Frank Grossman [part owner of Tri-Star] then requested that Channel execute a letter of intent that, as Grossman put it, could be shown to 'other people, banks or whatever.' App. at 366a–367a. . . . Apparently, Frank Grossman was anxious to get Channel's signature on a letter of intent so that it could be used to help Grossman secure financing for his purchase of the mall. App. at 366a–367a, 497a.

On December 11, 1984, in response to Grossman's request, Channel prepared, executed, and submitted a detailed letter of intent setting forth a plethora of lease terms which provided, *inter alia*, that:

> '[t]o induce the Tenant [Channel] to proceed with the leasing of the Store, you [Grossman] will withdraw the Store from the rental market, and only negotiate the above described leasing transaction to completion.'
>
> 'Please acknowledge your intent to proceed with the leasing of the store under the above terms, conditions and understanding by signing the enclosed copy of the letter and returning it to the undersigned within ten (10) days from the date hereof.'

Frank Grossman promptly signed the letter of intent and returned it to Channel.

On February 6, 1985, Frank Grossman notified Channel that 'negotiations terminated as of this date' due to Channel's failure to submit a signed and mutually acceptable lease for the mall site within thirty days of the December 11, 1984 letter of intent. App. at 42a. (This was the first and only written evidence of the purported thirty-day time limit. The letter of intent contained no such term. . . .) On February 7, 1985, Mr. Good Buys and Frank Grossman executed a lease for the Cedarbrook Mall. App. at 147a–196a. Mr. Good Buys agreed to make base-level annual rental payments which were substantially greater than those agreed to by Channel in the December 11, 1984 letter of intent. App. at 147a. Channel's corporate parent, Grace, approved the terms of Channel's proposed lease on February 13, 1985. App. at 443a–444a. . . .

It is hornbook law that evidence of preliminary negotiations or an agreement to enter into a binding contract in the future does not alone constitute a contract. *See Goldman v. McShain*, 432 Pa. 61, 68, 247 A.2d 455, 458 (j1968); *Lombardo v. Gasparini Excavating Co.*, 385 Pa. 388, 392, 123 A.2d 663, 666 (1956); *Kazanjian v. New England Petroleum Corp.*, 332 Pa.Super. 1, 7, 480 A.2d 1153, 1157 (1984); *see* Restatement (Second) of Contracts § 26 (1979). Appellees believe that this doctrine settles this case, but, in so arguing, appellees misconstrue Channel's contract claim. Channel does not contend that the letter of intent is binding as a lease or an agreement to enter into a lease. Rather, it is Channel's position that this document is enforceable as a mutually binding obligation to negotiate in good faith. By unilaterally terminating negotiations with Channel and precipitously entering into a lease agreement with Mr. Good Buys, Channel argues, Grossman acted in bad faith and breached his promise to 'withdraw the Store from the rental market and only negotiate the above-described leasing transaction to completion.' See *supra* note 2.

Under Pennsylvania law, the test for enforceability of an agreement is whether both parties have manifested an intention to be bound by its terms and whether the terms are sufficiently definite to be specifically enforced. . . .

Applying Pennsylvania law, then, we must ask (1) whether both parties manifested an intention to be bound by the agreement; (2) whether the terms of the agreement are sufficiently definite to be enforced; and (3) whether there was consideration. . . .

The letter of intent, signed by both parties, provides that '[t]o induce the Tenant [Channel] to proceed with the leasing of the Store, you [Grossman] will withdraw the Store from the rental market, and only negotiate the proposed leasing transaction with Channel to completion.'

Evidence of record supports the proposition that the parties intended this promise to be binding. After the letter of intent was executed, both Channel and the Grossmans initiated procedures directed toward satisfaction of lease contingencies. Channel directed its parent corporation to prepare a draft lease; Channel planning representatives visited the lease premises to obtain measurements for architectural alterations, renovations, and related construction. Channel developed extensive marketing plans; delivery schedules were prepared and material and equipment deemed necessary for the store were purchased. The Grossmans applied to the township zoning committee for permission to erect Channel signs at various locations on the mall property. Channel submitted a draft lease on January 11, 1985, and the parties, through correspondence and telephone conversations and on-site visits, exhibited an intent to move toward a lease as late as January 23, 1985. . . . Accordingly, the letter of intent and the circumstances surrounding its adoption both support a finding that the parties intended to be bound by an agreement to negotiate in good faith.

We also believe that Grossman's promise to 'withdraw the Store from the rental market and only negotiate the above described leasing transaction to completion,' viewed in the context of the detailed letter of intent (which covers most significant lease terms, *see supra* n. 2), is sufficiently definite to be specifically enforced, provided that Channel submitted sufficient legal consideration in return."

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

"The complaint alleged that Lukowitz, as agent for Red Owl Stores, represented to and agreed with plaintiffs that Red Owl would build a store building in Chilton and stock it with merchandise for Hoffman to operate in return for which plaintiffs were to put up and invest a total sum of $18,000; that in reliance upon the above mentioned agreement and representations plaintiffs sold their bakery building and business and their grocery store and business; also in reliance on the agreement and representations Hoffman purchased the building site in Chilton and rented a residence for himself and his family in Chilton; plaintiffs' actions in reliance on the representations and agreement disrupted their personal and business life; plaintiffs lost substantial amounts of income and expended large sums of money as expenses. Plaintiffs demanded recovery of damages for the breach of defendants' representations and agreements. . . .

The action was tried to a court and jury. The facts hereafter stated are taken from the evidence adduced at the trial. Where there was a conflict in the evidence the version favorable to plaintiffs has been accepted since the verdict rendered was in favor of plaintiffs.

Hoffman assisted by his wife operated a bakery at Wautoma from 1956 until sale of the building late in 1961. . . . Red Owl is a Minnesota corporation having its home office at Hopkins, Minnesota. It owns and operates a number of grocery supermarket stores and also extends franchises to agency stores which are owned by individuals, partnerships and corporations. . . .

In November, 1959, Hoffman was desirous of expanding his operations by establishing a grocery store and contacted a Red Owl representative by the name of Jansen, now deceased. Numerous conversations were had in 1960 with the idea of establishing a Red Owl franchise store in Wautoma. In September, 1960, Lukowitz succeeded Jansen as Red Owl's representative in the negotiations. Hoffman mentioned that $18,000 was all the capital he had available to invest and he was repeatedly assured that this would be sufficient to set him up in business as a Red Owl Store. About Christmastime, 1960, Hoffman thought it would be a good idea if he bought a small grocery store in Wautoma and operated it in order that he gain experience in the grocery business prior to operating a Red Owl store in some larger community. On February 6, 1961, on the advice of Lukowitz and Sykes, who had succeeded Lukowitz as Red Owl's district manager, Hoffman bought the inventory and fixtures of a small grocery store in Wautoma and leased the building in which it was operated.

After three months of operating this Wautoma store, the Red Owl representatives came in and took inventory and checked the operations and found the store was operating at a profit. Lukowitz advised Hoffman to sell the store to his manager, and assured him that Red Owl would find a larger store for him elsewhere. Acting on this advice and assurance, Hoffman sold the fixtures and inventory to his manager on June 6, 1961. Hoffman was reluctant to sell at that time because it meant losing the summer tourist business, but he sold on the assurance that he would be operating in a new location by fall and that he must sell this store if he wanted a bigger one. Before selling, Hoffman told the Red Owl representatives that he had $18,000 for 'getting set up in business' and they assured him that there would be no problems in establishing him in a bigger operation. The makeup of the $18,000 was not discussed; it was understood plaintiff's father-in-law would furnish part of it. By June 1961, the towns for the new grocery store had been narrowed down to two, Kewaunee and Chilton. In Kewaunee, Red Owl had an option on a building site. In Chilton, Red Owl had nothing under option, but it did select a site to which plaintiff obtained an option at Red Owl's suggestion. The option stipulated a purchase price of $5,000 with $1,000 to be paid on election to purchase and the balance to be paid within 30 days. On Lukowitz's assurance that everything was all set plaintiff paid $1,000 down on the lot on September 15th.

On September 27, 1961, plaintiff met at Chilton with Lukowitz and Mr. Reymund and Mr. Carlson from the home office who prepared a projected financial statement. Part of the funds plaintiffs were to supply as their investment in the venture were to be obtained by sale of their Wautoma bakery building.

On the basis of this meeting Lukowitz assured Hoffman: '[E]verything is ready to go. Get your money together and we are set.' Shortly after this meeting Lukowitz told plaintiffs that they would have to sell their bakery business and bakery building, and that their retaining this property was the only 'hitch' in the entire plan. On November 6, 1961, plaintiffs sold their bakery building for $10,000. Hoffman was to retain the bakery equipment as he contemplated using it to operate a bakery in connection with his Red Owl store. After sale of the bakery Hoffman obtained employment on the night shift at an Appleton bakery. . . .

[Eventually, Red Owl presented Hoffmann with a statement which he interpreted to require] 'a total of $34,000 cash made up of $13,000 gift from his father-in-law, $2,000 on mortgage, $8,000 on Chilton bank loan, $5,000 in cash from plaintiff, and $6,000 on the resale of the Chilton lot.' . . . Hoffman informed Red Owl he could not go along with this proposal, and particularly objected to the requirement that his father-in-law sign an agreement that his $13,000 advancement was an absolute gift. This terminated the negotiations between the parties. . . .

Originally the doctrine of promissory estoppel was invoked as a substitute for consideration rendering a gratuitous promise enforceable as a contract. See Williston, Contracts (1st ed.), p. 307, sec. 139. In other words, the acts of reliance by the promisee to his detriment provided a substitute for consideration. If promissory estoppel were to be limited to only those situations where the promise giving rise to the cause of action must be a definite with respect to all details that a contract would result were the promise supported by consideration, then the defendants' instant promises to Hoffman would not meet this test. However, sec. 90 of Restatement, 1 Contracts, does not impose the requirement that 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. Rather the conditions imposed are:

(1) Was the promise one which the promisor should reasonably expect to induce action or forbearance of a definite and substantial character on the part of the promisee?

(2) Did the promise induce such action or forbearance?

(3) Can injustice be avoided only by enforcement of the promise?

We deem it would be a mistake to regard an action grounded on promissory estoppel as the equivalent of a breach of contract action. As Dean Boyer points out, it is desirable that fluidity in the application of the concept be maintained. 98 University of Pennsylvania Law Review (1950), 459, at page 497. While the first two of the above listed three requirements of promissory estoppel present issues of fact which ordinarily will be resolved by a jury, the third requirement, that the remedy can only be invoked where necessary to avoid injustice, is one that involves a policy decision by the court. Such a policy decision necessarily embraces an element of discretion.

We conclude that injustice would result here if plaintiffs were not granted some relief because of the failure of defendants to keep their promises which induced plaintiffs to act to their detriment."

Note: Courts in the United States have recognized a duty to perform a contract in good faith once it has been made. But they have not recognized a duty to negotiate in good faith absent an agreement to do so or, as in *Red Owl*, a promise on which the plaintiff has relied. Alan Farnsworth claimed that American law does not need to recognize such a duty because the plaintiff should recover only if the defendant has deceived him during negotiations, broken an express or implied promise made during negotiations, or enriched himself unjustly by receiving something from the plaintiff before a contract was made.[1] In all of these cases, American courts would give relief because of deceit, the breaking of a promise, or unjust enrichment. Ewould Hondius, a leading continental jurist, has said that, aside from some caveats that do not matter here, "I would underwrite [Farnsworth's] opinion"[2] as to when relief should be given. Farnsworth also claimed that with rare exceptions, continental courts that recognize a duty to negotiate in good faith actually give relief in the same circumstances as American courts, although he acknowledged there have been exceptions. One of them, he said, is the first case in the next section, the decision of the *Cour de cassation* of 20 March 1972. Consider whether, with this exception, the decisions of French and German courts in the following sections would be decided the same way in the United States, as Farnsworth claims. If so, consider why that case is an exception.

French law

Cour de cassation, ch. comm. et finan., 20 March 1972, Bull. civ. 1972.IV. no. 93

The court below found that the *Société des éstablissements Gerteis* entered into negotiations in April 1966 with the *Société établissements Vilber-Lourmat*, the sole distributor in France of machines, used for the manufacture of cement pipes made by the American firm Hydrotile Co. After Robert Gerteis made a trip to the United States from May 13 to 23, 1966 in order to observe the operation of these machines, the *Société Gerteis* requested from the *Société Vilber-Lourmat* further information

1. E. Allan Farnsworth, "Precontractual Liability and Preliminary Agreements: Fair Dealing and Failed Negotiations," *Colum. L. Rev.* 87 (1987), 217.

2. Ewoud Hondius, "General Report," in E. Hondius, ed., *Precontractual Liability Reports to the XIIIth Congress International Academy of Comparative Law Montreal, Canada, 18–24 August 1990* (1991), 3, 27.

before making its choice among several types of machines manufactured by the Hydrotile company. The *Société Vilber-Lourmat* did not reply to this letter. The *Société Gerteis* learned later that on June 4, 1966, the American manufacturer had sent an estimate to *Vilber-Lourmat* which it had not transmitted the estimate to *Gerteis*. On June 16, 1966, *Vilber-Lourmat* signed a contract with the company *Les Tuyaux Centrifugés du Rhin*, a competitor of *Gerteis*, for the sale for a Hydrotile machine. The contract contained a clause obligating *Vilber-Lourmat* not to sell a similar machine in an area including the east of France for twenty-four months from the delivery of the machine ordered by the company *Les Tuyaux Centrifugés*.

The court below "found that *Vilber-Lourmat* had deliberately withheld the final estimate of the American firm intended for *Gertais* and had broken off the negotiations it had entered into with *Gervais* brutally (*brutalement*), unilaterally and without a legitimate reason when they were far advanced when *Gerais*, as *Vilber-Lourmat* knew, had made large expenditures, and *Vilbert-Lourmat* had kept *Gerteis* for a long time in a state of uncertainty . . . *Vilber-Lourmat* therefore did not live up to the rules of good faith in commercial relations." It was accordingly "liable for a delict." The *Cour de cassation* held that the court below had correctly found that there had been "an abusive breaking off of negotiations." noting that although *Vilber-Lourmat* "had inquired one last time to learn *Gerteis's* intentions [it] did not furnish the slightest justification for breaking off negotiations and . . . , in any event, such extended negotiations could not be terminated by a simple telephone call whose occurrence was more than problematic."

Note: As mentioned earlier, Alan Farnsworth claimed that relief should only be given when the defendant deceived the plaintiff, made and broke a promise, or unjustly enriched himself during negotiations. He claimed those are the circumstances in which continental courts normally give relief although he acknowledged that this French case was an exception. Another case he regarded as an exception is Dutch: the decision *Plas v. Valburg, Hoge Raad*, 18 June 1982, NJ 1983, 723, in which the plaintiff construction firm submitted a proposal to the municipal authorities of a small town to build a swimming pool. Although there was no official bidding, its proposal was judged the best and was agreed to by the mayor and alderman. Their decision required approval from the city council. It was not approved because, at the initiative of one member of the city council, a rival bid was submitted at a lower price and accepted instead. The highest Dutch court (*Hoge Raad*) ruled in favor of the plaintiff, holding that the process of negotiation is divisible into three stages: an initial one, in which either party can break off negotiations; a middle stage, in which he can do so only if he compensates the other party for expenses incurred; and a final stage in which to break off negotiations at all would be a violation of good faith, and a party who does so is responsible for what a common lawyer would call expectation damages. He is liable, that is, to the same extent that he would be had a final contract been signed. Rarely, if ever, however, has a Dutch court held that negotiations had reached this final stage.