Red Owl's Legacy

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Abstract
In the early 1960s, Joseph Hoffman, a high school graduate, baker and father of seven, sought to obtain a Red Owl grocery store franchise in Wisconsin. He entered into negotiations with Red Owl Stores, Inc. after the franchisor assured him that the $18,000 he had to invest in the franchise was sufficient. Over the course of the negotiations, Red Owl encouraged Hoffman to sell his bakery, buy a small grocery store to gain experience in the grocery business, sell his grocery store three months later, and move his family to the desired location for his Red Owl franchise. The negotiations fell apart after Red Owl raised the amount of the investment required of Hoffman beyond what he could afford. Hoffman lost his bakery business and lost the franchise that he coveted. Despite the fact that Hoffman and Red Owl had yet to enter into a contract, the Supreme Court of Wisconsin in Hoffman v. Red Owl Stores, Inc. fashioned liability for Hoffman around the doctrine of promissory estoppel. That Supreme Court decision and its aftermath are Red Owl's legacy.

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RED OWL'S LEGACY

GREGORY M. DUHL

In the early 1960s, Joseph Hoffman, a high school graduate, baker and father of seven, sought to obtain a Red Owl grocery store franchise in Wisconsin. He entered into negotiations with Red Owl Stores, Inc. after the franchisor assured him that the $18,000 he had to invest in the franchise was sufficient. Over the course of the negotiations, Red Owl encouraged Hoffman to sell his bakery, buy a small grocery store to gain experience in the grocery business, sell his grocery store three months later, and move his family to the desired location for his Red Owl franchise. The negotiations fell apart after Red Owl raised the amount of the investment required of Hoffman beyond what he could afford. Hoffman lost his bakery business and lost the franchise that he coveted. Despite the fact that Hoffman and Red Owl had yet to enter into a contract, the Supreme Court of Wisconsin in Hoffman v. Red Owl Stores, Inc. fashioned liability for Hoffman around the doctrine of promissory estoppel. That Supreme Court decision and its aftermath are Red Owl's legacy.

1. INTRODUCTION

In Hoffman v. Red Owl Stores, Inc., the Supreme Court of Wisconsin offered unprecedented protection for the interests of potential franchisees. In the absence of any contractual obligation on the part of franchisors to prospective franchise owners, the court boldly invoked the doctrine of promissory estoppel to recognize the economic risks that individuals take

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* Honorable Abraham L. Freedman Fellow and Lecturer in Law, James E. Beasley School of Law, Temple University. B.A. 1991, Yale College; J.D. 1995, Harvard Law School. I thank William J. Woodward, Jr., an inspiring mentor and friend, for giving me the opportunity to teach Hoffman v. Red Owl Stores, Inc. (Red Owl) to his first-year contracts class, and Richard K. Greenstein for his comments on an earlier draft of this article. I also acknowledge the exceptional research assistance of Audrey K. Bowen and Damian M. Taranto. Last, I could not have written this article without the wonderful insights I discovered in Contracts: Law in Action, by Stewart Macaulay, John Kidwell, and William Whitford. The authors of this casebook deserve much credit for shaping how we teach and learn about Red Owl.

when negotiating for the extension of a franchise. By pinning certain responsibilities on franchisors during such negotiations, the court corrected the unequal bargaining power between the corporate franchisor and the potential franchisee. In that regard, the decision was a victory for the "powerless" and a loss for the "powerful"—a victory for small entrepreneurs in their struggle against corporate greed.

Thousands of first-year law students have read Red Owl to learn about promissory estoppel, and courts in Wisconsin and elsewhere have cited the case as precedent for imposing liability on promisors. But even though the Supreme Court of Wisconsin cloaked its Red Owl decision in the fabric of promissory estoppel, the theory does not explain why the court imposed liability when the franchisor made no "actionable" promise, or why the court did not instruct the trial judge to award damages sufficient to protect the Hoffmans' reliance interest. Interpreting Red Owl merely as a case about promissory estoppel masks what was truly daring about the court's opinion in Red Owl, as well as the decision's unfulfilled legacy.

The court in Red Owl recognized the need to rectify a clear injustice and used promissory estoppel as its vehicle to do so. In light of the poor fit between promissory estoppel and the facts of the case, a very small number of courts and legal scholars have interpreted the court's decision in Red Owl as establishing a precontractual duty on the part of franchisors to negotiate in good faith. Under that interpretation, a franchisor's precontractual assurances and representations to a potential franchisee are not enforceable as promises, but rather are actionable in tort if made in bad faith. The interpretation is problematic, however, because the Supreme Court of Wisconsin did not explicitly recognize such a duty in Red Owl or in any case thereafter, and it narrowed the scope of the promissory estoppel doctrine in subsequent decisions. Unfortunately, such problems have clouded the significance of the decision for potential franchisees and employees, as well as for many first-year law students who have read the court's opinion in their contracts casebooks.

2. See id. at 274.
3. See id. at 276-77.
The 150th anniversary of the Supreme Court of Wisconsin is the perfect time to re-examine the heralded and unheralded legacies of Red Owl. In this Article, I do not pretend to rewrite history, but try to re-examine the Red Owl decision and its impact. Such a history not only highlights both the court’s inventiveness and shortsightedness but also it provides insight into the role courts play in American society. Rather than taking Red Owl out of contracts class and moving it to torts, we should use this occasion to appreciate all that Red Owl has contributed to the study of contract law over the past four decades.

In Part II, I present the background to Red Owl in addition to the decision itself and its aftermath. Part III discusses the impact of Red Owl on the development of franchise law and its more general impact on the doctrine of promissory estoppel and precontractual business relationships. Part IV explains why the case does not fit the promissory estoppel rubric and speculates why the court relied upon that doctrine regardless. It also describes the ways in which the facts of the case better fit a theory grounded in tort for breach of a duty to negotiate in good faith. Part V examines instances when courts and scholars have interpreted Red Owl as establishing such a duty and discusses the benefits and drawbacks of reading the case in that way. This Article concludes by revisiting the lessons that lawyers, law professors, and law students can draw from Red Owl.

II. HOFFMAN V. RED OWL STORES, INC.

In 1965, the Supreme Court of Wisconsin decided Hoffman v. Red Owl Stores, Inc.\textsuperscript{6} The question before the court was whether a prospective franchisee had a cause of action against a franchisor whose actions were inconsistent with specific, but noncontractual, assurances made during negotiations under the extension of a franchise.\textsuperscript{7} The court’s efforts to compensate potential franchisees for some of the losses they incur in relying on such assurances have affected franchise law as well as employment and business law more generally. While it is possible to criticize the decision in hindsight as shortsighted, a contextual understanding of the case reminds us of how radical the court’s position truly was.

A. The Facts

The plaintiffs were Joseph Hoffman (Hoffman) and his wife, a couple who owned and operated a bakery in Wautoma, Wisconsin, from late 1956

\textsuperscript{6} 133 N.W.2d 267 (Wis. 1965).
\textsuperscript{7} See id. at 267.
until they sold the building in late 1961.\textsuperscript{8} Hoffman, a high school graduate with a year of vocational training in business, was in his twenties when the couple opened the bakery.\textsuperscript{9} He and his wife had seven children.\textsuperscript{10}

In November 1959, Hoffman, wishing to expand operations by opening a grocery store, contacted the defendant, Red Owl Stores, Inc. (Red Owl), a Minnesota corporation that owned and operated a chain of grocery stores in the Midwest.\textsuperscript{11} Red Owl also extended franchises to individuals, partnerships, and corporations.\textsuperscript{12} During 1960, Hoffman and Red Owl began negotiations for Hoffman to open a Red Owl franchise in Wautoma.\textsuperscript{13} In the fall of that year, Hoffman informed Edward Lukowitz, a divisional manager for Red Owl, that he had $18,000 available for capital to invest in the franchise, and Lukowitz assured him that such an investment was more than sufficient to open a Red Owl store.\textsuperscript{14}

In late 1960, Hoffman thought that he should buy a small grocery store in Wautoma to gain experience before owning a Red Owl franchise.\textsuperscript{15} After seeking and obtaining Lukowitz’s approval, Hoffman purchased and began operating a grocery store.\textsuperscript{16} Three months later when Red Owl representatives found that the store was profitable,\textsuperscript{17} Lukowitz advised Hoffman to sell the store.\textsuperscript{18} Although reluctant to sacrifice the summer tourist business, Hoffman sold the grocery store in June 1961 after Lukowitz assured him that he would be operating a larger Red Owl store by fall.\textsuperscript{19} Lukowitz also reconfirmed that Hoffman could open a franchise with only $18,000 in capital.\textsuperscript{20}

In the fall of 1961, following the franchisor’s suggestion, Hoffman exercised an option to purchase a lot in Chilton, Wisconsin, on which to build his Red Owl store.\textsuperscript{21} Hoffman gave a $1000 deposit toward the purchase

\begin{itemize}
\item \textsuperscript{8} Id. at 268-69.
\item \textsuperscript{9} See Stewart Macaulay et al., Contracts: Law in Action 401 (2d ed. 2003).
\item \textsuperscript{10} Id.
\item \textsuperscript{11} Red Owl, 133 N.W.2d at 269.
\item \textsuperscript{12} Id.
\item \textsuperscript{13} Id.
\item \textsuperscript{14} Id.
\item \textsuperscript{15} Id.
\item \textsuperscript{16} Id.
\item \textsuperscript{17} Id.
\item \textsuperscript{18} Id.
\item \textsuperscript{19} Id.
\item \textsuperscript{20} Id.
\item \textsuperscript{21} Id. at 270. The full price of the lot was $6000, and upon electing to purchase the lot, Hoffman owed the entire balance within thirty days. Id. at 269-70. Red Owl had planned for a third party to buy the lot from Hoffman, construct a building, and then lease the lot to Hoffman for $550 a month. Id. at 270. The lease was to run for ten years, and at the end of the lease, Hoffman would have had the option to renew the lease or buy the property. Id.
\end{itemize}
price. A couple of months later, Lukowitz advised the potential franchisee to sell his bakery building as the final step to obtaining a Red Owl franchise. On November 6, 1961, the Hoffmans sold their bakery building but kept the bakery equipment in anticipation of opening a bakery within their Red Owl store.

Hoffman sold the building, moved his family to Neenah where he rented a house, and took a job working the night shift at an Appleton bakery, only to learn from Red Owl officials in late November 1961 that he needed $24,100 in capital to open a Red Owl franchise. Red Owl raised the figure again to $26,000, claiming that the additional investment was needed for promotional endeavors. Hoffman’s father-in-law agreed to contribute $13,000 of the start-up capital under the condition that he be made a partner in the business. Lukowitz told Hoffman that a partnership “sound[ed] fine,” only for Red Owl later to reject the partnership and require Hoffman’s father-in-law to make his investment “either [as] a gift or a loan subordinate to all general creditors.”

In the first few months of 1962, Red Owl provided Hoffman with financial statements that Hoffman interpreted as requiring him and his father-in-law to invest $34,000 in the grocery store. Red Owl made no further mention of Hoffman’s father-in-law signing a subordination agreement and instead insisted that he make his investment as a gift. At that point, Hoffman broke off negotiations with Red Owl.

B. Procedural History

The Hoffmans filed a lawsuit against Red Owl in the Circuit Court of Outagamie County, Wisconsin, to recover “for the breach of [Red Owl’s] representations and agreements” related to the Hoffmans’ potential acquisition of a Red Owl franchise. The plaintiffs grounded their complaint on the

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22. Id.
23. Id. In November 1961, Hoffman sold his bakery building for $10,000. Id. The building was owned in joint tenancy by Hoffman and his wife. Id. at 276.
24. Id. at 270.
25. Id. at 269-70, 276.
26. Id. at 270.
27. Id.
28. Id.
29. Id.
30. Id. at 271.
31. Id.
32. Id. at 268-69.
33. Id. at 269.
theory of promissory estoppel. After the trial, the court submitted the case to the jury for a special verdict. The jury found all of the elements necessary for liability present, which enabled the court to find Red Owl liable to the Hoffmans under the plaintiffs’ theory of recovery. The jury also found that Red Owl should pay the Hoffmans the following amounts in damages: $16,735 for the sale of the Wautoma grocery store; $2000 for the sale of the bakery building; $1000 for the down payment to exercise the option on the Chilton building site; $140 for the costs incurred in the move to Neenah; and $125 for the house they rented.

The Hoffmans moved for judgment on the special verdict, and Red Owl moved that the court change the jury’s answers to the questions related to liability from “Yes” to “No,” and, in the alternative, relieve Red Owl of the jury’s recommended damage awards or order a new trial. On March 31, 1964, the trial judge ordered the parties to submit to a new trial on the sole issue of how much Red Owl should compensate the Hoffmans for the sale of their Wautoma grocery store and adopted the rest of the jury’s verdict. Red Owl appealed the judgment to the Supreme Court of Wisconsin, and the Hoffmans cross-appealed the order for a new trial.

C. The Supreme Court’s Holding

In Hoffman v. Red Owl Stores, Inc., the Supreme Court of Wisconsin set out to answer three questions:

(1) Whether this court should recognize causes of action grounded on promissory estoppel as exemplified by [Section] 90 of Restatement, 1 Contracts? (2) Do the facts in this case make out a cause of action for promissory estoppel? (3) Are the jury’s findings with respect to damages sustained by the evidence?

The first two questions relate to liability and the third relates to damages.

1. Liability

The first question the court addressed was whether Wisconsin courts

34. Id. at 272-73.
35. Id. at 271.
36. Id. at 271-72.
37. Id. at 272.
38. Id.
39. Id.
40. Id.
41. Id. at 272-73.
should recognize causes of action under Section 90 of the *Restatement (First) of Contracts.*\(^{42}\) Section 90 provides that """"[a] promise which the promisor should reasonably expect to induce action or forbearance of a definite and substantial character on the part of the promisee and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise.""""\(^{43}\) Prior to the *Red Owl* decision, no Wisconsin court had adopted Section 90.\(^{44}\) However, the court in *Red Owl* concluded that promissory estoppel provided a """"needed tool . . . to prevent injustice""""\(^{45}\) and, consequently, followed the precedent of courts in other states and adopted Section 90.\(^{46}\)

The second question before the court was whether the facts supported a cause of action for promissory estoppel.\(^{47}\) The court ultimately determined that there was ample evidence of numerous """"promissory representations"""" made by Red Owl and its agents to Hoffman and that Hoffman relied on the representations """"in the exercise of ordinary care.""""\(^{48}\) After resolving those fact-specific inquiries, the court made the discretionary policy decision to find liability to prevent an injustice to the Hoffmans.\(^{49}\)

*Red Owl* contended that judicial intervention was inappropriate because the parties never reached final agreement as to the """"essential factors necessary to establish a contract between Hoffman and Red Owl.""""\(^{50}\) The court held that Section 90 did not require a comprehensive and definite promise as a breach of contract action did.\(^{51}\) Implicit in the court’s analysis was that *Red Owl* made a promise or a series of promises to Hoffman, however indefinite, but the court failed to identify the specific promise or promises in its opinion.

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42. *Id.* at 273.
43. *Id.* (quoting *RESTATMENT (FIRST) OF CONTRACTS § 90 (1932)*).
44. *Id.*
45. *Id.*
47. *Red Owl*, 133 N.W.2d at 273.
48. *Id.* at 274.
49. *Id.* at 275.
50. *Id.* at 274.
51. *Id.* at 275. The court concluded that """"it would be a mistake to regard an action grounded on promissory estoppel as the equivalent of a breach of contract action."""" *Id.*
2. Damages

While the court turned next to the jury’s findings with respect to damages,\textsuperscript{52} it gave scant attention to the appropriate measure of damages in a promissory estoppel case.\textsuperscript{53} The Supreme Court of Wisconsin affirmed the lower court’s judgment on damages, giving most of its attention to the order for a new trial.\textsuperscript{54} The court agreed with the trial court that the damages recommended by the jury for the Hoffmans’ sale of their Wautoma store were excessive, explaining that “[w]here damages are awarded in promissory estoppel instead of specifically enforcing the promisor’s promise, they should be only such as in the opinion of the court are necessary to prevent injustice.”\textsuperscript{55}

The Hoffmans purchased the store only to gain experience in the grocery business. Consequently, the court did not find it appropriate to award them their lost profits from the sale of the store because they had expected to sell the store as soon as they opened their Red Owl franchise.\textsuperscript{56} The court held that the correct measure of damages for the sale of the store was the actual loss sustained by the Hoffmans, as measured by the “difference between the sales price received and the fair market value of the assets sold, giving consideration to any goodwill attaching thereto by reason of the transfer of a going business.”\textsuperscript{57} Because neither side presented evidence at trial of the fair market value of the assets sold, the court agreed with the trial court that a new trial was warranted to determine the Hoffmans’ damages from the sale of the store.\textsuperscript{58}

\textit{D. The Aftermath}

The Supreme Court of Wisconsin remanded the case to the trial court, and the Hoffmans and Red Owl settled the case for $10,600 after a day and one-half of trial.\textsuperscript{59} The Hoffmans received $6600 of the settlement, and their attorney received $4000, with Red Owl paying two-thirds of the Hoffmans’ costs as ordered by the Supreme Court of Wisconsin.\textsuperscript{60} Soon after negotiations broke off with Red Owl, Metropolitan Life Insurance Company

\begin{footnotes}
52. \textit{id.} at 274.
53. \textit{See id.} at 275.
54. \textit{id.} at 275-77.
55. \textit{id.} at 276.
56. \textit{id.} at 277.
57. \textit{id.} at 276.
58. \textit{id.} at 277.
59. Macaulay et al., \textit{supra} note 9, at 403. The case was re-tried in the Circuit Court of Outagamie County. \textit{id.}
60. \textit{id.}
\end{footnotes}
(Metropolitan) hired Hoffman as an insurance salesman, and he quickly received honors for having the most sales. Metropolitan promoted him to District Manager in Milwaukee and thereafter considered him for a managerial position in Indiana. Hoffman and his family faded into anonymity as the case that bore his name became, in perhaps an ironic twist, subsequently known as Red Owl.

III. RED OWL'S INFLUENCE

Red Owl has exerted a pervasive influence on contract law. Although identified by the Supreme Court of Wisconsin as a noncontractual theory, promissory estoppel extends the contractual baseline of mutual promises or a promise plus performance to cases in which there is no contract to enforce. The court introduced a new lexicon for providing franchisees, employees, and family members, among others, a remedy for unfulfilled precontractual assurances and representations. Consequently, courts across the nation have scrutinized the reasoning in Red Owl, looking for similarities and dissimilarities to the cases before them. Red Owl has influenced the application of promissory estoppel to the formation of franchising relationships and to legal relationships more generally.

A. Red Owl's Impact on Franchise Law

In invoking promissory estoppel as explicated in Section 90 of the Restatement (First) of Contracts, the Supreme Court of Wisconsin created new precedent. The court adopted a doctrine that partially protects the interests of prospective franchisees who, without much bargaining power and with much more at stake than franchisors, take economic risks in reliance on precontractual assurances and representations.

By recognizing promissory estoppel as a valid cause of action, the Supreme Court of Wisconsin potentially altered the tone of negotiations between franchisors and potential franchisees. Previously, individuals

61. Id.
62. See id.
seeking franchise agreements had little leverage in negotiations because the franchisor controlled all terms and conditions. Furthermore, the franchisor could terminate negotiations at any point before (and at many points after) signing the franchise agreement without fear of incurring liability. The court in Red Owl recognized that franchisors could abuse that bargaining power without risk to themselves and provided a mechanism in promissory estoppel to induce franchisors to live up to their precontractual assurances and representations. That mechanism protected potential franchisees who, to their detriment, relied on a franchisor’s precontractual statements.

Red Owl has been central to franchise law for nearly forty years. Courts inside and outside of Wisconsin, both state and federal, have relied on and cited Red Owl in cases testing the scope of a franchisor’s responsibility to potential franchisees. For instance, in Walker v. KFC Corp., a franchisee filed suit against KFC for the franchisor’s failure to keep certain promises, such as developing a nationally recognized “Mexican McDonalds,” providing

64. See generally Buggs v. Ford Motor Co., 113 F.2d 618, 619 (7th Cir. 1940) (recognizing “the wisdom and necessity of legislation which protects the weak against a suing party” when a manufacturer unfairly cancels a motor vehicle dealer’s franchise); Cut Price Super Mkts. v. Kingpin Foods, Inc., 98 N.W.2d 257 (Minn. 1959); Kuhl Motor Co. v. Ford Motor Co., 71 N.W.2d 420, 423 (Wis. 1955) (acknowledging “the inequality in bargaining power between an automobile dealer and an economically powerful manufacturer”).


[C]ourts traditionally take a view of this precontractual period that relieves the parties of the risk of any liability, whether contractual or not, and that results in a broad “freedom of negotiation.” As a general rule, a party to precontractual negotiations may break them off without liability at any time and for any reason—a change of heart, a change of circumstances, a better deal—or for no reason at all.

Id. The franchisor can avoid liability absent fraud or deceit. See id. at 233-34 (“A negotiating party may not with impunity fraudulently misrepresent its intention to come to terms. Such an assertion is one of fact—of a state of mind—and if fraudulent, it may be actionable in tort.” (citing RESTATEMENT (SECOND) OF TORTS §§ 525, 530 (1977))); see id. at 234 (citing Markov v. ABC Transfer & Storage Co., 457 F.2d 535 (Wash. 1969)).


equipment leases at competitive rates, and engaging in national advertising.70 The jury awarded the plaintiffs over $1,000,000 for actual reliance losses, lost profits, and emotional distress.71 The court, applying California law, denied the defendant’s motion for judgment notwithstanding the verdict and allowed the part of the jury’s verdict that was grounded in promissory estoppel to stand.72 The franchisee’s attorneys presented, and the court accepted, an argument based on the Supreme Court of Wisconsin’s interpretation of promissory estoppel in Red Owl: A court could enforce promises on which a franchisee reasonably relies even if those promises are not part of a contract.73 Unlike Red Owl, however, the court premised liability on promissory estoppel even though the franchisee had already been operating under a written franchise agreement with KFC.74 Walker is illustrative of the ways in which courts have cited Red Owl in finding noncontractual liability on the part of a franchisor to a franchisee.

B. The Broader Impact of Red Owl

Similarly, courts nationwide have cited Red Owl in promissory estoppel cases, applying the doctrine to different types of business and potential business relationships.75 For example, in Mooney v. Craddock,76 the court cited Red Owl to hold that the plaintiff, who retired from the armed forces after receiving assurances from the defendant that he could lease space to operate a health club in a new office building, had a cause of action for promissory estoppel even though the parties had no contractual relationship.77 Likewise, the court in Alaska Bussell Electric Co. v. Vern Hickel Construction Co.78 enabled a contractor to recover from a subcontractor who did not fulfill his bid on which the contractor relied in winning a construction contract.79 The court looked to Red Owl to decide whether the injustice presented by the subcontractor’s conduct required the type of relief that promissory estoppel provides.80

70. Id. at 616.
71. Id. at 615.
72. Id. at 622.
73. Id. at 616.
74. Id.
77. Id. at 1305.
79. Id. at 581.
80. See id.
Red Owl's influence eventually reached the federal courts as well. In Cyberchron Corp. v. Caldata Systems Development, Inc., a supplier refused to buy computers from a manufacturer because of a dispute over shipping costs. The United States Court of Appeals for the Second Circuit recognized that the supplier had provided assurances to the manufacturer that induced the manufacture of the computers, and the manufacturer could reasonably have expected the parties to agree on shipping costs because they had an ongoing business relationship. With mention of Red Owl and a federal appellate court that cited it, the court invoked the theory of promissory estoppel to avoid an injustice.

Many scholars have cited Red Owl in analyses of Section 90 of the First and Second Restatements of Contracts. It has also been categorized in

81. 47 F.3d 39 (2d Cir. 1995).
82. Id. at 41.
83. Id.
84. Id. at 44. Courts have also cited Red Owl to articulate the appropriate measure of damages in promissory estoppel cases. See, e.g., Ehret Co. v. Eaton, Yale & Towne, Inc., 523 F.2d 280 (7th Cir. 1975); Pop's Cones, Inc. v. Resorts Int'l Hotel, 704 A.2d 1321 (N.J. Super. Ct. 1998).
several casebooks and treatises under the heading of promissory estoppel.\textsuperscript{86} \textit{Franchise and Distribution Law and Practice}\textsuperscript{87} and \textit{Williston on Contracts}\textsuperscript{88} both refer to \textit{Red Owl} in their promissory estoppel sections,\textsuperscript{89} with the former using the case as a specific example in the section defining "Reasonable Reliance."\textsuperscript{90} In the treatise \textit{Modern Law of Contracts}, Professor Hunter credits \textit{Red Owl} for the revised definition of promissory estoppel found in the \textit{Restatement (Second) of Contracts},\textsuperscript{91} which adds the following to the prior definition: "The remedy granted for breach may be limited as justice requires."\textsuperscript{92} The drafters added that clause to the original definition in an attempt to recognize that in doing justice to the promisee, a court must be careful not to do injustice to the promisor—an idea derived from the limitations on damages imposed by courts in cases such as \textit{Red Owl}.\textsuperscript{93}

The court's decision in \textit{Red Owl} has also given individuals and small business owners a new vocabulary when trying to enforce noncontractual promises made by corporations, even when courts ultimately deny relief. In \textit{Major Mat Co. v. Monsanto Co.},\textsuperscript{94} a case decided by the United States Court of Appeals for the Seventh Circuit, one plaintiff fell casualty to \textit{Red Owl}. In that case, the plaintiff claimed that the defendant promised to supply it with a certain number of S-54 AstroTurf remnants for producing golf tee mats.\textsuperscript{95} After considering the elements of promissory estoppel as established in \textit{Red Owl}, the court held that the defendant's statement was a mere expression of opinion or prediction of future availability.\textsuperscript{96} The court therefore held that the plaintiff could not receive damages for relying to its detriment on the defendant's statement.\textsuperscript{97}

While the Supreme Court of Wisconsin's decision in \textit{Red Owl} seems to contemplate applying promissory estoppel to mere assurances or statements of opinion, the United States Court of Appeals for the Seventh Circuit has demanded evidence of a promise before entertaining a cause of action for

\textsuperscript{87} 2 Garner, \textit{supra} note 86.
\textsuperscript{88} Williston, \textit{supra} note 86.
\textsuperscript{89} Id. at § 8.5; 2 Garner, \textit{supra} note 86, at § 8.23.
\textsuperscript{90} 2 Garner, \textit{supra} note 86, at § 8.23 n.11.
\textsuperscript{91} Hunter, \textit{supra} note 86.
\textsuperscript{92} \textit{Restatement (Second) of Contracts} § 90 (1981).
\textsuperscript{93} See Hunter, \textit{supra} note 86, at § 6.12.
\textsuperscript{94} 969 F.2d 579 (7th Cir. 1992).
\textsuperscript{95} Id. at 582.
\textsuperscript{96} Id. at 583.
\textsuperscript{97} Id. at 584.
promissory estoppel. The author of one contracts casebook calls Red Owl the "high water mark" in the development of promissory estoppel, as courts have scaled back the scope of the doctrine ever since. Consequently, many courts that have cited Red Owl distinguish the Wisconsin precedent. What we do not know, however, is how many cases are settled because a plaintiff can articulate a claim for promissory estoppel in the spirit of Red Owl, even though the claim never has to withstand judicial scrutiny.

The real tragedy of Red Owl is that even courts in Wisconsin have limited the potential reach of Red Owl and the promissory estoppel doctrine. For instance, in Durkee v. Goodyear Tire & Rubber Co., the plaintiffs claimed that they incurred marketing expenditures after the defendant made statements giving them reason to anticipate receiving an exclusive dealership from the defendant. The Wisconsin federal district court, however, made a crucial distinction between Red Owl and the case before it. The franchisor in Red Owl told the plaintiffs that they had to rely on its assurances to get a franchise, whereas the plaintiffs in Durkee were never told that receipt of the dealership depended on them making the marketing expenditures. The court narrowed the Red Owl rubric so as to compensate prospective business owners only for their detrimental reliance on specific, identifiable assurances made in precontractual negotiations that certain expenditures would reap certain rewards.

Two years after Red Owl, the Supreme Court of Wisconsin itself reduced

98. See, e.g., Beer Capitol Distrib., Inc. v. Guinness Bass Imp. Co., 290 F.3d 877 (7th Cir. 2002); Major Mat Co., 969 F.2d at 583; Landess v. Borden, Inc., 667 F.2d 628 (7th Cir. 1981).
99. See, e.g., Jungmann v. St. Regis Paper Co., 682 F.2d 195 (8th Cir. 1982) (requiring a clear and definite agreement for an action in promissory estoppel); Ruud v. Great Plains Supply, 526 N.W.2d 369 (Minn. 1995) (reversing judgment of lower court because promise was not definite and did not meet the requirements of a contractual offer); Pine River State Bank v. Mettille, 333 N.W.2d 622, 626 (Minn. 1983) (stating that a promise of particular terms, if in the form of an offer and if accepted by the employee, is binding); Weitzman v. Steinberg, 638 S.W.2d 171 (Tex. App. 1982) (stating that promissory estoppel cannot substitute for essential contractual elements). But see Whorley v. First Westside Bank, 485 N.W.2d 578 (Neb. 1992) (holding that reliance need only be reasonable for action in promissory estoppel even if offer is indefinite); Kelly v. St. Germain, 670 P.2d 764 (Colo. 1983) (stating that promissory estoppel does not rely on contractual principles and is often appropriate when the parties have not mutually agreed on all essential elements of a contract).
100. STUDIES, supra note 75, at 475.
102. 676 F. Supp. 189 (W.D. Wis. 1987).
103. Id. at 190.
104. See id. at 192.
the impact of its ruling on the bargaining position of prospective employees and small businesses. In _Forrer v. Sears, Roebuck & Co._, the plaintiff sued his former employer under a theory of promissory estoppel after he was discharged only four months after starting work. The employee alleged that his former employer was liable for failing to provide “permanent employment,” which the employer had promised to the plaintiff if the plaintiff abandoned his farming operations and accepted employment with the defendant. By infusing words with, perhaps, their unintended meaning, the court held that the promise of “permanent employment” only requires an employer to hire an employee at will, a promise that the defendant made when the plaintiff started working. Although the plaintiff had previously worked for the defendant for almost eighteen years before becoming ill and quitting, and had allegedly lost over $11,000 in giving up his farming operations to resume work for the defendant, justice did not require the court to invoke the promissory estoppel doctrine.

Employees, who often have less bargaining power than employers, lost the weapon of promissory estoppel in deciding whether to forgo the benefits of prospective employment or to accept the benefits and risks of an at-will relationship. Wisconsin courts continued to drain promissory estoppel of its potency after _Forrer_. Partially as a consequence of _Forrer_ and similar cases, the full potential of _Red Owl_ to bridge the gap in bargaining power between individuals and big business was never realized. But perhaps that was to be expected because promissory estoppel did not fit the facts in _Red Owl_.

IV. MOVING TOWARD A NEW UNDERSTANDING OF _RED OWL_

None of the assurances Red Owl made to Joseph Hoffman during their

105. 153 N.W.2d 587 (1967).
106. _Id._ at 588.
107. _Id._ at 589.
108. _See id._ at 590. The court in _Forrer_ said:

> Generally speaking, a contract for permanent employment, for life employment, or for other terms purporting permanent employment, where the employee furnishes no consideration additional to the services incident to the employment, amounts to an indefinite general hiring terminable at the will of either party.... The presumption is grounded on a policy that it would otherwise be unreasonable for a man to bind himself permanently to a position, thus eliminating the possibility of later improving that position. Moreover, a contract of permanent employment is by its very nature indefinite, and thus any effort to interpret the duration of the contract and assess the amount of damages becomes difficult.

_Id._
109. _See id._ at 589-90.
negotiations easily satisfied the threshold for promissory estoppel. The Supreme Court of Wisconsin appropriated the doctrine of promissory estoppel despite the misfit to alleviate some of the Hoffman's financial losses. The court stretched the limits of promissory estoppel in Red Owl, which subsequent courts would soon narrow. Beneath the surface of the opinion, however, it appears that the court appropriated a more relevant theory. Perhaps at the core of the court's opinion—but which the court did not articulate—was the imposition of a duty on the part of franchisors to negotiate with prospective franchisees in good faith.

A. The Missing Promise

Although the Supreme Court of Wisconsin grounded its decision in Red Owl on promissory estoppel, the court begged the question of what the actionable promise made by the franchisor to Hoffman was. The Restatement (First) of Contracts specifically distinguishes a promise from a "statement of intention or of opinion and from a mere prophecy." The Restatement (Second) of Contracts clarifies the definition of a promise as a manifestation of intent by the promisor to be bound. It appears that Red Owl did not promise the Hoffmans a franchise but merely suggested its intention to extend one to them if they satisfied certain conditions. Some courts citing Red Owl have commented on the absence of any enforceable promise made by Red Owl to Hoffman.

The court pointed to a number of promises and assurances made by Red Owl, including: 1) Hoffman needed invest only $18,000 to begin a Red Owl franchise; 2) if Hoffman sold the Wautoma grocery store, he would be operating a bigger Red Owl store by fall; and 3) Hoffman selling his bakery building was the final obstacle to obtaining a Red Owl franchise. However, the court described no evidence that Red Owl promised Hoffman a franchise if he invested $18,000 or later if he sold his Wautoma grocery store and bakery building. Further, some argue that individuals contemplating franchise

110. See Yorio & Thel, supra note 85, at 143 ("The court may have found a promise, however, because it saw no other basis on which to hold for Hoffman, shoehorning the facts into Section 90 in order to afford Hoffman some relief for what the trial judge apparently regarded as (negligent) misrepresentation by Red Owl's agent." (footnotes omitted)).

111. Restatement (First) of Contracts § 2, cmt. c (1932).

112. Restatement (Second) of Contracts § 2 (1981) ("A promise is a manifestation of intention to act or refrain from acting in a specified way, so made as to justify a promisee in understanding that a commitment has been made.").

113. See, e.g., State Bank of Standish v. Curry, 500 N.W.2d 104, 109 (Mich. 1993) ("Promissory estoppel has been used to enforce promises too indefinite or incomplete to constitute valid offers." (citing Hoffman v. Red Owl Stores, Inc., 133 N.W.2d 267, 274 (Wis. 1965))).

114. Red Owl, 133 N.W.2d at 274.
relationships realize that precontractual negotiations do not give rise to a franchise, and the assurances and representations are only part of those negotiations. If Hoffman knew that Lukowitz did not have the authority to extend a Red Owl franchise, he should have realized that Lukowitz's statements were simply expressions of opinion. While those arguments overlook that Hoffman might have lacked a subjective appreciation for the legal effect of Red Owl's assurances and representations, a focus on such subjectivity would require subsequent courts to try to ascertain the state of mind of parties involved in precontractual negotiations. Such focus only magnifies the difficulties of applying Red Owl to other cases.

The misalignment between promissory estoppel and the facts of Red Owl is also apparent in how the court measured damages. The court declared that awarding damages for promissory estoppel did not necessitate "[m]echanical or rule of thumb approaches." The court cited Professors Corbin and Seavey to assert that damages must be based on the plaintiff's "reliance as well as by the value to him of the promised performance [expectancy]." Further, the court found that the ultimate decision as to damage awards in promissory estoppel cases resided in judges' equitable powers, a finding that enabled courts to award damages as they saw fit in such cases.

Courts usually award successful plaintiffs reliance damages in promissory estoppel cases. However, the Red Owl court did not fully protect the Hoffmans' reliance interest; otherwise, the court would have instructed the

116. See Red Owl, 133 N.W.2d at 276-77.
117. Id. at 276.
118. Id. at 276-77 (citing ARTHUR L. CORBIN, CORBIN ON CONTRACTS § 200, at 221 (1963)).
119. Id. (citing Warren A. Seavey, Reliance on Gratuitous Promises or Other Conduct, 64 HARV. L. REV. 913, 926 (1951)).
120. Id. at 277 (quoting ARTHUR L. CORBIN, CORBIN ON CONTRACTS § 200, at 221 (1963)).
121. Id. at 276-77.
123. See L.L. Fuller & William R. Purdue, Jr., The Reliance Interest in Contract Damages: I, 46 YALE L.J. 52 (1936) (categorizing the three different measures of contracts damages: reliance, expectation, and restitution). Reliance damages compensate victims of breach of contract for their out-of-pocket losses. In other words, instead of putting the victim where he or she would have been had the contract been performed (the expectancy interest), the court compensates him or her for
trial judge to award the Hoffmans their lost profits from the sale of the Wautoma grocery store. The Hoffmans' reliance on Red Owl's assurance that they would be in a bigger store by fall if they sold their grocery store caused them to lose the store profits from the busy summer season, making the sale fiscally detrimental without a franchise to offset such losses. Nor did the court award the Hoffmans their expectation damages,\(^{124}\) even though some scholars have acknowledged that protecting a promissory's expectancy interest is appropriate in cases of promissory estoppel.\(^ {125}\) The Hoffmans' expectancy interest included their anticipated profits from the operation of a Red Owl franchise, discounted to their present value. The court made no overtures that the trial court should have included those lost profits in its measure of damages.

Instead of a reliance or expectation measure, the court purported to follow a formula dictated by the trial court: reliance damages except to compensate the Hoffmans for the sale of the Wautoma grocery store, for which the court instructed the trial court to award the difference between the fair market value of the Wautoma grocery store inventory and fixtures and the sale price of the assets, plus goodwill.\(^ {126}\) Another symptom of the court's incoherent measure of damages is that it counted goodwill from the sale of the grocery store twice. Goodwill is necessarily included in the fair market value of assets sold as part of a going concern; but the court tacked on goodwill again at the end—perhaps in an attempt to increase the Hoffmans' damages. While the court found its measure of damages necessary to prevent an injustice to the Hoffmans, its measure did not mesh with either of the two approaches to damages traditionally used in promissory estoppel cases.

### B. The Unarticulated Duty

A more fitting rationale for the Supreme Court of Wisconsin's opinion in *Red Owl* might be that the court was imposing a duty to negotiate in good faith on franchisors. Although the *Uniform Commercial Code*, the *Restatement (Second) of Contracts*, and the common law impose a duty of good faith on parties to contractual relationships,\(^ {127}\) courts traditionally have

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\(^{124}\) See Fuller & Purdu, *supra* note 123, at 54 (stating expectation damages put the promisee in as good a position as had the contract been performed).

\(^{125}\) See *Red Owl*, 133 N.W.2d at 277 n.3 (noting one source that expresses this "opposite view" that courts in promissory estoppel cases should award expectation damages).

\(^{126}\) Id. at 276-77.

\(^{127}\) U.C.C. § 1-304 (2003) ("Every contract or duty within [the Uniform Commercial Code] imposes an obligation of good faith in its performance and enforcement."); *RESTATEMENT (SECOND)*
not imposed an obligation of good faith on parties engaging in precontractual negotiations. At common law, as long as the franchisor’s conduct did not give rise to a cause of action for fraud or misrepresentation, there were no limitations on the franchisor’s precontractual statements to prospective franchisees. In Hoffman’s case, the only way to obtain a Red Owl franchise was to follow through with the company’s requests. Unfortunately for Hoffman, that cost him time, energy, and—most importantly—money, and he never received the reward of the franchise. The court wanted to respond to Hoffman’s sympathetic situation, but had no tool rooted in good faith to do so.

In substance, the court was not rectifying a broken promise but rather holding Red Owl accountable for proffering a series of faulty assurances during negotiations—for advising Hoffman to sell a profitable store, buy a piece of land, and move his family—and for abusing its bargaining power to mislead a hard-working Wisconsin man. The justices recognized that people often incur substantial damages even before a formal contract comes to fruition. Essentially, the court wanted to label Red Owl’s behavior as tortuous, but it lacked a theory on which to base the Hoffmans’ recovery. The court chose to rely on the doctrine of promissory estoppel, a doctrine accepted by the Restatement and many other jurisdictions—even though it could not discern a true promise—rather than elect to set a precedent for requiring good faith in precontractual negotiations.

The court even hinted at such a good-faith rationale in its opinion. Chief Justice Currie, writing for the court, quoted an Arkansas court that stated: “[T]he law of promissory estoppel . . . ‘is an attempt by the courts to keep remedies abreast of increased moral consciousness of honesty and fair representations in all business dealings.’” Such reference to assessing

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128. See, e.g., Whirlpool Corp. v. U.M.C.O. Int’l Corp., 748 F. Supp. 1557, 1563 (S.D. Fla. 1990) (stating that although American law traditionally does not adopt culpa in contrahendo, cases such as Red Owl show that there may be a trend toward the inclusion of this civil law doctrine in United States courts).

129. See Farnsworth, supra note 65.

130. See MACAULAY ET AL., supra note 9, at 320-23.

131. See Temkin, supra note 115, at 45 (stating that Hoffman had “a particularly sympathetic case”).

132. See Red Owl, 133 N.W.2d at 273 (discussing how the idea of adopting promissory estoppel surfaced in Wisconsin in Lazarus v. American Motors Corp., 123 N.W.2d 548, 552-53 (Wis. 1963), but the facts of the case did not require adopting § 90 at that time); see also supra note 46 and accompanying text.

133. Id. at 273-74 (quoting People’s Nat’l Bank of Little Rock v. Linebarger Constr. Co., 240 S.W.2d 12, 16 (Ark. 1951)).
morality in “all business dealings”—not just those that occur in the context of a contractual relationship—supports the notion that the court, in part, found Red Owl liable for acting in bad faith during pre-contractual negotiations.\(^\text{134}\)

C. The Court Chose the Weaker Vessel

By finding Red Owl liable under a theory of promissory estoppel, despite perhaps the case’s greater similarities to a tort case about good faith, the court chose the weaker vessel. Though several sources believe that the decision created a duty to negotiate in good faith,\(^\text{135}\) the court’s avoidance of the term limited the usefulness of Red Owl as precedent for imposing a good-faith duty.

It is possible that the Wisconsin Supreme Court intended to stop short of creating such a duty. Perhaps it wanted to respond to the sympathetic set of facts in Red Owl without creating new law. Indeed, for the court to adopt a precontractual duty to negotiate in good faith—a notion implicit only in civil law systems—would have been revolutionary.\(^\text{136}\) Furthermore, it is possible that the court wanted to prescribe limitations on the scope of liability arising out of precontractual negotiations. Franchisors are typically large companies likely to have a measurable impact on a state’s economy.\(^\text{137}\) If the court had

\(^{134}\) See id.

\(^{135}\) E.g., Temkin, supra note 115, at 145 (stating that many scholars believe that the case stands for this proposition).


United States law is not unaware of the underlying values of good faith and of the doctrine of culpa in contrahendo. Case law acknowledges precontractual liability on grounds similar to those applied by civil law in notions of good faith and culpa in contrahendo, through the legal institutions of “promissory estoppel.”

Id. (citations omitted).


The relationship between franchisor and franchisee is a significant issue, and growing more important each year. As recently explained, “Franchising is rapidly becoming the dominant mode of distributing goods and services in the United States. According to the International Franchise Association, one out of every twelve businesses in the United States is a franchise. In addition, franchise systems now employ over eight million people and account for approximately forty-one percent of retail sales in the United States. Even conservative estimates predict that franchised businesses will be responsible for over fifty percent of retail sales by the year 2000.”

Id. (quoting David Hess, The Iowa Franchise Act: Towards Protecting Reasonable Expectations of Franchisees and Franchisors, 80 IOWA L. REV. 333 (1995)); see also id. (citing STAFF OF HOUSE COMM. ON SMALL BUS., 101ST CONG., FRANCHISING IN THE U.S. ECONOMY: PROSPECTS AND PROBLEMS 16 (Comm. Print 1990)).
created a duty to negotiate in good faith, a rather broad duty, the court likely would have alarmed franchisors and initiated an influx of litigation from disgruntled prospective business owners alleging bad faith. Instead, the court chose a more malleable doctrine in promissory estoppel, a doctrine enabling the court and other courts to distinguish Red Owl easily.

Pragmatists rightly claim that the Red Owl court refrained from judicial lawmaking. When faced with a set of circumstances that were blatantly unjust, the court appropriated the best doctrine available to achieve the desired result rather than create new law. Defenders might also argue that the court could not rule on an issue not raised by the parties in the trial court, but courts do so all of the time.

The court and the state of Wisconsin would have been better served if the court had explicitly ruled on the basis of good faith. Even if the court was reacting sympathetically to the Hoffmans' situation, it did not sufficiently protect prospective franchisees and may instead have worsened their position. First, franchisors can easily circumvent the doctrine of promissory estoppel by requiring prospective franchisees to sign a preliminary document releasing the franchisor from liability unless and until the parties sign a written contract. The franchisor can then continue to make assurances, such as those made in Red Owl, and maintain its bargaining power in precontractual negotiations. Unless a court in those circumstances imports the nonwaivable precontractual duty to negotiate in good faith, a prospective franchisee has no protection against a franchisor's precontractual statements and assertions.

Second, rather than require the aforementioned waivers, franchisors can simply use greater discretion in choosing prospective franchisees. Instead of contracting around liability, franchisors can protect themselves from the outset by disqualifying candidates who do not have sufficient capital or other resources to open a franchise. Such a practice, however, would disqualify successful entrepreneurs who could raise the money or fulfill other requirements for a new franchise over the course of a longer negotiation process. This practice also would prevent franchisors from negotiating with certain applicants willing to operate in a remote location or fill another niche. Consequently, when the court in Red Owl held the franchisor liable under the pretense of enforcing a promise, it likely hurt prospective franchisees as much as it helped them.

The Supreme Court of Wisconsin in Red Owl made additional costly mistakes when it compromised on the issue of damages. The decision fell short of compensating the Hoffmans for all of the losses they suffered as a result of Red Owl's unfair negotiating tactics. The court neither awarded

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138. See Temkin, supra note 115.
them expectation damages—the profits they would have received if they had obtained a franchise—nor did the court give them reliance damages. The limitations on damages imposed by the court likely precipitated the parties’ settlement for only $10,600. Of the total damages, the Hoffmans received $6600; their lawyer received $4000.¹³⁹ This modest compensation likely would not encourage anyone in Hoffman’s position to sue a franchisor for faulty assurances. Along the same line, franchisors that prefer to negotiate as Red Owl did would be undeterred by such pitiful monetary consequences. While prevailing in the lawsuit might have satisfied Hoffman and his attorney, imposing a duty in tort enabling Hoffman to recover all of his foreseeable damages would have provided him greater recovery.

Even if the court had used an expectation measure of recovery, it still could have denied the Hoffmans their lost profits, finding that future profits were too uncertain and speculative. Similarly, under an expectation measure, the Hoffmans could not have recovered for their emotional distress or other non-monetary injuries resulting from the failed negotiations with Red Owl. Punitive damages would also not have been an option even if Red Owl had intentionally negotiated in bad faith. If the court had grounded recovery in tort, the Hoffmans would have been entitled to all damages that were proximately caused by Red Owl’s conduct, and they would have had a stronger claim to lost profits and non-monetary and punitive damages.

V. RE-WRITING RED OWL AS A GOOD-FAITH DECISION

Although the majority of scholars, casebook authors, and courts reference Red Owl for the court’s invocation of promissory estoppel,¹⁴⁰ the decision stirred as much debate over what the justices did not say as over what they did say. A closer study of the opinions and writings of courts and scholars who have cited Red Owl as establishing a precontractual duty to negotiate in good

¹³⁹ Macaulay, supra note 9, at 334.
¹⁴⁰ See, e.g., Beer Capitol Distrib., Inc. v. Guinness Bass Imp. Co., 290 F.3d 877 (7th Cir. 2002); Ruzicka v. Conde Nast Publ’ns, Inc., 999 F.2d 1319 (8th Cir. 1993); Ehret Co. v. Eaton, Yale & Towne, Inc., 523 F.2d 280 (7th Cir. 1975); Lake Mich. Contractors v. Manitowoc Co., No. 1:00-CV-787, 2002 U.S. Dist. LEXIS 9547 (W.D. Mich. May 21, 2002); Davis v. Univ. of Montevallo, 638 So. 2d 754 (Ala. 1994); Farnsworth, supra note 65, at 236; Feinman, Judicial Method, supra note 85, at 694 (“Emphasizing the importance of good faith in negotiations and of protecting the reliance interest even in the face of limited commitment, [Red Owl] and subsequent cases have enforced what are actually conditional promises.”); Feinman, Promissory Estoppel, supra note 85, at 315; Snyder, supra note 85, at 749; Gordley, supra note 85, at 606; Stanley D. Henderson, Promissory Estoppel and Traditional Contract Doctrine, 78 YALE L.J. 343, 359 (1969); Katz, supra note 85, at 1255; Knapp, Rescuing Reliance, supra note 85, at 1243; Metzger & Phillips, supra note 85, at 854-55; Yorio & Theil, supra note 85, at 142-43.
faith\textsuperscript{141} draws valid questions as to how to interpret the court’s opinion.

\textbf{A. Interpreting Red Owl as a Good-Faith Decision}

In \textit{Whirlpool Corp. v. U.M.C.O. International Corp.},\textsuperscript{142} the court cited \textit{Red Owl} to show that the civil law concept of an implied, precontractual duty to negotiate in good faith has appeared in United States case law.\textsuperscript{143} In addition, several casebook authors include \textit{Red Owl} in their sections on good faith and fair dealing.\textsuperscript{144} For example, Profesor Kessler and his coauthors of \textit{Contracts: Cases and Materials} comment that the Supreme Court of Wisconsin in \textit{Red Owl} premised liability on the basis of the subtle bad faith that Red Owl exhibited when it failed to act consistently with or promptly withdraw both a “rash promise” regarding the investment needed to begin a franchise and post-

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\begin{quote}
It clearly follows from the court’s decision that Red Owl owed a duty not to cause loss by failure to bargain in good faith, but it is hardly plausible to say that this duty arose from defendant’s intentions or from the parties’ private ordering. It arose from the court’s perception of the requirements of good faith, even if this in turn was derived from normal understanding of commercial behavior.
\end{quote}


\textsuperscript{142} 748 F. Supp. 1557 (S.D. Fla. 1990).

\textsuperscript{143} \textit{Id.}

\textsuperscript{144} See \textsc{Melvin A. Eisenberg & Lon L. Fuller, Basic Contract Law} 576 (7th ed. 2001) (citing \textit{Red Owl} in section entitled “Preliminary Negotiations, Indefiniteness, and the Duty to Bargain in Good Faith”); \textsc{Friedrich Kessler et al., Contracts: Cases and Materials} 223-25 (3d ed. 1990) (citing \textit{Red Owl} in section entitled “Good Faith.” The authors explain that \textit{Red Owl} is a subtle example of bad faith found in failure to promptly withdraw a rash promise and post-promise assurances about future performance.); \textsc{Studies, supra} note 75, at 182, 421, 428, 775 (citing \textit{Red Owl} in sections entitled, “Insufficient or Defective Formulation of Agreement” and “The Duty of Good Faith.” In the latter section, the authors state, “[T]here are fitsful signs that some courts will impose more substantive duties of good faith in pre-contractual negotiations,” and cite to \textit{Red Owl} for that proposition.).
promise assurances regarding future performance. Furthermore, they argue that the Red Owl court used promissory estoppel to fill a gap left by the tort law of fraud. In Studies in Contract Law, Professor Murphy and his coauthors declare Red Owl to be the furthest advance of contract law into the regulation of precontractual negotiations, noting that the decision shows “fitful signs that some courts will impose more substantive duties of good faith in pre-contractual negotiations.” The casebook also mentions that Red Owl wandered into territory that neither Section 1-203 of the UCC nor Section 205 of the Restatement (Second) of Contracts addresses.

B. Red Owl’s Legacy

Despite such interpretations, courts and scholars cite to Red Owl (roughly 90% of the time) as an example of the Supreme Court of Wisconsin’s invocation of promissory estoppel. If the court intended to impose a duty to negotiate in good faith on franchisors, the duty was unarticulated, which undermined, if not destroyed, the precedential value of Red Owl for creating such a duty. Consequently, the potential of the court’s opinion to alter the dynamics of business relationships remains untapped. Yet the untapped potential of the case does not lessen the court’s boldness in finding a corporate franchisor liable to a prospective, relatively powerless, franchisee.

Perhaps, then, it is not necessary to criticize the court’s decision in Red Owl for what it failed to accomplish. Rather, we should laud the Supreme Court of Wisconsin for exposing the economic inequities between corporations and individuals, franchisors and franchisees, and employers and employees. Further, the court gave lawyers the vocabulary of promissory estoppel to fight to protect other individuals, franchisees, and employees while, at the same time, introducing the undercurrent of a duty to negotiate in good faith into the common law. While the court could have more fundamentally addressed the imbalance of bargaining power in precontractual negotiations, it did not, and we will never know why. Consequently, although we might desire to rewrite the court’s decision in Red Owl to impose a duty of good faith in precontractual negotiations, such revisionist history takes attention away from the real legacy of the case.

Many first-year law students read the decision of the Supreme Court of Wisconsin in Hoffman v. Red Owl Stores, Inc.—and those who do not should. The case illustrates how contract law is more about continuing relationships

145. See KESSLER ET AL., supra note 144, at 223-25.
146. See id.
147. See STUDIES, supra note 75, at 775.
148. See id. at 428.
than discrete transactions, how the law is as realistic as it is formalistic, how it is just as much about policy as it is about doctrine, and how it is less about bright-line rules and more about malleable doctrine. The case raises debates about the role that courts play and should play in American society—the intersection between law, society, and the economy. Sometimes the best legacy is the unintended one. For that legacy, current and future generations of law students and professors should be grateful.