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***125** WHEN DOES THE 'FAT LADY' SING? [FN1]: AN ANALYSIS OF 'AGREEMENTS IN PRINCIPLE' IN CORPORATE ACQUISITIONS

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INTRODUCTION

CORPORATE acquisitions between two financial giants involving hundreds of millions and sometimes even billions of dollars frequently occur today. [FN2] Such transactions are reported in newspapers, over the media, in business periodicals and the like. [FN3] Frequently, the press release announcing such an event indicates that the parties have reached either an 'agreement in principle,' where the parties contemplate ultimately negotiating and entering into a definitive agreement, or a definitive agreement. The 'agreement in principle' may be based on a handshake understanding or memorialized in a preliminary letter of intent. [FN4]

***126** After announcing the transaction, an issue that commonly arises concerns the enforceability of the agreement. The most common issue is whether the 'agreement in principle' constitutes a binding and enforceable contract, or rather, is an unenforceable 'agreement to agree.' [FN5] If the parties have entered into a definitive agreement, the enforceability of the agreement often depends on whether the selling entity's board of directors can bind the corporation prior to shareholder approval. [FN6] For example, the question of the enforceability of the definitive agreement arises when the selling entity receives a more attractive offer after its board of directors has approved the definitive agreement, but prior to shareholder approval. [FN7]

***127** This Article focuses primarily on the contractual issues resulting from the 'agreement in principle.' [FN8] In most cases, courts have espoused the notion that their major focus is effectuating the parties' intent. [FN9] This Article contends, however, that courts have not focused on the probable expectation of the parties in determining whether a binding and enforceable contract has arisen at the 'agreement in principle' stage. Rather, courts have generally used an 'all or nothing' approach. [FN10] Under this approach, courts determine either that the parties have entered into a contract to consummate the transaction or that no contract exists. [FN11] This Article suggests that, instead of limiting the inquiry to an all or nothing determination, courts should recognize three separate categories of situations involving corporate acquisitions in order to determine more accurately the parties' relationship. [FN12]

In the first category, the parties do not yet intend to have any contractual ***128** relationship.

They merely have conducted preliminary negotiations, and each party has felt free to walk away from the discussions for any or no reason. This stage occurs prior to the parties reaching an 'agreement in principle.' Because the parties understand that they have engaged only in preliminary talks and have not yet formulated an expectation that the deal will ultimately be consummated, these clear-cut situations are rarely the subject of litigation. The parties have neither a contract nor an obligation to each other.

In the second category, the parties have entered into a definitive agreement. In most of these cases, the parties feel that they have entered into a binding contract. [FN13] Each party expects the transaction to close, and if either party backs out of the deal, for reasons other than an inability to satisfy one or more of the conditions that is normally contained in an agreement of this nature, [FN14] the other party feels that the contract has ***129** been breached, entitling the non-breaching party to a remedy.

The third category, in the middle of these extremes, is the subject of this Article and is the most problematic. Here, the parties' negotiations have proceeded beyond the preliminary stage. [FN15] This is normally the situation where the parties have reached an 'agreement in principle,' which typically spells out the price and outlines the general structure of the transaction, but often conditions the parties' obligation to consummate the transaction on their working out the terms of a definitive agreement. [FN16] The 'agreement in principle' may be based on a handshake understanding [FN17] or reflected in either a preliminary memorandum of understanding or a letter of intent. [FN18] At this point, each party has a clear understanding that negotiations have progressed beyond the mere discussion stage. They have some expectation that an ultimate agreement to ***130** consummate the transaction will be reached. [FN19] The parties are aware, however, that a definitive agreement still must be negotiated. Nevertheless, while each party feels that either can walk away from the transaction, each is also likely to feel that there should be some justifiable good faith reason for doing so.

Through using the 'all or nothing' approach, courts, for the most part, have not considered the 'agreement in principle' cases as a separate category. Thus, the commercial expectations of the parties as the middle 'agreement in principle' stage are often ignored, creating an inequitable and an inefficient situation. Some courts have permitted parties to an 'agreement in principle' to withdraw in bad faith from negotiations, either for no reason or perhaps because of a higher offer from another party. [FN20] On the other hand, some courts have held the withdrawing party liable as if a fully negotiated contract to consummate the transaction already existed. [FN21] The inequity of this result is evidenced by the multi-billion dollar jury verdict in Texaco-Pennzoil, [FN22] a decision which will be referred to throughout this Article. Neither extreme is likely to reflect what the parties thought they were agreeing to when they entered into the 'agreement in principle.' In addition, the 'all or nothing' approach has created inefficiencies because negotiators are uncertain of whether a court will construe their negotiations as a final contract resulting in full expectation liability. [FN23]

This Article will explore different approaches in determining the enforceability of an 'agreement in principle.' Part I analyzes the traditional approach used by the courts. Part II discusses alternative approaches: use of promissory estoppel or enforcement of an obligation ***131** to negotiate in good faith as a mutually binding contract. Part III discusses how damages should be determined. This Article concludes that judicial recognition of a contractual duty to negotiate in good faith better effectuates the intent of the parties in cases involving an 'agreement in principle.'

## I. THE TRADITIONAL 'ALL OR NOTHING' APPROACH

### A. Theory

Under the traditional 'all or nothing' approach, courts focus on two related concerns to determine whether the 'agreement in principle' constitutes a binding and enforceable contract: whether the parties intended to be bound, [FN24] and if so, whether the agreement is sufficiently definite to be enforced. [FN25] Nevertheless, once a court has determined that the parties intended to contract, it will attempt to enforce the agreement. Thus, a court will read enough terms into the agreement to provide sufficient definiteness if it can find a reasonably certain basis for providing an appropriate remedy. [FN26]

***132** To determine the parties' intent under the 'all or nothing' approach, courts generally rely on the objective theory of contract. [FN27] The factors on which courts focus to determine intent include the type of contract involved, whether that type of contract is normally in writing or should be in writing, the amount of money at issue in the transaction, any indication that the parties intended to be bound only by a written definitive contract, and whether that contract is of a common or unusual type. [FN28] The party resisting enforcement often contends that the preliminary agreement does not satisfy the statute of frauds, [FN29] the parties had not yet ***133** intended to reach a final agreement, [FN30] and finally, even if the parties had intended to agree, the agreement they reached was too indefinite to enforce. [FN31] The party favoring enforcement often argues that, under the objective theory of contract law, the manifestations of the parties would indicate to a reasonable person that an agreement had been reached. [FN32] Although the party may try to use a promissory estoppel theory, courts generally have rejected the use of the doctrine in this situation. [FN33]

By focusing on the above factors, courts can determine whether, under traditional contract law principles, the parties have entered into an enforceable contract. Nevertheless, focusing on these factors may not effectuate what the parties expected from their 'agreement in principle.' In those cases where courts have enforced 'agreements in principle' as binding and enforceable contracts, three circumstances often recur. First, in each of the cases, courts have found that the 'agreement in principle' was sufficiently complete because it contained the essential terms of the contract. [FN34] Thus, through use of gap-fillers [FN35] and the implication of a good faith duty [FN36] on each of the parties, a court could supply the ***134** missing terms to make the preliminary agreement sufficiently definite to be enforced. Second, where the selling entity has withdrawn, it generally has done so in order to sell to another at a higher price. [FN37] Finally, the parties contemplated negotiation of a definitive agreement or at least further agreements between the parties.

Based on these three circumstances, courts have found themselves caught in a dilemma. On the one hand, the 'agreement in principle' is sufficiently complete to be enforced, thus overcoming the indefiniteness hurdle. On the other hand, because the parties conditioned any obligation they might have on the negotiation of a further agreement, perhaps they intended their present 'agreement in principle' to constitute an unenforceable 'agreement to agree.' [FN38] As such, a court should not enforce ***135** the preliminary agreement as a contract to consummate the transaction until finalization of the definitive agreement. Finally, the seller's withdrawal from the transaction in order to accept a higher offer without even an attempt to negotiate a definitive agreement is inequitable. [FN39]

B. Case Law Application

Courts enforcing an 'agreement in principle' have determined that if it contains the essential terms of the transaction, it indicates that the parties intended to be bound to consummate the transaction. [FN40] Yet this ***136** situation, in which the parties have conditioned the transaction on successful negotiation of a definitive agreement, differs from the situation in which the parties have reached a definitive agreement but merely failed to include all terms in the writing. Courts enforcing an 'agreement in principle' based on its completeness, however, are treating the two situations in a similar manner.

Several cases illustrate how courts rely on the completeness of the preliminary agreement [FN41] to help determine the intent of the parties. Under an 'all or nothing' approach, these courts have enforced a preliminary agreement as a contract to consummate the transaction. In Melo-Sonics Corporation v. Cropp, [FN42] the court considered a telegram from the defendant's attorney providing that his clients were willing to sell their stock for $1,500,000 'subject to formalizing a preliminary agreement along lines previously discussed.' [FN43] After plaintiff's lawyer replied and accepted the offer, the parties began negotiating the complete terms of the transaction. ***137** Negotiations continued for almost two months before the defendants notified the plaintiff that they were withdrawing from the contemplated transaction. The defendants then sold to a third party for $4,556,700. [FN44]

In reversing the lower court's dismissal of the case, the court stated that the issue of whether the parties had entered into a contract depended on their intent, which should be decided by a trier of fact. [FN45] The Melo-Sonics court further stated that where the parties have agreed on all the essential terms and must only formalize the definitive agreement, the preliminary agreement is sufficiently definite to be enforced as a contract. [FN46]

A number of courts have adhered to the Melo-Sonics rationale. [FN47] In American Cyanamid Co. v. Elizabeth Arden Sales Corp., [FN48] the court held that a four page preliminary letter had terms sufficiently definite to enforce as a final contract since it contained the essential elements with respect to the subject matter required for a contract. [FN49] The lack of certain ***138** terms in the letter did not dissuade the court. Rather, the court judicially supplied the missing terms, such as the closing date and the date for signing the formal agreement. [FN50] Similarly, in

V'Soske v. Barwick, [FN51] the court rejected the argument that no contract had yet arisen because the parties had left too many terms unsettled in the initial agreements. In V'Soske, the parties had not only exchanged correspondence, resulting in an 'agreement in principle,' they also began procedures for consummating the transaction, including drafting and negotiating the formal written agreement. [FN52] The court found that the terms contained in the parties' initial offer and counter-offers sufficiently detailed the terms of their agreement to constitute an enforceable contract. [FN53]

In Mid-Continent Telephone Corp. v. Home Telephone Co., [FN54] the court considered the enforceability of a letter agreement executed by both parties that stated that its purpose was 'to put in writing the terms and conditions of an agreement that we would propose to enter into.' [FN55] Even though the letter agreement contained conditions concerning a number of different matters, including the development of 'a mutually satisfactory arrangement for the continued employment of certain management personnel,' [FN56] the court found it enforceable. On that basis, the court held Home Telephone liable for damages which Mid-Continent sustained as a result of Home Telephone's withdrawal. The Home Telephone court ***139** rejected the argument that a contract is unenforceable because some terms are left open for future agreement of the parties. [FN57] The court emphasized that its primary focus in determining the contract's enforceability was the parties' intent. [FN58] Nevertheless, the court stated that where the parties have agreed on all substantial terms of the contract, that the parties contemplate entering into a final agreement does not make the preliminary agreement unenforceable absent a definite intent that the agreement should not be binding until execution of the final document. [FN59]

Finally, the most dramatic example is the recent jury verdict in Texaco-Pennzoil [FN60] involving the battle for the Getty Oil Company. The jury returned a $10.53 billion verdict against Texaco [FN61] based on its finding that the Getty Oil Company, the Sarah C. Getty Trust, which at the time controlled about 40.2% of the Getty Oil stock, and the J. Paul Getty Museum, which controlled about 11.8% of that stock, had entered into a binding agreement with Pennzoil pursuant to which Pennzoil was to become a three-sevenths owner of Getty Oil. The jury found that the 'agreement in principle' between the parties was binding even though no definitive agreements had been reached, [FN62] and even though the parties ***140** contemplated negotiating and entering into such agreements. [FN63]

In these cases, the court was confronted with the three circumstances noted above: [FN64] first, the parties had agreed on the essential terms of the proposed transaction; second, the parties still contemplated negotiating and entering into further agreements spelling out all of the terms and conditions of their arrangement; and in each case where the seller had withdrawn, it had done so in order to sell to a third party at a higher price.

By using the 'all or nothing' approach, courts treat 'agreements in principle' as either creating a binding and enforceable contract to consummate the transaction, or as creating no obligation whatsoever. Classic black-letter law holds that an 'agreement to agree' is no agreement. [FN65] Yet, in each of the cases discussed, the parties had agreed on the essential terms of the transaction. Additionally, the breaching party often withdrew only because someone else offered a better price. Although many courts have concluded that an 'agreement in principle' constitutes an unenforceable 'agreement to agree,' [FN66] other courts have apparently recognized the inequity of the situation and found that the 'agreement in principle' evidencec an agreement sufficiently complete to warrant enforcement as a contract to consummate the transaction. [FN67]

## ***141** II. A PROPOSED SOLUTION TO THE 'ALL OR NOTHING' PROBLEM

### A. Determining the Parties' True Intent

As discussed in Part I, one of the arguments advanced in favor of finding liability is that courts should attempt to effectuate the intent of the parties. Some courts have assumed that even in the absence of a definitive agreement, in the parties intended to be bound to consummate the transaction. In transactions of the magnitude involved in the corporate acquisition setting, however, a court inferring such an intent at the 'agreement in principle' stage will generally not effectuate the parties' true commercial expectations. Even if the 'agreement in principle' contains the essential terms, because of the complexity of the transaction, numerous substantive provisions remain for negotiation before the parties would reach a definitive agreement. For example, the parties often still will have to agree on such critical provisions as warranties and representations, contract conditions, the scope of indemnifications, and sometimes non-competition clauses.

In a corporate acquisition situation, the parties involved are usually sophisticated business people [FN68] represented by able counsel. They realize that a definitive agreement must still be concluded even after they have reached an 'agreement in principle.' [FN69] Admittedly, they are probably assuming that the party on the other side of the bargaining table will negotiate in good faith. Relying on that good faith, however, does not mean that either of the negotiating parties is unaware of the possibility that negotiations might break off. [FN70] On the contrary, each party probably realizes that, until definitive documents are signed, the transaction might not close. This is one reason why the parties are normally anxious to draft, negotiate and finalize their agreement as soon as possible. Once ***142** those documents are completed, the parties finally feel that they have an enforceable agreement which, assuming the conditions contained therein are satisfied, will be consummated. [FN71]

Assuming that the parties understand that a final definitive agreement must still be reached, how do we deal with the dilemma created if one of the parties withdraws in bad faith? For example, there would be something troublesome about letting the defendants in Melo-Sonics [FN72] walk away from the negotiating table in order to accept another offer yielding three times the prior offer. [FN73] Similarly, in Texaco-Pennzoil, [FN74] it seems unfair to permit one of the parties, while the attorneys are drafting final documents based on the 'agreement in principle,' to withdraw from the transaction with impunity simply because it has received a higher offer. [FN75]

The 'all or nothing' approach does not provide a solution to the problem of one party withdrawing in bad faith from an 'agreement in principle' since it forces courts to treat the preliminary agreement as either creating a final and binding contract to consummate the transaction or as creating no obligation whatsoever. If, however, at the 'agreement in principle' stage courts viewed the parties as having obligated themselves to negotiate with one another in good faith to attempt to reach a definitive agreement, courts could more closely effectuate their commercial expectations. Such an approach also permits tailoring a remedy that more effectively compensates the injured party for breach of that good faith duty.

### ***143** C. Two Approaches to Impose a Duty to Negotiate in Good Faith on Parties

This Article discusses two ways to create and enforce a duty to negotiate in good faith. The first, using promissory estoppel, is a less satisfactory method of creating the duty to negotiate than is the second, which would enforce the obligation to negotiate as a mutually binding contract. [FN76]

#### 1. The Impact of Promissory Estoppel

In the 'agreement in principle' context, plaintiffs contending that a court should enforce such an agreement will typically assert that the court should invoke promissory estoppel. [FN77] The plaintiffs will argue that ***144** they have reasonably relied to their detriment on a promise made by the defendants, either in their handshake agreement, their letter of intent or perhaps both, and that they have been damaged as a result. Under the approach taken by section 90 of the Restatement (Second) of Contracts, [FN78] the promise is binding if injustice can be avoided only through enforcement of the promise.

Courts generally have rejected the plaintiffs' promissory estoppel argument in this situation. They have found that the situation did not justify taking the contract out of the statute of frauds, [FN79] there was no promise on which the plaintiffs could rely, [FN80] or that, even if a promise did exist, reliance on that promise was unreasonable. [FN81]

Despite the general unwillingness of courts to rely on promissory estoppel to provide a remedy to the non-breaching party when an 'agreement in principle's is at issue, [FN82] precedent exists for using the doctrine to ***145** enforce an obligation to negotiate in good faith. Many commentators have viewed Hoffman v. Red Owl Stores, Inc. [FN83] as creating such a duty to negotiate in good faith. [FN84] Hoffman represented a significant development in the law of promissory estoppel [FN85] by overcoming judicial reluctance to apply the promissory estoppel doctrine to situations involving commercial transactions. [FN86]

In Hoffman, the plaintiff relied on assurances from Red Owl officials and sold his businesses in anticipation of receiving a Red Owl franchise. [FN87] Despite the lack of a final written franchise agreement between the parties, the Hoffman court held that the plaintiff actually and substantially relied to his detriment on a promise by the defendant, and thus met the elements necessary to invoke promissory estoppel. [FN88]

A court in the 'agreement in principle' setting could rely on the Hoffman case as precedent for invoking promissory estoppel to effectuate the parties' expectation that each will negotiate with the other in good faith. [FN89] The Hoffman case may not provide strong precedent for giving a remedy when a corporate defendant involved in sophisticated business transactions withdraws in bad faith from an 'agreement in principle.' The plaintiff in Hoffman presented a particularly sympathetic case. Because promissory estoppel is an equitable remedy and within the court's discretion, it lends itself to just such sympathetic cases. On the other hand, courts are not always as sympathetic to corporate defendants.

***146** Moreover, promissory estoppel is not the preferable way to enforce the obligation to negotiate in good faith. [FN90] If the parties are viewed as having undertaken a contractual obligation to negotiate at the 'agreement in principle' stage, action or forbearance in reliance on the promise should not be required. There is also no need to determine whether the promisor could reasonably have expected such action or forbearance. [FN91] Although section 90 of the Restatement (Second) of Contracts no longer requires that the action or forbearance be of a definite and substantial character, it retains both the requirement of some action or forbearance in reliance on the promise, and the promisor's reasonable expectation of such action or forbearance. [FN92]

Moreover, even though section 90 gives courts using the doctrine of promissory estoppel the flexibility to award whatever remedy justice requires, [FN93] a recent study indicates that the vast majority of courts now ***147** award full expectation damages in promissory estoppel cases. [FN94] A court following the majority approach and awarding expectation damages in 'agreement in principle' cases may not be enforcing a duty to negotiate in good faith but, rather, may be enforcing a final contract under the 'all or nothing' approach. If a court views the promise on which the nonbreaching party is relying as a contract to consummate the transaction, and if it awards expectation damages as a remedy for breach of that promise, then the promissory estoppel doctrine does not overcome the flaws in the 'all or nothing' approach. Unfortunately, courts have not used the flexibility of section 90 to tailor a remedy that enforces the parties' commercial expectations. This inflexible approach has resulted in too much uncertainty for the parties. Although the parties may not have agreed on a contract even if they had negotiated in good faith, if a court invokes promissory estoppel, the withdrawing party might be liable for full expectation damages. [FN95]

### 2. Reprosystem, B.V. v. SCM Corp. and the Growing Judicial Recognition of a Duty to Negotiate in Good Faith

Rather than invoking promissory estoppel to enforce an 'agreement in ***148** principle,' courts should view the parties as having entered into a mutually binding agreement, with each party having undertaken an obligation to negotiate with the other in good faith to arrive at a definitive contract. [FN96] That obligation should itself be enforceable regardless of whether either party takes any action in reliance thereon. [FN97] The advantage of viewing the 'agreement in principle' as a mutually binding contract to negotiate, rather than relying on promissory estoppel, is that it will result in more certain damage awards for a breach of the 'agreement in principle.' The non-breaching party should be compensated for the harm it has suffered in reliance on the other party's duty to negotiate in good faith. [FN98]

Assuming that promissory estoppel is a less satisfactory means of compensating a party for its counterpart's failure to negotiate in good faith than basing recovery on a mutually binding contract to negotiate, the question then becomes whether we can formulate such a contractual duty that is capable of enforcement. The answer is yes, even though some recent case law indicates that courts willing to acknowledge a duty to bargain in good faith are often unwilling to recognize such a duty as a separate contractual obligation. [FN99]

Courts that recognize a duty to negotiate in good faith could hold in three different ways. First, a court may hold that a withdrawing party is liable for breach of a duty to negotiate in good faith regardless of whether an enforceable contract to consummate the transaction is found. [FN100] Second, ***149** a court may recognized that a separate contractual duty to negotiate exists, but may find that such a duty is too indefinite to enforce. [FN101] Third, a court may acknowledge the duty to negotiate in good faith but may, even without relying on the agreement's indefiniteness, revert to the 'all or nothing' approach to decide whether an enforceable contract has yet arisen. [FN102]

Perhaps the most complete judicial discussion of a contractual duty to negotiate in good faith in the corporate acquisition setting appears in the district court opinion in Reprosystem, B.V. v. SCM Corp. [FN103] In April 1976 SCM and Reprosystem began negotiating for the sale of SCM's six office copier subsidiaries in Europe. In May, Reprosystem offered $9,000,000 for the businesses. [FN104] No further negotiations occurred until August. While not accepting the earlier letter offer, SCM provided Reprosystem with a list of items that it considered essential to an agreement. The parties supplemented that list, which became the basis for further negotiations. [FN105]

***150** As negotiations continued, the parties began drafting the formal documents necessary to consummate the transaction. Although the negotiating and drafting process continued on into December with execution of a final agreement seemingly in the offing, [FN106] prospects for finalizing the transaction worsened when, effective January 1, 1977, the person who had directed negotiations for SCM was replaced. The newly appointed officer reviewed the transaction and determined that the businesses being sold were more profitable than earlier projected. After SCM formally broke off negotiations on February 2, 1977, Reprosystem sued for damages, alleging among other things, breach of contract, promissory estoppel, and failure to perform and to negotiate in good faith. [FN107]

The issue confronting the court was whether a contract existed despite the lack of executed formal documents, where the drafts prepared explicitly provided that they were to become binding only upon execution. [FN108] The district court, relying on the objective theory of contract, found that the parties had reached an agreement [FN109] in December 1976 and that SCM's subsequent actions were inconsistent with its duty to perform that agreement in good faith. [FN110]

Because the objective facts indicated that the parties had reached an agreement, the court rejected SCM's argument that a formal signing of final documents was necessary. The court based much of its reasoning on the parties' agreement on the essential terms of the transaction. The court relied on section 2-204(3) of the Uniform Commercial Code to hold that, as long as the parties had agreed on the essential terms of the ***151** transaction, the court could supply the missing ones. [FN111]

In addition to its discussion of whether an agreement to consummate the transaction existed, the district court dealt at length with whether a duty to negotiate in good faith had arisen and whether SCM had breached that duty. The court, in concluding that such a duty did exist and that SCM had breached it, attempted to go beyond the 'all or nothing' approach and, after noting the difficulty in fashioning an appropriate remedy, [FN112] adopted a remedy theory based on restitution or unjust enrichment. [FN113] On that basis, the court awarded Reprosystem the profits earned by the copier businesses during the period in which it deemed SCM had, pursuant to the parties' understanding, operated those businesses on Reprosystem's behalf. [FN114]

The Reprosystem court focused on the proper issue by recognizing that the parties, through their lengthy negotiating process, had obligated themselves to deal with one another in good faith. [FN115] Unfortunately, however, even though the court acknowledged a duty to negotiate in good faith, it did not properly view the contractual good faith duty as separate from the contract to consummate the transaction. Rather, under the Reprosystem approach, a court will only find a breach of duty to negotiate if it first finds an enforceable contract to consummate the transaction. The Reprosystem court found that once the parties had agreed on all material terms of a contract, a final and binding contract existed. The breach of the good faith duty was thus a breach of the performance ***152** of the contract rather than the breach of a separate obligation to negotiate.

On appeal, the Second Circuit reversed, [FN116] finding that the language of the contract drafts, taken together with the other communications between the parties, indicated that the parties did not intend to be bound until the final execution of definitive agreements. [FN117] The court reasoned that such an intent comported with commercial reality in such a large transaction. In considering the issue of whether SCM had breached a duty to negotiate in good faith, the court relied on the typical 'all or nothing' approach. Since the court concluded that no contract existed, it found that SCM could not have breached any good faith duty. In addition, the court that any implied agreement to negotiate in good faith that might have existed was too indefinite for a court to enforce under New York law. [FN118]

The Second Circuit's conclusions indicate its unwillingness to find a duty to negotiate in good faith unless the court first finds that the parties had an enforceable agreement to consummate the transaction. These conclusions, however, produce the potentially inequitable result we noted earlier. [FN119] In Reprosystem, the testimony indicated that, after the attorneys had generated sixteen drafts of the agreement, the parties had resolved all open issues. Nevertheless, the parties had not yet executed a definitive agreement. The parties had indicated in these drafts that they were to be final and binding only when executed and delivered. [FN120] Thus, the court may have accurately interpreted the parties' intent that an enforceable definitive agreement would arise only after the parties had executed it. That intent should not mean, however, that until the final agreement is executed either party may act as it likes with impunity. Rather, once the parties have entered into an 'agreement in principle,' each party reasonably expects to be obligated to act in good faith to agree ***153** on the terms of a definitive agreement, regardless of whether they ultimately execute a definitive agreement.

C. Applying the Good Faith Duty

The reluctance of many courts to consider whether a separate duty to negotiate in good faith exists, and the reluctance of other courts to enforce such a duty even if they find that it does exist, may stem from two possible concerns. The first concern is that good faith can be a difficult concept to apply [FN121] and, thus, courts may fear that they are unable to determine whether one of the parties has failed to negotiate in good faith. The second concern may arise out of the difficulty in devising an appropriate remedy for the breach of such a duty. [FN122] Both of these concerns are evidenced by some courts focusing on the indefiniteness of an 'agreement in principle' as the basis for not enforcing it as a contract to negotiate.

Concern over the application of the good faith duty most likely stems from the difficulty of defining, or perhaps even deciding whether to define, good faith. [FN123] The Restatement (Second) of Contracts views good faith as an excluder. [FN124] Under this approach, good faith cannot be defined but, rather, merely excludes many forms of bad faith. [FN125] Although various examples of bad faith conduct can be offered, the excluder approach views as too confining any definition of good faith or any definitive listing of examples of bad faith conduct. [FN126] The excluder approach ***154** views good faith as an evolving concept that can be used to fit any situation on a case-by-case basis. [FN127]

Although the Restatement's provision does not directly address the issue of good faith in the formation of a contract, the comment to the section indicates that bad faith in negotiation, although not within the purview of the section itself, may give rise to sanctions. [FN128] Professor Summers, one of the more ardent advocates of the excluder approach, specifically notes in his seminal article on good faith [FN129] that bad faith in negotiating can result in a cause of action, and that among the forms of bad faith in negotiating is the abuse of the power to break off negotiations. [FN130]

More recently, a different approach to good faith has been proposed. Under this analysis, good faith is examined by use of a forgone opportunities test. [FN131] When a contract is formed, each party has agreed to forgo certain alternative opportunities, and thus has limited its discretion. A party will act in bad faith by trying to recapture alternative opportunities it had forgone at the time of contracting. As an illustration, if A had agreed to sell 100 designated widgets to B for $1.00 each, A has limited its discretion by forgoing the opportunity of selling those same widgets to C for $1.50 each. If A now tries to sell those widgets to C, A will be acting in bad faith by trying to recapture an alternative opportunity it had forgone at the time of contracting with B.

Professor Burton, who first formulated the 'forgone opportunities approach,' poses two questions. [FN132] First, at the time of contract formation, what were the reasonably expected costs of performance (forgone opportunities) to the party who has allegedly breached the contract? Second, at the time of performance, did the party who allegedly breached the contract use its discretion to recapture an opportunity that it had forgone on entering the contract?

Professor Burton's forgone opportunities approach can be particularly helpful in determining whether the parties have entered into a contract to negotiate and whether either party has breached that contract. In deciding whether the parties have a contract to negotiate in good faith, a court can look at whether the parties have forgone alternative opportunities. Professor Burton states that courts should focus attention on the time of contract formation. This analysis involves an objective inquiry into the promisee's reasonable expectations as to which opportunities the discretion-exercising promisor acting in bad faith had forgone by entering into ***155** the contract. [FN133] Under traditional contract law principles, these forgone opportunities would constitute consideration.

In the 'agreement in principle' setting, this analysis can be illustrated by the following hypothetical. Assume that on January 1, Acquiring Corporation and Target Corporation began negotiating for purchase by Acquiring of Target. Acquiring formed a subsidiary corporation that was to tender for some or all of Target's shares at a specified price. After completion of the tender offer, Target was to be merged into the subsidiary. Target is a processor of Florida orange juice and about 75% of its assets consist of orange groves in Florida. On January 10, although no definitive agreement had been reached, the parties entered into either a handshake understanding that Acquiring would tendder for all of Target's shares at a price of $25 per share or a letter of intent spelling out the basic terms of the transaction. In both situations, the parties understood that the transaction was subject to their negotiating and entering into a definitive agreement.

Once the 'agreement in principle' was reached, the attorneys began negotiating the terms of a definitive merger agreement, and although disagreements existed over the wording of the final agreement, the negotiations were ongoing and had centered around the provisions necessary to implement the transaction. However, negotiations came to an abrupt halt when, on January 13, Vulture Corporation approached Target's management with a proposal in which Vulture agreed to buy all Target's stock that might be tendered at a price of $30 per share. Target ultimately accepted Vulture's offer.

In the hypothetical, although their letter of intent might not be enforceable as a contract to consummate the transaction, it may constitute an enforceable contract to negotiate in good faith. If each party could reasonably expect that the other, by entering into the letter of intent, has forgone certain opportunities, then sufficient consideration has passed between the parties for a contract to have come into existence. [FN134] By accepting Vulture's offer, Acquiring might reasonably conclude that Target is attempting to recapture a forgone opportunity and is breaching its contract to negotiate in good faith. [FN135]

In addition to clearing the consideration hurdle, Professor Burton's first inquiry can help a court evaluate whether the 'agreement in principle' is sufficiently definite. If a court can look at the terms of the 'agreement in principle' and find a sufficiently definite understanding between the parties as to the opportunities that each had forgone, then it can find ***156** that the parties formed a contract to negotiate. The definiteness required for the formation of this contract should be viewed on a different level than the definiteness that would be required to form a contract to consummate. A court should only be concerned here with determining whether the parties had forgone opportunities. It should not be seeking to supply sufficient terms to create an enforceable contract to close the transaction.

Even if consideration is found, and a court determines that the agreement contains sufficient definiteness to permit the finding of an enforceable contract to negotiate, it must still find that the parties intended to be bound by the contract to negotiate. By focusing on the opportunities that the parties had forgone, a court can discern what the parties expected from their agreement. For example, if the agreement contains either an implicit or an explicit understanding that the parties will withdraw from the market during the negotiation process, a presumption should arise that the parties intended to be bound to negotiate in good faith. On the other hand, if the parties indicated in the 'agreement in principle' that they did not intend any obligation to have arisen, including one to negotiate in good faith, then a court should respect that intent. Absent an explicit statement in the 'agreement in principle' disclaiming any obligation to negotiate in good faith, focusing on the forgone opportunities will help a court determine what the parties expected from the 'agreement in principle.'

Professor Burton's inquiry is whether the withdrawing party has breached the contract to negotiate in good faith and on whether that party has used its discretion to recapture an opportunity that it had forgone on entering into the contract. Here, the court should examine the promisor's subjective intent [FN136] in withdrawing from the negotiations. [FN137] This inquiry should help a court determine whether the promisor is withdrawing from the transaction because it is honestly dissatisfied with the progress of the negotiations or because it changed its mind irrespective of the status of negotiations. [FN138] If the promisor is honestly dissatisfied with the progress of the negotiations, it can withdraw from the contract with impunity. If, on the other hand, the promisor merely declines to pursue the transaction, it may be attempting to recapture a forgone opportunity ***157** in breach of the contract to negotiate. [FN139]

A look at some case law is helpful to illustrate how the forgone opportunities approach might work in the corporate acquisition setting. In Interway, Inc. v. Alagna, [FN140] the parties entered into a letter of intent providing that Interway would transfer approximately $1.6 million of its stock to Alagna in exchange for Alagna's interest in Trailer Leasing Corporation. [FN141] The letter of intent, prepared by Interway and accepted by Alagna, stated that " o ur purchase is subject to a definitive Purchase and Sale Contract to be executed by the parties." [FN142] He day following the execution of the letter of intent, Alagna informed Interway that he would not proceed with execution of the final contract. Interway sued. [FN143]

The court, after indicating that the parties' intent controlled the question of whether they had entered into an enforceable contract, held that the letter unambiguously indicated the tentative nature of any agreement between them. Adhering to the 'all or nothing' approach, the appellate court affirmed the trial court's dismissal of the plaintiff's complaint. [FN144]

Applying the forgone opportunities approach to the facts in Interway demonstrates how a court could find an enforceable duty to negotiate in good faith. First, a court would determine whether each party had forgone opportunities by entering into the letter of intent. [FN145] If so, the court would then have to focus on the second inquiry--determining precisely which opportunities these were and deciding whether Alagna was now trying to recapture them.

In the first step, the court's concern should be whether a mutually binding contract has been formed. The court should focus on forgone opportunities to determine whether the parties gave consideration and intended to be bound, and whether the 'agreement in principle' is sufficiently definite to be enforced as a contract to negotiate. In the Interway case, because the important price term was specified, [FN146] a court could ***158** reasonably conclude that, by entering into the letter of intent, each party had limited its discretion and had forgone certain opportunities. A buyer who has entered into a letter of intent of the type present in the Interway case, for example, reasonably might expect that the seller could not withdraw solely because of receipt of a higher offer for the asset. [FN147] Similarly, a seller reasonably could expect that the buyer cannot shop around for a comparable substitute asset that might be available at a cheaper price. In addition, the buyer probably is reasonable in assuming that the seller has forgone the opportunity of taking the property off the market, as occurred in Interway, without trying to negotiate an acceptable agreement with the buyer. [FN148]

The second step of the inquiry, determining whether the withdrawing party has breached the good faith duty, admittedly will be difficult in many cases. Here, the court must ask whether the promisor is withdrawing because it is trying to recapture a forgone opportunity or because it feels that negotiations have irretrievably broken down despite good faith efforts. In the Interway case, for example, because one party withdrew without even attempting to negotiate a final agreement, a court could logically conclude that the party had breached his contractual duty to negotiate in good faith.

Although the Interway case presents a clear-cut situation where one party refused to negotiate at all, the hypothetical situation illustrates how the analysis can become difficult in the second step. Let us assume that after Target and Acquiring had entered into their 'agreement in principle' and while negotiations were underway, a freeze hit Florida that killed the majority of oranges in the state but miraculously left Target's groves untouched. Would Target be liable if it decided that it no longer wanted to continue negotiations with Acquiring, even if it did not accept a better offer?

If Target's withdrawal from negotiations is based on its decision that its assets are now worth more than before and that it wants to remain independent, then Target appears to be recapturing a forgone opportunity and has breached its duty to negotiate in good faith. [FN149] Frequently, however, the decision to withdraw from negotiations results from a combination of factors. For example, although Target may remain committed to negotiating a final agreement with Acquiring even though the value of its assets has risen, the attitude of its negotiators toward the negotiations is likely to change, at least subconsciously. Because Target probably feels that the value of its bargain has diminished, it will likely ***159** be more inflexible in its demands and less willing to concede certain points.

The second inquiry is undoubtedly a difficult one for courts to make, especially because Professor Burton's approach requires a determination of the promisor's subjective intent. [FN150] This difficulty should not deter the use of this analysis, however, because courts are frequently forced to make such determinations. [FN151]

An interesting example of a court's inquiry into a party's good faith in negotiating, although not arising in the corporate acquisition setting, occurred in Evans, Inc. v. Tiffany & Co. [FN152] Evans involved the negotiation of a sublease. [FN153] The Evans court extensively reviewed the history of the parties' negotiations and concluded that the defendant breached its duty to negotiate in good faith by ignoring custom and usage, by insisting on arbitrary clauses and by ignoring the sublessor's legitimate interests. [FN154]

Although the Evans court may have looked at objective factors in making its determination because the letter of intent between Evans and Tiffany provided that the parties were to enter into a formal contract incorporating the terms of the letter of intent within 'reasonable limitations,' [FN155] a similar analysis could be undertaken in the corporate acquisition setting. Thus, to evaluate the promisor's subjective intent, a court should be able to consider usage of trade [FN156] and underlying industry ***160** practice [FN157] to help determine whether the promisor was negotiating in good faith or just taking a particularly harsh negotiating position in order to create an excuse for withdrawing from the transaction. In the latter situation, the promisor is negotiating in bad faith and should be liable for breaching the contract since it is attempting to recapture a forgone opportunity.

Creating an independent cause of action for failing to negotiate in good faith does present some dangers. The first danger is that good faith is a difficult concept to apply, particularly because of the difficulty in defining, or even deciding whether to define, the term. [FN158] What a court might objectively view as bad faith conduct might not, in reality, have been subjective bad faith by the party. [FN159] Similarly, a court might view certain conduct as not constituting bad faith when in fact one of the parties had in bad faith stymied negotiations in order to recapture a forgone opportunity. Nevertheless, a court focusing on the good faith issue will be far more likely to discern the parties' true intent than will a court that relies on the 'all or nothing' approach. [FN160]

The second danger lies in formulating an appropriate remedy for the breach. Some courts that have considered whether a party has breached its duty to negotiate have found such a duty too indefinite to enforce. [FN161] ***161** Both the UCC [FN162] and the Restatement (Second) [FN163] analyze definiteness in terms of whether there is a reasonably certain basis for giving an appropriate remedy. Although courts have not generally articulated the difficulty in formulating an appropriate remedy as their reason for not finding an independent cause of action for breach of the duty to negotiate, this difficulty may explain the results of some cases. [FN164]

## III. REMEDIES FOR BREACH

Commentators' suggestions for appropriate remedies for a breach of the duty to negotiate in good faith have ranged from protecting either a party's reliance interest, its expectation interest, or its restitution interest. [FN165] Courts have not yet sufficiently explored this area and consequently, there is still no judicially recognized theory of an appropriate remedy.

Two reasons can be posited to explain this lack of development in the area of remedies. First, courts only recently have begun to recognize the duty to negotiate in good faith as a separate cause of action. [FN166] In addition, once a court suggests that the plaintiff might succeed on such a cause of action, which often occurs in deciding a motion for summary judgment, the parties may well settle the case out of court, thus preempting any need for a court-formulated remedy. [FN167] Second, and more important, courts have focused their analysis on whether a binding contract to consummate the transaction exists. Consequently, the court will focus on whether the parties intended a final and binding contract, and, if ***162** so, whether the terms of the 'agreement in principle' are sufficiently definite for a court to enforce. [FN168] By focusing on these issues, rather than on whether a contract to negotiate has arisen, courts have held either that there is no remedy because there is no liability [FN169] or, if they find liability, they assume that the traditional expectation measure of damages is the appropriate remedy. [FN170]

Generally, a court holding that an 'agreement in principle' constitutes a binding contract under the 'all or nothing' approach will give the non-breaching party traditional contract damages. [FN171] When the sale of a business is involved, the typical remedies for breach of such a contract would include either specific performance, if the business is unique and damages could not provide an adequate remedy, [FN172] or damages, based on the non-breaching party's expectation interest.

At the 'agreement in principle' stage, neither of these remedies is appropriate. Specific performance is inappropriate for two reasons. First, in order to grant specific performance the contract must be sufficiently certain to provide a basis for granting and enforcing the decree. [FN173] The certainty required for specific performance is greater than the certainty required for granting damages. [FN174] Thus, although the 'agreement in principle' may be sufficiently certain for a court to enforce as a contract and to grant damages for its breach, it may not be certain enough to ***163** warrant a decree of specific performance. Second, specific performance at the 'agreement in principle' stage is inappropriate since the parties do not yet expect that the transaction will close. They each realize that a definitive agreement must still be negotiated, and if negotiations break down over the terms of that definitive agreement, even though both parties have acted in good faith, they each expect to walk away with impunity. Thus, specifically enforcing the agreement would not effectuate the parties' intentions.

The traditional measure of expectation damages is also an inappropriate remedy at the 'agreement in principle' stage. Expectation damages in the sale of business context are intended to give the non-breaching party the benefit of its bargain. This measure of damages is normally calculated by the difference between the contract price and the fair market value of the business on the date of breach plus incidental or special damages provided that they are foreseeable at the time of contracting and can be proven with reasonable certainty. [FN175] These special damages might include costs incurred in connection with a substitute transaction, [FN176] and, in some cases, lost profits. [FN177] At the 'agreement in principle' stage, this measure of damages overcompensates the non-breaching party. Because neither party has any assurance that they will successfully reach a definitive agreement, even if both act in good faith, the non-breaching party should not be entitled to damages other than the harm it suffers in reliance on the other party's implicit agreement to negotiate in good faith. [FN178]

A court focusing on the duty to negotiate in good faith can formulate a remedy concentrating on the harm that the non-breaching party suffers as a result of the breaching party's failure to negotiate in good faith. As already suggested, courts should view the parties to an 'agreement in principle' as entering into a contract with mutual obligations. Each party intends that it will withdraw from the market and not seek a better deal elsewhere. [FN179] In the hypothetical, for example, Acquiring, by entering ***164** into an 'agreement in principle' with Target, has forgone the opportunity of shopping around to purchase a comparable firm if that purchase would serve as a substitute for the acquisition of Target. When a party breaches the duty to negotiate in good faith by reentering the market and recapturing that forgone opportunity, it should have to pay any damages that the non-breaching party has suffered in reliance on the 'agreement in principle.'

As a general principle, the non-breaching party's damages can be measured by the extent that it has been harmed by its withdrawal from the market between the time when the parties entered into the 'agreement in principle' and when the withdrawing party terminated the negotiations in bad faith. [FN180] If during this period the market changed to the detriment of the non-breaching party, then the non-breaching party should be compensated to the extent of that change. The purpose of this remedy is not to give the non-breaching party the benefit of the bargain. Rather, it is an attempt to return the non-breaching party, as nearly as possible, to its status quo position at the time of the 'agreement in principle.' [FN181] The hypothetical demonstrates how damages should be calculated under this theory. [FN182]

***165** Assume that on the date that the parties entered into the 'agreement in principle' Target's stock was trading on the market at $20 per share. At that time, Acquiring was willing to purchase those same shares for $25 per share. Subsequently, Vulture offered Target $30 per share. [FN183] On the date that Target breached its duty to negotiate in good faith by accepting Vulture's offer, Acquiring would be placed in its initial position vis-a-vis the market if it could reenter the market and purchase a similar company for the same price it had agreed to purchase Target. On the date the 'agreement in principle' was reached, Acquiring was willing and able to buy the asset it wanted at $25 per share. On the date of breach, that exact asset is being sold for $30 per share. In the absence of other information concerning the market, that $30 per share selling price should indicate that Acquiring would have to pay the equivalent of $30 per share for a comparable asset. We can thus put Acquiring in its original position by allowing it to recover the $5 per share difference between ***166** its offer and Vulture's offer. [FN184]

Because Acquiring should be contractually obligated to withdraw from the market following its 'agreement in principle' with Target, Acquiring has suffered damages to the extent that the amount it would have to pay for Target rose while it was contractually obligated to be out of the market. By allowing Acquiring to recover damages based on the $5 per share increase in the market, Acquiring is returned to the status quo ante. Although the cost it would have to pay has increased, Acquiring has recovered damages equal to that increase, thus permitting it to compete for a substitute for Target on the same basis as before in the now higher market. [FN185]

***167** Now assume that, instead of a rising market, the value of Target's stock in this same time period, absent Acquiring's offer, fell to $15 per share after the parties entered into their 'agreement in principle.' Acquiring is more likely to breach in this situation because it may no longer be willing to pay $25 per share to acquire Target when the stock's value would have fallen, but for its offer, to only $15 per share. [FN186] In this case, Target is the non-breaching party that had contractually obligated itself not to sell to, or perhaps even to negotiate with, another while negotiating with Acquiring. This remedy compensates Target and places it back to its original position as of the date of the 'agreement in principle.' As of that date, Target could have sold its shares on the market for $20 per share. On the date of breach, it could sell its shares for $15 per share. Target can only be put back into its original position if Acquiring is required to pay damages based on the $5 per share decrease in market value of Target's stock between the date of the 'agreement in principle' and the date of Acquiring's breach. In effect, Target is compensated for the harm it suffered as a result of its contractual obligation to stay out of ***168** the market in reliance on Acquiring's agreement to negotiate in good faith. [FN187]

The purpose of formulating a remedy based on changes in price is to compensate the non-breaching party to the extent that the 'agreement in principle' contractually obligated it to withdraw from the market. Such a remedy is more in line with the expectations of the parties than are the traditional remedies for the breach of a contract to consummate. [FN188]

In the area of corporate acquisitions, when the parties enter into an 'agreement in principle,' each party recognizes that a definitive agreement may never be reached because of the complicated and intricate nature of such transactions. [FN189] In most cases, however, at the 'agreement in principle' stage, absent a provision permitting 'shopping' of the deal, there is an expectation that the other party will negotiate in good faith. This expectation normally means that the parties have agreed to withdraw from the market. [FN190]

To the extent that a party has withdrawn from the market in reliance ***169** on the other party's agreement to negotiate in good faith, the non-breaching party deserves protection. That reliance interest, however, should be limited to any detrimental changes in the price of the target company. Any measure of damages based on future profits or benefits arising from the consummation of the transaction is unjustified because the parties have not entered, nor have they intended to enter, into a contract to consummate the transaction. Additionally, such damages would require the fact-finder to speculate as to what kind of definitive contract the parties eventually might have negotiated.

Applying the proposed reliance type of recovery introduces a measure of certainty to the interpretation of an 'agreement in principle.' On the one hand, the parties' legitiamte commercial reliance interest will be protected if they withdraw from the market. On the other hand, there is a clear and a definite understanding of the scope of the damages. The proposed solution restores the non-breaching party to its status quo position, but avoids the egregious result to the breaching party that may stem from awarding full expectation damages. [FN191] This should encourage more parties to enter into negotiations, which should result in the consummation of more transactions, and, ultimately, will benefit shareholders.

***170** CONCLUSION

The recent verdict in Texaco-Pennzoil, where the jury awarded over $10 billion to Pennzoil and put Texaco on the verge of bankruptcy, is probably the most dramatic and almost certainly the most well-publicized example of the problems resulting from the confusion as to whether an 'agreement in principle' constitutes an enforceable contract. As this Article illustrates, however, Texaco-Pennzoil is just one of many cases where the same issue has arisen. General judicial adherence to the 'all or nothing' approach has exacerbated the confusion because parties are uncertain whether their 'agreement in principle' will be enforced as a contract to consummate the transaction or, alternatively, whether either party can withdraw from the transaction with impunity. As the Texaco-Pennzoil verdict illustrates, under the current state of the law, either the target corporation or the pursuing third-party suitor may be gambling with its economic future, not knowing how a court will decide the enforceability of the 'agreement in principle.'

Increased judicial recognition of a contractual duty to negotiate in good faith will help alleviate confusion over whether the 'agreement in principle' constitutes a binding and enforceable contract to consummate the transaction. By focusing on the contract to negotiate, courts will determine more accurately what the parties were trying to accomplish when they entered into the 'agreement in principle.' Courts will also be more likely to tailor a remedy for the breach of that contractual duty that reflects the harm that the breach has caused.

Imposing a contractual duty to negotiate in good faith is not risk-free. Courts may often face difficulties in determing whether the withdrawing party acted in bad faith. Additionally, even using the suggested reliance approach to damages, courts may have difficulty in determining the precise harm that the non-breaching party has suffered as a result of the breach. Nevertheless, these difficulties should be no more significant than the difficulties that courts frequently face when they have to apply the good faith doctrine and make determinations of value in other contexts.

The most significant justification for increased judicial adoption of a contractual duty to negotiate is that courts can then accomplish their primary goal of effectuating the parties' intent and reasonable commercial expectations. Courts should carefully examine the parties' expectations at the time they entered into the 'agreement in principle.' If the parties did not intend any contractual duty to arise, including a duty to negotiate, courts should respect that intent and, in such a case, allow either party to withdraw with impunity. If the parties did not so indicate, however, the court should look carefully at what the parties agreed on at the 'agreement in principle' stage. It is likely that they will determine that the parties have obligated themselves to negotiate in good faith. Once we determine the parties' true intent, courts can and should effectuate ***171** that intent. In doing so, the parties will know that the obligation they intended to undertake is the same one that the court will enforce.

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[FN1]. Although this phrase probably originated in the opera setting, one of its more interesting uses occurred in the battle between Pennzoil and Texaco for the Getty Oil Company. When Texaco's Chairman, John K. McKinely, asked Getty Oil's Chairman Sidney Peterson whether Getty might still be available even though an 'agreement in principle' had been entered into with Pennzoil, Peterson responded that 'the fat lady had not yet sung.' Pennzoil Co. v. Getty Oil Co., No. 7425, slip op. at 46 (Del. Ch. Feb. 6, 1984). For a further discussion of the Texaco-Pennzoil case, see infra text accompanying notes 60 to 63.

[FN2]. In 1984 alone, over 2,500 corporate mergers and acquisitions occurred with a combined value of over 122 billion dollars. Work & Seamonds, What are Mergers Doing to America?, 99 U.S. News & World Rep. 48 (July 22, 1985). Some of the more notable 1984 mergers and acquisitions included Texaco's purchase of Getty Oil, Allied Chemical's purchase of Bendix Corporation and 39 percent of Martin Marietta, Chevron's purchase of Gulf Oil, and General Motor's purchase of Hughes Aircraft and Electronic Data Systems. Id. at 48-49. In 1985, some of the more well-publicized mergers included General Electric's takeover of RCA, Capital City Communication's purchase of ABC and Kohlberg Kravis' buy-out of Beatrice. Although 1986 started by showing some slowdown in the mergers and acquisitions area, the Sperry-Burroughs merger, Northwest Airline's takeover of Republic Airlines and Texas Air's takeover of Eastern Airlines were among a few of the transactions which continued to garner headlines. As the year concluded, activity in the corporate acquisition area increased, presumably in anticipation of implementation of the Tax Reform Act of 1986.

[FN3]. See infra note 70.

[FN4]. A related issue is when disclosure of merger negotiations is required in order to comply with the federal securities laws. Although the law is by no means wholly free from doubt, it seems clear that by the time an 'agreement in principle' has been reached, an announcement which is not misleading and which does not contain any material omissions is required. See

Starkman v. Marathon Oil Co., 772 F. 2d 231, 238 (6th Cir. 1985), cert. denied, 106 S. Ct. 1195 (1986). For recent developments concerning when disclosure of merger negotiations is required under the securities laws, see Levinson v. Basic, Inc., 786 F. 2d 741 (6th Cir. 1986), cert. granted, 55 U.S.L.W. 3569 (U.S. Feb. 23, 1987) (No. 86-279); Greenfield v. Heublein, Inc., 742 F.2d 751 (3d Cir. 1984), cert. denied, 469 U.S. 1215 (1984); In re Revlon, Inc., Exchange Act Release No. 34-23320, [Current Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 84,006 (June 16, 1986); In re Carnation Co., Exchange Act Release No. 22,214 [1984-85 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶83,801 (July 8, 1985); L. Solomon, Corporate Acquisitions, Mergers & Divestitures, ¶¶70,120, 73,730 (Prentice Hall 1983 & Supp. 1985); Broadsky, Disclosure of Merger Negotiations, N.Y.L.J. July 2, 1986, at 1, col. 1. See also Bloomenthal, Materiality of Preliminary Merger Negotiations (Part I), 8 Sec. & Fed. Corp. L. Rep. 129 (1986); Klein, Disclosure of Merger Negotiations, 19 Rev. Sec. & Comm. Reg. 8 (1986); Note, Corporate Disclosure of Merger Negotiations--When Does the Investor Have a Right to Know?, 36 Syracuse L. Rev. 1155 (1985).

[FN5]. See J. Calamari & J. Perillo, Contracts, at 51 (2d ed. 1977); E. Farnsworth, Contracts, 202-04 (1982). Recently, however, there has been some recognition of the commercial need for agreements to agree. See J. Calamari & J. Perillo, supra, at 51; E. Farnsworth, supra, at 204. Both the U.C.C. and the Restatement state that agreements to agree, even on material terms, are not necessarily too indefinite to enforce. See Restatement (Second) of Contracts § 33 at 92-97 (1981); U.C.C. §§ 2-204(3) and official comment, 2- 305(1)(b) (1977).

[FN6]. State law usually requires approval by the boards of directors of both of the involved volved entities. See, e.g., Revised Model Business Corp. Act [hereinafter MBCA] §§ 11.01(a), 12.02(b) (1985); Cal. Corp. Code Sections 1001(a)(1), 1101 (West 1977 & Supp. 1986); Del. Code Ann. tit. 8, §§ 251(b), 271(a) (1975); N.Y. Bus. Corp. Law §§ 902, 909(a)(1) (McKinney 1986).
Even in a friendly takeover situation, most states require shareholder approval by at least the selling entity's shareholders. See, e.g., MBCA Sections 11.03, 12.02 (1985); Cal. Corp. Code §§ 1001(a)(1), 1101 (West 1977 & Supp. 1986); Del. Code. Ann. tit. 8, §§ 251(b), 271(a) (1975); N.Y. Bus. Corp. Law §§ 902, 909(a)(1) (McKinney 1986).

[FN7]. This Article will not address the fiduciary duties owed by corporate management and the corporation's board of directors to its shareholders. Suffice it to say that, over the past few years, the fiduciary duties owed by management and directors when a corporate acquisition is at issue has received a considerable amount of attention both from the courts and from legal scholars. For a sampling of some of the more important recent court decisions in this area, see Hanson Trust PLC v. ML SCM Acquisition, Inc., 781 F.2d 264 (2d Cir. 1986) (holding that target corporation's directors did not exercise their proper business judgment in granting a lock-up option of substantial target company assets to Merrill Lynch in an attempt to fend off hostile tender offer); Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc., 506 A.2d 173 (Del. 1986) (holding that target corporation's directors breached fiduciary duty in granting lock-up option to defeat hostile offer and further holding that, once target's board realized that company's break-up was inevitable, directors took on the role of auctioneers, trying to get best price for its shareholders); Moran v. Household Int'l., 500 A.2d 1346 (Del. 1985) (upholding directors' action in adopting 'poison pill' preferred stock rights dividend plan); Smith v. Van Gorkom, 488 A.2d 858 (Del. 1985) (holding target corporation's directors liable for breaching fiduciary duty in approving Marmon Group's $55 per share offer for shares of TransUnion Corporation).

[FN8]. Throughout this Article, the term 'agreement in principle' will be used to describe a situation in which the parties have agreed on the basic terms of the transaction, including price and general structure but still contemplate negotiating and entering into a definitive agreement detailing the complete terms of the transaction.

[FN9]. See, e.g., Channel Home Centers v. Grossman, 795 F.2d 291, 299 (3d Cir. 1986); Winston v. Mediafare Entertainment Corp., 777 F.2d 78, 80 (2d Cir. 1985); R.G. Group, Inc. v. Horn & Hardart, Co., 751 F.2d 69, 74 (2d Cir. 1984); Reprosystem, B.V. v. SCM Corp., 727 F.2d 257, 261 (2d Cir. 1984), cert. denied, 469 U.S. 828 (1984); V'Soske v. Barwick, 404 F.2d 495, 499 (2d Cir. 1968), cert. denied, 394 U.S. 921 (1969); Melo-Sonics Corp. v. Cropp., 342 F.2d 856, 859 (3d Cir. 1965); Banking & Trading Corp. v. Floete, 257 F.2d 765, 769 (2d Cir. 1958); Garner v. Boyd, 330 F. Supp. 22, 25-26 (N.D. Tex. 1970), aff'd, 447 F.2d 1373 (5th Cir. 1971); Continental Fin. Servs. v. First Nat'l Bank of Boston Corp., No. 82-1505-T, slip. op. at 6 (D. Mass. Aug. 30, 1984); Metropolitan Life Ins. v. Calumet Fed. Savings & Loan, No. 78-6-3728, slip op. at 5 (N.D. Ill. Mar. 11, 1982).

[FN10]. See Knapp, Enforcing the Contract to Bargain, 44 N.Y.U. L. Rev. 673, 719 (1969). See infra notes 24-28 and accompanying text.

[FN11]. See infra notes 40-66 and accompanying text.

[FN12]. Discussing generally the concept of an 'all or nothing' approach in contract law, Fuller and Perdue stated:

Though the all-or-nothing approach may be harsh, it at least allows a man to know where he stands. This comforting supposition can be preserved only so long as one ignores the psychological realities of the judicial process. In fact, more often than not, the all-or-nothing theory introduces stresses (and with them, a fortuitous element) into the process of decision which can be eliminated only by the adoption of a more flexible scheme of legal sanctions.

The objection to the all-or-nothing attitude is not simply that it often results in the plaintiff's getting all when a part would have made him whole. The more serious objection is that in those cases where a court balks at giving him all, he may get nothing when he urgently needed and deserved a part.

Fuller & Perdue, The Reliance Interest in Contract Damages, 46 Yale L.J. 373, 419-20 (1937) (footnotes omitted).

[FN13]. Despite the parties' intention that the definitive agreement is their complete agreement spelling out all of the terms and conditions of their contractual obligations, courts are still split as to whether the target company can withdraw from the agreement with impunity either because of the target's receipt of a higher offer or because of changed circumstances. Compare ConAgra, Inc. v. Cargill, Inc., 222 Neb. 136, 382 N.W. 2d 576 (1986) (holding, under Delaware law, that target company's board had no statutory authority to bind corporation to merger agreement without shareholder approval--directors' primary duty was to shareholders, despite directors' agreement to use their best efforts to obtain shareholder approval) and Great Producers Coop. v. Great United Corp., 200 Colo. 180, 187, 613 P.2d 873, 879 (1980) (holding, under Delaware law, that directors of target company are not required to recommend shareholder approval of definitive agreement where changed circumstances result in directors determining that contemplated transaction is no longer in shareholders' best interests, even though directors had agreed with acquiring entity to use 'best efforts' to obtain shareholder approval) and Smith v. Good Music Station, Inc., 36 Del. Ch. 262, 265, 129 A.2d 242, 245 (1957) (letter agreement containing offer to purchase corporate assets not binding until requisite statutory approval obtained) and Masonic Temple, Inc. v. Ebert, 99 S.C. 5, 8-9, 18 S.E. 2d 584, 587-89 (1942) (court held defendant could withdraw offer to purchase company's property made to company's officer or agent because there was no binding contract until shareholders ratified) and Finklea v. Carolina Farms Co., 196 S.C. 466, 469, 13 S.E. 2d 596, 598-99 (1941) (court held no contract where plaintiff submitted offer to president and attorney of company to purchase option to buy company's realty, but consent of shareholders not obtained as required by law) with Jewel Companies v. Pay Less Drug Stores Northwest, Inc., 741 F.2d 1555 (9th Cir. 1984) (holding, under California law, that target company's board has authority to enter into exclusive merger agreement to bind itself to forbear from negotiating or accepting competing offers until shareholders have opportunity to consider the first proposal). See also Hart & Brodwin, Merger Agreements in Takeover Contests, 17 Rev. Sec. Reg. 779 (1984) (courts split over enforceability of target company's agreement to recommend merger to shareholders when director's duty to recommend best available offer subsequently conflicts); Ward, The Legal Effect of Merger and Asset Sale Agreements Before Shareholder Approval, 18 W. Res. L. Rev. 780 (1967) (suggesting that uncertainty of legal effect of board of directors' merger sale agreements due to common law rule requiring shareholder approval be clarified by statutory amendment); Brodsky, When is a Merger Agreement Binding?, 195 N.Y.L.J., No. 26, at 1, col. 1 (Aug. 6, 1986).

[FN14]. Even in situations where a definitive agreement has been reached, the consummation of the transaction frequently will be conditioned on various matters, including obtaining shareholder approval in those situations where shareholder approval is either required by statute or is otherwise sought; obtaining any necessary antitrust clearance; obtaining other required regulatory approvals; obtaining the consent of other necessary parties such as major creditors; securing financing for the transaction; and the absence of an injunction issued to prohibit the transaction. See infra notes 129-37 and accompanying text. See supra notes 6 and 135 and accompanying text.

[FN15]. Professor Knapp notes the different views parties may have at this stage of the negotiating process. First, the parties may think that they are not bound unless and until a formal writing is signed. They may think that they can refuse to sign the writing for any reason. As Professor

Knapp indicates, this type of thinking may occur in situations where the contract has to be in writing, involves large sums of money, is very detailed and is not one for which there is a standard form. The second view that the parties may have is that the final document is a mere formality. This situation might arise where a simple transaction, not involving long-term obligations, is involved. The third view that the parties may have is that they have taken the transaction as far as they can and it is now left to the lawyers and accountants to formalize the agreement.
[T]he principals are likely to feel ethically bound to the outlines of the deal as they have hammered it out, the withdrawal of either one based simply on dissatisfaction with those outlines being regarded by both as admittedly unjustified. The principals, however, are likely to consider themselves still morally free to withdraw if and when it should appear that the 'second team' of bargainers have raised a substantial issue on which they are unable to agree and which the principals, when apprised of the difficulty, are likewise unable to resolve.
Knapp, supra note 10, at 684.

[FN16]. This contemplation of entering into a definitive agreement is often referred to as an 'agreement to agree.' See 1 A. Corbin, Corbin On Contracts § 30, at 98-99 (2d ed. 1963). See also infra note 38, which notes the distinction between the 'agreement to agree' and the 'formal contract contemplated' situations.

[FN17]. Even where the reference is to a handshake agreement, typically there is some writing between the parties. See Melo-Sonics Corp. v. Cropp, 342 F.2d 856, 860 (3d Cir. 1965); J. Freund, Anatomy of a Merger: Strategies and Techniques for Negotiating Corporate Acquisitions, 126 (1975).

[FN18]. Merely terming a document a letter of intent will not be conclusive as to how a court will construe the document. For example, if the document does not clearly and unequivocally indicate that no binding obligations are to arise until a definitive agreement has been reached, a court might look at the intent of the parties and find that the letter of intent constitutes a binding contract. J. Calamari & J. Perillo, supra note 5, § 2-7, at 30-33. As to the risks that are created when the parties enter into a letter of intent, see Volk, The Letter of Intent, 16 Inst. on Sec. Reg. 143, 145 (1985) (indicating that announcement of a letter of intent puts the company on the auction block and 'is a little bit like announcing what you think is an engagement to marry a lovely lady and have it be treated in the market place as if the lady were not engaged but available').

[FN19]. This agreement is the 'contract to bargain' that Professor Knapp discusses in his Article. See Knapp, supra note 10, at 685-86.

[FN20]. See, e.g., Belcher v. Import Cars, Ltd., 246 So. 2d 584 (Fla. Dist. Ct. App.), cert. denied, 252 So. 2d 801 (Fla. 1971) (reversing trial court and adopting appellant's argument that letter agreement, which was quite detailed, did not constitute a contract); Michigan Broadcasting Co. v. Shawd, 352 Mich. 453, 90 N.W.2d 451 (1958) (concluding that lower court was justified in finding no enforceable contract where the parties clearly intended to finalize their oral agreement in a formal written document).

[FN21]. See infra text accompanying notes 40-67.

[FN22]. Texaco, Inc. v. Pennzoil Co., No. 01-86-00216-CV (Tex. Ct. App. Feb. 12, 1987) (LEXIS, States library, Tex file). In discussing Texaco-Pennzoil and the earlier decisions by the Delaware Chancery Court involving motions for a temporary restraining order and then summary judgment, one commentator stated that the case presents 'an unusual situation, in terms of its notoriety. But, when you review the cases in this area, you will see that the Getty decision is par for the course. The cases are all 'over the board.'' Volk, The Letter of Intent, supra note 18, at 145. See also Volk & McMahon, Letter of Intent--Getty and Beyond, 16 Inst. on Sec. Reg. (Vol. 1) 445, at 445 (1984).

[FN23]. As later discussed in this Article, although it is relatively easy to articulate how courts have reached questionable conclusions and why their decisions in this area have been so inconsistent, it is more difficult to determine whether either party has negotiated in bad faith, and then to construct a proper remedy for that breach. Perhaps courts have refused to enforce 'agreements in principle' because of the difficulty in formulating an appropriate remedy for the breach that did occur. For a proposal as to how courts might formulate such a remedy, see infra text accompanying notes 179- 81.

[FN24]. The question of whether the parties to a contract intended to be bound is a factual one. As a result, decisions in this area appear inconsistent, and it is almost impossible to tell in advance how a court or jury would decide any particular case. Because the decisions are so heavily dependent on the facts, they may not be inconsistent, but may result from no two cases presenting identical facts. In many cases the question may properly be left to the jury. See 1 A. Corbin, supra note 16, § 30, at 105-09. See also Arnold Palmer Golf Co. v. Fuqua Indus., 541 F.2d 584 (6th Cir. 1976) (reversing summary judgment for the defendant and remanding case to trial court for determining whether parties intended to be bound even though preliminary letter agreement provided for preparation of a definitive agreement).
Because the results of these cases are seemingly unpredictable, planning becomes very difficult. Even well-advised parties may be unable to determine whether a contract had resulted from their actions. This uncertainty may cause the parties to be more reluctant to enter into negotiations out of fear that they may find themselves embroiled in a lawsuit if one party withdraws from the negotiations.

[FN25]. The Uniform Commercial Code provides, for example, that '[e]ven though one or more terms are left open a contract for sale does not fail for indefiniteness if the parties have intended to make a contract and there is a reasonably certain basis for giving an appropriate remedy.' U.C.C. § 2- 204(3) (1978). Although Article 2 may not apply to a merger transaction because it does not involve a contract for the sale of goods under §§ 2-105 and 2-106 of the U.C.C., the same general principle concerning the enforceability of a merger agreement may well be applied by a court in this context. See Gruen Indus. v. Biller, 608 F.2d 274, 278 n.2 (7th Cir. 1979) (in cause of action for alleged breach of contract to sell stock, court accepted plaintiff's argument that although Article 8 of the UCC (governing investment securities) contains no section on sales contract formation, plaintiff could analogize to § 2-204 of the U.C.C.). See also, Pennsylvania Co. v. Wilmington Trust Co., 39 Del. Ch. 453, 166 A.2d 726 (1960), aff'd in part, 40 Del. Ch. 1, 172 A.2d 63 (1961) (involving enforceability of letter of intent concerning stock acquisition in which court relied on Section 2-204(3) of the U.C.C.); Restatement (Second) of Contracts § 33 (1981) (providing that '[t]he terms of a contract are reasonably certain if they provide a basis for determining the existence of a breach and for giving an appropriate remedy').

[FN26]. Once a court determines that the parties intended to contract, its goal will be to find that the agreement is sufficiently definite and not allow it to fail for uncertainty, although the court may have to consider relevant extrinsic evidence and use gap-fillers. See, e.g., Mid-Continent Tel. Corp. v. Home Tel. Co., 319 F. Supp. 1176, 1192 (N.D. Miss. 1970).

[FN27]. Perhaps the most well-known articulation of the objective theory of contracts was pronounced by Judge Learned Hand in Hotchkiss v. National City Bank, 200 F. 287, 293 (S.D.N.Y. 1911), aff'd, 201 F. 664 (2d Cir. 1912), aff'd, 231 U.S. 50 (1913), where he stated:

A contract has, strictly speaking, nothing to do with the personal, or individual, intent of the parties. A contract is an obligation attached by the mere force of law to certain acts of the parties, usually words, which ordinarily accompany and represent a known intent. If, however, it were proved by twenty bishops that either party, when he used the words, intended something else than the usual meaning which the law imposes upon them, he would still be held, unless there were some mutual mistake, or something else of the sort.

[FN28]. See Mid-Continent Tel. Corp. v. Home Tel. Co., 319 F. Supp. 1176, 1189 (N.D. Miss. 1970); Michigan Broadcasting Co. v. Shawd, 352 Mich. 453, 90 N.W.2d 451 (1958); Restatement (Second) of Contracts § 27 comment c (1981); J. Calamari & J. Perillo, supra note 5, § 2-11, at 42; 1 A. Corbin, supra note 16, § 30 at 105-09; Volk & McMahon, supra note 22, at 465.

Four factors are relevant under New York law in determining whether the parties intended to be bound. They are:

(1) whether there has been an express reservation of the right not to be bound in the absence of a writing; (2) whether there has been partial performance of the contract; (3) whether all of the terms of the alleged contract have been agreed upon; and (4) whether the agreement at issue is the type of contract that is usually committed to writing.

Winston v. Mediafare Entertainment Corp., 777 F.2d 78, 80 (2d Cir. 1985) (citations omitted). See also, R.G. Group, Inc. v. Horn & Hardart Co., 751 F.2d 69, 75-76 (2d Cir. 1984).

[FN29]. Although § 2-201 of the Uniform Commercial Code does not apply, § 8-319 of the Code provides that

[a] contract for the sale of securities is not enforceable by way of action or defense unless there is some writing signed by the party against whom enforcement is sought or by his authorized agent or broker, sufficient to indicate that a contract has been made for sale of a stated quantity of described securities at a defined or stated price.

U.C.C. § 8-319(a) (1978). Official comment 1 to § 8-319 states that '[t]his Section is intended to conform the statute of frauds provisions with regard to securities to the policy of the like provisions in Article 2.' The comment notes, however, that § 8-319 does require that the contract specify quantity and price. Even if a sale of securities is not involved, § 1-206 provides that 'a contract for the sale of personal property is not enforceable . . . beyond five thousand dollars in amount or value of remedy unless there is some writing which indicates that a contract for sale has been made between the parties at a defined or stated price, reasonably identifies the subject matter, and is signed by the party against whom enforcement is sought.'
Documents can be pieced together to form the necessary writing. Thus, a court could hold that the statute of frauds is satisfied, even if the parties had not entered a definitive agreement, provided that they intended to contract and intended those documents to reflect their agreement. See Levin v. Knight, 780 F.2d 786 (9th Cir. 1986); R.G. Group, Inc. v. Horn & Hardart Co., 751 F.2d 69, 77 (2d Cir. 1984); Pennzoil Co. v. Getty Oil Co., No. 7425, slip op. at 33 (Del. Ch. Feb. 6, 1984). It should not be assumed, however, that the statute of frauds argument is without merit. An impressive number of courts have relied on the statute of frauds to refuse enforcement of preliminary agreements. See, e.g., Gruen Indus. v. Biller, 608 F.2d 274, 277-80 (7th Cir. 1979) (finding insufficient evidence of contract satisfying the statute of frauds where parties had not entered into formal letter of intent); California Natural, Inc. v. Nestle Holdings, Inc., 631 F. Supp. 465, 471 (D.N.J. 1986) (noting that under U.C.C. § 2-201 the writing must reasonably prove existence of contract); Continental Fin. Servs. v. First Nat'l Boston Corp., No. 82-1505-T, slip op. at 11 (D. Mass. Aug. 30, 1984) (finding no compliance with statute of frauds where, although no formal letter of intent existed, there was correspondence back and forth between parties concerning proposed transaction); Southeastern Waste Treatment, Inc. v. Chem-Nuclear Sys., 506 F. Supp. 944, 949 (N.D. Ga. 1980) (holding that letter of intent did not satisfy statute of frauds); Chromalloy Am. Corp. v. Universal Hous. Sys. of Am., 495 F. Supp. 544, 550-51 and n.8 (S.D.N.Y. 1980), aff'd, 697 F.2d 289 (2d Cir. 1982) (finding that even if parties intended to form oral joint venture, it would be barred by statute of frauds); Consolidated Petroleum Indus. v. Jacobs, 648 S.W.2d 363, 366-67 (Tex. App. 1983) (finding that alleged agreement did not satisfy U.C.C. § 8-319 and the exceptions thereto).

[FN30]. See supra note 24 and accompanying text.

[FN31]. See supra note 25.

[FN32]. See supra note 27 and accompanying text.

[FN33]. See infra text accompanying notes 74-161.

[FN34]. See infra notes 40-64 and accompanying text.

[FN35]. See Restatement (Second) of Contracts § 204 (1981) ('When the parties to a bargain sufficiently defined to be a contract have not agreed with respect to a term which is essential to a determination of their rights and duties, a term which is reasonable in the circumstances is supplied by the court.'); U.C.C. § 2-204(3) (1978) (providing that '[e]ven though one or more terms are left open a contract for sale does not fail for indefiniteness if the parties have intended to make a contract and there is a reasonably certain basis for giving an appropriate remedy'); U.C.C. § 2- 309(1) (1978) (providing that unless otherwise agreed, the time for performance 'shall be a reasonable time').

[FN36]. See Burton, Breach of Contract and the Common Law Duty to Perform in Good Faith, 94 Harv. L. Rev. 369, 387 (1980) [hereinafter Burton I] ('many of the contracts in which good faith performance is of central importance once would have been unenforceable for indefiniteness or lack of mutuality'). See Restatement (Second) of Contracts § 205 (1981) ('Every contract imposes upon each party a duty of good faith and fair dealing in its performance and enforcement.'). There is no counterpart to the good faith provision in the original Restatement, and it has been suggested that the lack of such a provision resulted from the lack of an affirmative good faith duty at common law. Holmes, A Contextual Study of Commercial Good Faith: Good Faith Disclosure in Contract Formation, 39 U. Pitt L. Rev. 381, 382 at n.3 (1978).
Professor Summers has noted that 'the requirement of good faith often functions as a kind of 'safety valve' which may be turned to fill gaps and qualify or limit rights and duties arising under contracts or rules of law.' Summers, 'Good Faith' in General Contract Law and the Sales Provisions of the Uniform Commercial Code, 54 Va. L. Rev. 195, 215-16 (1968) [hereinafter Summers I]. By using gap fillers and reading into the contract a good faith duty on each of the parties, a party would not have to fear that his counterpart could withdraw from the contract with impunity simply because the parties had neglected to include all terms. See D. Dobbs, Remedies § 12.3, at 798-817 (1973). Arguably commerce is promoted because courts would be encouraging people to live up to their promises and trust others. See, e.g., Farber & Matheson, Beyond Promissory Estoppel: Contract Law and the 'Invisible Handshake', 52 U. Chi. L. Rev. 903, 928 (1985)
Because trust is essential to our basic economic institutions, it is a public good. One individual breaking trust in a dramatic way, or many individuals breaking trust less dramatically, can lead to short-run benefits for those individuals but create negative externalities. The willingness of others to trust is impaired, requiring them to invest in precautions or insure themselves against the increased risk of betrayal.
Id.

[FN37]. The majority of litigated cases where the seller has withdrawn have occurred from receipt of a better offer, as opposed to just because they decided to take the property off the market. See, e.g., Melo-Sonics Corp. v. Cropp, 342 F.2d 1373 (5th Cir. 1971); Texaco, Inc. v. Pennzoil Co., No. 01- 86-00216-CV (Tex. Ct. App. Feb. 12, 1987) (LEXIS, States library, Tex file); American Cyanamide Co. v. Elizabeth Arden Sales Corp., 331 F. Supp. 597 (S.D.N.Y. 1971). For some recent situations where the buyer has withdrawn, see California Natural, Inc. v. Nestle Holdings, Inc., 632 F. Supp. 465 (D.N.J. 1986); I.M.A. Inc. v. Rocky Mountain Airways, 713 P.2d 882 (Colo. 1986).

[FN38]. See J. Freund, supra note 17, at 61-62. There are really two separate types of agreements to agree. The first type involves a situation where the agreement may not be an enforceable contract because it is too indefinite. If the agreement is deficient as to particular terms, a court may be able to enforce the agreement through its gap-filling powers. The second type of 'agreement to agree' is a 'formal contract contemplated' situation. The agreement may be complete enough to enforce, either because it contains sufficiently definite terms or because a court could supply the requisite terms to overcome the indefiniteness hurdle, but nevertheless the parties still contemplate entering into a formal contract. Here, the court's primary concern is not indefiniteness of the contract, but whether the parties intended to have a court enforce their preliminary agreement as a contract. See Knapp, supra note 10, at 677. Many of the cases this Article examines fall into the latter category.

[FN39]. The issue may become whether we should view the buyer's and seller's obligation as a legally binding promise or as a non-binding moral obligation. One author states that
it is simply right that one get what he was promised. This is not the place to figure out why we enforce promises, but surely there is a reason beyond efficient allocation of resources. The origins of enforcement may be religious, or religion may have been used to achieve utility, but I think that today most people believe that one should stand by one's word.
Linzer, On the Amorality of Contract Remedies--Efficiency, Equity, and the Second Restatement, 81 Colum. L. Rev. 111, 138 (1981).
The distinction between a moral obligation and a legal obligation has recently been described as follows:
The areas of moral obligations and legal obligations are not coextensive. A moral obligation is something we ought to do or refrain from doing. A moral obligation that is not also a valid legal obligation can only be legitimately secured by voluntary means. That is, one may have a moral obligation to do something, but unless there is also a valid legal obligation, one cannot legitimately be forced by another to do it. A moral obligation is only a legal obligation if it can be enforced by the use or threat of legal force. This added dimension of force requires moral justification. The principle task of legal theory, then, is to identify circumstances when legal enforcement is morally justified.
Barnett, A Consent Theory of Contracts, 86 Colum. L. Rev. 269, 296 (1986).
Justice Oliver Wendell Holmes noted this dilemma many years ago stating: 'Nowhere is the confusion between legal and moral ideas more manifest than in the law of contract.' Holmes, The Path of the Law, 10 Harv. L. Rev. 457, 462 (1897).

[FN40]. One claim frequently asserted by plaintiffs in 'agreements in principle' cases where a third party bidder has outbid the original bidder is that the third party has tortiously interfered with the original bidder's contractual relations. In fact, the jury verdict in Texaco-Pennzoil was based on a tortious interference with contract claim. Texaco, Inc. v. Pennzoil Co., No. 01-86-00216-CV (Tex. Ct. App. Feb. 12, 1987) (LEXIS, States library, Tex file); see also Gruen Indus., Inc. v. Biller, 608 F.2d 274 (7th Cir. 1979); American Cyanamid Co. v. Elizabeth Arden Sales Corp., 331 F. Supp. 597 (S.D.N.Y. 1971); Mid-Continent Tel. Corp. v. Home Tel. Co., 319 F. Supp. 1176 (N.D. Miss. 1970); Consolidated Petroleum Indus. v. Jacobs, 648 S.W.2d 363 (Tex. Civ. App. 1983). In order for an action based on such a tort to succeed, the parties first must have a contract. Even in the absence of a contract, however, the plaintiff may assert a claim based on the related tort of interference with a prospective economic advantage. In order to find a party liable for the tort of interference with a prospective economic advantage, a court must find '(1) intentional interference by the defendant, (2) with an economic expectancy of the plaintiff, (3) of which the defendant knew or should have known, (4) resulting in the expectancy being lost, (5) and the plaintiff being damaged.' Loewenstein, Tender Offer Litigation and State Law, 63 N.C.L. Rev. 493, 499 (1985). Generally, until a contract has been formed there is more room for permissible interference by an interested third party. See Belden Corp. v. InterNorth, Inc., 90 Ill. App. 3d 547, 552, 413 N.E.2d 98, 101 (1980); W. Keeton, Prosser and Keeton on Torts § 129, at 994-97 (5th Ed. 1984). But see, Dowling, A Contract Theory for a Complex Tort: Limiting Interference with Contract Beyond the Unlawful Means Test, 40 U. Miami L. Rev. 487, 510-12 (1986) (arguing that interference with business relations deserves stronger protection than interference with contractual relations).

A court that finds that the parties had entered into a contract to negotiate in good faith, rather than an agreement to consummate the transaction, should examine whether a third party has interfered with the parties' relationship under the applicable tests for tortious interference with prospective economic advantage. By doing so, courts will not be discouraging third parties from bidding for an entity merely because an 'agreement in principle' has been reached. This will enhance competition and may result in a higher bid being received for the target entity. As later shown, the original bidder will be compensated for losing the opportunity to purchase the target with damages based on the harm it suffered by being out of the market in reliance on the target's implied promise to negotiate in good faith. See infra text accompanying notes 96-98. That remedy should normally be sufficient to compensate the original bidder so that no further remedy is either necessary or appropriate.

[FN41]. Letters of intent, which normally contemplate the execution of a more formal definitive agreement, may themselves contain a great deal of detail. See, e.g., Arnold Palmer Golf Co. v. Fuqua Indus., 541 F.2d 584, 590-93 (6th Cir. 1976), where the court attached the memorandum of intent to its opinion (letter of intent stated amount of stock to be purchased, the price (including cash and stock), the conduct of the business, license rights, stock options, warranties, etc.); see also Garner v. Boyd, 330 F. Supp. 22, 25-26 (N.D. Tex. 1970) (letter of intent contained all essential elements of a contract), aff'd, 447 F.2d 1373 (5th Cir. 1971); Belcher v. Import Cars, Ltd., 246 So. 2d 584, 586 (Fla. Dist. Ct. App.), cert. denied, 252 So. 2d 801 (1977) (although letter of intent contained detailed formula to acquire all outstanding stock of company, court held parties did not have contract because language was in future tense and condition precedent of purchaser obtaining loan not met).

Courts that have enforced 'agreements in principle' as binding contracts to consummate the transaction have generally done so where the preliminary agreements contained the essential terms. These cases can be categorized as 'formal contract contemplated' cases. See supra note 38.

[FN42]. 342 F.2d 856 (3d Cir. 1965).

[FN43]. Id. at 858.

[FN44]. Id.

[FN45]. Id.

[FN46]. Id. at 859-60.

[FN47]. See Arnold Palmer Golf Co. v. Fuqua Indus., 541 F.2d 584, 589 (6th Cir. 1976) (remanding case to lower court for determination of parties' intent when they entered into preliminary letter of intent; court noted that parties may orally or by informal memorandum agree on all essential terms of contract and bind themselves if that is their intention, even though they contemplate subsequently executing formal document to memorialize their undertaking); Garner v. Boyd, 330 F. Supp. 22, 25-26 (N.D. Tex. 1970) (holding that since the minds of the parties had met on all essential terms of contract, letter of intent actually constituted a contract), aff'd, 447 F.2d 1373 (5th Cir. 1971); I.M.A., Inc. v. Rocky Mountain Airways, Inc., 713 P.2d 882, 885-87 (Colo. 1986) (en banc) (affirming jury's verdict enforcing contract and awarding damages to non-breaching seller where operative writing provided that it was "preliminary in nature, and . . . each party will work toward more definitive statements and the execution of agreements and resolutions and contracts"); Borg-Warner Corp. v. Anchor Coupling Co., 16 Ill. 2d 234, 243- 44, 156 N.E. 2d 513, 517 (1958) (holding that if parties intended a general acceptance by plaintiff to complete the contract, the contract could be enforceable even if parties agree to contract concerning additional matters). But see Citizens Utils. Co. v. Wheeler, 156 Cal. App. 2d 423, 319 P.2d 763, 765 (1958) (affirming trial court's finding that no contract existed where price terms in memorandum of agreement were so vague as to be wholly unascertainable); Michigan Broadcasting Co. v. Shawd, 352 Mich. 453, 462, 90 N.W.2d 451, 456 (1958) (finding no enforceable contract where negotiations were complex, and a written agreement was proposed, referred to and suggested by the parties).
The comments to the Restatement (Second) provide that the parties may make a contract which includes an obligation that they will subsequently execute a final writing containing certain provisions. Those comments state that if the 'parties have definitely agreed that they will do so, and that the final writing shall contain these provisions and no others, they have then concluded the contract.' Restatement (Second) of Contracts § 27 comment a, at 78 (1981).

[FN48]. 331 F. Supp. 597 (S.D.N.Y. 1971). Arden was attempting to withdraw after receiving a higher bid. See id. at 601.

[FN49]. The preliminary letter agreement stated:
The consummation of such acquisition is conditioned upon the execution of a mutually satisfactory purchase agreement and, on the part of Cyanamid, the approval of its board of directors. It is understood that, if either Cyanamid or Elizabeth Arden is unable to reach such agreement or to obtain such approval, neither party shall have any obligation to the other.
Id. at 602 n.3.

[FN50]. Id. at 603-04. The court was troubled, however, that the letter of intent provided that consummation of the transaction was contingent on the approval of Cyanamid's directors. As a result, it denied Cyanamid's motion for summary judgment, finding that an issue existed as to whether the letter agreement constituted an option irrevocable of a reasonable time, the acceptance of which would occur when Cyanamid's board approved the transaction. Id. at 605-06. In connection with whether a letter of intent that might otherwise be enforceable is binding pending board of director approval, see Pennsylvania Co. v. Wilmington Trust Co., 40 Del. Ch. 567, 572, 186 A.2d 751, 754 (1962) (court noted that 'even if the April 15 agreements were intended to be binding before the execution of this implementing agreement, it is nevertheless tacitly conceded that such agreements were not binding between the parties thereto prior to approval by the respective boards of the purchasing railroads . . .'), aff'd, 41 Del. Ch. 548, 200 A.2d 441 (1964). For a discussion of the problems that can arise in connection with an officer signing a letter of intent without board approval, see A/S Apothekernes Laboratorium for Special-praeparater v. I.M.C. Chem. Group, Inc., No. 78-C-2872, slip op. (N.D. Ill. Aug. 26, 1982), appeal dismissed, 725 F.2d 1140 (7th Cir. 1984), on remand, No. 78-C-2872, slip op. (N.D. Ill. July 17, 1985). See also Note, Board of Directors Approval Clauses in Corporate Contracts: The Duty of Good Faith, J. Corp. L. 931 (Summer 1984).

[FN51]. 404 F.2d 495 (2d Cir. 1968), cert. denied, 394 U.S. 921 (1969).

[FN52]. Id. at 498.

[FN53]. The V'Soske court noted that the parties' intention to memorialize their agreement in a formal document does not prevent their informal agreement from taking effect prior to entering the formal agreement. See id. at 499.

[FN54]. 319 F. Supp. 1176 (N.D. Miss. 1970).

[FN55]. Id. at 1183.

[FN56]. Id. at n.3. In fact, the reference to retention of certain management personnel related to an employment agreement being reached between Mid-Continent and Rex Darley, who was the son of Lon Darley, Home Telephone's principal shareholder. Id. at 1184.

[FN57]. The court stated:
[T]he law favors a determination that an agreement is sufficiently definite and will not allow a contract to fail for uncertainty 'if it contains matter which will enable the court under proper rules of construction to ascertain its terms, including consideration of the general circumstances of the parties and if necessary relevant extrinsic evidence.' Once the court has found that a contract was made, the agreement should not be frustrated where it is possible to reach a fair and just result, 'even though this requires a choice among conflicting meanings and the filling of some gaps that the parties have left.'
In the final analysis, a contract becomes enforceable against the objection of apparent uncertainty

and indefiniteness when a court is able to determine as a fact that the agreement is complete by resorting to objective external standards, or commercial practice, or other usage or custom fairly shown to be within the contemplation of the parties.'
319 F. Supp. at 1192 (citations omitted) (quoting Corbin, Corbin on Contracts § 95, at 400).

[FN58]. Id.

[FN59]. Although the court did not rely on a separate duty to negotiate in good faith in enforcing the letter agreement, the Home Telephone decision easily could be explained on such a basis. See infra note 153.

[FN60]. Texaco, Inc. v. Pennzoil Co., No. 01-86-00216-CV (Tex. Ct. App. Feb. 12, 1987) (LEXIS, States library, Tex file).

[FN61]. The judgment entered in favor of Pennzoil on December 10, 1985, in the state trial court totalled $11.12 billion, including prejudgment interest. The jury's $10.53 billion judgment included an award of $7.53 billion in compensatory damages and $3 billion in punitive damages. Brief for Appellant at 10, Texaco Inc. v. Pennzoil Co. (Tex. Ct. App. 1986) (No. 01-86-00216-CV). The Texas Court of Appeals affirmed the $7.53 billion compensatory award and reduced the amount of punitive damages to $1 billion. Texaco Inc. v. Pennzoil Co., No. 01-86-00216-CV (Tex. Ct. App. Feb. 12, 1987) (LEXIS, States library, Tex file).

[FN62]. Pennzoil had prepared a five-page single-spaced Memorandum of Agreement which was signed by Gordon Getty, as sole trustee of the Sarah C. Getty Trust, Harold Williams, as President of the J. Paul Getty Museum and by Hugh Liedtke, Pennzoil's Chairman. That Memorandum of Agreement spelled out in considerable detail the terms of the transaction and provided for approval by the Getty Oil board. After lengthy meetings and negotiations, the Getty board rejected the terms of the transaction as spelled out in that memorandum. Ultimately, Pennzoil and the Getty Oil board agreed on a proposal that contained some revised, and from Getty's standpoint, improved terms. Although the Getty board clearly voted to reject the terms of the initial Memorandum of Agreement, at the trial there was conflicting testimony as to whether the Getty board ever voted on approving the Memorandum of Agreement with revised terms. Brief for Appellant at 12, Texaco, Inc. v. Pennzoil Co. (Tex. Ct. App. 1986) (No. 01-86-00216-CV).

[FN63]. After entering into the 'agreement in principle,' Getty Oil, Gordon Getty, and the Museum issued a press release on January 4, 1984, indicating that an 'agreement in principle' had been reached but that consummation of the transaction was subject to execution of a definitive agreement.
Under the 'agreement in principle,' Gordon Getty and Pennzoil were to take Getty Oil 'private' by buying out the Museum's interest and buying out the public shareholders with the result that Pennzoil and the Sarah C. Getty Trust would jointly own Getty Oil. Pennzoil was to own three-sevenths of the firm and the Trust was to own the remaining four-sevenths with Gordon Getty being named chairman of the new entity. Texaco, Inc. v. Pennzoil Co., No. 01-86-00216- CV

(Tex. Ct. App. Feb. 12, 1987) (LEXIS, States library, Tex file).

[FN64]. See supra notes 34-37 and accompanying text.

[FN65]. See supra note 5 and accompanying text.

[FN66]. See Reprosystem, B.V. v. SCM Corp., 727 F.2d 257, 261 (2d Cir.), cert. denied, 469 U.S. 828 (1984); Arnold Palmer Golf Co. v. Fuqua Indus. Inc., 541 F.2d 584, 587 (6th Cir. 1976); United Acquisition Corp. v. Banque Paribas, 631 F. Supp. 797, 808 (S.D.N.Y. 1985); Pepsico, Inc. v. W. R. Grace & Co., 307 F. Supp. 713, 719 (S.D.N.Y. 1969); Interway, Inc. v. Alagna, 85 Ill. App. 3d 1094, 1099-100, 407 N.E. 2d 615, 619-20 (1980); Michigan Broadcasting Co. v. Shawd, 352 Mich. 453, 462, 90 N.W.2d 451, 456 (1958).

[FN67]. See supra notes 21 & 72-73 and accompanying text.

[FN68]. Some courts have specifically noted that the parties involved are sophisticated business people and, thus, the situations presented do not involve cases where one party with superior knowledge or expertise is able to take advantage of the other party. See, e.g., Gruen Indus., Inc. v. Biller, 608 F.2d 274, 281 (7th Cir. 1979); Silberman v. Roethe, 64 Wis. 2d 131, 146, 218 N.W.2d 723, 730-31 (1974).

[FN69]. See Volk, supra note 18, at 144 (when parties involved in complex transaction and specify their intent to subsequently enter into a formal binding contract, 'there should be an inference that the parties have no intent to be bound in the absence of such an executed final document.') See also, Volk & McMahon, supra note 22, at 471.

[FN70]. The impact of the Texaco-Pennzoil verdict as well as the uncertainty surrounding the effect of an 'agreement in principle' has had a noticeable impact on the negotiations of corporate acquisitions. See Sterngold, Pennzoil Case Chills Advisers: Firms Fear More Suits, N.Y. Times, Dec. 16, 1985, § D, at 4, col. 4; Waldman, Texaco-Pennzoil Case Makes Firms More Careful About Merger Moves, Wall St. J., Apr. 15, 1986 at 1, col. 1. See also Andresky, The Tripple Ripple Ice Cream Case, 138 Forbes 82 (Aug. 25, 1986) ('handshake agreement' enforceable as contract, similar to enforcement of Getty-Pennzoil oral agreement). In the recent transaction where Texas Air agreed to take control of Eastern Airlines, Eastern's investment banker commented on the concern of both parties that the contract be drafted sufficiently tight so that neither party could walk away from the deal. See New Orleans Times-Picayune/States-Item, Feb. 27, 1986, § B, at 2, col. 1; Texas Air Corp.'s Pact to buy Eastern Draws Rumors of Rival Bids for Airline, Wall St. J., Feb. 26, 1986, at 4, col. 1.

[FN71]. But see discussion, supra at note 13, for situations where courts have refused to enforce definitive agreements.

[FN72]. Melo-Sonics Corp. v. Cropp, 342 F.2d 856 (3d Cir. 1965).

[FN73]. Id. at 857-58. For another example of egregious conduct, see United Acquisition Corp. v. Banque Paribas, 631 F. Supp. 797 (S.D.N.Y. 1985). The plaintiff verbally agreed to purchase stock of a company which the defendant bank had acquired after the company defaulted on certain loans. Id. at 803. While the plaintiff was sitting in the defendant's waiting room with a check to tender payment to purchase the stock, the defendant was negotiating with the creditors' committee, which was trying to purchase the stock despite awareness of plaintiff's offer. The defendant bank accepted the creditors' committee's higher offer, claiming that plaintiff had failed to transfer the funds to close the deal. Id. at 803-04. In reality, it appears that the plaintiff's offer served as leverage to squeeze a higher price and perhaps quicker action out of the creditors' committee.

[FN74]. Texaco Inc. v. Pennzoil Co., No. 01-86-00216-CV (Tex. Ct. App. Feb. 12, 1987) (LEXIS, States library, Tex file).

[FN75]. Id. As previously noted, supra at note 40, the Texaco-Pennzoil jury verdict was based on a tortious interference with contract claim. The initial causes of action were brought in Delaware against Getty Oil Co., Gordon P. Getty as Trustee of the Sarah C. Getty Trust, the J. Paul Getty Museum and Texaco. Those causes of action included claims based on breach of contract and tortious interference with contract. Pennzoil Co. v. Getty Oil Co., No. 7425, slip op. (Del. Ch. Apr. 12, 1984). Pennzoil subsequently dropped its tortious interference claim against Texaco in Delaware and refiled it in Texas. For a general discussion of the Texaco-Pennzoil case, see Baron & Baron, The Pennzoil-Texaco Dispute: An Independent Analysis, 38 Baylor L. Rev. 253 (1986); Comment, Texaco Inc. v. Pennzoil Co.: Some Thoughts on the Limits of Federal Court Power over State Court Proceedings, 54 Fordham L. Rev. 767 (1986).

[FN76]. As noted supra at note 6, courts are in disagreement over the extent to which directors can bind the target corporation to an exclusive merger agreement. If a court holds that the directors could not bind the corporation in the face of a higher offer, then, if the 'agreement in principle' were intrepreted as a contract to consummate, the corporation could likely withdraw from the contract with impunity. The question that follows is whether, if the 'agreement in principle' is viewed as a contract to negotiate rather than as a contract to consummate, a court should enforce that obligation against the corporation, even if it would not have enforced the contract as a contract to consummate the transaction. Entering into a contract to negotiate should be within the realm of the directors' responsibility in managing the corporation, and the directors' actions should be judged based on whether they have complied with their fiduciary duties. See supra note 7. Other commentators take a more restrictive view of the actions that directors can take in limiting the shareholders' role in the merger and acquisition process. See, e.g., Buxbaum, The Internal Division of Powers in Corporate Governance, 73 Calif. L. Rev. 1671, 1706 (1985), where Professor Buxbaum contends that 'lock up,' 'crown jewel,' and 'hostage' provisions, as well as other types of liquidated damages provisions that make it substantially more expensive for the target corporation to withdraw from the transaction, are attempting 'to prevent the shareholders from exercising their statutory right of rejection by making the costs so high that acceptance cannot fairly be characterized as a choice; rather, it is a forgone result dictated by the board's 'managerial' activity of granting these options or penalties.' Id. If the 'agreement in principle' were viewed as increasing the costs to shareholders so significantly as to deny shareholders the effective right to decide the merger issue, Professor Buxbaum would presumably argue that it should not be enforced. See id.

[FN77]. See, e.g., California Natural, Inc. v. Nestle Holdings, Inc., 631 F. Supp. 465, 472-73 (D.N.J. 1986); Continental Fin. Servs. v. First Nat'l Boston Corp., No. CA 82-1505-T, slip op. at 11 (D. Mass. Aug. 30, 1984); A/S Apothekernes Laboratorium For Special-praeparater v. I.M.C. Chemical Group, Inc., No. 78 C 2872, slip op. (N.D. Ill. Aug. 26, 1982), appeal dismissed, 725 F.2d 1140 (7th Cir. 1984), on remand, No. 78-C-2872, slip op. (N.D. Ill. July 17, 1985); Chromalloy American Corp. v. Universal Housing Sys. of Am., Inc., 495 F. Supp. 544, 551 (S.D.N.Y. 1980), aff'd mem., 697 F.2d 289 (2d Cir. 1982); Coley v. Lang, 339 So. 2d 70, 75 (Ala. Ct. App. 1976); Consolidated Petroleum Indus. v. Jacobs, 648 S.W.2d 363, 367 (Tex. Ct. App. 1983).
For general discussions of promissory estoppel, see Farber & Matheson, supra note 36; Feinman, Promissory Estoppel and Judicial Method, 97 Harv. L. Rev. 678 (1984); Henderson, Promissory Estoppel and Traditional Contract Doctrine, 78 Yale L.J. 343 (1969); Note, Once More into the Breach: Promissory Estoppel and Traditional Damage Doctrine, 37 U. Chi. L. Rev. 559 (1970) [hereinafter Once More into the Breach].
In addition to raising a promissory estoppel argument, plaintiffs often make an argument based on equitable estoppel. In contrast to promissory estoppel that relates to reliance on a promise regardless of whether the breaching party has made a misrepresetation, equitable estoppel generally relates to misrepresentation of a statement of fact by a breaching party. See A/S Apothekernes Laboratorium for Specialpraeparater v. I.M.C. Chemical Group, Inc., 725 F.2d 1140, 1142 (7th Cir. 1984); Continental Fin. Servs. v. First Nat'l Boston Corp., No. 82-1505-T, slip op. (D. Mass. Aug. 30, 1984); Klinke v. Famous Recipe Fried Chicken, Inc., 94 Wash. 2d 255, 258-59, 616 P.2d 644, 646 (1980); E. Farnsworth, supra note 5, § 6.12, at 435-41 (1982); W. Keeton, supra note 40, § 105, at 733.

[FN78]. Restatement (Second) of Contracts § 90(1) (1981). In a departure from § 90 of the First Restatement, the Restatement (Second) provides that 'the remedy granted for breach may be limited as justice requires.' Id.

[FN79]. See, e.g., Chromalloy Am. Corp. v. Universal Housing Sys. of Am., Inc., 495 F. Supp. 544 (S.D.N.Y. 1980), aff'd mem., 697 F.2d 289 (2d Cir. 1982); Consolidated Petroleum Indus. v. Jacobs, 648 S.W.2d 363 (Tex. Ct. App. 1983); Restatement (Second) of Contracts § 139 (1981) ('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 the action or forbearance is enforceable notwithstanding the Statute of Frauds if injustice can be avoided only by enforcement of the promise.'); see also California Natural, Inc. v. Nestle Holdings, Inc., 631 F. Supp. 465 (D.N.J. 1986); McIntosh v. Murphy, 52 Haw. 29, 469 P.2d 177 (1970); Henderson, supra note 77, at 380-83 ('As a practical matter, the priority of the writing requirement seems to result in more restricted application of Section 90 than would normally be the case in other settings.'); Knapp, Reliance in the Revised Restatement: The Proliferation of Promissory Estoppel, 81 Colum. L. Rev. 52, 53 (1981).

[FN80]. E.g., Reprosystem, B.V. v. SCM Corp., 727 F.2d 257, 265 (2d Cir.), cert. denied, 469 U.S. 828 (1984).

[FN81]. See, e.g., Continental Fin. Servs. v. First Nat'l Boston Corp., No. 82-1505-T, slip op. at 16 (D. Mass. Aug. 30, 1984) (rejecting plaintiff's promissory estoppel argument, noting that '[r]eliance on a statement of future intent made prior to the conclusion of negotiations in a complex business transaction is unreasonable as a matter of law' and that 'businessmen would be inhibited in their dealings if expressions of intent and the exchange of drafts were taken as legally binding agreements'); see also Chromalloy Am. Corp. v. Universal Housing Sys. of Am., 495 F. Supp. 544, 551 (S.D.N.Y. 1980) ('In light of all the written disclaimers of contractual liability which were made, any reliance on the existence of a joint venture agreement was unreasonable.'), aff'd. mem., 697 F.2d 289 (2d Cir. 1982); Coley v. Lang, 339 So. 2d 70, 75 (Ala. Ct. App. 1976) (finding no action or forebearance of a 'definite and substantial character') (quoting Restatement (First) of Contracts § 90 (1932)).

[FN82]. But see, e.g., California Natural, Inc. v. Nestle Holdings, Inc., 631 F. Supp. 465 (D.N.J. 1986) (refusing to grant defendant's motion for summary judgment noting that factual issues remained as to plaintiff's reliance and the reasonableness thereof). For corporate acquisition cases where courts have refused to find that the elements of promissory estoppel justified taking the contract out of the statute of frauds, see Chromalloy Am. Corp. v. Universal Housing Sys. of Am., 495 F. Supp. 544 (S.D.N.Y. 1980), aff'd mem., 697 F.2d 289 (2d Cir. 1982); Consolidated Petroleum Indus. v. Jacobs, 648 S.W.2d 363 (Tex. Ct. App. 1983).

[FN83]. 26 Wis. 2d 683, 133 N.W.2d 267 (1965).

[FN84]. See, e.g., Henderson, supra note 77, at 358-59; Note, Contracts: Reliance Losses: Promissory Estoppel as a Basis of Recovery for Breach of Agreement to Agree: Hoffman v. Red Owl Stores, Inc., 51 Cornell L.Q. 351, 353-56 (1966). But see Fried, Contract as Promise 24 (1981) (noting that the award of reliance damages in Hoffman did not involve enforcement of a promise but rather resulted from the false assurances that Red Owl had made to Hoffman).

[FN85]. Despite the decision in the Hoffman case, promises made in preliminary negotiations are generally not enforceable under § 90 of the Restatement (Second) of Contracts. See Goetz & Scott, Enforcing Promises: An Examination of the Basis of Contract, 89 Yale L.J. 1261, 1314 (1980).

[FN86]. It has been noted that courts will carefully look at the reasonableness of the reliance in using promissory estoppel as a mechanism to create a duty to negotiate in good faith. See Henderson, supra note 77, at 361.

[FN87]. Hoffman v. Red Owl Stores, Inc., 26 Wis. 2d 683, 685, 133 N.W.2d 267, 270 (1965).

[FN88]. Id.

[FN89]. One of the issues that the court considered involved whether the promise required to sustain a cause of action for promissory estoppel must contain the essential details of a proposed transaction so that it can be deemed to be the equivalent of an offer that, upon acceptance, will constitute a binding contract. In answering that question in the negative, the court noted that it would be a mistake to regard an action based on promissory estoppel as the equivalent of a breach of contract action. Id. at 698, 133 N.W.2d at 275.

[FN90]. See Note, A Call for a Common Law Culpa in Contrahendo Counterpart, 15 U.S.F. L. Rev. 587 (1981), which notes that if promissory estoppel is merely a substitute for consideration, then the contract should be treated as sacredly as any contract. If, on the other hand, promissory estoppel is being used to remedy a different type of wrong such as a breach of a duty to negotiate in good faith, as was arguably the case in Hoffman v. Red Owl Stores, 26 Wis. 2d 683, 133 N.W.2d 267 (1965), then the need arises to create a more flexible remedy. The author concludes that because of the confusion over damages and agreements to agree, promissory estoppel is not the best mechanism to use to create a duty to negotiate in good faith. Rather, the author would prefer adopting an 'implied in fact' contract approach. A Call for Common Law Culpa in Contrahendo Counterpart, supra, at 604-15.

[FN91]. As discussed in Part II, C of this Article, there will, as a practical matter, always be forbearance when a contract to negotiate is found if that contract is premised on the notion that each party, by entering into the 'agreement in principle,' has forgone certain opportunities. An additional problem with promissory estoppel is that if reliance is required, it becomes difficult to determine on which promise the party relied. For example, is the promise one relating to consummation of the transaction or is it merely one to negotiate in good faith? In the corporate acquisition area, courts have refused to rely on promissory estoppel. They seem to require that a plaintiff cannot use promissory estoppel without proof of reliance on a promise to consummate the transaction, implying that reliance on a promise to negotiate is insufficient. See, e.g., Reprosystem, B.V. v. SCM Corp., 727 F.2d 257, 265 (2d Cir.), cert. denied, 469 U.S. 828 (1984); Chromalloy Amer. Corp. v. Universal Housing Sys. of Am., 495 F. Supp. 544, 551 (S.D.N.Y. 1980), aff'd mem., 697 F.2d 289 (2d Cir. 1982).

[FN92]. See Restatement (Second) of Contracts § 90 and Reporter's Notes (1981). The Hoffman case is now included as an example in section 90 illustrating how the Restatement provision can be applied. Nevertheless, courts in the corporate acquisition area have generally continued to require that the detriment to the promisee be of a definite and substantial nature. See, e.g., California Natural, Inc. v. Nestle Holdings, Inc., 631 F. Supp. 465, 472 (D.N.J. 1986).

[FN93]. Section 90 of the Restatement (Second) of Contracts explicitly provides that the remedy granted for breach may be limited as justice requires. Restatement (Second) of Contracts § 90 (1981). That flexibility could lead courts to vary the remedy for breach of the good faith duty. Assuming the parties relied, a court could limit the non-breaching party to his out-of-pocket costs incurred in entering into the 'agreement in principle.' This would not adequately compensate that party for the opportunities that he has lost while being out of the market. A court could also award the non-breaching party his expectation interest, which could include lost profits. This remedy overcompensates the non-breaching party because, in effect, it compensates that party as if a contract to consummate the transaction had been entered into. By recognizing a separate contract to negotiate, courts will be able to recognize a breach and tailor the remedy to compensate for that breach. See infra text accompanying notes 179-91. Some commentators argue that expectation damages should be awarded when a promise is enforced on the basis of promissory estoppel. See, e.g., Once More into the Breach, supra note 77, at 563-64 (discussing the difficulties involved in determining an appropriate remedy). The comments to Section 90 of the Restatement (Second) provide that a promise binding under that section is a contract and that full enforcement by normal remedies is often appropriate. Restatement (Second) of Contracts § 90 comment d (1981).

In discussing the concept of a duty to negotiate in good faith, Professor Summers notes that, because no contract has been formed at the negotiation stage, no recovery in contract lies. In order to compensate a party harmed by one who has negotiated in bad faith, he proposes a tort action. The problem with such a tort action is that it too does not tailor the remedy to the breach. See Summers I, supra note 36, at 257-58. As will be discussed, infra at text accompanying notes 165-91, by creating a contractual duty to negotiate, damages will be awarded based on the loss resulting from the breach. The non-breaching party will be made whole through such an award while the breaching party will be able to reasonably determine what damages it will be required to pay. That breaching party will have the necessary information to decide whether it is in its economic best interest to breach or continue to negotiate. See R. Posner, Economic Analysis of the Law 88-89 (2d ed. 1977); Once More into the Breach, supra note 77, at 578-79; Goetz & Scott, Liquidated Damages, Penalties and the Just Compensation Principle: Some Notes on an Enforcement Model and a Theory of Efficient Breach, 77 Colum. L. Rev. 554, 558 (1977).

[FN94]. See Farber & Matheson, supra note 36, at 909.

[FN95]. The recent jury verdict in Texaco-Pennzoil may present the most dramatic example of what a breaching party has to fear by accepting a higher offer. The jury verdict in that case calculated damages based on Pennzoil's expectancy interest with the result that Texaco, an entity well within the top 50 corporations in America in all relevant categories based on the most recent Forbes 500, was placed on the brink of financial disaster. The Forbes 500s: The Nation's Largest Companies Ranked Four Ways, 137 Forbes 116, 232 (Apr. 28, 1986). The impact that the jury verdict had on Texaco is discussed in Texaco, Inc. v. Pennzoil Co., 784 F.2d 1133 (2d Cir.), cert. granted, 106 S. Ct. 3270 (1986).

[FN96]. The notion that there is a separate duty to negotiate in good faith arises originally out of the German law doctrine of culpa in contrahendo, or fault in negotiating. See Kessler & Fine, Culpa in Contrahendo, Bargaining in Good Faith, and Freedom of Contract: A Comparative Study, 77 Harv. L. Rev. 401 (1964).

[FN97]. As noted above, when determining whether the parties have undertaken a duty to negotiate in good faith, it is important to determine that each party, by entering into the 'agreement in principle,' has forgone certain opportunities. This agreement to forgo alternative opportunities could constitute the forebearance necessary to trigger recovery under § 90. In the Hoffman situation, for example, Hoffman would be deemed to have forgone the opportunity of negotiating with other grocery franchisors while negotiating with Red Owl. See infra text accompanying notes 131-33.

[FN98]. See infra text accompanying notes 179-91.

[FN99]. The letter of intent may expressly obligate the parties to negotiate in good faith or to use their 'best efforts' to reach an agreement. Pinnacle Books, Inc. v. Harlequin Enters., 519 F. Supp. 118, 120 (S.D.N.Y. 1981); Thompson v. Liquichimica of America, Inc., 481 F. Supp. 361, 362 (S.D.N.Y. 1979). Farnsworth distinguishes the duty to act in good faith and a 'best efforts' clause:
Good faith is a standard that has honesty and fairness at its core
and that is imposed on every party to a contract. Best efforts is a standard that has diligence as its essence and is imposed only on those contracting parties that have undertaken such performance. The two standards are distinct and that of best efforts is the more exacting.
Farnsworth, On Trying to Keep One's Promises: The Duty of Best Efforts in Contract Law, 46 U. Pitt. L. Rev. 1, 8 (1984) (footnote omitted).

[FN100]. See, e.g., Thompson v. Liquichimica of America, Inc., 481 F. Supp. 365, 366 (S.D.N.Y. 1979) (court held best efforts clause could give rise to binding obligation because '[u]nlike an 'agreement to agree', which does not constitute a 'closed' proposition, and consequently is not an agreement at all, an agreement to use best efforts is a closed proposition, discrete and actionable'); Chase v. Consolidated Foods Corp., 744 F.2d 566, 571 (7th Cir. 1984) (court held commitment by parties to negotiate in good faith binding if parties intended enforceable contract, even though agreement was 'merely a letter of intent'); see also Itek Corp. v. Chicago Aerial Indus., 248 A.2d 625, 629 (Del. 1968) (holding that letter of intent obligated each party to attempt in good faith to reach a final and formal agreement and indicated that a court could conclude that one of the parties had breached that duty). But see Continental Fin. Servs. v. The First Nat'l Boston Corp., No. 82-1505-T, slip op. at 12 (D. Mass. Aug 30, 1984) (holding that absent 'compelling judicial precedent,' court unwilling to create duty to negotiate in good faith).

[FN101]. See, e.g., Reprosystem, B.V. v. SCM Corp., 727 F.2d 257, 264 (2d Cir.), cert. denied, 469 U.S. 828 (1984) (acknowledging that duty to negotiate in good faith might exist but finding it too indefinite to enforce); Mocca Lounge, Inc. v. Misak, 94 A.D.2d 761, 763, 462 N.Y.S.2d 704, 707 (1981) (although court recognized that duty of good faith negotiating did exist, it found that no such duty could be implied because '[n]o objective criteria or standards against which defendants' efforts [could] be measured were stated in the contract of sale'); see also Jillcy Film Enter. v. Home Box Office, Inc., 593 F. Supp. 515, 521 (S.D.N.Y. 1984) (refusing to enforce provision requiring parties to negotiate in good faith, on grounds of uncertainty and vagueness '[b]ecause no definite, objective criteria or standards' were offered against which to judge the defendant's performance); Candid Prod. v. International Skating Union, 530 F. Supp. 1330, 1337 (S.D.N.Y. 1982) (holding that '[a]n agreement to negotiate in good faith is even more vague than an agreement to agree'); Pinnacle Books, Inc. v. Harlequin Enter., 519 F. Supp. 118, 121 (S.D.N.Y. 1981) (in disapproving the holding in Thompson v. Liquichimica, court held that "[b]est efforts' or similar clauses, like any other contractual agreement, must set forth in definite and certain terms every material element of the contemplated bargain. . . . Essential to the enforcement of a 'best efforts' clause is a clear set of guidelines against which the parties' 'best efforts' may be measured.').

[FN102]. See, e.g., Pepsico, Inc. v. W. R. Grace & Co., 307 F. Supp. 713, 720 (S.D.N.Y. 1969) (granting defendants' motion for summary judgment on basis that no contract existed even though court specifically recognized that there could have arisen duty to negotiate in good faith if a contract had come into existence).

[FN103]. 522 F. Supp. 1257 (S.D.N.Y. 1981), rev'd., 727 F.2d 257 (2d Cir.), cert. denied, 469 U.S. 828 (1984).

[FN104]. Reprosystem's offer was conditioned on both its satisfaction with the audit its accountants were to perform of the subsidiary businesses and also on the entering into of a mutually satisfactory formal agreement. Id. at 1261.

[FN105]. In fact, the district court found that, by mid-September, the parties had agreed both on a formula for determining the price to be paid for the subsidiaries and on an arrangement under which SCM would operate the businesses subsequent to August 31, 1976 on Reprosystem's behalf. Id.

[FN106]. The court found that:
It is undisputed that the drafts were reviewed, page by page, and all open issues were sought to be resolved. Parties caucused in various groups, discussions were held, and agreement was reached wherever possible. It was contemplated that another draft would be generated by Sullivan & Cromwell, and indeed on the evening of December 15 another draft of the Global Agreement was produced.
Id. at 1266.
The meeting continued on December 16, and at its conclusion, the assembled group was asked by Rodich whether there were any open terms, and none were advanced. Sullivan & Cromwell was to provide agreements embodying the discussions. Id. at 1266. By this time, sixteen drafts of the agreements had already been passed between the parties. Id. at 1265.

[FN107]. Id. at 1259.

[FN108]. Id. at 1274-77.

[FN109]. The Reprosystem court considered a number of factors to decide whether the parties had intended a contract to arise even prior to formal execution of documents. For example, SCM's 10-K report for the fiscal year ending June 30, and filed with the SEC on September 30, 1976, stated that SCM had reached an 'agreement in principle' to sell its European copier subsidiaries. Additionally, a press release issued on September 28 referred to an 'agreement in principle' having been reached. Finally, on November 8, SCM's board of directors adopted a resolution authorizing its officers to negotiate the sale of the businesses. Id. at 1262-69, 1273.

[FN110]. Id. at 1273.

[FN111]. Id. at 1275-76. The district court also considered a statute of frauds argument but held that the final draft of the agreement together with other correspondence and releases sufficed to satisfy the statute. Id. at 1277-78.

[FN112]. Id. at 1280. The difficulty in fashioning such a remedy was borne out at subsequent proceedings in the case where the district court's award had to be implemented by determining the true profits of the copier businesses. See Reprosystem, B.V. v. SCM Corp., 565 F. Supp. 4 (S.D.N.Y. 1982), rev'd, 727 F.2d 257 (2d Cir.), cert. denied, 469 U.S. 828 (1984).

[FN113]. 522 F. Supp. at 1281. The court specifically rejected Reprosystem's promissory estoppel argument and claim for reliance damages. The court noted that reliance damages might have included the value of opportunities that Reprosystem had forgone in anticipation of the closing of the transaction. Id. at 1281 n.11.

[FN114]. Id. at 1280. The court clearly indicated that Reprosystem was not entitled to expectation damages as a result of the breach. Id. at 1281. The reason why expectation damages would not be awarded, however, is not completely clear from the opinion. It appears as if the court was unwilling to award expectation damages because of Reprosystem's inability to prove its financial ability to ultimately consummate the transaction. Had Reprosystem been able to prove such ability, it is unclear whether the court would have awarded expectation damages as a remedy.

[FN115]. Whether the district court correctly determined the liability issue presents a difficult question. If the parties had clearly indicated an intent not to be bound to any type of contract, including a contract to negotiate in good faith, a court should respect that intent. Merely specifying in an unsigned document, however, that the document should not constitute a binding contract until it is signed should not necessarily be construed as indicating that the parties are disclaiming a duty to negotiate in good faith. See also infra text accompanying note 135.

[FN116]. Reprosystem, B.V. v. SCM Corp., 727 F.2d 257 (2d Cir.), cert. denied, 469 U.S. 828 (1984).

[FN117]. Id. at 261-62.

[FN118]. Id. at 264. Following the Second Circuit decision in Reprosystem, New York law has tended toward not finding a binding contract in the absence of a final written agreement. See, e.g., Winston v. Mediafare Entertainment Corp., 777 F.2d 78 (2d Cir. 1985) (finding no intent to enter into binding settlement agreement in absence of executed writing); R.G. Group, Inc. v. Horn & Hardart Co., 751 F.2d 69 (2d Cir. 1984) (finding no binding franchise contract in absence of signed written agreement); United Acquisition Corp. v. Banque Paribas, 631 F. Supp. 797 (S.D.N.Y. 1985) (finding no binding contract to purchase corporation's stock in absence of written contract); Spinnerin Yarn Co. v. Apparel Retail Corp., 614 F. Supp. 1174, 1179-81 (S.D.N.Y. 1985) (finding no binding purchase contract in absence of a writing and absence of conduct by defendant recognizing contract). But see Pennzoil Co. v. Getty Oil Co., No. 7425, slip op. at 19-26 (Del. Ch. Oct. 15, 1984) (finding on motion for summary judgment that factual issue existed as to parties' intent to be bound in absence of final, executed transaction agreement).

[FN119]. See supra notes 72-75 and accompanying text.

[FN120]. Reprosystem, B.V. v. SCM Corp., 522 F. Supp. 1257, 1267 (S.D.N.Y. 1981), rev'd, 727 F.2d 257 (2d Cir.), cert. denied, 469 U.S. 828 (1984).

[FN121]. See, e.g., Gillette, Limitations on the Obligation of Good Faith, 1981 Duke L.J. 619, 642-49 (1981); Holmes, supra note 36, at 382 ('Due to the fact that 'good faith' is an amorphous concept, manifested in endlessly variable settings and forms, it does not identify a manageable body of law for analytic inquiry.').

[FN122]. See Knapp, supra note 10, at 693.

[FN123]. Holmes, supra note 36, at 400-01; Summers, The General Duty of Good Faith--Its Recognition and Conceptualization, 67 Cornell L. Rev. 810, 829- 30 (1982) [hereinafter Summers II]. One commentator explained why 'good faith' should remain undefined, stating that:
The breadth of meanings attributable to good faith in various contexts supports the hypothesis that the concept has no general meaning of its own and lends credence to the excluder approach to good faith . . .. If good faith is defined, it leads to confusion; if good faith is left undefined, it confers on the courts broad powers that can easily be abused.
Perhaps the concept of good faith takes on so many different meanings in different contexts because at base it is nothing more than a requirement of fairness--a definition so broad as to be virtually meaningless.
Hillman, Policing Contract Modifications under the UCC: Good Faith and the Doctrine of Economic Duress, 64 Iowa L. Rev. 849, 877 (1979) (footnotes omitted).

[FN124]. Restatement (Second) Of Contracts § 205 (1981). The 'excluder' analysis was first articulated by philosophers such as Aristotle and J. L. Austin. See Summers I, supra note 36, at 201-02.

[FN125]. See, e.g., Restatement (Second) Of Contracts § 205 comment d (1981) (citing as examples of bad faith: evasion of the spirit of the bargain, lack of diligence and slacking off, willful rendering of imperfect performance, abuse of a power to specify terms, and interference with or failure to cooperate in the other party's performance); Summers I, supra note 36, at 196.

[FN126]. See Burton, More on Good Faith Performance of a Contract: A Reply to Professor Summers, 69 Iowa L. Rev. 497, 498 (1984) [hereinafter Burton II]; Summers II, supra note 123, at 820-21.

[FN127]. See Summers I, supra note 36, at 206-07; Summers II, supra note 123, at 822.

[FN128]. Restatement (Second) Of Contracts § 205 comment c (1981).

[FN129]. Summers I, supra note 36.

[FN130]. Id. at 220-22.

[FN131]. Burton I, supra note 36.

[FN132]. Burton II, supra note 126, at 506-07.

[FN133]. Id.

[FN134]. See Burton I, supra note 36, at 387-88 ('The definiteness and mutuality requirements indicate that contract formation depends on a real commitment by each party. In other words, each party must forgo some future opportunity upon formation and thus restrain its future freedom in some way.') (footnote omitted).

[FN135]. See, e.g., Burton I, supra note 36, at 389; Note, Board of Directors Approval Clauses in Corporate Contracts: The Duty of Good Faith, 9 J. Corp. L. 931, 939-40 (1984).

[FN136]. Distinguishing between the objective and subjective approaches does not present an easy task. Professor Farnsworth has noted that the differences between an objective standard and a subjective standard may not be that great since '[u]nder a subjective test of good faith it is always open to the trier of the facts to evaluate the credibility of a claim of 'honesty in fact,' and in doing so to take account of the reasonableness or unreasonableness of the claim.' Farnsworth, Good Faith Performance and Commercial Reasonableness Under the Uniform Commercial Code, 30 U. Chi. L. Rev. 666, 672 (1963); see also Brook, Conditions of Personal Satisfaction in the Law of Contracts, 27 N.Y.L. Sch. L. Rev. 103, 115-16 (question of person's honesty in reporting his state of mind can be determined as can any other question of fact).

[FN137]. Burton I, supra note 36, at 389.

[FN138]. Id. at 390-97, 401.

[FN139]. Most of the cases in the corporate acquisition area concerning the enforceability of 'agreements in principle' have involved situations where the seller has withdrawn. See supra note 37.

[FN140]. 85 Ill. App. 3d 1094, 407 N.E.2d 615 (1980).

[FN141]. See id. at 1096, 407 N.E.2d at 617.

[FN142]. Id.

[FN143]. See id.

[FN144]. See id.

[FN145]. The determination here concerning the forgone opportunities still should be focused on the parties' intent. The issue remains whether the parties intended to bind themselves to any obligation. The forgone opportunities approach should help a court determine that intent. If the parties clearly indicate, for example, that they do not intend any legal obligation to arise, including any duty to negotiate in good faith, until definitive documents are executed, courts should respect that intent.

[FN146]. As to the importance of the price term in a corporate acquisition, see generally Greenfield v. Heublein, Inc., 742 F.2d 751, 757 (3d Cir. 1984) ('Agreement as to price and structure provides concrete evidence of a mature understanding between the negotiating corporations.'), cert. denied, 469 U.S. 1215 (1985); Citizens Util. Co. v. Wheeler, 156 Cal. App. 2d 423, 428, 319 P.2d 763, 769 (1958).

[FN147]. See Knapp, supra note 10, at 721.

[FN148]. See Summers I, supra note 36 at 220-22; Chase v. Consolidated Foods Corp., 744 F.2d 566, 571 (7th Cir. 1984); Knapp, supra note 10, at 721.

[FN149]. If Acquiring now decides that it no longer wants to enter the business that Target is now in and thus withdraws from negotiations on that basis, then it too appears to be recapturing a forgone opportunity and will have breached its duty to negotiate in good faith.

[FN150]. See Holmes, supra note 36, at 403-04.

[FN151]. See, e.g., Nuvest, S.A. v. Gulf & W. Indus., 649 F.2d 943, 945 (2d Cir. 1981) (affirming lower court's award of broker's fee because of seller's bad faith in withdrawing from negotiations based on inability to reach agreement on breadth of warranties in purchase and sale agreement).

[FN152]. 416 F. Supp. 224 (N.D. Ill. 1976).

[FN153]. Another case involving a corporate acquisition that can perhaps be explained on the basis of the forgone opportunities approach is Mid-Continent Tel. Corp. v. Home Tel. Co., 319 F. Supp. 1176 (N.D. Miss. 1970), discussed supra at text accompanying notes 54-59. There, the defendants contended that they withdrew because, among other things, the plaintiff delayed in getting them a reorganization plan and in agreeing on an employment contract for the principal shareholder's son. The court found that the true reason for the defendants' repudiation of the contract was the receipt of a higher cash offer received from a third party. On that basis, the court held defendant's action in withdrawing was wrongful repudiation and breach of its contractual obligations. Id. at 1196.
The court held that, by entering into the preliminary letter of intent, Home Telephone had forgone the opportunity of 'shopping around' for a higher offer unless it was unable, after negotiating in good faith, to agree on a final agreement with defendant. By accepting a higher offer, Home Telephone attempted to recapture a forgone opportunity. In analyzing the second step of the good faith analysis (determining whether the defendant was honestly dissatisfied with the negotiations or was using its dissatisfaction as an excuse), the court in effect found that Home Telephone was masking its true reason for withdrawing--receipt of a higher offer.

[FN154]. Evans, Inc. v. Tiffany & Co., 416 F. Supp. at 240.

[FN155]. Id. at 239.

[FN156]. In the Evans case, the court noted that although the U.C.C. was not directly on point since an interest in real property was at issue, it could still look to the U.C.C.'s concept of custom and usage of trade. 416 F. Supp. at 239-40. The same logic applies to the corporate acquisition setting. Even in looking at a party's subjective intent, custom and usage of trade will be helpful to determine why the defendant was behaving in a certain way. See also Restatement (Second) Of Contracts § 222(3) (1981) ('Unless otherwise agreed, a usage of trade in the vocation or trade in which the parties are engaged or a usage of trade of which they know or have reason to know gives meaning to or supplements or qualifies their agreement.'); E. Farnsworth, supra note 5, § 7.13, at 507-15 (1982); J. White & R. Summers, Uniform Commercial Code § 3-3, at 98-104 (2d ed. 1980). Changed circumstances may also be relevant to the court's consideration. For example, in our hypothetical involving Target and Acquiring, a court might deem relevant the freeze in Florida and the resultant increase in the value of Target's assets.

[FN157]. See Burton, Good Faith Performance of a Contract Within Article 2 of the Uniform Commercial Code, 67 Iowa L. Rev. 1, 6 (1981) [hereinafter Burton III] ('[I]n applying standards of interpretation and the relevant rules of performance, good faith calls attention to courses of dealing, usages of trade, and other business practices as to opportunities forgone by the promisor, in addition to those as to benefits to be received by the promisee.').

[FN158]. In discussing the Restatement's position that every contract imposes on each party a duty of good faith and fair dealing in its performance and enforcement, Professor Braucher stated:

Now, the trouble with this section, of course, is that it's very general, very abstract, and it needs specification [in] the worst way, and specification is not to be had . . ..

This proposition is thoroughly acceptable if you define good faith very narrowly; but as you define good faith more broadly, doubts begin to arise.

47 A.L.I. Proc. 485, 490 (1970); see also Holmes, supra note 36, at 382-83.

[FN159]. The U.C.C. provides that, although the parties cannot disclaim the duty of good faith, they can determine in their agreement the standards by which good faith performance is to be measured so long as such standards are not manifestly unreasonable. U.C.C. § 1-102(3) (1978). As noted, infra at note 179, the parties should, in their 'agreement in principle,' be able to disclaim any intent to bind themselves to a contract to negotiate, and if they do so, no duty of good faith negotiation should be deemed to arise.

[FN160]. See generally, Summers II, supra note 123, at 823-24 (setting forth guidelines judge has in examining good faith under U.C.C.).

[FN161]. See supra note 101 at accompanying text.

[FN162]. U.C.C. § 2-204(3) (1978).

[FN163]. Restatement (Second) of Contracts § 33(2) (1981) ('The terms of a contract are reasonably certain if they provide a basis for . . . giving an appropriate remedy.').

[FN164]. But see Candid Productions, Inc. v. Int'l Skating Union, 530 F. Supp. 1330, 1334-35 (S.D.N.Y. 1982).

[FN165]. See Burton I, supra note 36, at 392 (suggesting that party who recaptures forgone opportunity should compensate the other party to protect non-breaching party's reliance interest); Knapp, supra note 10, at 718 (suggesting that an appropriate remedy for breach of contract to bargain would be the 'standard 'expectation remedy"); Perillo, Restitution in a Contractual Context, 73 Colum. L. Rev. 1208, 1224 (1973) (suggesting that where a contract is too indefinite to warrant expectation damages, courts can use restitution to restore the parties to their status quo position).

Fuller and Perdue, in their seminal article, The Reliance Interest in Contract Damages, 46 Yale L.J. 52 (1936), distinguished between expectation interest, reliance interest, and restitution interest. They defined the expectation interest as giving 'the promisee the value of the expectancy which the promise created.' Id. at 54. The reliance interest is defined as serving to undo 'the harm which his reliance on the defendant's promise has caused him.' Id. Preventing gain 'by the defaulting promisor at the expense of the promisee' is the restitution interest. Id.

[FN166]. Although Professor Knapp introduced the idea of an enforceable contract to bargain in 1969, see Knapp, supra note 10, courts have been slow in adopting it as a separate basis of liability. See supra notes 100-02 and accompanying text.

[FN167]. See, e.g., Thompson v. Liquichimica of Am., 481 F. Supp. 365, 366 (S.D.N.Y. 1979) (telephone conversation between Donald Zoeller, Esq., of counsel for defendants, and James Shephard, the author's research assistant, on August 26, 1986 discussing settlement of case).

[FN168]. See supra notes 24-25 and accompanying text.

[FN169]. See Reprosystem, B.V. v. SCM Corp., 727 F.2d 257 (2d Cir.), cert. denied, 469 U.S. 828 (1984); United Acquisition Corp. v. Banque Paribas, 631 F. Supp. 797 (S.D.N.Y. 1985); Jillicy Film Enters. v. Home Box Office, Inc., 593 F. Supp. 515 (S.D.N.Y. 1984); Pinnacle Books, Inc. v. Harlequin Enters., 519 F. Supp. 118 (S.D.N.Y. 1981); Mocca Lounge, Inc. v. Misak, 94 A.D.2d 761, 462 N.Y.S.2d 704 (1983).

[FN170]. See supra note 95 and accompanying text.

[FN171]. This result of the 'all or nothing' approach was noted by Summers, supra note 36:
A judge who thinks of contract theory as the only possible basis for relief may, in some cases, be disinclined to grant recovery for the further reason that he thinks contract liability must inevitably be 'all or nothing' in character--liability for full expectancy damages, or no liability at all. Such a judge will turn away a plaintiff seeking merely reliance damages if expectancy damages would not also be appropriate.
Id. at 258, n. 259. See also Fuller & Perdue, supra note 12, at 373-77 (criticizing judicial disinclination to abandon the 'all or nothing' approach in favor of protecting a party's reliance interest).
As previously noted, Professor Knapp has termed this contract as a 'contract to bargain.' Knapp, supra note 10, at 685-86. The important element to finding such a contract lies in determining the extent to which both parties are committed to reaching an agreement. In other words, to the extent that '[e]ach [party] regards withdrawal by the other--for a reason other than failure to reach agreement on the remaining points--as unjustified, and worthy of both moral and legal condemnation,' an enforceable contract to bargain is created. Id.

[FN172]. C. Knapp, Commercial Damages, A Guide to Remedies in Business Litigation at 38-61 (1986). See, e.g., Hogan v. Norfleet, 113 So. 2d 437, 439 (Fla. Dist. Ct. App. 1959); DeBauge v. Whitsitt, 512 P.2d 487, 489 (Kans. 1973).

[FN173]. Restatement (Second) of Contracts § 362 (1981).

[FN174]. Restatement (Second) of Contracts § 362 comment a (1981)

[FN175]. C. Knapp, supra note 172, at 61-30 (1986).

[FN176]. See, e.g., Wickman v. Opper, 10 Cal. Rptr. 291, 294 (Cal. Dist. Ct. App. 1961).

[FN177]. C. Knapp, supra note 172, at 61-30 (1986).

[FN178]. Under the traditional expectation measure of damages, the non-breaching party is entitled to costs incurred in undertaking a substitute transaction since it would not have incurred those costs but for the breach of the original contract. A breach of the 'agreement in principle' should not entitle the non-breaching party to recover costs incurred in connection with the second transaction since, even if there had not been a breach of the 'agreement in principle,' at that stage the non-breaching party has no assurance that a definitive agreement will be reached. Thus, neither party has an assurance that it will not have to incur costs in connection with substitute transactions if the original parties cannot agree on a definitive agreement.

[FN179]. Withdrawal from the market is a prerequisite to the finding of an enforceable 'contract to negotiate.' If the parties include a 'shopping' provision in their 'agreement in principle' that allows one or both parties to remain in the market for an alternative deal, then that should reflect the parties' intent not to have forgone opportunities and not to have entered into an enforceable contract to negotiate. It is essential that the parties remain free at this stage in the transaction to conduct the negotiations along the lines that they see fit. Thus, if they intend not to be contractually obligated to negotiate in good faith and if their 'agreement in principle' indicates an intent not to be bound, courts should respect that intent.

[FN180]. For a general discussion of market damages, see Simon, A Critique of the Treatment of Market Damages in the Restatement (Second) of Contracts, 81 Colum. L. Rev. 80 (1981). As a general principle, both the Restatement (Second) of Contracts and the Uniform Commercial Code propose a market measure of damages for the breach of a sales contract. See Restatement (Second) Of Contracts § 344 & comment b (1981); U.C.C. §§ 2- 708, 2-713 (1978). Market damages in the context of both the Restatement (Second) and the U.C.C. are seen as a way of protecting the non-breaching party's expectation interest by permitting it to receive the benefit of its bargain. See Restatement (Second) of Contracts § 344(a) & comment b (1981); U.C.C. §§ 2-708, 2-713 (1978).

[FN181]. The goal is to protect the parties' reliance interest. See Restatement (Second) Of Contracts § 344(b) (1981) (defining reliance interest as the 'interest in being reimbursed for loss caused by reliance on the contract by being put in as good a position as he would have been in had the contract not been made'). See also Goetz & Scott, supra note 85, at 1289 (equating reliance cost with 'the opportunity cost of the promise' and measuring it by comparing 'the promisee's behavior in response to the promise with his prospective conduct in the absence of the promise: the promisee's detrimental reliance cost is the difference in satisfaction between these two positions'). This approach to arriving at a remedy assumes that both parties to the 'agreement in principle' withdraw from the market. This is the 'opportunity cost' of the promise. It further assumes that the parties would not have withdrawn from the market in the absence of the promise. If the market remains unchanged while the parties have withdrawn, then there is no detrimental reliance because no opportunity costs were incurred. If, however, the market has changed, then the opportunity cost is measured by the extent of that change because the parties had forgone the opportunity to buy or sell during the period when the market changed. As Goetz & Scott point out, calculating a promisee's detrimental reliance 'entails identifying the value of alternative opportunities forgone because of the promise and the benefits retained from the actions taken in reliance.' Id.

[FN182]. It should be noted that the hypothetical presents a simple transaction. The scenario assumes that Target, Acquiring and Vulture are all publicly held companies each of whose stock is traded sufficiently so that a market value for it can be readily determined. It is also assumed that both Acquiring and Vulture contemplate buying all of Target's shares for cash. Unfortunately, the relatively simplistic situation offered in the hypothetical rarely exists other than in the pages of law reviews. Thus, courts will admittedly be confronted with difficult determinations concerning what award, if any, should be made to the non-breaching party. Such difficult situations occur where the sale of assets rather than the sale of stock is contemplated, the competing bids are being made on a different basis, i.e., where one bid was to purchase all of the shares and the competing bid was limited to some lesser amount, and where the target entity's shares do not have a readily ascertainable market value. For a discussion of some of the various alternative types of stock transactions in an acquisition setting and how they can impact on whether the transaction is fair to shareholders, see Chazen, Fairness From a Financial Point of View in Acquisitions of Public Companies: Is 'Third-Party Sale Value' the Appropriate Standard?, 36 Bus. Law. 1439 (1981). Even in situations where courts merely have to determine the value of corporate stock to determine whether shareholders received a fair price in a merger or acquisition, the valuation determinations can be very complex. See, e.g., Mills v. Electric Auto-Lite Co., 552 F.2d 1239, 1241-49 (7th Cir. 1977) (court held when market value information is available and reliable, other factors should not be used), cert. denied, 434 U.S. 922 (1977); Rosenblatt v. Getty Oil Co., 493 A.2d 929, 940-42 (Del. 1985) (fair price involves 'all relevant economic factors' of proposed merger); Weinberger v. U.O.P., Inc., 457 A.2d 701, 713-14 (Del. 1983) (determination of fair value based upon 'all relevant factors,' excluding only speculative elements of value that may arise from the merger or the expectation of the merger). Nevertheless, by focusing on the harm suffered by the non-breaching party during the period in which it was contractually obligated to be out of the market, the court can try to determine the necessary values at the relevant times. Although perhaps of little solace, the damage determinations required here should not be significantly more difficult than similar determinations that courts are called on to make in other situations where value has to be determined. As to the difficulties involved in valuing a corporation's stock, one commentator has noted that '[m]easuring the worth of a corporate share is a challenging and difficult task. The process is an art for whoever attempts it and only the successful survive.' Banks, Measuring the Value of Corporate Stock, 11 Cal. W.L. Rev. 1 (1974).

[FN183]. As a general rule, courts consider the best measure of a stock's market value to be contemporaneous sales or bids. See Joseph v. Sulzberger, 136 A.D. 499, 121 N.Y.S. 73 (1910). Even where the only evidence of a stock's value is from a small block sale, courts still calculate the market value by estimating the value that would be derived from a large block sale. See Alleghany Corp. v. James Found., Inc. 115 F. Supp. 282, 293 (S.D.N.Y. 1953), aff'd, 214 F.2d 446 (2d Cir. 1954), cert. denied, 348 U.S. 913 (1955). On that basis, Vulture's $30 per share offer should be the best evidence of the market value of Target's shares and proof that the market has risen.

[FN184]. Another theory that could justify allowing Acquiring to recover the $5 per share different between its offer and Vulture's offer would be that of unjust enrichment. One could argue that Acquiring had conferred a benefit on Target by way of its $25 per share offer, without which, in all likelihood, Target would not have received the $30 offer from Vulture. Here, Acquiring has served as a stalking horse for Target. Target, therefore, should have to disgorge its benefits on the principle 'that a party should not be allowed to enrich himself at the expense of another.' Reprosystem, B.V. v. SCM Corp., 727 F.2d 257, 263 (2d Cir.), cert. denied, 469 U.S. 828 (1984). See also Childress & Garamella, The Law of Restitution and the Reliance Interest in Contract, 64 Nw. U.L. Rev. 433 (1969); Dawson, Restitution Without Enrichment, 61 B.U.L. Rev. 563 (1981); Dawson, Restitution or Damages, 20 Ohio St. L.J. 175 (1959); Farnsworth, Legal Remedies for Breach of Contract, 70 Colum. L. Rev. 1145 (1970); Fuller & Perdue, supra note 165; Nordstrom, Restitution on Default and Article Two of the Uniform Commercial Code, 19 Vand. L. Rev. 1143 (1966); Perillo, Restitution in the Second Restatement of Contracts, 81 Colum. L. Rev. 37 (1981).
The problem with a restitution-based approach to a remedy for a breach of the duty to negotiate in good faith is that it is too limiting to protect a party's full reliance interest because of the need to prove that an actual benefit was conferred on the breaching party. See Reprosystem, B.V. v. SCM Corp., 727 F.2d 257, 263 (2d Cir.), cert. denied, 469 U.S. 828 (1984) (finding that plaintiff's actions 'had little to do with the [benefits conferred] during the negotiation period'). Furthermore, the restitution interest has been greatly subsumed by the reliance interest, to the extent that the reliance interest is receiving greater judicial protection. See Childress & Garamella, supra, at 121-22. Fuller and Perdue suggest that the 'restitution interest is merely a special case of the reliance interest,' and that 'all of the cases coming under the restitution interest will be covered by the reliance interest.' Fuller & Perdue, supra note 165 at 55. For the above reasons, it is preferable to analyze damages for a breach of duty negotiate in good faith using a reliance interest analysis as opposed to a restitution interest analysis.

[FN185]. The key to assuring that the application of this theory of remedies results in a proper measure of damages lies in properly defining two elements. First, it is necessary to properly identify the non-breaching party's status quo position. Second, it is essential that equivalent assets be compared.
In the hypothetical, both of these elements are readily identifiable. First, Acquiring's status quo at the time of entering into the 'agreement in principle' is its availability and willingness to purchase

Target's stock for $25 per share. To the extent that the cost of a substitute for Target has risen above $25 per share while Acquiring was contractually obligated to be out of the market, Acquiring is entitled to recover the increase in such cost. The most appropriate way to determine what that increased cost would be is to look at how much more Target's shares would now cost. The best evidence of that is Vulture's $30 per share bid.

Second, it is essential that a proper comparison of the assets being purchased be made. In this situation, a corporation's stock is being purchased and, thus, damages should be calculated based on changes in the price of the stock rather than the value of the corporation's underlying assets. Acquiring might argue, however, that it is purchasing Target because of the value of its underlying assets. If Acquiring is planning to purchase all of Target's stock, then it will have control over those assets and could, if it chose, liquidate them. Their total liquidation value may exceed the total market value of the corporation's shares. This is often the case in a takeover situation and may be one reason why the firm is the subject of a takeover.

If a contract to consummate were at issue, Acquiring could claim that it was buying Target's shares because of the value of the underlying assets and that it should be compensated based on the difference between the value of those assets and the total contract price that Acquiring had agreed to pay. For example, if Target has 100,000 shares of stock outstanding, then, at $30 per share, Target's total market value is $3,000,000. The liquidation value of its assets, however, may be $6,000,000. Acquiring in this case should only be entitled to the difference between what Vulture is paying for those shares, $3,000,000, and what Acquiring was to pay for them, $2,500,000. Acquiring should not receive the difference between $6,000,000 and $2,500,000 since that result would be based on an expectancy measure of damages, i.e., it assumes that Acquiring would actually acquire Target's shares, which is something not known at the 'agreement in principle' stage. In fact, it was the use of the expectancy analysis that resulted in the $7.53 billion compensatory damage award in Texaco-Pennzoil. See Brief for Appellant at 76-81, Texaco Inc. v. Pennzoil Co., No. 01-86-00216-CV (Tex. Ct. App. 1986) (No. 01-86-00216-CV).

In the situation where Acquiring is buying assets rather than stock, the same rationale should apply so as to limit Acquiring's damages to the difference between what those assets would have cost on the date of breach less what it was to pay for those assets pursuant to the terms of the 'agreement in principle.'

[FN186]. Despite the drop in market price of the shares absent Acquiring's offer, Acquiring may still not want to breach. Part of Acquiring's decision concerning whether to breach may depend on why Acquiring wants to purchase Target and why the market price would have declined. For example, if Acquiring is purchasing Target because of some unique quality that Target possesses, such as undervalued orange groves in Florida that would enhance Acquiring's business, then the decline in price may not sufficiently alter Acquiring's reason for purchasing to cause it to withdraw. On the other hand, if Acquiring is purchasing Target because it has excess cash and is looking for a good investment, and if the entire market has declined, then Acquiring may now find a more attractive investment elsewhere.

[FN187]. Initially, one might think that Target should be entitled to the difference between the $25 per share set forth in the 'agreement in principle' and the $15 per share market price at the time of the breach of the contract to negotiate. Such reasoning would be in line with the market measure of damages found in the Uniform Commercial Code. See U.C.C. § 2-708(1) (1978). This results in overcompensation, however, in that it gives Target the benefit of a bargain not yet made, and it should not yet be assumed that the transaction will be consummated at $25 per share as there is not yet a contract to consummate in existence and no assurance that one will be conclusively reached.

[FN188]. As previously noted, supra notes 21-23, 95 and accompanying text, a remedy that confers upon the plaintiff a measure of damages based upon the benefit of the bargain results in overcompensation. This includes any remedy based upon an expectation measure of damages or specific performance. At the 'agreement in principle' stage of the transaction, the parties' agreement is as yet too indefinite to give rise to any reasonable expectation that either party will receive the benefits that it is negotiating for under the contract. It is this indefiniteness that often causes courts that utilize the 'all or nothing' approach to find no enforceable contract. See Reprosystem, 727 F.2d at 265, (2d Cir.), cert. denied, 469 U.S. 828 (1984); see also Candid Prod., Inc. v. Int'l Skating Union, 530 F. Supp. 1330 (S.D.N.Y. 1982) (clauses requiring good faith negotiations too vague and indefinite to be enforced); Pinnacle Books, Inc. v. Harlequin Enters., 519 F. Supp 118 (S.D.N.Y. 1981) (option provision unenforceable because terms of best efforts clause too vague). Since the parties do expect that negotiations will be conducted in good faith, however, a remedy protecting their reliance is within their expectations.

[FN189]. Courts that have used the 'all or nothing' approach have often referred to the complicated nature of corporate acquisition transactions as one factor for refusing to find a binding agreement in the absence of signed, written contracts. See, e.g., Reprosystem, 727 F.2d at 257, 262-63:

The result we reach is consistent with the realities of the complex transaction at issue. . . . [T]he magnitude and complexity of the deal . . . not only reinforce[s] the parties stated intent not to be bound until written contracts were signed, but also reflect[s] a practical business need to record all the parties' commitments in definitive documents.

cert. denied, 469 U.S. 828 (1984); see also United Acquisition Corp. v. Banque Paribas, 631 F. Supp. 797, 807-08 (S.D.N.Y. 1985).

[FN190]. As previously noted, a court's primary focus should still center on the intent of the parties. Therefore, if the parties have exhibited an intent that neither a contract to consummate nor a contract to negotiate shall have arisen, courts should respect that intent. See supra note 145.

[FN191]. One positive result of adopting the 'contract to negotiate' theory is that it will permit the party wishing to withdraw to make a rational decision as to whether breaching the contract to negotiate is in its best interest. For example, in our hypothetical, if Vulture offers $30 per share at a time when Target was contractually bound to negotiate in good faith pursuant to an 'agreement in principle' calling for $25 per share, it may still be in the best interest of Target's shareholders to have Target breach the 'agreement in principle' and accept Vulture's offer. Although damages of $5 per share would be owing to Acquiring, those damages generally will have to be paid by Vulture, either because it will now be the owner of Target or perhaps because of a contractual indemnification clause making clear that those damages will be paid by Vulture. In effect, Target's shareholders are being paid $5 more per share than they would be under the 'agreement in principle' with Acquiring. Vulture meanwhile is probably considering that its purchase price for those shares really amounts to $35 per share, the $30 it is paying to the Target shareholders and the $5 it anticipates paying to Acquiring in damages. One can view this result as requiring the Target shareholders, who in reality are receiving $30 per share for an asset that is now commanding $35 per share from Vulture, to compensate Acquiring for having served as a 'stalking horse' which resulted in Vulture making the $30 per share offer.

Similarly, if Target decides to withdraw from the 'agreement in principle' even if there is no competing offer, it can do so knowing that it will only cost it $5 per share to withdraw. In the hypothetical, Target might decide to withdraw after the freeze in Florida if it determines that its shares are now worth more, or have the potential of soon being worth more, than $30 per share, the $25 per share that Acquiring has offered plus the $5 per share in damages Target will have to pay Acquiring.

The 'all or nothing' approach prevents this type of analysis from being used. In effect, Target (or perhaps Vulture) is forced to gamble. If a court finds the parties have an enforceable contract to consummate the transaction, the party liable for damages has to fear a Texaco-Pennzoil type damages award, which could lead to its financial disaster. See supra note 95. On the other hand, a finding of no liability would result in Acquiring receiving no benefit for having served as a 'stalking horse' and either Target, or Vulture (or perhaps both in some proportion if they have divided the risk in determining the price for the shares), would reap a windfall.

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