU OF THE CENSUS, CENSUS OF POPULATION: 1960, at 51-20 (1961) [hereinafter 1960 CENSUS], *available at* http://www2.census.gov/prod2/decennial/documents/03994195v1p51ch2.pdf.

20. It has been reported that Professor Grant Gilmore mentioned to several contracts scholars that Hoffmann was allergic to bread (and implied that was why Hoffmann wanted to get out of the

In the autumn of 1960, Hoffmann began talking with Ed Lukowitz, the new Divisional Manager of Red Owl Stores for a territory including upper Michigan and most of Wisconsin. Lukowitz encouraged Hoffmann to pursue his interest in becoming a franchisee.

A. Purchase and Sale of the Wautoma Grocery

In late 1960 Hoffmann learned that a local grocery store was for sale. Hoffmann suggested to Lukowitz that Hoffmann purchase the grocery store and operate it to get experience as a grocer.[22] Lukowitz was supportive. With Lukowitz's help, Hoffmann put together a successful offer, obtained mortgage financing, and in January 1961 began operating "Joe the Baker's Red Owl."[23] He purchased much of his inventory from Red Owl.[24] Joe hired an employee to manage the grocery store because Joe continued to run the bakery during this period.[25]

Over the spring of 1961, Lukowitz and staff evaluated the fortunes of the grocery store and expressed satisfaction.[26] Discussions also continued about opening a Red Owl franchise.[27] Lukowitz informed Hoffmann that Red Owl felt Wautoma was too small, and mentioned several other towns in east central Wisconsin where Red Owl was considering starting a store.[28] Hoffmann expressed a willingness to move but emphasized that he had only $18,000 to invest and wondered if that would be enough.[29] Without any inquiry into the source of the $18,000,[30] Lukowitz assured Hoffmann it would be enough.[31]

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bakery business). *See* Scott, *supra* note 14, at 98. If believed, this may lead some scholars to believe that any misrepresentations or breached promises made to Hoffmann were not material because he was going to get out of the bakery business in any event. In fact, Hoffmann was allergic to dust, not bread. Flour is an allergen for Hoffmann, but he was able successfully to accommodate his allergy by wearing a mask and gloves when working with flour. Telephone Interview with Joseph Hoffmann (Oct. 14, 2008).

21. *See* Transcript of Trial, *supra* note 9, at 3–4.

22. *Id.* at 8. It was never Hoffmann's plan that this store would be the ultimate Red Owl franchise. It was too small and lacked off-street parking. Hoffmann had a different site in Wautoma in mind for a Red Owl store if Wautoma had been regarded as an appropriate franchise location by Red Owl. Telephone Interview with Joseph Hoffmann, *supra* note 20.

23. *See* Transcript of Trial, *supra* note 9, at 9; *Charlie Luhm Sells His Grocery to Joe Hoffmann*, Waushara Argus, Feb. 2, 1961, at 1.

24. Transcript of Trial, *supra* note 9, at 9.

25. *Id.* at 8–9, 17.

26. *Id.* at 18.

27. *Id.* at 20.

28. *Id.* at 21.

29. *Id.* at 18.

30. Hoffmann was asked on cross-examination about discussions at this time: "Was there any discussion at any time as to how this $18,000 was to be made up? That is, was it all unencumbered cash or partly to be borrowed cash?" *Id.* at 91. Hoffmann answered: "I don't believe there was any discussion of that." *Id.*

In discussions of the *Hoffman* case, some have suggested that Red Owl understood Hoffmann's statement to represent the ability to invest $18,000 in unencumbered cash. *See infra* note 240. It is clear that this was not Hoffmann's intention. We will later discuss, why we think that it is unlikely that Red

By the end of May, Lukowitz urged the sale of the Wautoma grocery, because he wanted Hoffmann free to devote more time and energy to getting a Red Owl store established elsewhere.[32] At the time, Lukowitz anticipated he could have Hoffmann operating a Red Owl store by November 1961.[33] Further, Hoffmann had a ready buyer, his manager.[34] Hoffmann expressed reluctance to sell the store at the beginning of the lucrative summer season, but he relented on Lukowitz's further urgings and reassurance that the $18,000 would be sufficient to put him into "a bigger operation."[35] On June 6, 1961, the Wautoma grocery store was sold to the manager, Ed Wrysinski, for about what Hoffmann had invested in it ($18,000).[36]



CONFIRMING THE DEAL—With inventory and paper work completed, Joe Hoffman, left, and Ed Wrysinski shake hands on the deal they made this week in which Hoffman sold his grocery, "Joe's Red Owl", to Wrysinski.

FIGURE 1: JOE HOFFMANN SELLS WAUTOMA GROCERY[37]

B. PURCHASE OF THE OPTION ON THE CHILTON LOT

Over the summer of 1961 Hoffmann spent a good deal of time with Lukowitz driving around east central Wisconsin looking for potential

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Owl relied upon any such understanding. *See infra* note 240 and accompanying text.

31. Transcript of Trial, *supra* note 9, at 18–19.

32. *Id.* at 19–20.

33. *Id.* at 21.

34. *See id.* at 18.

35. *See id.* at 18–20.

36. *See id.* at 20; *see also infra* p. 811 fig.1.

37. *Ed Wrysinski Buys Red Owl from Joe Hoffman*, WAUSHARA ARGUS, June 15, 1961, at 1. Reprinted with permission from the *Waushara Argus*.

sites for his Red Owl store.[38] Hoffmann understood that the amount of a franchisee's required investment was related to the size of the prospective store, so he tended to focus on the smallest cities that Red Owl considered acceptable.[39] He settled on Chilton.[40] It is about eighty miles due east of Wautoma, and in 1960 it had a population of about 2500.[41] Hoffmann and Lukowitz identified an undeveloped lot in Chilton that they thought was well situated for a new supermarket.[42] With Lukowitz's encouragement, on August 1, 1961, Hoffmann obtained a thirty-day option to purchase the lot.[43] It was obtained without paying any option price. It required a payment of $1000 upon exercise of the option and an additional $5000 at closing (a total of $6000) for the lot.[44]

As the day the option was scheduled to expire approached (August 31st), Hoffmann telephoned Lukowitz and asked whether he should exercise it.[45] Hoffmann clearly understood at this time that Red Owl Stores had not yet committed to approving a franchise in Chilton or one on this lot.[46] Lukowitz advised Hoffmann to get a fifteen-day extension on the option, which Hoffmann was able to do.[47] According to Hoffmann's testimony at trial, on September 13th, he called Lukowitz again.[48] He asked for advice on exercising the option.[49] Hoffmann was reluctant to spend the money unless Red Owl found this location acceptable. Lukowitz told Hoffmann to wait a day.[50] Lukowitz was going to travel on the next day to corporate headquarters in Hopkins, Minnesota (a Minneapolis suburb).[51] Late on September 14th, Lukowitz's secretary called Hoffmann and relayed the message that Hoffmann should exercise the option.[52] Hoffmann told the secretary that he wanted to talk to Lukowitz because he was unwilling to spend the money based on her word.[53] On the morning of September 15th, Hoffmann telephoned Lukowitz in his Green Bay office. Lukowitz said: "Everything is all set.

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38. *See* Transcript of Trial, *supra* note 9, at 21.

39. For example, Hoffmann ruled out Ripon, which had a 1960 census population of 6163. *See id.* at 120; 1960 CENSUS, *supra* note 19, at 51-16.

40. Transcript of Trial, *supra* note 9, at 23.

41. The 1960 census population was 2578. *See* 1960 CENSUS, *supra* note 19, at 51-14. Chilton is located in an agricultural area and does not have a substantially larger summer population.

42. *See* Transcript of Trial, *supra* note 9, at 22–23.

43. *See id.* at 23–24, 26–27.

44. *See id.* at 26.

45. *See id.* at 28.

46. *See id.* at 27–28.

47. *See id.* at 28.

48. *Id.* at 29.

49. *Id.*

50. *See id.*

51. *See id.*

52. *See id.* at 30.

53. *See id.*

Go ahead and pick up your option."[54] That afternoon, Hoffmann paid the landowner $1000 and exercised the option.[55]

A few days before exercise of the option, on September 11, 1961, Lukowitz prepared the first financial statement about Hoffmann's net worth, based on answers to questions he asked Hoffmann.[56] The statement showed $10,000 cash in the bank, $6000 equity in the Hoffmanns' personal residence, $1500 in inventory at the bakery (presumably mostly supplies), equity in the bakery building of $4500 ($12,000 market value less a $7500 mortgage), and equity in bakery equipment of $12,000 ($19,500 less a $7500 chattel mortgage).[57] This represented a total net worth of $34,000, though in subsequent negotiations between Hoffmann and Red Owl it never was contemplated that Hoffmann would invest his home equity in a Red Owl franchise. Lukowitz testified that he presented this financial statement to higher Red Owl officials.[58] However, it is not clear whether Lukowitz did this before he advised Hoffmann to exercise the option on September 15th.

C. The Chilton Meeting and First Proposed Financing Plan

On September 27th, Hoffmann met Lukowitz at the lot in Chilton.[59] Two Red Owl officials from corporate headquarters, Pete Reymund, a field representative working on new stores, and Harold Carlson, the future development manager, were with Lukowitz.[60] Reymund and Carlson expressed approval of the lot and its location. Then, while the four were sitting in the car, Reymund created another financial statement based on Hoffmann's answers to Reymund's questions.[61] The financial statement provided was similar to the earlier one, except it showed that Hoffmann had only $2500 in cash on hand and that the bakery building was unencumbered.[62] The difference reflected the fact that shortly after

54. *See id.* Lukowitz provided a different account of these events: He testified that he had heard nothing from headquarters and told Hoffmann that he could give Hoffmann no particular advice with respect to exercise of the option. *Id.* at 188. He advised Hoffmann to use his own judgment. *Id.* He testified that Hoffmann had expressed concern that A & P would purchase the lot if Hoffmann allowed the option to expire, so that the lot could not be obtained again later. *Id.* at 187–89. Lukowitz's testimony was corroborated by the testimony of Harold Carlson, a Red Owl official from headquarters, who said that he asked Hoffmann at a September 27th meeting why he had put down money on the lot when there was not yet a deal, and that Hoffmann replied that he was concerned that A & P would buy the lot if he did not exercise the option. *Id.* at 309.

55. *Id.*

56. *See id.* at 191.

57. *See* Transcript of Record, *supra* note 12, Ex. 40.

58. Transcript of Trial, *supra* note 9, at 192.

59. *See id.* at 291.

60. *See id.*

61. *See id.* at 292–93.

62. *See* Transcript of Record, *supra* note 12, Ex. 39.

the earlier financial statement (given on September 11th), Hoffmann had withdrawn cash and paid off the mortgage on the bakery building.[63]

After taking down Hoffmann's financial situation, Reymund and Carlson drafted the first of what would become several "proposed financial plans" for Hoffmann's franchise.[64] This plan contemplated an "equity" contribution at $18,600, consisting of $12,000 from the sale of the bakery building, $3600 in cash,[65] and $3000 on "resale of the lot."[66] Listed as "other trade payables" was a $7500 loan from Hoffmann's father-in-law.[67] Listed separately as "Bakery" was $1500 in bakery inventory and $12,000 equity in the bakery equipment.[68] Hoffmann's total investment, including the father-in-law's loan, was $39,600.[69] This first financial plan, in tabular form, was as follows:

63. Hoffmann testified to this fact. *See* Transcript of Trial, *supra* note 9, at 152–54, 168–69. This point is critical to one of the important differences between our account and Professor Scott's. Scott acknowledges Hoffmann's payment of the outstanding mortgage on the bakery building in mid-September. *See* Scott, *supra* note 14, at 78, 79 n.39 ("Hoffman paid off the $7500 mortgage on the bakery building, reducing his cash on hand in the bank to $2500."). However, later in his article he overlooks this payment and states that in the September 27th statement Hoffmann misrepresented the bakery building as clear of liens, causing Red Owl to be misled as to the resources available to Hoffmann for investment in a franchise. *See id.* at 81 ("The problem [Red Owl had], in essence, was that . . . contrary to Hoffman's initial representations, the [bakery] building had been mortgaged. When it became clear that the building was not unencumbered and thus could not provide a major portion of Hoffman's equity contribution, the financing plan had to be revised." (footnote omitted)). In the middle of October, after the September 27th financial statement that Scott describes as misleading, Hoffmann remortgaged the bakery building for $7500. *See* Transcript of Trial, *supra* note 9, at 151–52. He did this because he thought that this is what Lukowitz wanted. Hoffmann, still thinking that a Chilton store would be opened soon, was "getting his money together." *See infra* note 115.

In concluding that Hoffmann had misled officials about his assets in the September 27th meeting, Scott was apparently misled by Red Owl's cross-examination of Hoffmann. David Fulton, Red Owl's lawyer, suggested to Hoffmann that the bakery building had been encumbered at the time of the September 27th financial statement, yet was wrongly listed on that statement as unencumbered. Transcript of Trial, *supra* note 9, at 104–05. Hoffmann did not correct Fulton and appeared to agree with him. On redirect, however, Hoffmann's lawyer had Hoffmann correct this misstatement. He testified that he had paid off the mortgage on the bakery building, as stated in the text. The building then remained unencumbered for a few weeks that included the September 27th financial statement. *Id.* at 150–55. Hoffmann testified that he had checked with the bank the morning of his redirect "to make sure." *See id.* at 169. Apparently, Hoffmann had himself been unclear about this important fact at the time of his cross-examination. The trial took place nearly two years after the events happened.

64. *See* Transcript of Record, *supra* note 12, Ex. 39.

65. It is not explained in the transcript why $3600 in cash was expected, when the financial statement prepared at the same time listed $2500 in the bank.

66. Transcript of Record, *supra* note 12, Ex. 39; *see* Transcript of Trial, *supra* note 9, at 293.

67. Transcript of Record, *supra* note 12, Ex. 39.

68. *Id.*

69. *Id.*

TABLE 1: FIRST FINANCIAL PLAN
(* DENOTES AMOUNTS LISTED AS EQUITY CONTRIBUTION)

Contribution	Amount
Cash	$3600*
Bakery building	$12,000*
Resale of lot	$3000*
Loan from father-in-law	$7500
Inventory in bakery	$1500
Bakery equipment (and encumbrance)	$19,500 ($7500)
Total (using net value for bakery equipment)	**$39,600**

It needs to be emphasized that this first proposed financial plan was drafted as four people sat in a car in Chilton. All of them, including Hoffmann, understood that Reymund and Carlson, the Red Owl officials from corporate headquarters, needed to take the proposed plan back to headquarters for further vetting.[70] Nonetheless, Reymund and Carlson were headquarters officials who worked full time on development of new stores and likely knew of any specific requirements for all new franchises. They were encouraging at this meeting, and Hoffmann was encouraged. He testified: "[Carlson and Reymund] felt this whole thing looked real good. . . . [T]hey assured me that day there appeared to be no hitch . . . and that we should be getting our building started and under way in the not too distant future."[71]

Several features of this proposed plan are worth noting for what they show about the thinking at the time and what they portended for the future. First, the plan contemplated the sale of the bakery building and investment of the cash proceeds into the Chilton store.[72] As Lukowitz knew, it had been Hoffmann's plan that he would keep the bakery building and rent it to an employee, who would operate the bakery after Hoffmann left Wautoma.[73] This would provide Hoffmann with some income to support his family while building up the Chilton business. Sale of the building also meant that Hoffmann would personally invest more than the $18,000 he originally contemplated into the franchise.[74]

70. Reymund so testified. *See* Transcript of Trial, *supra* note 9, at 295.

71. *Id.* at 33.

72. *See* Transcript of Record, *supra* note 12, Ex. 39.

73. *See id.*; Transcript of Trial, *supra* note 9, at 57, 104, 171.

74. Hoffmann repeatedly testified that he originally contemplated an investment of "approximately" $18,000 in cash, that Red Owl's representatives, particularly Lukowitz, knew that, and that they knew that some of that would come from a loan from his father-in-law. *See, e.g.*, Transcript of Trial, *supra* note 9, at 10, 91–93. Hoffmann also made clear, as reported in the text

Second, Hoffmann owned extra bakery equipment not needed for operation of the Wautoma bakery, and it had long been his plan to install it at the Chilton store.[75] At this time, Red Owl did not consider Hoffmann's bakery equipment to be part of his equity contribution, although it would be so considered in later financing plans.[76] Perhaps the Red Owl officials present in Chilton were thinking that their superiors would require that Hoffmann's store be justified financially on its own and separately from consideration of any investment in or potential revenues from the in-store bakery. However, there is nothing in the transcript to indicate what Red Owl's thinking was on this point.

Third, Red Owl did not consider the $7500 loan from Hoffmann's father-in-law as part of Hoffmann's "equity" contribution.[77] It became clear in later negotiations that Red Owl wanted Hoffmann to have this cash available. However, Red Owl did not consider this amount to be part of Hoffmann's "equity" contribution, apparently because it was borrowed.

Fourth, the plan contemplated that the Chilton lot would be resold for a $3000 profit.[78] The idea was that Hoffmann would transfer the lot to a building contractor who would construct and own the building. Hoffmann would then pay the building contractor a "rent."[79] The rent would be based on the contractor's investment and designed to provide him with an appropriate return.[80] Consequently, by increasing the sale price of the lot to the builder, Hoffmann would in effect be taking out a loan from the contractor, to be repaid in increased rent. Yet in this financial plan, though not in later plans, profit on the sale of the lot was treated as part of Hoffmann's "equity" contribution.

D. Sale of the Bakery

Sometime during the first week of October, Lukowitz telephoned Hoffmann from his office in Green Bay.[81] According to Hoffmann's trial testimony, Lukowitz told him "that Minneapolis had told [Lukowitz] that the only hitch in this thing at the present time was that I had to get rid of

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above, that he did not contemplate sale of the bakery building. Presumably Hoffmann intended that the $18,000 would come from his cash savings, reported as $10,000 in his first financial statement, *see supra* note 57 and accompanying text, and the $7500 loan from his father-in-law mentioned in the first financial plan, *see supra* p. 815 tbl.1.

75. *See* Transcript of Trial, *supra* note 9, at 58.

76. *See id.* at 298.

77. *See* Transcript of Record, *supra* note 12, Ex. 39.

78. *See id.*

79. *See* Transcript of Trial, *supra* note 9, at 63.

80. *See id.* The monthly rent would be based on one percent of the building cost, but an annualized six percent return on the land cost. *Id.* At the end of ten years, Hoffmann was to have an option to renew the lease or buy the building and land. *Id.*

81. *Id.* at 57.

my bakery and my bakery building."[82] As Lukowitz knew, this had not been Hoffmann's intention.[83] Hoffmann expressed a willingness to sell the bakery, nonetheless, if he was assured that the deal was going through.[84] He pointed out that the bakery provided his family's livelihood, and by this time Hoffmann had six children.[85] Lukowitz provided verbal reassurance, insisting that sale of the bakery was the only "hitch."[86] A few days earlier, Lukowitz had shown Hoffmann a proposed floor plan for the Chilton store, which reinforced the idea that Red Owl was proceeding with the deal.[87]

Hoffmann and his wife decided to sell the bakery business immediately, including the bakery equipment not set aside for the Chilton store, to a twenty-one-year-old bakery employee, Mike Grimm.[88] The sale was entirely on credit, with Grimm agreeing to make monthly payments from business income.[89] The bakery building was sold for $10,000 in cash to a local investor, who then rented it to Grimm.[90] Hoffmann had to guarantee payment of the rent in order to get the investor to buy the building.[91] The building sold for $2000 less than Hoffmann had previously valued it,[92] but Hoffmann accepted the deal anyway because of Red Owl's insistence on a quick sale and his expectation that he would soon be set up in the Chilton store.

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82. *Id.* Shirley Hoffmann corroborated the essence of this critical conversation in her testimony. *See id.* at 261. Lukowitz was never asked about this telephone conversation by either lawyer at trial. During this period Shirley was regularly listening into Hoffmann's long-distance calls, as Hoffmann was often overtired, especially on Thursdays through Saturdays when he worked so hard preparing for weekend sales. *See id.* at 258. Shirley testified that Joe and Lukowitz talked two to three times per week. *Id.* at 263.

83. There had been some interchange between Lukowitz and Red Owl management on this issue prior to Lukowitz's telephone call to Hoffmann. A teletype dated October 9th from Lukowitz to Mr. Hall, a Red Owl officer, stated: "Joe Hoffman of Wautoma has cash with no strings attached. *He is going to rent his building to another baker for $200 per month.*" Transcript of Record, *supra* note 12, Ex. 10 (emphasis added); *see* Transcript of Trial, *supra* note 9, at 211. Evidently, Red Owl management was unwilling to go along with this plan.

84. *See* Transcript of Trial, *supra* note 9, at 58–59.

85. *See id.* at 87.

86. *See id.* at 57.

87. *See id.* 197–98.

88. *See id.* at 58–59; *see also infra* p. 818 fig.2.

89. Grimm's obligation was secured by a chattel mortgage payable to Tasty Bakery, a corporation wholly owned by Joe and Shirley Hoffmann. *See* Transcript of Record, *supra* note 12, Ex. 8.

90. *See* Transcript of Trial, *supra* note 9, at 59.

91. Technically, the investor leased the building to Hoffmann, who then sublet it to Grimm. *See id.* at 59–62.

92. This valuation was based on an appraisal that Hoffmann had obtained in the spring of 1961. *See id.* at 140.



NEW OWNER AT WAUTOMA BAKERY – Michael Grimm, left, became the new owner of Tastee Bakerie Monday when he bought the business and equipment from Joe Hoffman. Mike, 21, is the son of Mr. and Mrs. Elver Grimm. He has worked for Hoffman in the bakery all but six months out of five years Hoffman has owned the bakery. Grimm says he is planning no changes for the present, but he will operate under the name of "Mike's Tastee Bakerie". Hoffman announced that he will devote more of his time to his other interests.

FIGURE 2: JOE HOFFMANN SELLS WAUTOMA BAKERY[93]

E. LUKOWITZ'S WARNING OF TROUBLE AHEAD

Joe Hoffmann told us that he still remembers clearly a surprise visit by Ed Lukowitz to Wautoma shortly before the closing of the sale of the bakery on November 6th.[94] Hoffmann and Lukowitz sat in Lukowitz's car while Hoffmann read over a memorandum that Lukowitz had received from Red Owl headquarters.[95] Hoffmann remembers the memorandum stating or implying that because of financial difficulties at Red Owl, it would be necessary to restrict the company's investment in new franchises.[96] The memorandum said nothing specifically about the Chilton store, and Lukowitz told Hoffmann that he hoped that it did not mean trouble for Hoffmann.[97] However, Lukowitz had taken the time to drive unexpectedly from Green Bay to Wautoma to show the telegram to Hoffmann. We can infer that Lukowitz feared that the policy change might derail Joe's proposed Chilton franchise.

Nothing was said at trial about this conversation. Hoffmann remembers that his lawyers, in pretrial discovery, tried to get a copy of the memorandum that Lukowitz showed Hoffmann, but Red Owl said

93. *New Owner at Wautoma Bakery*, WAUSHARA ARGUS, Nov. 9, 1961, at 1. Reprinted with permission from the *Waushara Argus*.

94. Telephone Interview with Joseph Hoffmann, *supra* note 20.

95. *See id.*

96. *Id.*

97. *Id.*; Telephone Interview with Joseph Hoffmann (Feb. 10, 2009).

that they could not find it.[98] There is no mention in the transcript of this unsuccessful discovery request.[99] Nonetheless, Hoffmann's current recollection of his conversation with Lukowitz is very clear, including a vision of where on Main Street in Wautoma that the car was parked.[100] We have come away from our conversations with Hoffmann convinced that the meeting with Lukowitz actually happened.[101]

Notwithstanding any fear that the memorandum provoked, there was apparently no thought of backing out of the sale of the bakery or the bakery building. Hoffmann told us that he felt legally committed by the contracts he had signed.[102] And both Hoffmann and Lukowitz obviously thought there was still at least a good chance that a franchise would be awarded. Hoffmann rented a residence in Chilton and paid the rent for January, with the intention of moving his family there once they had disposed of their residence in Wautoma.[103] Lukowitz wrote a letter to Carlson, advocating Chilton as the location for Hoffmann's franchise.[104] Lukowitz was also in contact with a builder who would construct the building in Chilton, informing him that no final decision had yet been made respecting a Chilton store.[105] These actions indicate that Lukowitz knew that his superiors at Red Owl had not made a final commitment to the Chilton site, but the actions were also not inconsistent with an understanding by Lukowitz that a commitment had been made to Hoffmann to put him into a franchise somewhere.

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98. Telephone Interview with Joseph Hoffmann, *supra* note 97.

99. However, there was extensive discussion at trial about Red Owl's inability to produce a later telegram from headquarters to Lukowitz, raising the possibility that in his current recollection Hoffmann has confused this later telegram for the earlier memorandum discussed in the text above. We have discounted that possibility because of our interviews with Hoffmann, as described above. The later missing telegram is discussed *infra* notes 128–30 and accompanying text.

100. Telephone Interview with Joseph Hoffmann, *supra* note 97.

101. Hoffmann does not recall why there was no mention of the missing memorandum at trial. At one point, Hoffmann's lawyer (Van Hoof) asked Lukowitz: "Isn't it true that the amount of money that the Red Owl stores felt was needed for working capital was continuously increased because of experience with other stores?" Transcript of Trial, *supra* note 9, at 227. An objection to the question was sustained, and Lukowitz never answered the question. *Id.* This is the only point in the transcript in which there is reference to a policy change at Red Owl that might have adversely affected Hoffmann's chances of obtaining a franchise.

102. Telephone Interview with Joseph Hoffmann (Mar. 25, 2009).

103. *See* Transcript of Trial, *supra* note 9, at 62–63.

104. *See* Transcript of Record, *supra* note 12, Ex. 12 (letter from Lukowitz to Carlson, dated November 9, 1961). The letter related a conversation with Joe Hoffmann about the relative merits of Chilton and another small Wisconsin town (Kewaunee) as a site for Hoffmann's store. *Id.* This passage of the letter could be read as consistent with an understanding by Lukowitz that there was a commitment to put Hoffmann in a store somewhere, but that sentiment was not stated expressly. *See id.* The letter could also be read as showing Lukowitz's understanding that Red Owl officials had not yet made a binding commitment to Hoffmann.

105. *See id.* Ex. 13 (letter from Lukowitz to Keshenberg, dated November 21, 1961). In mid-October Hoffmann had accompanied Lukowitz to meet this builder, who had worked with Red Owl before. *See* Transcript of Trial, *supra* note 9, at 207 (testimony of Lukowitz).

Shortly after the sale of the bakery, Joe Hoffmann moved to Appleton and began to work as an employee at Elm Tree Bakery.[106] He needed to support his family, and he had lost the income from the Wautoma bakery. The family stayed in Wautoma in order to sell or rent the family residence. Just before Christmas, the family moved to a rented residence close to Appleton.[107] They never did move to the residence that had been rented in Chilton.[108]

F. The November Twenty-Second Meeting in Minneapolis and Proposed Financial Plan

In late November, Lukowitz called Hoffmann and said, "Joe, let's go to Minneapolis together and get this thing all ironed out; and we can get this store in operation right after the first of the year."[109] They flew together from Green Bay, and on November 22nd met at Red Owl headquarters with Harold Carlson, who had also been at the September meeting in Chilton, and with Walter Hall, Red Owl's credit manager.[110] Joe Hoffmann told us that it was at this time that he first thought that Red Owl was not likely to approve the Chilton store.[111] Although negotiations continued for another two months, Hoffmann remembers that he was upset that Red Owl was demanding more money, and that he told the Minneapolis officials that he was thinking of consulting an attorney.[112]

At trial Hoffmann did not express precisely these sentiments. He did indicate that the meeting did not go the way he expected, by testifying: "This is the first time that I find out that they are pressing for more money. I have already got everything sold so now they are upping the amount of money they want."[113] The Red Owl officials nonetheless proceeded to the drafting of a proposed financing plan that came to be known as the $24,100 plan, the dollar figure referring to the amount of cash that Hoffmann needed to provide.[114] This amount consisted of $4600 in cash,[115] $8000 to be obtained from a loan from a Chilton bank secured

106. *See* Transcript of Trial, *supra* note 9, at 62–63.

107. *See id.*

108. *See id.*

109. *See id.* at 63.

110. *See id.* at 64. Frank Walker, the manager of the Franchise Department, made a brief appearance but did not participate in the substantive discussions at this meeting. *See id.*

111. Telephone Interview with Joseph Hoffmann, *supra* note 97.

112. *Id.*

113. Transcript of Trial, *supra* note 9, at 64. On Red Owl's objection, the court ordered the second sentence of the quote stricken from the record. *Id.* at 65.

114. *See id.* at 65.

115. Hoffmann's cash position at this time reflected a series of transactions he had engaged in since mid-October. On October 11, 1961, Hoffmann had borrowed $13,500 from the local Wautoma bank, secured by an additional $6000 chattel mortgage on his bakery equipment and a renewed $7500 mortgage on the bakery building, because Lukowitz had instructed him to "get his money together."

by the bakery equipment, $7500 in a loan from Hoffmann's father-in-law, and $4000 "profit" from sale of the lot.[116] The plan also contemplated Hoffmann's contribution of his bakery equipment.[117] As illustrated by the following table, when compared with the September 27th plan, the November 22nd plan actually represented a reduction in the money to be invested by Hoffmann, in part because the sale of the bakery building was for less than what previously had been considered its value.[118]

TABLE 2: COMPARISON OF FIRST AND SECOND FINANCIAL PLANS
(* DENOTES AMOUNTS LISTED AS EQUITY CONTRIBUTION)[119]

Contribution	Sept. 27th Plan	Nov. 22nd Plan
Cash	$3600*	$4600*
Proceeds of Bakery Building	$12,000*	—
Resale of Lot	$3000*	$4000
Loan from Father-in-Law	$7500	$7500
Loan from Chilton Bank	—	$8000
Inventory in Bakery	$1500	—
Bakery Equipment Value (and encumbrance)	$19,500 ($7500)	$17,500* ($8000)
Total (using net value for bakery equipment)	**$39,600**	**$33,600**

See id. at 154–55, 169–70; *see also* Scott, *supra* note 14, at 79 n.44. As a consequence, when he sold the bakery building, he needed to use $7500 of the proceeds to repay the bank. Before the $13,500 bank loan, Hoffmann had $2500 in cash resources. With the extra $2500 netted from the sale of the bakery building, he now had over $18,000 in cash. However, the bakery equipment was now encumbered by a chattel mortgage of $13,500 ($7500 originally, plus an additional $6000 when he took out the October loan). *See* Transcript of Record, *supra* note 12, Ex. 42. When Hoffmann left Wautoma in early November, he apparently paid off the loan secured by chattel mortgage, since the second financial plan, drafted a few weeks later, indicated that Hoffmann then possessed only $4600 in cash. *See infra* p. 821 tbl.2. The assumption that he used cash to pay off the Wautoma bank loan also explains why the Chilton bank was willing to loan $8000 secured by the bakery equipment (reflected in the second financial plan), something they presumably would not have done if the Wautoma bank still possessed a chattel mortgage in the bakery equipment.

116. This "profit" was effectively a loan from the builder. *See supra* note 80 and accompanying text. The amount of this loan had been increased by $1000 between the September and November plans, and it was to be increased further in subsequent plans. *See infra* p. 825 tbl.3.

117. *See* Transcript of Record, *supra* note 12, Ex. 32. The bakery equipment was now valued at $17,500, rather than the September valuation of $19,500. Throughout the record there is no indication of how valuations were obtained for the bakery equipment, nor is there any detailing of how much bakery equipment would be transferred to the Chilton store. Hoffmann always intended to include some of his bakery equipment in the sale of his Wautoma business to his employee. *See* Telephone Interview with Joseph Hoffmann, *supra* note 97.

118. Other reasons for the difference in the total investment required by the plans are the reduced value of the bakery equipment and noninclusion, for unexplained reasons, of bakery inventory in the second plan. *See* Transcript of Record, *supra* note 12, Ex. 32.

119. The bakery equipment (at $17,500) was now also listed as part of Hoffmann's equity contribution to the franchise, as well as $4600 in cash. *Id.* Since Hoffmann effectively used accumulated cash and part of the proceeds from the sale of the bakery building to pay off an encumbrance on the bakery equipment for preexisting debt, *see supra* note 115, it was certainly appropriate to consider at least part of the bakery equipment as "equity."

Hoffmann testified that he had agreed to go along with this plan.[120] The record from the trial makes clear, however, that the parties understood that the November plan was not a final plan. Two days after the meeting, Carlson sent a copy of the November plan directly to Hoffmann, along with a note suggesting that more funds might be needed and concluding: "We certainly plan on being as helpful as we can to bring the deal together if it is at all possible."[121] In a pretrial deposition that was read into the record at trial, Lukowitz stated about the Minneapolis meeting: "[Hoffmann] was told right then and there that it would not go through because of the financial situation, for his own protection; it would be better for him to get more money, and if he could raise it he should try to see if he could."[122]

Lukowitz nonetheless remained optimistic that Hoffmann would receive a franchise. He also remained a strong supporter of Hoffmann within the Red Owl world. Upon returning from Minneapolis he set about finding used fixtures that Hoffmann could buy and install in the Chilton store.[123] Lukowitz was successful in this endeavor. On December 6, 1961, he sent a telegram to Carlson which stated that he thought he could get the fixtures for less than $20,000.[124] In the same telegram, Lukowitz advocated further for Hoffmann, repeating the amount of cash that Hoffmann could invest as detailed in the November 22nd plan and stating: "$24,100 seems to me . . . should be enough money for anybody

120. Transcript of Trial, *supra* note 9, at 107. Hoffmann testified that he regarded the plan as requiring more money than the September plan, presumably because in September and early October he did not expect to sell his bakery building, despite what the September plan had said. *Id.* The September plan called for $26,100 in cash investment, assuming that proceeds from the sale of the bakery building would be invested. *See* Transcript of Record, *supra* note 12, Ex. 39. So in terms of cash, the November plan, calling for only a $24,100 cash investment, represented a reduction, reflecting the sale of the bakery building for less than its appraised value. *See id.* Ex. 32.

121. *See* Transcript of Trial, *supra* note 9, at 310–12. The letter was read into the transcript but not submitted as an exhibit. This is the only time, so far as we can tell, that Carlson or anybody else from Minneapolis communicated directly with Hoffmann, other than at the three meetings Hoffmann had with Minneapolis officials. At all other times, the headquarters officials communicated with Lukowitz, asking him to tell Hoffmann anything that needed to be said.

Hall, the other Red Owl headquarters official at the November meeting, testified that they had encouraged Hoffmann to come up with some additional money and asked whether the father-in-law might contribute more. *Id.* at 320–21.

122. *Id.* at 206.

123. *See id.* Fixtures included shelving, freezer cases, and the like. This was important because Red Owl's standard finance plan contemplated that Red Owl would finance eighty percent of the fixture cost for a new store with a five-year loan. Reducing the cost of the fixtures would reduce Red Owl's investment in a new franchise in Chilton, as well as the size of the periodic payments (on the fixtures loan) that Hoffmann would have to make once a franchise opened. The idea of used fixtures was obviously discussed during the Minneapolis meeting, as the proposed financial plan drafted there listed the fixture cost as $20,000 and the size of the fixture loan from Red Owl at $16,000. In the September plan, the estimated fixture cost had been $30,000 and the estimated fixture loan was $24,000. *See* Transcript of Record, *supra* note 12, Ex. 37.

124. Transcript of Record, *supra* note 12, Ex. 43.

to go into a business. Will see what I can do on more land cost. However, Joe feels he cannot borrow anymore."[125]

G. The $26,000 Proposal

Soon after December 6th, Lukowitz asked Hoffmann to meet him at the Red Owl store in Appleton.[126] There Lukowitz showed Hoffmann a telegram that he had received from somebody at Red Owl headquarters.[127] It said that if Hoffmann could come up with an additional $2000, then Red Owl was ready to make a commitment.[128] Red Owl was unable to find this telegram in pretrial discovery.[129] However, during the trial, no representative of Red Owl denied that the telegram existed.[130]

Hoffmann did not immediately accept this proposal, instead telling Lukowitz that he would have to find out if he could make an additional $2000 available.[131] Several days later he discussed the situation with his wife and father-in-law.[132] The father-in-law expressed a willingness to put up $13,000 and come into the venture as a partner.[133] Since Red Owl wanted $26,000, Hoffmann would contribute the other $13,000. Hoffmann intended to raise this money without taking out the $8000 loan from the Chilton bank.[134]

The record does not reveal all of the interactions between Hoffmann and Lukowitz over the next month.[135] The record suggests that once the father-in-law's offer to contribute $13,000 was communicated to Red Owl headquarters, officials there focused on getting the father-in-law's agreement that the $13,000 would be either an outright gift or a

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125. *See id.*

126. Transcript of Trial, *supra* note 9, at 69–70.

127. *Id.* at 70.

128. *See id.*

129. Telephone Interview with Joseph Hoffmann, *supra* note 97.

130. At the end of the trial, Red Owl put its house counsel, Richard Johnson, on the stand to testify about his unsuccessful search for the telegram. *See* Transcript of Trial, *supra* note 9, at 346–47. But none of the other Red Owl witnesses who could have been the author of the telegram (most likely, Carlson or Hall) were asked about the telegram or denied that it existed. Lukowitz confirmed discussing with Hoffmann the need for an additional $2000 at this meeting, but he said that he did not recall whether he had received a telegram from Red Owl headquarters. *See id.* at 215, 231.

131. *Id.* at 70.

132. *Id.* at 71.

133. *See id.* at 71, 77.

134. *See id.* at 71–73. On cross-examination Hoffmann indicated that his $13,000 would consist of $5000 cash, $6000 profit on the sale of the land, and a $2000 loan, secured by the bakery equipment, from his old bank in Wautoma. *Id.* at 108.

135. Lukowitz, remaining enthusiastic about granting a franchise to Hoffmann, drafted a $26,100 plan that would raise the additional funds by having the builder buy the lot for an additional $2000, so that Hoffmann would make a $6000 "profit" on the sale of the lot. *See id.* at 72; *see also* Transcript of Record, *supra* note 12, Ex. 33. The only communications from headquarters in the record indicate that no decision had been reached on this plan. *See id.* Exs. 13, 14.

loan subordinated to other creditors (of whom Red Owl would be by far the largest).[136] However, this concern was not communicated to Hoffmann. In late January, Lukowitz asked Hoffmann to arrange a meeting between Lukowitz and the father-in-law.[137] Hoffmann did not know that Lukowitz intended to ask Hoffmann's father-in-law to sign an agreement with Red Owl that the $13,000 was a gift or a subordinated loan to Hoffmann, given in consideration for Red Owl's extension of a franchise.[138] Lukowitz did meet with Hoffmann, but the meeting with the father-in-law did not happen, for reasons that are disputed in the testimony by Hoffmann and Lukowitz.[139] Nonetheless, shortly thereafter Lukowitz sent a telegram to Minneapolis stating that the father-in-law would sign an agreement that the $13,000 was either a gift or a loan subordinated to other creditors.[140]

H. The Final Proposal

A few days after Lukowitz's aborted meeting with Hoffmann's father-in-law, Lukowitz invited Hoffmann to a meeting at the Appleton Red Owl store with two officials from Red Owl headquarters: Herman Carlson, who had been at both prior meetings in Chilton and Minneapolis, and his superior, Frank Walker, an assistant vice president and the manager of the Franchise Department.[141] Lukowitz had led Hoffmann to expect that a deal could now be concluded because of the increase in his father-in-law's contribution.[142] However, Carlson and Walker presented Hoffmann with a new financing plan that came to be

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136. Hall, Red Owl's credit manager, sent a telegram to Lukowitz, dated January 16, 1962, asking for the father-in-law's name (Simon Vanden Heuvel), so that Hall could prepare an agreement to such effect. Transcript of Record, *supra* note 12, Ex. 47. Such an agreement was later drafted and forwarded to Lukowitz to obtain a signature. *See* Transcript of Trial, *supra* note 9, at 220–21; *see also* Transcript of Record, *supra* note 12, Ex. 47.

137. Telephone Interview with Joseph Hoffmann, *supra* note 97.

138. *See* Transcript of Trial, *supra* note 9, at 219, 285 (testimony of Lukowitz). It is not clear whether Lukowitz had the agreement along at the time of his meeting with Hoffmann, though the agreement was drafted. *See* Transcript of Record, *supra* note 12, Ex. 46. It was first shown to Hoffmann when he met with headquarters officials in Appleton to receive their final proposal. *See infra* note 144.

139. According to Lukowitz, Hoffmann stated that he did not want Lukowitz to meet with his father-in-law. *See* Transcript of Trial, *supra* note 9, at 282. Hoffmann testified that his father-in-law had an unexpected meeting and could not make the scheduled meeting with Lukowitz. *See id.* at 351. We believe that Hoffmann's testimony on this point is the more credible.

140. *See* Transcript of Record, *supra* note 12, Ex. 20. Hoffmann testified that he had told Lukowitz that, in return for putting up $13,000, his father-in-law wanted to be a partner. Transcript of Trial, *supra* note 9, at 90. Lukowitz indicated that this would be okay and that he was sure a deal could now be put together. *Id.* at 73, 90. But Lukowitz suggested that Hoffmann "not go into the partnership bit with the front office." *Id.* at 90 (testimony of Hoffmann). The record does not indicate why Lukowitz may have thought that the front office people might object to the partnership plan.

141. *See* Transcript of Trial, *supra* note 9, at 73.

142. *See id.*

known as the $34,000 plan.[143] It required $13,000 from the father-in-law, but also required Hoffmann to secure his father-in-law's consent to the proposed agreement stating that the $13,000 would be a gift.[144] It also called for $5000 cash from Hoffmann, contribution of Hoffmann's bakery equipment, loans of $8000 from the Chilton bank and $2000 from the Wautoma bank, and $6000 profit on the sale of the land (also effectively a loan).[145] As the following table comparing the three plans indicates, the final plan contemplated an increased contribution by Hoffmann, especially as compared to the second plan.[146]

TABLE 3: COMPARISON OF THE THREE PLANS
(* DENOTES AMOUNTS LISTED AS EQUITY CONTRIBUTION)

Contribution	Sept. 27th Plan	Nov. 22nd Plan	Final Plan
Cash	$3600*	$4600*	$5000*
Proceeds of Bakery Building	$12,000*	—	—
Resale of Lot[147]	$3000*	$4000	$6000
Loan/Gift from Father-in-Law	$7500	$7500	$13,000
Loan from Chilton Bank	—	$8000	$8000
Loan from Wautoma Bank	—	—	$2000
Bakery Inventory	$1500	—	—
Bakery Equipment Value (and encumbrance)	$19,500 ($7500)	$17,500* ($8000)	$17,500* ($8000)
Total (using net value for bakery equipment)	**$39,600**	**$33,600**	**$43,500**

143. *See* Transcript of Record, *supra* note 12, Ex. 34. The $34,000 refers to the cash to be contributed exclusive of the bakery equipment. *See infra* p. 825 tbl.3.

144. *See* Transcript of Record, *supra* note 12, Ex. 34. Hoffmann testified that this was the first time he had learned of Red Owl's demand that his father-in-law agree to make his $13,000 a gift. *See* Transcript of Trial, *supra* note 9, at 80–81, 354–57. Apparently, Hoffmann also was not informed that Red Owl would have accepted an agreement from the father-in-law subordinating the loan, though Red Owl officials testified that they would have accepted the latter, and telegrams exchanged with Lukowitz in the days preceding this meeting made that clear. *See id.* at 326–28 (testimony of Hall); Transcript of Record, *supra* note 12, Ex. 17. In a pretrial deposition, Hoffmann had appeared to acknowledge seeing these telegrams, but at trial he denied seeing them. Transcript of Trial, *supra* note 9, at 356–58.

145. *See* Transcript of Record, *supra* note 12, Ex. 34. The plan also presumed used fixtures and provided for a fixture loan from Red Owl of only $14,000. This further reduced Red Owl's investment in the franchise when compared to the second plan. *See supra* note 123.

146. From Hoffmann's perspective, the final plan was also a substantial increase from the first plan, after one accounts for the sale of the bakery building for less than market value and the reduced valuation on the bakery equipment. *See supra* note 118 and accompanying text.

147. Recall that this "profit" was effectively a loan to Hoffmann from the builder. *See supra* note 80 and accompanying text.

Hoffmann immediately objected to the final proposed plan, and there was not much discussion about it.[148] The meeting was a short one. On February 2, 1962, Hoffmann sent the following letter to Lukowitz:

> Due to the generosity of my Father-in-Law, who agreed to give me $13,000, we thought it would be possible to put a store in Chilton. He agreed to this under the assumption that we could put this store together with an available $26,000, which I assumed, due to conversations with yourself, was the agreed upon amount. It now seems apparent that the only way Red Owl will consider this store is if I have $34,000 available.
>
> After doing my utmost to put this together for 2 1/2 years, it seems to me Red Owls' demands have gotten beyond my power to fulfill. Therefore, the only thing I can do at this time is drop the entire matter, and try to make up the losses I suffered, due to your ill-advice.[149]

There was conflict in the testimony about what reasons Hoffmann gave for rejecting the final plan when it was first presented to him at the Appleton meeting. According to Walker, Hoffmann objected to having to continue to borrow the $8000 from the Chilton bank.[150] Walker testified that Hoffmann said: "My father-in-law won't let me be in debt."[151] Hoffmann testified that he gave as his reason: "I will not go to my father-in-law and ask him for a $13,000 gift."[152] And according to the uncontradicted testimony of Hoffmann, neither he nor anybody else ever discussed with his father-in-law the possibility of making the contribution a gift.[153]

Hoffmann recalls today another reason why he called the deal off. He remembers that he did not believe that Red Owl would grant him a

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148. *See* Transcript of Trial, *supra* note 9, at 76–77.

149. Transcript of Record, *supra* note 12, Ex. 35. Hoffmann testified that before sending this letter, he telephoned Hall, a Red Owl official with whom he met in Minneapolis but who had not been at the Appleton meeting, and asked whether it would be possible to put Hoffmann into a smaller store. Transcript of Trial, *supra* note 9, at 79–80. Hall said that it was "this store or none." *See id.* According to Hoffmann, Hall also said that "this thing has gotten a little goofed up," and said that the people in Green Bay (which would mean Lukowitz) had been "severely reprimanded." *See id.* Hall testified that he did not remember this telephone call. He denied ever telling Hoffmann that Lukowitz had been reprimanded, and he also denied ever actually reprimanding Lukowitz. *Id.* at 323–24.

150. Transcript of Trial, *supra* note 9, at 334.

151. *Id.*

152. *Id.* at 355.

153. *Id.* Hoffmann did not testify about why he was unwilling to ask his father-in-law to make a gift. In response to our questions in our interviews with him, Hoffmann stated that it is possible that his wife's siblings would have been concerned if the money had been designated as a gift, but he does not remember that being an explicit concern at the time. Telephone Interview with Joseph Hoffmann, *supra* note 97. We asked the questions because at trial Hoffmann's lawyer had asked Hoffmann's wife, Shirley, about her siblings. Transcript of Trial, *supra* note 9, at 251. In response to an objection to the question's relevance, Hoffmann's lawyer suggested that making the $13,000 a gift would raise issues about equity in the distribution of the estate among siblings. *Id.* at 255–56. The trial judge nonetheless sustained the objection and so we learn nothing about Shirley's siblings from the transcript, though in fact she had several. *Id.* at 256.

franchise even if he had agreed to the $34,000 plan.[154] Ever since the meeting in Minneapolis, he had been skeptical that Red Owl wanted to grant him a franchise on any conditions. He had gone to the meeting in Minneapolis with the expectation that the deal would be concluded, only to be told that he would need more money. Then he had been told by Lukowitz, who showed Hoffmann a telegram from headquarters to that effect, that $26,000 would suffice and he went to the Appleton meeting with that expectation, only to be disappointed again. To this day Hoffmann suspects that if he had agreed to the $34,000 plan, there would have been a later demand for even more money.[155]

I. THE AFTERMATH

After Hoffmann called off the negotiations in February 1962, he continued to work at the Elm Tree Bakery to support his family while he searched for other career opportunities.[156] By Christmas 1962, he was accepted as a sales agent by Metropolitan Life Insurance Company.[157] In January 1963, after a brief training, he began working, largely for commissions.[158] In the meantime, the buyer of the bakery business in Wautoma began falling behind on his payments.[159] Sometime during 1964 to 1965, Hoffmann applied to Metropolitan Life for a transfer to the Wautoma area.[160] He hoped that he could take over management of the bakery while still selling insurance.[161] This would allow him to recover some of his investment in the bakery business. The Wautoma position went to somebody else, however.[162] In the end, Hoffmann received only a small part of the money he was promised for the sale of the bakery business.[163] The bakery equipment that was designated for the Chilton store remained in Wautoma and was never sold, further enhancing Hoffmann's losses from giving up the bakery business.[164]

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154. Telephone Interview with Joseph Hoffmann, *supra* note 97.

155. There was some testimony to this effect at trial as well. On cross-examination of Hoffmann, Red Owl's lawyer tried to establish that Hoffmann understood that if he had accepted the $34,000 plan, Red Owl would "put you in the store." *See* Transcript of Trial, *supra* note 9, at 127. Hoffmann responded, "They had told me numerous times, on different figures, they were ready to go ahead. If I said 34,000 I don't know where it would have went. They had definitely told me a number of times previous to that 26,000 would be sufficient." *Id.* at 128. Immediately after this answer, Red Owl's attorney ended the cross-examination. *Id.*

156. Telephone Interview with Joseph Hoffmann, *supra* note 97.

157. *Id.*

158. *See id.*

159. *See id.*

160. *Id.*

161. *Id.*

162. *Id.* The job went to Ed Wrysinski, Hoffmann's former employee who had purchased the Wautoma grocery store from him. *Id.*

163. *See id.*

164. *Id.*

However, Hoffmann's life insurance career was a great success. By mid-1965 he was promoted to agency manager in the Appleton area. By 1968 he was transferred to Indiana, where he soon became district manager for Lafayette.[165] He was successful in this position and in the early 1970s he became district manager for St. Joseph, Michigan, where Metropolitan Life had more business than in Lafayette.[166] Joe stayed in this position until he retired in the mid-1980s.[167] In the meantime, Shirley had started to sell real estate.[168] Shortly after they moved to St. Joseph, she started her own agency, Red Arrow Realty, which quickly became successful.[169] Joe joined the business upon his retirement from Metropolitan Life.[170] Today the business is owned by one of Joe and Shirley's nine children, while Joe and Shirley continue to work as agents.[171] They lead a comfortable life surrounded by many children and grandchildren.[172]

Red Owl never opened a store in Chilton. Hoffmann never completed his purchase of the Chilton lot, which reverted to the seller. Hoffmann reports that a supermarket was built across the street by somebody else and has been successful.[173]

III. THE TRIAL

Joe and Shirley Hoffmann retained G. H. (Gerry) Van Hoof and John Wiley, lawyers from Little Chute, a small town near Appleton.[174] A complaint was filed on October 11, 1962, in Outagamie County Court, which is located in Appleton. The defendants were both Red Owl and Lukowitz.[175] The complaint alleged that, through Lukowitz, Red Owl had both agreed to and represented that they would build and stock a Red Owl store in Chilton for Hoffmann to operate, in return for Hoffmann's investment of $18,000. The damages claimed were $30,000. David Fulton of Appleton represented both Lukowitz and Red Owl.[176] He filed an answer that put in issue both the alleged agreement and representation. However, he did not question Lukowitz's authority to bind Red Owl in either way. There was extensive discovery and depositions. Trial before a

165. *Id.*
166. *See id.*; Telephone Interview with Joseph Hoffmann, *supra* note 20.
167. Telephone Interview with Joseph Hoffmann, *supra* note 20.
168. *Id.*
169. *See id.*
170. *Id.*
171. *Id.*
172. *Id.*
173. *Id.*
174. *See* Transcript of Trial, *supra* note 9, at 1.
175. Telephone Interview with Joseph Hoffmann, *supra* note 102.
176. *See* Transcript of Trial, *supra* note 9, at 1.

jury began on October 21, 1963.[177] The case went to the jury in the afternoon of the fourth day of trial.[178] The jury returned a verdict, described below, after only three hours of deliberation.[179] The witnesses examined most extensively were Hoffmann and Lukowitz.

Midway through the trial, the judge essentially directed a verdict on the contract issue, holding that too many terms still had to be determined about the store in Chilton to allow Hoffmann to go to the jury on that claim.[180] With respect to the alternative "representation" claim, the trial judge decided to submit a special verdict.[181] Fulton (Red Owl's attorney) objected that contract was the only permissible theory of liability,[182] a point he also argued vociferously in a motion for a judgment notwithstanding the verdict and on appeal.

Over the course of the trial, and during discussion about the form of the special verdict, the trial judge made two determinations adverse to Hoffmann's case. First, Van Hoof had intended to introduce evidence about losses on the sale of the bakery business to an employee.[183] The theory for why there was a loss was that, like the Wautoma grocery and the bakery building, it had been sold on a fire sale basis, without an opportunity to market the asset to the highest bidder.[184] In his proffer of evidence, Van Hoof estimated the loss at $6000.[185] However, the bakery business was the property of Joe and Shirley Hoffmann's wholly owned corporation, Tasty Bakery, Inc.[186] This corporation was not a party to the case. As a result, the trial judge disallowed any evidence on the loss of the sale of the bakery business.[187] The Hoffmanns' claim for profits from the grocery store over the summer of 1961 prompted another adverse ruling. The theory of loss on the sale of the grocery store was that there was a difference between the fair market value of the store if sold to the highest bidder and the actual sale price to Hoffmann's employee.[188] However, the trial judge reasoned that there would be a double recovery

177. *See id.*

178. *Id.* at 364, 378.

179. *Id.* at 380.

180. *See id.* at 272. Van Hoof did not contest this determination.

181. *Id.* at 274–75.

182. *Id.* ("It is our position that as a matter of law . . . a contract is necessary in order to form the foundation for any recovery, on any theory, by the plaintiffs in this action. . . . I maintain that the plaintiffs cannot establish a case on the basis of estoppel or on any theory other than the contract theory . . . .").

183. *Id.* at 239.

184. *Id.*

185. *Id.*

186. *Id.* at 236–37.

187. *Id.* at 237–39. The judge also denied Van Hoof's motion to amend the complaint to add the corporation as a party.

188. This theory of loss was made clear in the judge's charge to the jury. *See id.* at 376.

if he allowed Hoffmann to recover lost profits over the summer.[189] Those profits would have been incorporated into the fair market value of the store.[190]

The trial transcript does not include the lawyers' closing arguments. All counsel are now deceased, so we have no way of knowing what they argued. The trial judge's instructions did not devote much attention to what constituted a "representation," other than to state that they are to be distinguished from "[m]ere expressions of opinions."[191] The instructions did specify that in considering whether Hoffmann, in the exercise of ordinary care, ought to have relied on any presentation, the jury should consider Hoffmann's "business experience, knowledge, and background."[192] Perhaps most significantly, the trial judge was careful to

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189. *Id.* at 270.

190. *See id.*

191. *See id.* at 370. One of the oddities of the case is that the charge used the term "representation," though the case is now understood to be based on promissory estoppel. The difference between the term "representation" and the term "promise," if any, is not a matter that concerned the trial judge or litigants. The parties at several places throughout the trial exhibited an understanding that Hoffmann's noncontract theory was based on estoppel. Van Hoof (Hoffmann's counsel) called the theory "estoppel in pais." *Id.* at 277. By the time of Red Owl's motion for judgment notwithstanding a verdict, their attorney (Fulton) was referring to the theory as promissory estoppel, and citing standard authorities (for example, *Corbin on Contracts*) on this theory. *See* Defendants' Outline Brief on Motions After Verdict at 3, *in* Transcript of Record, *supra* note 12. The essence of his argument was that to constitute a "promise" for purposes of promissory estoppel, the promise must be definite enough that it could form a contract if there were acceptance, consideration, etc.:

> The Court satisfied itself that no contract resulted from the negotiations between the parties and we submit that for the same reasons it should conclude that the essentials of a Promissory Estoppel have not been proved. Even under the more liberal view, there must be at least a definite and specific promise such as would be sufficient for a contract. That point was simply never reached under the undisputed evidence of this case!
>
> This is nothing more or less than a case of continuing negotiations with modifications and changes accepted by the plaintiff himself for whatever reason, but which ultimately failed to ripen into a contract.

Id. at 9–10.

192. Transcript of Trial, *supra* note 9, at 372. Scott implicitly criticizes this part of the charge, on the ground that what he calls the "subjective/objective test of reasonable reliance" is normally limited to fraudulent misrepresentation. *See* Scott, *supra* note 14, at 87. Perhaps, however, the trial court's instruction can be defended as consistent with conventional objective theory: "[O]bjective manifestations of intent of the party should generally be viewed from the vantage point of a reasonable person in the position of the other party." JOSEPH M. PERILLO, CALAMARI AND PERILLO ON CONTRACTS 24 (6th ed. 2009).

In *Beers v. Atlas Assurance Co.*, the court said: "[I]t is what the parties manifest to each other that controls and not an undisclosed secret intent." 253 N.W. 584, 589 (Wis. 1934); *see also* Wayne Barnes, *The Objective Theory of Contracts*, 76 U. CIN. L. REV. 1119, 1130 (2008) ("Subjective, internal equivocations or doubts are of no consequence to the parties' contractual affairs and thus cannot create havoc in the parties' reasonable expectations."). Ed Lukowitz, Red Owl's agent, knew about the level of Joe Hoffmann's business experience, his financial situation, and, most importantly, that the bakery provided the livelihood for Hoffmann's family. We do not think that the jury was instructed about Hoffmann's uncommunicated, subjective understandings about Lukowitz's reassurances. An abstract "reasonable person" in Hoffmann's position would not be somebody who was experienced in

charge the jury that they were to award damages only if the representations were made and relied upon before the damage occurred, and in this respect he directed attention to the time difference between the sale of the grocery (June 6, 1961) and the sale of the bakery building (November 6, 1961).[193]

There was discussion about the form of the questions, which ultimately were formulated as follows (the questions are followed by the answers provided by the jury):[194]

(3) Did Red Owl Stores make representations to Joseph Hoffmann that if he fulfilled certain conditions that they would establish him as a franchise operator of a Red Owl store in Chilton?[195] (Yes)
(4) Did Joseph Hoffmann rely on said representations and was he induced to act thereon?[196] (Yes)
(5) Ought Joseph Hoffmann, in the exercise of ordinary care, to have relied on said representations?[197] (Yes)
(6) Did Joseph Hoffmann fulfill all the conditions he was required to fulfill by the terms of the negotiations between the parties up to January 26, 1962?[198] (Yes)
(7) What sum of money will reasonably compensate the plaintiffs for such damages as they sustained by reason of:
    (a) The sale of the Wautoma store fixtures and inventory? ($16,735)
    (b) The sale of the bakery building? ($2000)
    (c) Taking up the option on the Chilton lot? ($1000)
    (d) Expenses of moving his family to Neenah? ($140)
    (e) House rental in Chilton?[199] ($125)

The sum of the items of damage that the jury awarded total $20,000. It seems reasonable to assume that the jury decided that $20,000 was an appropriate verdict. Since the amount of loss associated with all the items

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negotiating franchise contracts, and is not likely to have viewed Ed Lukowitz's assurances with any greater skepticism than Hoffmann did. In fact, we think that Hoffmann was above average in his sophistication as compared with other businesspeople in Wisconsin small towns. And Lukowitz did business with small-town Wisconsin businesspeople on a daily basis.

193. Transcript of Trial, *supra* note 9, at 375–76.

194. We omit the first two questions, which were answered by the court. The first question was whether the parties initiated negotiations looking to the establishment of a Red Owl Store in Chilton (answered yes), and the second was whether the parties had mutually agreed on all of the details so as to have reached a final agreement thereon (answered no). *Id.* at 369.

195. *Id.* at 369–70.

196. *Id.* at 370.

197. *Id.* at 372.

198. *Id.* at 372–73. The reason for the date was Van Hoof's concern that Hoffmann had not fulfilled the final condition that his father-in-law's $13,000 be a gift. *See id.* at 359–60. By inserting the date, the court intended to limit the question to conditions negotiated prior to the final meeting in Appleton, when Hoffmann testified he first learned of the gift requirement.

199. *Id.* at 375–77.

of potential damage, other than the sale of the grocery store, was pretty clear on the evidence, it seems likely the jury just subtracted those amounts from $20,000 and assigned the difference to the grocery store. The trial judge immediately questioned whether there was an evidentiary basis for the damages awarded with respect to the grocery store.[200] When ruling on Red Owl's motion for a judgment notwithstanding the verdict, approximately five months later, the trial judge set this part of the verdict aside and ordered a new trial, limited to that item of damage.[201]

IV. THE APPEAL

Red Owl filed its notice of appeal on June 25, 1964. According to Hoffmann, there were no settlement negotiations between the parties at this time.[202] Hoffmann cross-appealed the trial judge's order setting aside the damages award on the Wautoma store. Hoffmann did not appeal the trial judge's exclusion of evidence on the sale of the bakery business. Instead, the corporation that owned the bakery business, Tastee Bakery, Inc., filed a separate suit against Red Owl and Lukowitz.[203] Trial of this case was postponed to await the Wisconsin Supreme Court's decision.

A. RED OWL'S BRIEF

Red Owl's brief in the supreme court argued strongly that promissory estoppel was not available in this case because a "promise" had never been made by Red Owl, emphasizing the many terms that were yet to be negotiated and agreed upon.[204] Wisconsin courts had not previously expressly endorsed the doctrine of promissory estoppel, and so the brief relied largely on secondary authorities to argue that the doctrine required a promise sufficiently definite that it could lead to an enforceable contract.[205] It then detailed the many matters that remained to be agreed upon throughout the negotiation. Importantly, these included the terms of the lease of the building to Hoffmann (which lease Red Owl would guarantee) and the source of Hoffmann's funds.[206]

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200. *Id.* at 379.

201. Transcript of Record, *supra* note 12, at 42–48. The Wisconsin Supreme Court decision in *Hoffman* also reports this posttrial order. *See* 133 N.W.2d 267, 272 (Wis. 1965).

202. Telephone Interview with Joseph Hoffmann, *supra* note 102.

203. Letter from G. H. Van Hoof, Attorney for Joseph Hoffmann, to Ian R. Macneil, Professor, Cornell Law School (July 10, 1965) (on file with the Hastings Law Journal). We were later provided with a copy of the letter by Mr. Van Hoof.

204. Appellants' Brief, *supra* note 12, at 40–52.

205. *Id.* at 35–39.

206. The brief justified the relevance of the source of funds in this way:

> The make-up of the $18,000 . . . was important because of the necessary relationship between borrowed and unborrowed capital to the success of any business, . . . since the share of the profits of a small town grocery might well not be sufficient to support a man with a large family and an operator without adequate personal income would not likely be a

Red Owl advanced two arguments to the effect that the trial court should have directed a verdict against Hoffmann's claim for damages on the sale of the Wautoma grocery store, rather than ordering a new trial on this claim. The first argument stressed that with respect to each item of damage, "it becomes necessary to review the status of the claimed assurances at the times of the various acts which [Hoffmann] claims he did to his detriment."[207] The gist of the argument was that the agreement was especially indefinite on June 6, 1961, when Hoffmann sold the grocery store. The second argument was that Hoffmann had not presented any credible evidence that there were losses in connection with the sale of the store.[208] The evidence showed that the store was sold for about what Hoffmann had paid for it. The theory of Hoffmann's damages claim was that the sale, on short notice, was for less than its fair market value. Hoffmann offered no direct evidence, such as an appraisal, of its fair market value. Red Owl argued strenuously that a new trial should not be offered to allow Hoffmann to present a better case, and that on the record as presented, there was no basis for finding that Hoffmann suffered any losses on the sale of the grocery.[209]

Red Owl advanced an extensive argument on the equities of the case, under the premise that section 90 of the *Restatement*, the promissory estoppel rule, requires enforcement only if "injustice" will result from non-enforcement of the promise:

> [I]t is clear . . . that Hoffmann has no just cause for complaint. On his own testimony, in June of 1961, in September and in November of that year he sold properties and made commitments at times when he certainly must have known that there were many items yet to be agreed upon . . . . At each stage he had a choice of either insisting upon a firm contract before he acted to his alleged detriment or of electing to continue the negotiations, gambling on the possibility that the parties might eventually reach an impasse. Clearly, he elected the latter course . . . .
>
> While plaintiffs would like it to appear that Red Owl was engaged in some nefarious plot to do the plaintiffs out of their property, any such view is wholly unrealistic. Red Owl is in the business of selling groceries. The more stores and agency outlets it has the more groceries

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> successful one. . . . [I]t would not be to the interest of either Hoffman or Red Owl for this particular agency to either fail or be so undercapitalized as to be unable to furnish adequate service to the public and to merchandise competitively.

Id. at 42–43.

207. *Id.* at 41.

208. *Id.* at 54.

209. *Id.* at 54–59. At trial Hoffmann had offered the testimony of Wrysinski, the employee who had purchased the grocery, about his profits earned over the summer of 1961, the peak retail season in Wautoma. The testimony was offered on the theory that one could imply that the fair market value would have been higher in June if profits were imminent. However, Wrysinski did not present any evidence about what his *net* profits were, but rather only evidence about his gross receipts for that period. *See* Transcript of Trial, *supra* note 9, at 142–50.

> it sells. Therefore, it has every incentive to work toward the completion of such deals as this. On the other hand, Red Owl must extend credit for merchandise and fixtures, and presumably in this case would have been obliged to guarantee the lease. Also, it has the reputation and public image of all its stores to consider. It would have done neither Red Owl nor Hoffmann any good to set up a store that was either doomed to failure because of undercapitalization or which because of excessive overhead for such things as interest and rental payments could not afford . . . to give good service to the public. . . . There was nothing unreasonable about the so-called final demands of Red Owl . . . .
>
> The $8,000 Chilton Bank loan which he objected to at the final meeting was something that had appeared in previous projections to which he had been agreeable. The matter of the $13,000 from the father-in-law appears never to have been thoroughly explored or discussed at the time that Hoffmann threw up the deal. . . . [H]e had an $18,000 home, subject to a $12,800 mortgage, which he could have sold without hardship, since it had become a rental property. . . . The point is, of course, that due to Hoffmann's own arbitrary impatience these items were never explored. He persisted, wrong-headedly, in looking at the capital requirements as some sort of "price" of $34,000 which Red Owl was attempting to exact from him. Actually, however, this was not money that was to be paid to Red Owl but was capital which he would keep and use for himself in his own business. All in all, therefore . . . there is no "injustice" in charging Hoffmann with the consequences of his own failure to require a firm contract before disposing of his property and in impetuously breaking off the negotiations.[210]

B. HOFFMANN'S BRIEF

Hoffmann's brief is not nearly so extensive, but it made some points worth noting. In its restatement of the facts, it emphasized that while the financial demands on Hoffmann kept going up over the course of the various plans, the financial commitment of Red Owl to the Chilton store went down, primarily because Red Owl had reduced the amount of the fixtures loan after used fixtures had been located.[211] And it referred to testimony by Hoffmann "that the greater amount of money put in by Hoffmanns, the lesser the hurt to Red Owl should the store go bad, that he understood that if something went wrong they took over and all of his money would be lost."[212] The legal argument rested entirely on the doctrine of promissory estoppel but did not address the question whether a promise that was too indefinite or incomplete to form a contract could nonetheless be the basis for a promissory estoppel claim.[213] At one point,

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210. Appellants' Brief, *supra* note 12, at 49–52 (citation omitted).

211. Respondents' Brief at 8, Hoffman v. Red Owl Stores, Inc., 133 N.W.2d 267 (Wis. 1965) (No. 14954).

212. *Id.* at 9–10.

213. The brief did stress that many details of a proposed franchise had been agreed upon, such as

they implied that the problem underlying the case may have been that Red Owl's doubts about Hoffmann had not been communicated to Hoffmann by Lukowitz: "The trouble is, [Lukowitz] communicated confidence to the Hoffmanns but failed to disclose any Red Owl doubts. And of course Red Owl is bound by his statements and course of conduct as the acts of an agent."[214]

Hoffmann's argument on the equities of the case was as follows:

> Red Owl's claimed expertise in this field of setting up agency stores put the burden on them to prevent such substantial changes of position which they claim now to not have desired. Could not Red Owl have set up the Chilton store without Hoffmanns being required to rid themselves of all means of livelihood? Why didn't Red Owl purchase the option on the lot in Chilton? There can be no other inference but that Red Owl wanted Hoffmanns to "burn their bridges", so they would have no choice but to comply with any further demands of Red Owl, however unreasonable. . . . Perhaps the explanation was that Red Owl wanted Hoffmanns very badly to be franchise operators of a new Red Owl Store in Chilton, Wisconsin, and therefore wanted to put them in a position where they would have no choice, or perhaps Red Owl had bad experiences elsewhere with new franchise operators and wanted extra protection for itself. In either case, Red Owl's actions were . . . not characterized by full and fair disclosure or fair dealings which would be required for it to have "clean hands" in equity.[215]

C. The Supreme Court's Decision

In the end, a unanimous supreme court affirmed the trial court's judgment, including the order for a new trial on the issue of damages for the sale of the grocery store.[216] In the course of the opinion, the court adopted the doctrine of promissory estoppel as the law of Wisconsin.[217] It also expressly addressed Red Owl's primary contention that there needed to be a promise sufficiently definite that it could lead to a contract if other elements existed. The court described the representations found by the jury as "promissory" and simply stated that it is not a requirement for promissory estoppel that

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the used fixtures, downplaying in that way the degree to which the deal was incomplete. *Id.* at 24–26.

214. *Id.* at 27. Hoffmann's brief also made various arguments that the evidence supported the jury's verdict on damages with respect to the Wautoma grocery, and hence that the verdict in this respect should not have been overturned. *See id.* at 28–31.

215. *Id.* at 27–28.

216. *Hoffman*, 133 N.W.2d at 275, 277.

217. *Id.* at 273–74. The court noted that one of our predecessors as a teacher of contracts at the University of Wisconsin Law School, the legendary William Herbert Page, had stated in his 1933 annotations to the *Restatement of Contracts*: "The Wisconsin cases do not seem to be in accord with this section [section 90] of the Restatement. It is certain that no such proposition has ever been announced by the Wisconsin court and it is at least doubtful if it would be approved by the court." *Id.* at 273 (quoting William H. Page, Wisconsin Annotations to Restatement of Contracts 53 (1933)).

> the promise giving rise to the cause of action must be so comprehensive in scope as to meet the requirements of an offer that would ripen into a contract if accepted by the promisee.
>
> . . . .
>
> We deem it would be a mistake to regard an action grounded on promissory estoppel as the equivalent of a breach of contract action. . . . [I]t is desirable that fluidity in the application of the concept be maintained.[218]

It is this part of the holding that has made *Hoffman v. Red Owl Stores* a famous case throughout the country, credited with starting a new and controversial line of precedent allowing recovery for precontractual reliance when negotiations abort thereafter.

The opinion does not contain an extensive discussion of the evidence to identify what might be considered a "promise" under this lesser standard. It does state:

> The record here discloses a number of promises and assurances given to Hoffman by Lukowitz in behalf of Red Owl upon which plaintiffs relied and acted upon to their detriment.
>
> Foremost were the promises that for the sum of $18,000 Red Owl would establish Hoffmann in a store.
>
> We determine that there was ample evidence to sustain the answers of the jury to the questions of the verdict with respect to promissory representations made by Red Owl, Hoffman's reliance thereon in the exercise of ordinary care, and his fulfillment of the conditions required of him by the terms of the negotiations had with Red Owl.[219]

With respect to damages, the court did not address either of the two arguments advanced by Red Owl to the effect that there should have been a directed verdict with respect to liability for a loss on the sale of the Wautoma store. Instead, the court ordered a new trial on this item of damages, measured by the difference between the fair market value and actual sale price of the store—the same measure charged by the trial judge.[220] The supreme court agreed that there was no evidence in the record to sustain the jury's verdict and commented that the record contained no direct evidence of the fair market value of the store on the date of its sale.[221]

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218. *Id.* at 275.

219. *Id.* at 274.

220. *Id.* at 276–77.

221. *Id.* In the course of its opinion on this issue, the court opined that damages in promissory estoppel could be limited to recovery of reliance expenditures. *See id.* At the time of the decision, this statement was also precedent setting, although it is settled law today. *See* RESTATEMENT (SECOND) OF CONTRACTS, § 90 (1981) ("The remedy granted for breach may be limited as justice requires.") That sentence was not in section 90 of the first *Restatement of Contracts*. It is ironic that this case has influenced the development of the law on this point as well, since nobody has ever contended that Hoffmann had a possible claim for expectation damages—that is, lost profits from the Chilton store that was never established. For a recent article discussing remedies under promissory estoppel, see

D. RETRIAL

After the supreme court's decision, Red Owl conceded liability in the *Tastee Bakery, Inc. v. Red Owl* case that had been filed shortly after conclusion of the first trial.[222] The damages in that case, concerning the sale of the bakery business, were combined with the remanded issue concerning damages on the sale of the Wautoma grocery store.[223] Hoffmann recalls that the new trial was not going well for Red Owl when they initiated settlement discussions during the second day of the trial.[224] After one and one-half days of trial, the case was settled for $10,600.[225] This amount is substantially more than the damages awards affirmed by the Wisconsin Supreme Court, which totaled only $3265.[226] We suspect that the difference reflected mostly evidence that Hoffmann sold the bakery business at substantially below its fair market value, but we do not know. Because there was a settlement, no transcript was ever made of the second trial.

The Hoffmanns' share of the settlement, after attorney fees, was about $6500.[227] At the time of the settlement Joe Hoffmann's life insurance career was in its infancy, and he and his wife had seven children. The Hoffmanns used the settlement proceeds for daily living expenses.[228]

V. SUMMING UP: WHAT WAS MOTIVATING THE PARTIES?

In this Part we attempt to provide insight into what was motivating the parties over the course of their interactions.

A. HOFFMANN

Hoffmann's motives are easy to understand. He was a young man who had had considerable success in building his Wautoma bakery business. There were, however, limits to how much a bakery could grow in such a small town. Hoffmann wanted more. Originally, he wanted to open a store in Wautoma where he was well known. However, Red Owl

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Marco J. Jimenez, *The Many Faces of Promissory Estoppel: An Empirical Analysis Under the Restatement (Second) of Contracts*, 57 UCLA L. REV. 669 (2010). For discussion of a recent federal decision applying Wisconsin law and allowing expectation damages in facts similar in many respects to *Hoffman v. Red Owl Stores*, see *infra* note 300.

222. *See* Letter from G. H. Van Hoof to Ian R. Macneil, *supra* note 203.

223. *Id.*

224. Telephone Interview with Joseph Hoffmann, *supra* note 20.

225. Letter from G. H. Van Hoof to William C. Whitford (Mar. 21, 1970) (on file with the Hastings Law Journal), *quoted in* 1 MACAULAY, KIDWELL & WHITFORD, *supra* note 6, at 403–04. The record contains a stipulation by the parties settling the lawsuit, indicating that stipulation was reached on November 9, 1965. *See* Stipulation and Order for Dismissal, *in* Transcript of Record, *supra* note 12.

226. *See Hoffmann*, 133 N.W.2d at 275–76.

227. Letter from G. H. Van Hoof to William C. Whitford, *supra* note 225.

228. Telephone Interview with Joseph Hoffmann, *supra* note 97.

officials wanted a store in a bigger town, and he was willing to move. Hoffmann at all times exhibited a keen awareness of the limited resources available to him, and he was concerned about excessive debt. At the beginning of his dealings with Red Owl, he thought that he could invest $18,000. He could get this by investing his approximately $10,000 savings plus $7500 that he would borrow from his father-in-law. In addition, he expected to use bakery equipment not needed in Wautoma in the new enterprise.

Red Owl's demands for more money and more sacrifices kept increasing. When Red Owl suggested that Hoffmann sell the Wautoma grocery in 1961, Hoffmann sought reassurance that his $18,000 would be enough to get him set up. Upon receiving it, he went along with the suggestion because Red Owl wanted him free to work on the new franchise over the summer. The next big Red Owl demand was that the Hoffmanns sell the Wautoma bakery.[229] The record is very clear that Hoffmann and his wife questioned Lukowitz carefully about whether a deal was in hand before they agreed to sell the bakery business and building, and they were told that their continued ownership of the bakery and building was "the only hitch."[230] The decision to sell the business was a big one. The family was giving up what had been their livelihood, and they were committing to moving from Wautoma. And the reassurance from Lukowitz was credible. Hoffmann had already met with officials from headquarters at the proposed lot in Chilton. They had information about his financial condition, and they had drafted the first proposed financial plan. Lukowitz represented that he had communicated with those officials before reassuring Hoffmann.

Hoffmann was not asked to contribute significantly more at the November meeting in Minneapolis, but he was warned that demands for more resources would be forthcoming. A few weeks later, when he received the demand to come up with an additional $2000 in order to close the deal, he did not immediately commit but agreed to consider it. After all, it was not all that much more money. But Hoffmann's fiscal caution is illustrated by his unwillingness just to agree immediately.

In this context, the demand for a significantly greater investment at the late January meeting in Appleton proved to be far too much. It was the second time (Minneapolis being the first) that Hoffmann went to a meeting with headquarters officials having been assured by Lukowitz that everything was set, only to be faced with a demand for a greater investment. For Hoffmann, the critical question was always his total investment; whether the funds invested were borrowed and unborrowed

229. Before that, Hoffmann purchased the option on the Chilton lot. Hoffmann also sought and received reassurance from Lukowitz before making this investment.

230. Transcript of Trial, *supra* note 9, at 57.

did not matter much. As he pointed out in his testimony, if the store failed, Red Owl would take it over and operate it, and Hoffmann would get no return for his investment.[231] Yet Hoffmann would remain liable on any debt incurred and then invested in the new store. The demand that the father-in-law's contribution be a gift was also unsettling to Joe, for reasons not totally clear to us, but which may have been related to his concerns that his wife's siblings might have feared that Joe and Shirley would ultimately get more than a pro rata share of the father-in-law's estate.[232]

The Hoffmanns' decision to sue may have been partly motivated by vindication. Certainly, they felt wronged. Their unsuccessful effort to obtain a Red Owl franchise had fundamentally changed their life. They were able to hire a lawyer on a contingency basis,[233] so they did not have to invest any funds on a lawsuit whose success must have seemed problematic. In the end, they got a small recovery, which helped them meet living expenses for a large family during the lean years, while Joe was establishing himself in his new profession in life insurance sales and Shirley was just getting started in real estate sales.

B. Ed Lukowitz

We choose to offer an account of the motivations of Ed Lukowitz separate from the rest of the Red Owl management because Lukowitz's motives are easier to understand and were probably different from the motives of the other Red Owl officials. Lukowitz was a new divisional manager at the time he first began offering encouragement to Hoffmann in the fall of 1960. Previously, he had been a district manager for ten years. One major new responsibility of a divisional manager concerned the establishment of new stores, and it appears that Lukowitz took that responsibility very seriously.[234] It is also clear that Lukowitz became a

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231. *See id.* at 115–16. Hoffmann pointed out that Red Owl's ability to take over the store was clearly implied by their projected guarantee of his lease on the Chilton store. *See id.* This point was also emphasized in Hoffmann's brief to the Wisconsin Supreme Court. *See* Respondents' Brief, *supra* note 211, at 9–10.

At trial, Frank Walker, Red Owl's Franchise Department manager, testified that he tried to persuade Hoffmann that he would have complete control over the additional $8000 that Red Owl was asking him to borrow. "It's your money . . . . Joe, if after a reasonable length of time these funds aren't used give them back; give it back to the bank . . . ." Transcript of Trial, *supra* note 9, at 333. But Walker also testified that the funds were intended to provide Hoffmann some cushion should the store not be immediately profitable. *Id.* Since Red Owl would be both directly (for inventory, and on the fixtures' financing) and indirectly (as guarantor on the lease) a major creditor of Hoffmann, they would benefit directly from the expenditure of the funds. And if Hoffmann invested the additional $8000 in ongoing costs before the store failed, he would remain liable on the loan and have nothing to show for the extra investment.

232. *See supra* note 153.

233. Telephone Interview with Joseph Hoffmann, *supra* note 102.

234. Scott speculates that Lukowitz would have earned a commission if the deal had gone through.

strong advocate for Hoffmann within the Red Owl hierarchy. Hoffmann today remembers Lukowitz as "a real decent guy [who] had my interest at heart."[235] Lukowitz not only had gotten to know Hoffmann and observe how he managed the Wautoma bakery and grocery, but he had a sense of how well Hoffmann was regarded in the Wautoma community. And Lukowitz's judgment was probably correct. Hoffmann became a great success in the life insurance business. Hoffmann believes he would have been a successful operator of a Red Owl grocery in Chilton.

At the same time, the record suggests that at times Lukowitz may have gone further in reassuring Hoffmann than was justified by the communications Lukowitz had with his superiors at headquarters. This is particularly true of the time when Hoffmann exercised the option to buy the Chilton lot and when the Hoffmanns sold the bakery business.[236] Perhaps Lukowitz was reluctant to warn Hoffmann of the risks he was taking, for fear that Hoffmann, ever cautious about financial matters, would simply withdraw. Perhaps Lukowitz, a relative newcomer as a divisional manager, was overly optimistic that everything would work out, and hence thought there would be no harm in getting the Hoffmanns to overcome their caution.

Lukowitz denied that he had reassured Hoffmann at the time of the exercise of the option on the Chilton lot. "I told him we weren't quite ready yet and had too many details to work out. . . . I had to find out from Hopkins. This had to come from above."[237] Lukowitz was never directly asked at trial about conversations he had with Hoffmann at the time they were advised to sell the bakery building and business. Lukowitz's testimony about the strength of the reassurances that he gave Hoffmann appears to us as that of a Red Owl employee who wanted to

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See Scott, *supra* note 14, at 93. There is nothing in the record to support that speculation, but it could be true (and we have heard the same assumption made by other contracts teachers). Lukowitz was a divisional manager in charge of over eighty franchises in upper Michigan and Wisconsin. Transcript of Trial, *supra* note 9, at 172. Whether or not he received a commission for each new franchise, it is likely that he received bonuses based on overall sales within his division. But the addition of a small store in Chilton is not likely to have had a great impact on overall sales.

235. Telephone Interview with Joseph Hoffmann, *supra* note 20. Hoffmann adds that Lukowitz's attitude changed at trial, when "he had his job more at heart." *Id.*

236. The most important officials appear to be Walter Hall, the credit manager, who met with Hoffmann at the Minneapolis meeting in November 1961, and Frank Walker, an assistant vice president and manager for the Franchise Department. The evidence suggests that both Hall and Walker examined the Hoffmann file during October and advised that Hoffmann would need to sell the bakery. *See* Transcript of Record, *supra* note 12, Ex. 11 (telegram from Carlson to Lukowitz indicating that Walker had examined the file); *see also id.* Exs. 9, 10 (letter and telegram, respectively, from Lukowitz to Hall about Hoffmann's financial situation). But there is no evidence in the record that either of these officials had told Lukowitz that sale of the bakery was "the only hitch." Lukowitz told Hoffmann he had been so informed, however, and it is possible there had been a phone call not in the record to such effect. *Cf.* Transcript of Trial, *supra* note 8, at 57. Any telegrams or other written communication to such effect would likely have been turned up in discovery and introduced at trial.

237. Transcript of Trial, *supra* note 9, at 188

keep his job.[238] The entire story suggests that Joe Hoffmann was a cautious man, and strong reassurances were needed to persuade him to do what Ed Lukowitz thought that he should do.

C. Red Owl

On appeal, Red Owl maintained that their primary concern was the amount of "equity capital" that Hoffmann would invest. They argued that their demands in that respect had not measurably increased over the course of their interactions with Hoffmann, as the final financial plan required only $18,000 in unencumbered cash—$5000 from Hoffmann and $13,000 from his father-in-law.[239] A franchisor can have a legitimate interest in requiring investment of equity. An overleveraged investor may feel free to walk away from the investment at little cost to itself, essentially stiffing any creditors. A franchisee/investor feeling this way may act in an insufficiently risk-averse (or overly speculative) manner. These incentives are not consonant with the interests of the franchisor, who is an important creditor of the franchisee and who has long-term interests in brand reputation to protect.[240]

Red Owl may have had a corporate policy requiring a minimum investment of "equity," and corporate officers in Minneapolis may have had difficulty in justifying a franchise for Hoffmann under that policy. All the proposed financial plans identified certain parts of the proposed investment as "equity" and seemed concerned that the "equity capital" totaled approximately $18,000. This would suggest that there was some kind of corporate commitment or policy that needed to be satisfied. However, it was only on appeal that Red Owl suggested that it was important that all the "equity capital" contributed by Hoffmann be unencumbered cash. During the important time when Hoffmann was making his arrangements, all communications to Hoffmann suggested a much more flexible requirement as to what would constitute "equity

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238. This is Hoffmann's current assessment of Lukowitz's testimony. Telephone Interview with Joseph Hoffmann, *supra* note 20.

239. This argument was noted by the Wisconsin Supreme Court. *See* Hoffman v. Red Owl Stores, Inc., 133 N.W.2d 267, 275 (Wis. 1965). This was not an argument made in Red Owl's brief, but perhaps it was made at oral argument. We do not have a transcript of the argument.

240. In comments on *Hoffman v. Red Owl Stores* in the contracts casebook that he coedits, Scott makes explicit his assumption that this was Red Owl's principal concern:

> If a franchisee uses borrowed money as the source of his investment in the franchise, his poor performance risks only his lender's money, not his own. Red Owl therefore regarded a substantial equity contribution from its franchisees as the key to a successful franchise. . . . Although the amount of unencumbered cash Hoffman was supposed to supply was never precisely identified by Red Owl officials, they reasonably would have assumed that by stating he could contribute $18,000, Hoffman meant that he could and would supply his own cash in setting up the business and would not rely on money lent by others.

Scott & Kraus, *supra* note 6, at 294–95 (4th ed. 2007).

capital." The first financial plan even considered profit on sale of the Chilton lot as equity capital, though clearly it was effectively a loan from the builder, to be guaranteed by Red Owl.[241] And there was no suggestion at the time, or later at trial, that the officials who drafted that plan had expected Hoffmann to have $18,000 in cash available for investment. Though not in the first plan, all subsequent proposed financial plans considered Hoffmann's unencumbered bakery equipment to be "equity capital." The third financial plan, which was drafted by high corporate officials from Minneapolis, did not designate the father-in-law's $13,000 contribution as "equity capital," even though when they presented this plan to Hoffmann they also presented a form for the father-in-law to sign designating the money as a gift. Moreover, if the bakery equipment and the father-in-law's contribution had both been considered equity capital in the final plan, then there would have been a substantial increase in the amount of equity required over the course of the negotiations.

Moreover, the standard analysis for why an investment of equity is required assumes that the investor can walk away from the debt by declaring bankruptcy or organizing the enterprise so that the debt is owed by a limited liability entity.[242] In Hoffmann's case, this was not a practical alternative. He was or would be personally liable on all debt contemplated over the course of the negotiations.[243] As Lukowitz surely knew, Hoffmann is not the type of person who would have declared bankruptcy, especially in the early 1960s when individual bankruptcy was quite uncommon in the United States.[244] He was a young man seeking a career in business, had established a good business reputation in Wautoma, and would have been most reluctant to compromise that reputation by defaulting on a loan from the bank. And certainly he would continue to feel obligated to repay his father-in-law whether or

241. *See supra* note 80 and accompanying text.

242. *See supra* note 240. Scott assumes the franchisee using borrowed funds "risks only his lender's money, not his own." SCOTT & KRAUS, *supra* note 6. The text indicates ways in which a franchisee might avoid personal liability to his lender as well as to other creditors.

243. And none of the prospective creditors would have had a secured claim to any of the assets of the Red Owl store if Red Owl took over the business, except for the bakery equipment. Hoffmann says today that it never became clear whether Hoffmann would keep his bakery equipment if Red Owl took over the store. Telephone Interview with Joseph Hoffmann, *supra* note 102.

244. Bankruptcy filing rates were very low by contemporary standards throughout the 1960s. Total filings were between 100,000 and 200,000 cases annually. *See* DAVID T. STANLEY & MARJORIE GIRTH, BANKRUPTCY: PROBLEM, PROCESS, REFORM 25 tbl.3-1 (1971). Wisconsin's per capita bankruptcy filing rate was average for the country. *See id.* at 28–29 tbl.3-2. By way of comparison, total national bankruptcy filings surpassed one million in the mid-1990s. *See* NAT'L BANKR. REVIEW COMM'N, BANKRUPTCY: THE NEXT TWENTY YEARS 77 (1997). The great growth in bankruptcy filing rates occurred after enactment of the Bankruptcy Reform Act of 1978. *See* CHARLES JORDAN TABB, THE LAW OF BANKRUPTCY 39 (1997) (referring to "the exponential growth in the number of bankruptcy cases since the enactment of the 1978 Act").

not he declared bankruptcy. As applied to Hoffmann, a distinction between equity capital and borrowed funds made little difference in structuring his incentives to run the Red Owl store efficiently.

There is another possible account of Red Owl's motives, one suggested by Hoffmann's recounting to us of the warning that he received from Lukowitz about Red Owl's emerging financial difficulties. Despite the passage of more than forty-five years, Hoffmann remembers this conversation with clarity.[245] Much of Lukowitz's and Red Owl's behavior is consistent with an assumption that Red Owl's Franchise Department changed its policy in late October so that it was inclined to invest less in small-town franchises and take less risk. According to Hoffmann, the tone of his meeting with Red Owl officials in Chilton in late September was very supportive,[246] whereas the tone at the meeting in Minneapolis in late November was very different and Red Owl officials began suggesting that Hoffmann would need to raise more money. Their concern was clearly that Hoffmann needed to obtain additional total funds, whether borrowed or unborrowed, without any focus at this time on equity capital as such.[247] Further, in early November, Lukowitz began looking for used fixtures for the Chilton store, which reduced Red Owl's potential investment through its loan to finance the fixtures. Finally, Red Owl's increasing demands that Hoffmann have additional funds (including borrowed funds) for promotion, to ride out an early period of unprofitability as he was getting established in Chilton, would also have reduced the risk to Red Owl. Red Owl, after all, would have been Hoffmann's largest creditor—on the fixtures loan, on trade credit, and as guarantor on Hoffmann's rent agreement with the contractor—and it did not want Hoffmann to be unable to meet his current obligations.[248]

There is nothing about Lukowitz's warning in the transcript, nor any discussion of Red Owl's financial condition or policies respecting investment in small-town franchises.[249] We have consulted Red Owl's

245. *See supra* note 97 and accompanying text.

246. *See supra* note 71 and accompanying text.

247. Red Owl's $26,000 plan, offered in December, asked for an additional $2000 in borrowed funds for promotional expenses. The final plan increased that amount by an additional $8000 for the same purpose.

248. The testimony of Walter Hall, credit manager for Red Owl, supports this interpretation. *See* Transcript of Trial, *supra* note 9, at 327 ("I was protecting the investment of Red Owl . . . ."). Especially on cross-examination, he was asked why it was important that there be a contribution of equity. *See id.* He responded by citing the concern that Hoffmann might have cash flow problems in the early period of the franchise, and that requiring equity reduced the need to make payments for debt during this period. *Id.* at 327–28. He acknowledged that Red Owl would be an important creditor and that one reason to insist that the father-in-law agree to the $13,000 gift was to protect Red Owl's investment. *Id.* at 327–30.

249. Van Hoof's one effort to ask about these matters was barred by an objection that the trial judge sustained. *See supra* note 101.

annual reports for the relevant period.[250] Those reports indicate that franchises constituted a relatively small part of the overall Red Owl business, accounting for about twenty percent of gross sales and earnings.[251] The major part of the business was company-owned stores, which were located in larger towns (like Appleton, where the final meeting with Hoffmann occurred). During the period under consideration, Red Owl was focused on expansion of its company stores into larger markets.[252] In 1961, this effort included a major effort, financed by internally generated funds, to expand into the Chicago and Denver markets.[253] Perhaps those investments required the rest of the company to restrict its investments in other ventures.

In the end, it is impossible to know for sure what motivated Red Owl. What may have happened is that there was some kind of policy change in the Franchise Department, and this may have prompted the increasing demands that Hoffmann invest more in the business. Headquarters officials may or may not have known what Lukowitz had told Hoffmann. Red Owl officials may have felt that they were within their rights when they increased their asking price for a franchise. Or they may have known about Lukowitz's assurances but assumed that they faced no real threat of a lawsuit by Hoffmann because of cost barriers to litigation.

In this context, it may be useful to speculate about Red Owl's litigation strategy. At some point early in the litigation, and certainly after they had deposed Hoffmann, it must have become clear to Red Owl that Hoffmann's case relied on statements made to him by Lukowitz. Yet

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250. Red Owl's annual reports for 1954 to 1971 are in the library of the Minnesota Historical Society. In 1967, Red Owl was acquired by Gamble-Skogmo, Inc. *See* Bertin C. Gamble: An Inventory of His Papers at the Minnesota Historical Society, http://www.mnhs.org/library/findaids/00479.xml (last visited Mar. 17, 2010). Gamble-Skogmo, Inc. was later merged into Wickes, Inc., which filed for bankruptcy in 1982. *See* Wickes Inc.—Company History, http://www.fundinguniverse.com/company-histories/Wickes-Inc-Company-History.html (last visited Mar. 17, 2010).

251. RED OWL STORES, INC., 1962 ANNUAL REPORT [hereinafter 1962 ANNUAL REPORT]. The franchises constituted what was called the "Agency Division," headed by Frank Walker during the relevant period. The annual reports say little about this agency division, though they do contain an accounting for the division showing that sales to agency stores grew modestly during the relevant period. The 1962 Report stated: "Further expansion of the Agency Division . . . for the most part utilizes existing facilities." *Id.* at 7. It is not clear whether this statement suggests a deemphasis on creating new franchises, but it might.

252. LOEWI & CO., A STUDY OF RED OWL STORES, INC. 1 (1958) ("[T]he current stepped-up program of opening larger supermarkets in metropolitan centers and closing smaller rural stores was started . . . . The vigorous continuation of this expansion program now underway gives promise of further significant earnings growth in the years ahead.").

253. RED OWL STORES, INC., 1961 ANNUAL REPORT 3. Red Owl sold off its Chicago stores in 1963 and its Denver stores in 1966, in both cases after suffering losses. RED OWL STORES, INC., 1964 ANNUAL REPORT 3; RED OWL STORES, INC., 1967 ANNUAL REPORT 3. In 1961 and 1962, Red Owl was also preparing to purchase Snyder Drugs, perhaps creating an additional drain on capital. *See* 1962 ANNUAL REPORT, *supra* note 251, at 3.

at no time in the trial did Red Owl try to distance themselves from Lukowitz by suggesting that it was not reasonable for Hoffmann to rely on Lukowitz as their agent.[254] Rather, Red Owl's trial strategy was to suggest that Lukowitz had not made any representations that were not fulfilled, going to some length to stress that nobody in Red Owl ever found fault with Lukowitz's interactions with Hoffmann.[255] But the jury apparently did not believe Lukowitz's claims that he had only offered opinions and advice.[256] Hoffmann wanted more than that before he would act, and Lukowitz created the impression that he had cleared everything with the home office.

We can also ask why Red Owl chose to litigate this case so vigorously. The damages claimed were not great,[257] and the ultimate settlement was for a modest amount. Simply from the perspective of saving litigation costs, an earlier settlement offer would seem to have been in Red Owl's best interests. We have no doubt that Red Owl believed strongly that the law favored them, but does a corporation like Red Owl litigate just to vindicate a legal position? One possible explanation for Red Owl's aggressive litigation perspective comes from Hoffmann's current recollection that there were other prospective franchisees in the same area of Wisconsin who were caught up in the policy change that required greater franchisee investment and whose deals consequently did not go through.[258] If this recollection is correct, perhaps Red Owl feared that if Hoffmann got a settlement, other

254. Hoffmann's brief on appeal emphasized this point. *See supra* note 214 and accompanying text. Scott points out that the key statement by Lukowitz—that the sale of the bakery was the only thing holding up the deal—was made after Hoffmann's meeting in Chilton with Carlson and Hall. *See* Scott, *supra* note 14, at 95. "By that time, Hoffman knew well that their approval, and not Lukowitz's was the key to securing the franchise." *Id.* But this ignores the fact that Red Owl always communicated with Hoffmann through Lukowitz. Hoffmann's understanding when he sold the bakery was that Lukowitz had checked with Minneapolis headquarters, and officials there had said that the sale of the bakery was the only thing holding up the deal.

255. *See* Transcript of Trial, *supra* note 9, at 324 (testimony of Walter Hall).

256. *See supra* notes 237–38 and accompanying text.

257. Red Owl was a Delaware corporation and hence there was a diversity of citizenship with Hoffmann. *See* LOEWI & CO., *supra* note 252. The jurisdictional amount at the time was $10,000, *see* 28 U.S.C. § 1332(a) (1958), and the complaint was for $30,000. Hoffmann sued both Red Owl and Lukowitz, however, and Lukowitz lived and worked in Green Bay. To have removed the case to federal court, Red Owl would have had to get the case against Lukowitz dismissed, which they could have done if they had been willing to admit at the very beginning that all of Lukowitz's actions were within his delegated authority. *See* WILLIAM A. GREGORY, THE LAW OF AGENCY AND PARTNERSHIP, 202–03 (3d ed. 2001) ("If both the existence and the identity of the agent's principal are fully disclosed to the other party, the agent does not become a party to any contract which he negotiates."). If the case had been removed to federal court, the trial would have been in Milwaukee rather than Appleton, which was essentially Hoffmann's home town and where he was working at the time of the trial. And it would have made matters quite a bit more inconvenient for Hoffmann's lawyer, Mr. Van Hoof, whose offices were in Little Chute, a small town near Appleton.

258. Telephone Interview with Joseph Hoffmann, *supra* note 97.

lawsuits would surely be forthcoming. We do not know whether other lawsuits were ever filed.

VI. WHAT WE HAVE LEARNED

A. ABOUT LITIGATION, FACT FINDING, AND HISTORICAL RESEARCH

Storytelling reveals that the facts stated in an appellate opinion are incomplete. In the case of *Hoffman*, the omitted facts tend to recast key issues in importantly different ways.

First, our story suggests that the key reliance by the Hoffmanns was the sale of the bakery building and business. This was their livelihood. The sale ultimately became a career-changing event. And it was precisely at this point that the Hoffmanns hesitated, insisted on extra assurances that the deal would go through, and received them from Lukowitz. After Hoffmann had met with officials from Red Owl headquarters in Chilton, had given them a fully accurate statement of his financial affairs, and received Red Owl's first financial plan, Lukowitz telephoned Hoffmann and told him "that Minneapolis had told him (Lukowitz) that the only hitch in this thing at the present time was that I had to get rid of my bakery and my bakery building."[259] Hoffmann relied on this statement to his detriment. It is very unlikely he would have sold his bakery absent Lukowitz's reassurances.

The supreme court's opinion does not reveal that there was anything special about this moment. It considers the key Red Owl assurance to be Lukowitz's statement in June, at the time of the sale of the Wautoma grocery, that $18,000 would be enough to set up Hoffmann in a Red Owl store. Lukowitz made such a statement, and without it Hoffmann might not have sold the Wautoma grocery. But Hoffmann had much less reason to understand that this assurance effectively promised him a franchise, as compared with Lukowitz's later statement that the sale of the bakery was "the only hitch." In June, a site for Hoffmann's franchise had not yet been selected, Red Owl had made no inquiry into Hoffmann's finances, and Hoffmann had no idea what headquarters officials knew or had told Lukowitz at that time. Further, the Wautoma grocery was a business that Hoffmann had purchased in order to gain experience in managing a grocery store and to demonstrate to Red Owl his managerial abilities in that field. It was not his livelihood, and he did not expect to own it for more than a short period. Moreover, by the time of the sale of the bakery, whatever assurance had been made about $18,000 being the outside limit of Hoffmann's investment was clearly no longer operative. By this time, Red Owl had accepted Hoffmann's proposal to invest his bakery equipment in addition to the $18,000,

259. *See supra* note 82 and accompanying text.

something that later financial plans considered as part of his equity contribution. Further, it was clear to Hoffmann that Red Owl anticipated investment of the proceeds of the sale of the bakery building, which would push Hoffmann's cash investment to over $18,000.[260]

What might account for this difference between the court's view and our view about what are the important facts? Certainly litigation strategies played a role. Although the court noted the sale of the bakery building, it did not even mention the sale of the bakery business. Evidence about the sale of the business had been excluded by the trial court because the business was owned by a corporation, albeit one wholly owned by the Hoffmanns. The trial court also did not allow Hoffmann to amend the complaint to include the corporation as a party. Rather than appeal either ruling, Hoffmann's lawyer chose to file a second complaint on behalf of the corporation. That action was stayed during the appeal and then combined with the principal action on remand from the supreme court for ascertainment of damages.

In 1965, Wisconsin required an appellant in the supreme court to include an Appendix to its brief that included an extensive narrative summary of the transcript.[261] This narrative summary in *Hoffman* reported relatively little about assurances to Hoffmann at the time of the sale of the bakery and placed much greater emphasis on assurances at various times that $18,000 would be enough investment by Hoffmann. The statement of facts in the parties' briefs also mentions little about the assurances to the Hoffmanns at the time of the sale of the bakery.[262] It is likely that the court, in educating itself about the facts of the case, paid much closer attention to the parties' statement of facts in the Appendices than to the trial transcript. The parties' decision to cast the facts in this way may have reflected the focus in the appeal on the jury's findings of extensive damages on the sale of the Wautoma grocery.[263] In his cross-appeal, Hoffmann sought to reinstate that jury verdict.

The failure of the court to mention the extra assurances provided to Hoffmann before the sale of the bakery building may have another

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260. *See supra* notes 82–87, 114–15 and accompanying text.

261. WIS. STAT. § 251.34(5)(c) (1965) ("The appendix shall contain . . . [a]n abridgment of the appeal record, including the transcript, but only so much thereof as is necessary and material to a consideration of the questions involved. The abridgement of the testimony shall be in narrative form with marginal page references to the record."). The narrative summary was in addition to the actual transcript, which was included in the record on appeal. The briefs of both parties cited both the narrative summary from the Appendix and the trial record. *See* Appellants' Brief, *supra* note 12; Respondents' Brief, *supra* note 211.

262. Appellants' Brief, *supra* note 12, at 15 (one sentence devoted to assurances at this time); Respondents' Brief, *supra* note 211, at 5 (two sentences).

263. Scott observes that the full trial transcript "paints a very different picture" than does the edited transcript contained in the Appendix. *See* Scott, *supra* note 14, at 74–75. On this point we both agree.

explanation. Red Owl argued strenuously in its appellate brief that the supreme court should direct a verdict on the issue of losses from sale of the Wautoma grocery because there was no evidence of any promise by Red Owl at that time, a position the court did not accept or even discuss with specificity. Emphasis in the opinion on the discussions between Lukowitz and Hoffmann, at the time of the sale of the bakery, would have called attention to how much weaker was the evidence of an actionable assurance at the time of the sale of the Wautoma grocery.

It is hard to establish "the facts" involved in a complex transaction that occurred over forty years ago. As we move from the appellate opinion to the edited transcript that was before the court, we get both more answers and more questions. When we look at the full transcript and interview one of the parties, we learn more but we still must create a story that makes sense. There still are gaps and conflicting points of view. Anyone trying to tell the story necessarily must select what she chooses to report and give emphasis to what she sees as important.

We and Professor Scott tell somewhat different stories about *Hoffman v. Red Owl*. Scott focuses on explaining Red Owl's behavior. He says that the key to understanding the case is to "put to one side a consideration of the various actions taken by Hoffmann in reliance on statements made by Lukowitz" and to focus on "[w]hat explains the behavior of Red Owl officials who, according to the court, repeatedly increased Hoffman's minimum capital requirements."[264] This leads Scott to emphasize Red Owl's stated concern that Hoffmann should have sufficient equity capital to invest.[265] In describing the reasons why Hoffmann broke off negotiations after Red Owl's third financial plan, Scott accepts the explanation given by Red Owl's vice president, Walker: that Hoffmann's father-in-law would not let him incur further debt.[266] He does not mention Hoffmann's explanation—he testified that he did not want to ask his father-in-law to make his financial contribution a gift.[267]

We choose not to ignore Ed Lukowitz's statements to Joe Hoffmann, especially those made preceding the sale of the bakery

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264. *Id.* at 75.

265. *See id.*

266. *Id.* at 84.

267. Professor Scott also speculates that the primary problem was Hoffmann's "personal relationship with his father-in-law, who appears to have been a prosperous, but stern, Calvinist. . . . [H]is father-in-law was sufficiently skeptical about Joe's business acumen that he wanted to have some control over his money." *Id.* at 84–85. In making these comments, Scott makes assumptions about the father-in-law and his relationship with Hoffmann that are not supported by the transcript. There is nothing in the transcript about either topic. Hoffmann's contemporary recollections are quite different from Scott's assumptions. Hoffmann remembers his father-in-law, a farmer himself, as being supportive and proud of his son-in-law's business successes. Hoffmann says today that his father-in-law would have signed the agreement that the $13,000 be a gift if he had been asked, but Joe did not think it was right. Telephone Interview with Joseph Hoffmann, *supra* note 97.

business. Scott discounts statements made by Lukowitz after the Chilton meeting with officials from Red Owl's headquarters, because Hoffmann surely knew afterward that Lukowitz was not the ultimate decisionmaker.[268] We believe that Hoffmann knew that Lukowitz was not the ultimate decisionmaker well before that. But we also think that Hoffmann very reasonably understood that Lukowitz was authorized by Red Owl to convey decisions made at headquarters. In fact, Red Owl never disputed Lukowitz's agency in this regard.[269] If a jury believed Hoffmann's testimony that Lukowitz said that the people at the home office had told him that the "only hitch" to Joe being granted a franchise was the sale of the bakery, we think the jury could reasonably find the statement to be a promise. This understanding is entirely consistent with the encouraging attitude of the Red Owl officials at the Chilton meeting. It is possible that Lukowitz overstated what he had been told by the home office officials. There is some reason to believe that some officials at the home office had not yet considered the adequacy of Hoffmann's proposed investment in the new franchise.[270] But Lukowitz failed to convey this information, if he knew it. Moreover, Lukowitz knew he was persuading Joe Hoffmann to do something that Hoffmann did not want to do. Had Lukowitz only made carefully limited statements about what might influence the home office decision, Red Owl would have been justified in deciding to deny Hoffmann a franchise for good, bad, or no reason. But Hoffmann testified, credibly, that Lukowitz did make highly encouraging statements about Red Owl's commitments, which prompted significant reliance.

We have drawn our own conclusions about what happened. We have had several extended telephone conversations with Joe Hoffmann, and we like him. Time has passed, and we have been unable to interview the other people involved in the events that provoked the litigation or the lawyers who represented each side. We have tried to be careful. We have validated most aspects of Hoffmann's story with the trial transcript. Perhaps we have looked at the transcript with an eye to telling Hoffmann's story. Certainly, we have focused on what Hoffmann was told and reasonably believed before he took various fateful steps during the negotiations. We also doubt that Red Owl officials at the home office were particularly concerned about how much unencumbered capital Hoffmann had available because of their shifting view of what they regarded as his "equity."[271] We suspect that Red Owl officials primarily

268. Scott, *supra* note 14, at 95.

269. *See supra* notes 237–38, 254–55 and accompanying text.

270. *See supra* note 236 and accompanying text.

271. For example, the first financial plan considered the profit on the sale of the lot as "equity." And the last plan did not consider the father-in-law's $13,000 to be equity, even as Red Owl asked Joe to obtain his father-in-law's agreement that it be a gift. *See supra* p. 825 tbl.3.

were concerned that Hoffmann have enough money to ride out a slow period at the beginning of a new store.[272] Finally, it is clear that Red Owl's demands about the resources available to Hoffmann, both encumbered and unencumbered, increased substantially.

Although all stories about events in the past necessarily reflect a point of view, we do not regard historical research as so subjective as to be limited in value. We agree with Scott on many points. Everybody agrees that Ed Lukowitz spoke with Joe Hoffmann before he sold the bakery. The transcript shows that a jury could have found that Hoffmann was told that the "only hitch" holding up award of a franchise was selling the bakery, and that Hoffmann relied on this statement. We may never be able to establish conclusively everything that happened in several small Wisconsin towns in the mid-1960s. Nonetheless, good research can help us get closer to a truthful understanding of what we need to know to debate intelligently whether *Hoffman v. Red Owl Stores* presented a reasonable circumstance for liability for precontractual reliance.

B. About the Fairness of the Result

Professor Scott characterizes the holding in *Hoffman v. Red Owl Stores* as an "outlier."[273] His characterization surely rests on his judgment that no promise was made to Hoffmann on which he could have relied reasonably.[274] Viewed that way, the case could stand as a precedent for recovery of precontractual reliance in all cases in which the defendant has not obtained an explicit agreement that each party will absorb any precontractual reliance losses if the prospective deal were to fall through. We think that this position would surprise most businesspeople who assume that you can walk away until you make a contract—unless, perhaps, you have asked for significant reliance as the one condition for going ahead with the deal.

Professor Scott is not alone in his skepticism about the *Hoffman* opinion. In our own casebook we have a note in which we quote extensively from the summary transcript in the Appendix to Appellant's

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272. *See supra* notes 247–48 and accompanying text.

273. Scott, *supra* note 14, at 73.

274. Scott's view of the *Hoffman* facts is nicely illustrated by his citation of a recent Seventh Circuit decision as refusing to allow recovery "under similar facts," which validates his conclusion that *Hoffman* is an "outlier." *See id.* at 73 n.9. In the case cited, *Beer Capitol Distributing, Inc. v. Guinness Bass Import Co.*, 290 F.3d 877, 880–81 (7th Cir. 2002), the defendant's employee had represented that he would recommend that the plaintiff be appointed the defendant's exclusive distributor for southeastern Wisconsin, and the employee did so recommend. On summary judgment, the trial court found that no agent of the defendant had made any other promise respecting plaintiff's receipt of the exclusive distributorship. *Id.* Therefore, plaintiff could not recover for precontractual reliance because there was no promise that had been breached. *Id.* The case stands for the inability to recover for precontractual reliance where the defendant has not breached any promise or representation to the plaintiff. Evidently, this is how Scott views the *Hoffman* facts.

Brief.[275] We then ask whether there was any promise made by Ed Lukowitz or only opinions and encouragement.[276] After reading the complete transcript and talking to Joe Hoffmann, we now view the situation differently. We think that the jury could reasonably have viewed Lukowitz's statements preceding the sale of the bakery as a promise on which Hoffmann reasonably relied to his substantial detriment. There are two particular issues that we must address to defend our judgment.

The first issue is whether Lukowitz's statements to the Hoffmanns in October should have bound Red Owl. The Hoffmanns knew, probably from the very beginning of the relationship, that Lukowitz was not authorized to commit Red Owl to granting a franchise. Lukowitz's superiors at Red Owl headquarters had to approve. But the Hoffmanns were reasonable in viewing Lukowitz as an agent authorized to communicate messages from those headquarters officials. Red Owl never really challenged this position at trial, probably because there was no reasonable basis for doing so. Lukowitz was a divisional manager in charge of over eighty stores in Wisconsin and upper Michigan.[277] He was responsible for developing proposals for new franchises. And except for direct meetings with Hoffmann, all communications from Red Owl headquarters officials had been conveyed to Hoffmann through Lukowitz.[278]

The second and more difficult issue is what kind of a promise is needed before the promisor becomes liable for some or all of the precontractual reliance losses of the promisee. The Supreme Court of Wisconsin raised this issue in the *Hoffman* case. It held that there had been no promise sufficient to make a contract because too many important details were never agreed upon, but that the promissory estoppel principle did not require a promise "so comprehensive in scope."[279] The court never specifically addressed, however, what precisely are the characteristics that distinguish a promise sufficient to invoke promissory estoppel from mere advice, prediction, or enthusiastic expression of an opinion.

The opinion does refer to Lukowitz's statements that $18,000 "would establish Hoffman in a store" as "promises,"[280] and most previous

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275. 1 MACAULAY, KIDWELL & WHITFORD, *supra* note 6, at 398–401.

276. *Id.* Others have expressed similar reservations about the opinion in *Hoffman*. *See, e.g.*, Gregory M. Duhl, Red Owl's *Legacy*, 87 MARQ. L. REV. 297, 312–13 (2003); Peter Linzer, *Rough Justice: A Theory of Restitution and Reliance, Contracts and Torts*, 2001 WIS. L. REV. 695, 718–19.

277. *See* Transcript of Trial, *supra* note 9, at 172.

278. One exception to this pattern occurred after the November meeting at the Red Owl headquarters near Minneapolis. *See supra* note 121 and accompanying text. This exception occurred after all of Hoffmann's critical reliances on Lukowitz's assurances.

279. *See supra* note 218 and accompanying text.

280. *See supra* note 219 and accompanying text.

interpretations of the case have assumed that was the promise the court meant to enforce.[281] We have indicated our doubts that Lukowitz's statements to Hoffmann in June, at the time of the sale of the Wautoma grocery, should be considered as anything other than advice or encouragement. We suspect that Hoffmann himself viewed those statements as such. To impose liability based on those statements does raise serious questions about whether the requirement of a promise imposes any limits on liability for precontractual reliance.

But the statements made to Hoffmann in October, when he agreed to sell the bakery and building, seem to us much different. By that time, Hoffmann had met with Red Owl headquarters officials who appeared to approve the proposed location in Chilton. Those officials had reviewed Hoffmann's personal financial statement and then drafted a proposed financial plan for the franchise. And Hoffmann was being asked to sell the bakery and building so that he could invest more in the franchise than he had originally planned. In those circumstances, Lukowitz's statement that the sale of the bakery was "the last hitch" could be understood by an ordinary person as a commitment.[282] Hoffmann says today that he understood it as a commitment.[283]

We do not mean to suggest that the only possible understanding of the discussions between Lukowitz and Hoffmann was that Red Owl was making a promise. This is not a case where Hoffmann was entitled to summary judgment on the issue of liability. Hoffmann knew that ultimately he needed a document signed by one or more officials from the home office. Not everything had been decided about the terms of Hoffmann's franchise,[284] though more had been decided than many people assume.[285] Unless, however, a promise sufficient to invoke promissory estoppel must be definite enough to complete a contract—in which case there would be no law of precontractual liability—we think the October discussions sufficed to justify a jury verdict in Hoffmann's favor. Hoffmann asked for assurances before he took what was obviously a big step for him, and Lukowitz, purporting to speak for Red Owl as an

281. *See, e.g.*, FARNSWORTH, CONTRACTS, *supra* note 17, at 196–97.

282. We have earlier noted that the trial judge's charge instructed the jury to interpret the communications as they would be understood by somebody in Hoffmann's life situation. *See supra* note 192 and accompanying text.

283. Telephone Interview with Joseph Hoffmann, *supra* note 20. ("When he [Lukowitz] urged me to sell the bakery, I thought he was representing that we had a deal.").

284. From Red Owl's perspective, not even the location of the franchise had been finalized, though Hoffmann may have thought otherwise. *See supra* notes 102–03 and accompanying text.

285. Red Owl had a standard form contract that dictated many terms, including the terms of the fixtures loan and the trade credit that Hoffmann would receive on the purchase of groceries (seven days' credit). Transcript of Trial, *supra* note 9, at 66–67. There was a draft floor plan, and the contractor who would build the store had been selected. *See supra* note 87 and accompanying text. There was a formula by which the rent that Hoffmann would pay on the store would be determined. *See supra* note 80 and accompanying text.

authorized agent, delivered them. Lukowitz's statement was understood to mean that Red Owl would be happy with a franchise run by Joe Hoffmann with the capitalization that Hoffmann had then offered to provide.[286]

If we are right that there was an actionable promise made to Hoffmann when he sold the bakery, was it breached? This turns on what the promise means. This is a difficult question in all precontractual reliance cases. A complete contract has not yet been negotiated, and we think that some reasons would justify a party who has made such a promise to back out without liability. What promise did Lukowitz convey to Hoffmann? We think that the promise meant that Red Owl would not back out because it changed its mind about anything it knew when Lukowitz told Hoffmann that the sale of the bakery was the only hitch.[287] And as we have stressed, after Hoffmann sold the bakery, Red Owl increased its demands concerning the amount of the Hoffmanns' investment.[288]

If the actionable promise was the "only hitch" statement that prompted the sale of the bakery, what does this suggest about the Supreme Court of Wisconsin's decision? The opinion affirmed all of the damages awarded by the trial court and remanded for a further trial on

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286. Professor Jay Feinman sees the decision in *Hoffman v. Red Owl* as "problematic." *See* Jay M. Feinman, *The Last Promissory Estoppel Article*, 61 FORDHAM L. REV. 303, 315 (1992). He says:

> *Hoffman* can hardly be understood on the basis of promissory estoppel doctrine. . . . [I]t may be better understood as a tort case involving negligent misrepresentation of a peculiar kind. It can be best understood, though, as a relational case. The relational analysis would proceed at two levels; it would examine the interactions between the parties, which extended over several years, involved many different issues, and were conducted by several agents of Red Owl, and would then look at the broader setting in which franchisors and their agents employ a variety of techniques to procure franchisees. That kind of analysis, not constrained by notions of promise or reliance, would provide a better understanding of how courts treat such cases and how they should do so. It might well provide a contested understanding; we could argue about the appropriate scope of liability of franchisors for the acts of their agents in particular settings, but at least the argument would proceed from a fuller understanding of the case, and one that is more attuned to the responsibilities that arise from relationships.

Id. (footnote omitted). We find much to like about the suggested relational approach in setting the liabilities between franchisors and prospective franchisees. However, we think that when you look at the facts in the context of this case, on quite conventional grounds the jury and the appellate court would have been justified in finding a promise to grant a franchise if Joe Hoffmann would sell the bakery. Consideration of the relational background of the case would further support that conclusion, by justifying interpretation of Lukowitz's statements in the way Hoffmann says he understood them.

287. This is consistent with the view about the meaning of the promise in precontractual reliance cases suggested years ago by Charles Knapp in a famous article. It is what he called a "contract to bargain." *See* Charles L. Knapp, *Enforcing the Contract to Bargain*, 44 N.Y.U. L. REV. 673, 684–86 (1969).

288. *See supra* notes 118, 146 and accompanying text. We have also made clear earlier that there was no issue of Hoffmann not having available any of the resources that he claimed to have at the time he sold the bakery. *See supra* note 63.

damages related to the Wautoma grocery.[289] If we are right that Lukowitz's statement in June—that $18,000 was enough to get Hoffmann a franchise—was not enough to justify liability, the supreme court should have directed a verdict on damages in connection with the sale of the Wautoma grocery.[290] If the court had done this and distinguished events in June from those in October, there would have been less debate about the *Hoffman* case over the years.

In terms of the fairness of the ultimate result in the case, however, any error by the court in not directing a verdict on the claim for damages for sale of the Wautoma grocery may have been harmless. We have speculated, reasonably, we think, that the ultimate settlement was driven by damages for sale of the bakery business.[291] We doubt that on remand Hoffmann was able to demonstrate damage arising from the sale of the Wautoma grocery, which was sold for approximately the same amount that Hoffmann had paid for it. There may also have been what Peter Linzer has called "rough justice."[292] Hoffmann used the settlement proceeds to support his family during the lean years when he was starting his new career in life insurance sales, a career to which he turned because he had given up his livelihood as a baker.

C. THE STATUS OF *HOFFMAN V. RED OWL STORES* AS A PRECEDENT

It is common to interpret a precedent as though the facts of the case are those stated in the opinion. From that perspective, *Hoffman* stands for enforcement of the "promise" that Hoffmann would get a franchise for an investment of $18,000. Scott has referred to *Hoffman* as an unfortunate case that, because of the attention that it has received, has retarded thinking about the precise limits of a rule allowing recovery for precontractual reliance.[293] We agree that because the court does not explain why Lukowitz's statements about the $18,000 should be considered a promise rather than a mere opinion or enthusiastic

289. Hoffman v. Red Owl Stores, Inc., 133 N.W.2d 267, 275, 277 (Wis. 1965).

290. It could also be argued that the Court should have reversed the award to Hoffmann of $1000 for the option on the Chilton lot. At the time Hoffmann committed that money, he did ask for assurance from Lukowitz that it was an appropriate expenditure. Lukowitz knew that Hoffmann was careful with his money and did not want to expend the money unless the franchise was going to be placed in Chilton. Lukowitz purported to (and perhaps did) check with Red Owl headquarters before telling Hoffmann to go ahead. *See supra* note 54 and accompanying text. On the other hand, at that time Hoffmann had not met with any Red Owl headquarters officials and they had not drafted a first financial plan detailing his investment. In sum, there were some characteristics of an actionable promise at this time, but not as many as there were later at the time of the sale of the bakery.

291. *See supra* note 226 and accompanying text. These damages had been excluded from the first trial and were estimated by Hoffmann's lawyer to be $6000. *See supra* note 185 and accompanying text.

292. *See* Linzer, *supra* note 276, at 695 n.*.

293. *See* Scott, *supra* note 14, at 71–72.

encouragement, the opinion does not help explain the limits on precontractual reliance.

In historical context, however, the *Hoffman* case is best known as the leading early American case to allow recovery for precontractual reliance, in a situation where the parties clearly contemplated at all relevant times later negotiations and agreement.[294] Though still controversial, a considerable majority of commentators now support a legal remedy for precontractual reliance in some circumstances.[295] It is now widely recognized that when, in precontractual bargaining, only one party detrimentally relies, the other party is immediately in a stronger bargaining position. The relying party now has an investment it wants to protect, while the other party can walk away from the deal without loss. For reasons of both efficiency and fairness, scholars who advocate various positions are now willing to accept, at least in some circumstances, recovery of reliance loss caused by a failed negotiation. Most are comfortable with such a recovery where the reliance was at the defendant's urging or was a foreseeable and desired response to a strong assurance that a deal would be reached.[296] The efficiency concern is that without some legal protection, the relying party will be reluctant to make a precontractual investment that will likely benefit the parties' prospective project. The fairness concern is that because of its stronger

294. 1 FARNSWORTH, *supra* note 1, § 3.26, at 379 ("In recent decades, courts have begun to . . . base liability on a specific promise that has been made in order to interest the other party in the negotiations and that the other party has relied on. . . . The leading decision in this line is *Hoffman v. Red Owl Stores* . . . ."). *Hoffman* is also historically significant for using the doctrine of promissory estoppel to frame a new doctrine allowing recovery for precontractual reliance in appropriate circumstances. It did not have to be that way. Others have suggested that a doctrine of good faith be employed as a vehicle for policing precontractual bargaining behavior and allowing recovery for precontractual reliance in appropriate cases, as is done in some European countries. *See* Friedrich Kessler & Edith Fine, Culpa in Contrahendo, *Bargaining in Good Faith, and Freedom of Contract: A Comparative Study*, 77 HARV. L. REV. 401, 403–04 (1964). We suspect that the doctrine would have developed in either doctrinal frame, but there are potential advantages in debating the issues in the terms of promissory estoppel. When it comes to establishing the limits on recovery for precontractual reliance, promissory estoppel tends to focus the debate on whether there was a "promise" and whether the reliance was a foreseeable consequence of the promise. While these terms are vague and require interpretation, they point to considerations that surely should help define the limits on this theory of liability.

295. *See, e.g.*, authorities cited *infra* note 296.

296. Juliet Kostritsky details this rationale for precontractual liability, citing many other authorities and discussing several cases upholding this view. *See* Juliet Kostritsky, *Uncertainty, Reliance, Preliminary Negotiations and the Holdup Problem*, 61 SMU L. Rev. 1377, 1410–38 (2008). For similar reasons, Scott and his frequent collaborator, Alan Schwartz, have argued in favor of recovery of precontractual reliance when there is a "preliminary agreement" that both parties will invest precontractually and one party later reneges. *See* Alan Schwartz & Robert F. Scott, *Precontractual Liability and Preliminary Agreements*, 120 HARV. L. REV. 661, 703–04 (2007). There was not an agreement for both parties to invest precontractually in *Hoffman v. Red Owl Stores*, as Red Owl never made any investment (beyond its expenses in vetting Hoffmann) in the proposed Chilton store. So perhaps Scott would not support recovery in *Hoffman* even if he accepted our view of the facts.

bargaining position, the nonrelying party may be able in later negotiations to secure an undue share of the joint benefits from the deal.

It also is possible to justify recovery of precontractual reliance on freedom of contract or autonomy principles. If parties agree explicitly, before any precontractual reliance occurs, that such losses will or will not be reimbursed or shared, few would object to respecting their explicit agreement. However, we think that this is a rare situation. In *Hoffman* there was no such explicit agreement, and so we have a "gap" situation that is so common in the law of contract interpretation. Some scholars prefer very predictable and determinative default rules in such situations—rules that allow courts little discretion in their application and require parties to enter explicit agreements if they want something else.[297] We would allow courts, and where appropriate juries, to consider all the facts in context to fashion a rule for the case that approximates the parties' "tacit" agreement or probable assumptions.[298] And from that perspective, at least a sharing of Hoffmann's losses with respect to his bakery business seems to us consistent with the parties' reasonable assumptions. Notice, too, that the very uncertainty of the situation when the Supreme Court of Wisconsin remanded the case helped provoke a settlement. As is true in most precontractual reliance situations, the amount Red Owl paid to Hoffmann was not a huge sum.[299] Nonetheless, it helped the Hoffmanns cope with the way their lives had been upset by the failed pursuit of a Red Owl franchise.

Ironically, perhaps, with our view of the full facts, in its ultimate outcome *Hoffman v. Red Owl Stores* provides a mainstream example of precontractual liability under any of these rationales. Hoffmann relied on Red Owl's assurances in order to benefit the franchise project. He sold the bakery business and the building in order to get his money together and position himself to work on establishing the Chilton store as soon as

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297. *See, e.g.*, Allan Schwartz & Robert E. Scott, *Contract Theory and the Limits of Contract Law*, 113 YALE L.J. 541, 618 (2003) ("An efficient default rule . . . is simple in form, condition on few states of the world . . . .").

298. *See, e.g.*, Stewart Macaulay, *The Real and the Paper Deal: Empirical Pictures of Relationships, Complexity and the Urge for Transparent Simple Rules*, 66 MOD. L. REV. 44, 45 (2003) ("Often, however, the paper deal will not reflect the real deal: a writing can be inconsistent with the actual expectations of the parties."); William C. Whitford, *The Role of the Jury (and the Fact/Law Distinction) in the Interpretation of Written Contracts*, 2001 WIS. L. REV. 931, 947–50 (arguing that a contextualized inquiry better respects each party's autonomy or freedom of contract); *see also* Jason Johnston, *Communication and Courtship: Cheap Talk Economics and the Law of Contract Formation*, 85 VA. L. REV. 385, 496–99 (1999) (suggesting that the decision in *Hoffman* may have been efficient if a contextualized inquiry shows the reliance to have been "pretrade performance" without the defendant disclosing doubts that the deal would go through); Richard Craswell, *Offer, Acceptance, and Efficient Reliance*, 48 STAN. L. REV. 481, 544–550 (1996) (arguing for case-by-case determination of when recovery of precontractual reliance is "efficient").

299. *See* Stewart Macaulay, *The Reliance Interest and the World Outside the Law Schools' Doors*, 1991 WIS. L. REV. 247, 266–67.

possible. He was reluctant to do this because he knew that Red Owl had not yet signed a formal franchise contract. Yet he trusted Lukowitz's statement about the position of the home office—sale of the bakery was "the only hitch." Hoffmann probably did not think about his legal rights at this point, but he thought that he had a firm commitment from Red Owl. When the deal fell apart, he told the Red Owl representatives that he was considering seeing a lawyer. Further, once the Hoffmanns sold their bakery business, their bargaining position was compromised because they had only less attractive alternatives if the deal collapsed. Red Owl responded by demanding ever-increasing investments from Hoffmann. If he had made these investments, they would have reduced Red Owl's risks in the joint enterprise.

Put another way, if we accept the facts as we have reported them, *Hoffman v. Red Owl Stores*, far from being an outlier,[300] is a very mainstream precontractual reliance case. The Wisconsin courts, in perhaps an inelegant but historically significant way, got it right.

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300. A more recent Seventh Circuit case written by Judge Posner that protects precontractual reliance may be a better vehicle for examining the outer limits of recovery. In *Cosgrove v. Bartolotta*, 150 F.3d 729, 733–34 (7th Cir. 1998), the plaintiff, an experienced corporate lawyer who was the defendant's family friend, agreed to loan defendant start-up capital and provide defendant with legal services needed to start a new restaurant. Defendant promised to give the lawyer an ownership interest in the restaurant. *Id.* at 732. Plaintiff assisted defendant in negotiating the lease of the restaurant premises and a loan from a bank, and plaintiff advised defendant on the appropriate corporate structure for the venture. *Id.* Plaintiff and defendant never worked out the exact terms under which plaintiff would receive a share in the restaurant. *Id.* Plaintiff was willing and able to make the loan, but he never did this. *Id.* Defendant obtained financing elsewhere and cut plaintiff out of the deal. *Id.* The jury found that there was no contract because details respecting the partial ownership interest remained to be negotiated, but it nevertheless awarded plaintiff the value of the partial ownership interest ($117,000) on a promissory estoppel theory. *Id.* at 731–32. The trial judge overturned this judgment because plaintiff had failed to prove reliance on the promise. *Id.* at 731.

Judge Posner wrote an opinion reinstating the jury's award. *Id.* at 734–35. The pledge of a loan did not cost plaintiff anything so it was not sufficient reliance to support recovery. *Id.* at 733. Judge Posner nonetheless found sufficient reliance to support promissory estoppel in the rendering of professional services by the plaintiff, even if performed during what would otherwise have been leisure time. *Id.* at 733–34. Judge Posner also read *Kramer v. Alpine Valley Resort, Inc.*, 321 N.W.2d 293, 294 (Wis. 1982), as interpreting *Hoffman v. Red Owl Stores* to allow either reliance or expectation damages. *See Cosgrove*, 150 F.3d at 734. He affirmed the jury's award of expectation damages although both the *Hoffman* and *Kramer* cases themselves awarded only reliance damages. *See id.* at 734–35. Judge Posner's opinion tests the limits of precontractual reliance recovery both because it was not clear that the reliance was very extensive and because he allowed expectation damages. Reliance damages might have been difficult to calculate—should the lawyer be allowed to bill at his usual hourly rate when working outside normal hours for a friend?—but they surely were less than the $117,000 expectation damages awarded.

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